

COURT OF APPEAL
CALABAR JUDICIAL DIVISION
2ND DECEMBER, 1999. CA/C/55/1998
CORAM:- D. O. EDOZIE, O. OPENE, S. O. EKPE, JJCA

CHIEF EDET BROWN & 5 ORS. APPELLANTS

(For themselves and as representing the
entire families of Umana Efio Odion Ene,
Okon Ene, Okon Efiom, Nkese Akim,
Etim Akabom, and Arit Enoh)

AND

CHIEF PAUL EDET BASSEY & 4 ORS. RESPONDENTS

(For themselves and as representing the
families of Ekpo Effah and Ete Anam Akan)

APPEALS - Brief of appeal - Argument therein - Must be confined to the
issues raised - Based on the grounds of appeal.

CONSENT JUDGMENTS - Signature of consenting parties - Is unnecessary - For its validity.

ESTOPPEL - Res judicata - Claim and subject matter - Where not the
same - The plea will not be sustained.

ESTOPPEL - Res judicata - Parties - Representative or personal capacities in which the suits were contested - Limits the applicability of res judicata.

ESTOPPEL - Res judicata plea - To be sustained - Things that must be shown.

ESTOPPEL - Res judicata - Points to which it applies - Includes every litigation point brought forward - Save in special cases.

ESTOPPEL - *Res judicata* - Two Principles - Underlining the plea of estoppel per rem judicatam.

PRACTICE & PROCEDURE - *Fraud* - *Consent judgment* - *Allegation of fraud* - *On the ground that the consenting parties* - *Did not sign the consent judgment* - *Is misconceived* - *As no such signature is needed.*

FACTS

The appellants as plaintiffs before the Calabar High Court Commenced an action against the respondents as defendants. Appellants Claimed for an account, damages and an injunction in respect of the management of palm fruits harvested from a designated Communal land. The respondents denied the claim and pleaded that the appellants' suit was not maintainable by reason of estoppel founded on a consent judgment, inter alia. They therefore, filed a motion on notice praying for the dismissal of the suit. Affidavits and counter affidavits were filed by the parties.

The trial court in a reserved ruling, upheld the plea of *res judicata* and dismissed the appellants' claim. Being dissatisfied, the appellants have now appealed to the Court of Appeal raising a single issue.

ISSUE FOR DETERMINATION

"Whether or not the alleged consent judgment in suit No. C/124/76 satisfies the conditions of successful plea of res judicata as to vitiate suit No. C/653/95 from which this appeal is predicated."

HELD (Unanimously allowing the appeal in part per lead judgment of EDOZIE JCA

Brief of appeal - Argument therein

1. Arguments in a brief of argument must be related to and confined to the issues formulated for determination based on the ground of appeal challenging the judgment appealed against. Any argument to the contrary is irrelevant and ought to be discountenanced. (p. 687 H)

Fraud - Consent judgment - Allegation of Fraud

2. Even if the question of fraud under consideration were to fall within the sole issue for determination, which is not conceded, the contention that the consent judgment Exhibit 'B' is vitiated by fraud is misconceived. This is so because as deposed to in paragraph 7 of the appellants' counter-affidavit, the reason for the allegation that the consent judgment Exhibit B was a fraud was that it is a forgery not having been signed by the parties nor their counsel. It is a misconception for the appellants to think that for consent judgment to be valid, it has to be signed by the consenting parties. A consent judgment is a judgment of court embodying the terms of settlement agreed to by the parties and filed in the registry of the court. It does not bear the signatures of the consenting parties as erroneously thought by learned counsel for the appellants. The court below was justified in not treating the consent judgment Exhibit 'B' as a forgery. (p. 688 A)

Consent Judgments - Signature of consenting parties

3. It had long been established that if a cause of action in a present suit had been determined in a previous suit, that cause of action became merged in the judgment - *Transit in rem judicatam*. The principles underlining the plea of estoppel *per rem judicatam* are:-

"(a) Interest replicae ut sit fines litium It is for the common good that there should be an end to litigation.

(b) Nemo debet bis vexari pro una et eadem causa - No one should be sued twice on the same ground. No one shall be twice vexed for one and the same cause.' (p. 688 F)

Res judicata - Two principles

4. The plea of *res judicata* applies except in special cases not only to points which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belongs to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time.

See Aladegbemi v. Fasanmade (1988) 3 NWLR (Pt. 81) 129. A success-

ful plea of res judicata ousts the jurisdiction of the court before which it is raised. (p. 689 A)

Res judicata - Points to which it applies

B 5. It has been laid down in a long line of cases that to sustain a plea of res judicata, it must be shown:-

(a) That the parties in the previous and present suit are the same.

(b) That the claim and issue in the previous suit are the same as those in the present suit.

C (c) That the subject matter of litigation in the previous and present suits are identical.

See Oke v. Atoloye (1986) 1 NWLR (Pt. 15) 241 at 260. (p. 689 C)

D ***Estoppel - Res judicata plea***

6. It is quite clear that while the present suit was brought and defended in representative capacities, the action in the previous suit was prosecuted in personal capacities of the parties. It is trite law that when an action is brought by a plaintiff in a representative capacity against another person personally and the action is prosecuted 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 interest the defendant may later represent in an action brought against him in a representative capacity, See Shitta-Bey and ors v. Lagos Executive Development Board and ors (1962) 2 SCNLR 107. It is my judgment that apart from the fact that the names of the parties who sued or were sued are not the same in the earlier and present suits, since the earlier suit was brought and defended in personal capacities the earlier consent judgment is not res judicata in respect of the present suit. (p. 691 E)

H ***Res judicata - parties***

7. From the claims as set out above, it seems to me that while the present suit is for account and management of proceeds from sale of palm oil from some portions of the communal land of the people, the

previous suit is for the headship of the village, sale and trespass to communal land. In my view, the claims and the subject-matter in the two suits are not identical. In the light of the foregoing, the plea of *res judicata* is not sustainable. (p. 693 E)

B

NOTABLE POINT OF INTEREST

EKPEJCA

1. Res judicata - Action now brought in a representative capacity

It is a correct proposition of law that 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 *res judicata* as the parties to the respective action are not the same, since in one action the defendant is sued personally and in the other action he is sued as representative of a class of persons. See Alabi v. Ladeji (1986) 5 NWLR (pt. 42) 423. (p. 697 H)

C

D

REPRESENTATION

A.U. Unimna Esq., for the Appellants
Respondents unrepresented

E

CASES REFERRED TO

Adomba v Odiese (1990) 1 NWLR (Pt. 125) 165

Afribank Ltd v Fadlallah Text (Nig) Ltd (1997) 3 NWLR (Pt. 493) 367

Alabi v Ladeji (1986) 5 NWLR (Pt. 42) 423

Aladegbemi v Fasanmade (1988) 3 NWLR (Pt.81) 129

Alashe v Ilu (1965) NMLR 66

Aro v Fabolude (1983) 1 SCNLR 58

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

Oke v Atoloye (1986) 1 NWLR (Pt. 15) 241

Ojiako v Ewuru (1995) 9 NWLR (Pt. 420) 460

Odua v Nwanze (1934) 2 WACA 98

Oduka v Kasumu (1968) NMLR 28

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LEAD.JUDGMENT BY EDOZIE JCA

By a writ of summons and statement of claim filed on 8th day of December, 1995, the appellants as plaintiffs commenced an action at the Calabar High Court against the respondents as defendants claiming against them for an account, damages and an injunction in respect of the management of palm fruits harvested from designated area of the communal land of Ikot Effiom village in the Akpabuyo Local Government Area of Cross River State to which village both parties belong. In their reaction the respondents herein, as defendants filed a statement of defence dated 5th January, 1996 denying the claim and in paragraph 17 of the statement of defence pleaded that the appellants' suit was not maintainable by reason inter alia of estoppel founded on a consent judgment in suit No. C/124/76 delivered by a Calabar High Court dated 2nd December 1985. Sequel to this, the respondents/applicants on 6th February 1996 filed a motion of notice praying for the dismissal of the suit on the ground of "1. Judgment estoppel, 2. Issues estoppel, 3. Statute bar, 4. Abuse of process and for want of locus standi."

In a 13 paragraph affidavit in support of the motion which was sworn to by Bartholomew B. Effiom, it was deposed to as follows:-

"1. That I am the 5th defendant/applicant herein and I have the leave of my co-defendant/applicants to depose to this affidavit on their behalf.

2. That the points of law raised on the motion paper for the dismissal of this suit are set out on paragraph 17 of the statement of defence.

3. That this application is for the dismissal of the suit.

4. That there is a valid and subsisting judgment entered by a court of competent jurisdiction in respect of the same parties and or privies over the same subject matter. I shall rely on the statement of claim and the consent judgment in suit No. C/124/76 as Exhibits A and B herein.

5. That the judgment has not been appealed against.

6. That the respondents cannot thereby bring and or maintain this suit.

7. *That the cause of action arose in October 1985 that is well over six years before the purported institution of this action for account in 1985.*

8. *That the respondents cannot thereby bring and or maintain this suit.* B

9. *That the respondents cannot validly pray or be heard to pray for an order of injunction against a village head, the 1st applicant, whose functions are statutory prescribed. I shall rely on the certificate of recognition of the 1st applicant as the village head, Exhibit 'C'.* C

10. *That the families of the respondents are only a section or constituent of the village and not the community itself.*

11. *That the plaintiffs are not suing on behalf of or as representing the village, Ikot Effiom.*

12. *That the property of Ikot Effiom village does not belong to the plaintiffs and the six families they represent.* D

13. *That I depose to this affidavit conscientiously believing the truth of its contents."*

In response to the above, the plaintiffs filed a counter-affidavit E of 13 paragraph sworn to by Chief Lawrence Okon Etim which reads as follows:

"1. *I am the 6th plaintiff/respondent on record.*

2. *The facts of this case are within my personal knowledge and information from A.U. Unimne who has been handling it.* F

3. *I depose to this affidavit on behalf of the other plaintiffs/respondents with their knowledge and consent.*

4. *The defendants/applicants by a motion filed on the 6th day of February, 1996 raised certain issues for the purpose of dismissing this suit.* G

5. *Paragraphs 4, 5, 6, 7, 8, 9, 10, 11 and 12 of the applicants affidavit are false.*

6. *The alleged consent judgment referred to in paragraph 4 of the affidavit was a forgery. There was no consent judgment in the alleged suit.* H

7. *The alleged consent judgment was neither signed by the par-*

ties themselves nor their counsel.

8. *Exhibit 'C' the alleged certificate of recognition of the 1st defendant/applicant as village head was also a forgery.*

9. *By virtue of paragraph 8 above, the certificate of recognition was subsequently withdrawn. A copy of a letter withdrawing the certificate is here shown to me and marked as Exhibit 'L' (sic).*

10. *That plaintiffs/respondents do not lay exclusive claim to the communal property of Ikot Effiom village.*

11. *The complaint of the plaintiffs/respondents is that the defendants/applicants deprive the other 6 families the enjoyment of communal property of Ekot Effiom village.*

12. *Counsel to the plaintiffs/respondents, Messrs Kanu G. Agabi and Associates inform me and I believe them that this suit is properly constituted.*

13. *I depose to this affidavit in good faith, its contents being true and in accordance with the Oaths Act. 1990"*

There was also a reply to the above counter-affidavit and a further affidavit of Bartholomew B. Effiom but it is not necessary to reproduce them.

The motion on notice was on 4th September, 1997 argued by the learned counsel for both parties and in a reserved ruling delivered on 27th November, 1997 the learned trial Judge Ekpe (Mrs) J. upheld the plea of res judicata and dismissed the plaintiffs' claim.

Dissatisfied by the ruling, the appellants have filed the instant appeal predicated on a solitary ground of appeal which reads thus:-

Error in Law

The learned trial Judge erred in law when she held as follows:-

" I have found as a matter of fact that the there was a consent judgment in suit No. C/124/76 stamped and signed by the High Court registry on 25/1/96 .. it is clearly stated that the courts are prohibited from enquiring into a matter clearly adjudicated upon and res judicata therefore applies."

Particulars of Error

(a) *Unless the subject-matter and the parties or their privies in*

pending suit and a decided case are same, res judicata does not lie merely because there is subsisting consent judgment.

(b) The subject-matter of the suit before her Lordship has never been adjudicated upon by competent court of law."

In the appellants' brief of argument filed by learned counsel on their behalf, one issue was raised for determination of the appeal and it reads thus:-

"Whether or not the alleged consent judgment in suit No. C/124/76 satisfies the conditions of successful plea of res judicata as to vitiate suit No. C/653/95 from which this appeal is predicated."

The respondent filed on brief. On 19th October, 1999 when the appeal came before us for hearing, learned counsel for the appellants drew attention of the court that this court had earlier granted an application for the appeal to be heard on the appellants' brief alone in default of the respondents' filing their own brief whereupon he adopted the appellants' brief and urged the court to allow the appeal, set aside the ruling of the court below and remit the case thereto for retrial by another Judge.

In relation to the issue submitted for determination, learned counsel for the appellants dealt with the question of fraud vitiating the consent judgment and the conditions for a successful plea of res judicata. On the former, he submitted in paragraph 3-7 of his brief as follows:-

"In any event, the appellants insisted that the alleged consent judgment in suit No. C/124/76 was a fraud ... The appellants were entitled to raise the issue of fraud when they did even though there has been no appeal against it having been confronted with it for the first time. Section 53 of the Evidence Act provides as follows:-

'53 Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under section 49, 50 or 51 and which has been proved by the adverse party, was delivered by a court without jurisdiction or was obtained by fraud or collusion."

With due deference to learned counsel the sole ground of appeal and the issue distilled therefrom cannot accommodate any question of fraud vitiating the consent judgment Exhibit 'B' in the supporting affidavit of the respondents' motion. **Arguments in a brief of argument must be**

related to and confined to the issues formulated for determination based on the ground of appeal challenging the judgment appealed against. Any argument to the contrary is irrelevant and ought to be discountenanced. Even if the question of fraud under consideration were to fall within the sole issue for determination, which is not conceded, the contention that the consent judgment Exhibit 'B' is vitiated by fraud is misconceived. This is so because as deposed to in paragraph 7 of the appellants' counter-affidavit, the reason for the allegation that the consent judgment Exhibit B was a fraud was that it is a forgery not having been signed by the parties nor their counsel. It is a misconception for the appellants to think that for consent judgment to be valid, it has to be signed by the consenting parties. A consent judgment is a judgment of court embodying the terms of settlement agreed to by the parties and filed in the registry of the court. It does not bear the signatures of the consenting parties as erroneously thought by learned counsel for the appellants. The court below was justified in not treating the consent judgment Exhibit 'B' as a forgery.

The more substantial line of attack against the ruling of the court below was in the upholding of the plea of estoppel per rem judicatam. In the case of Oduka v. Kasumu (1968) NMLR 29, the Supreme Court held that estoppel per rem judicatam is a rule of evidence whereby a party is precluded from disputing in any subsequent proceedings matters which had been adjudicated upon previously by a competent court between him and his opponent. **It had long been established that if a cause of action in a present suit had been determined in a previous suit, that cause of action became merged in the judgment - Transit in rem judicatam.** The principles underlining the plea of estoppel per rem judicatam are:-

"(a) Interest replicae ut sit fines litium It is for the common good that there should be an end to litigation.

(b) Nemo debet bis vexari pro una et eadem causa - No one should be sued twice on the same ground. No one shall be twice vexed for one and the same cause."

The plea of *res judicata* applies except in special cases not only to points which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belongs to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time. B

See Aladegbemi v. Fasanmade (1988) 3 NWLR (Pt. 81) 129. A successful plea of *res judicata* ousts the jurisdiction of the court before which it is raised. A plaintiff cannot be seen to be raising a plea that will oust the jurisdiction of the court to entertain the action he has brought before the court. Generally the plea is a shield rather than a sword. See Yoye v. Lawani Olubode & 2 ors (1974) 10 SC 209. C

It has been laid down in a long line of cases that to sustain a plea of *res judicata*, it must be shown:- D

(a) That the parties in the previous and present suit are the same.

(b) That the claim and issue in the previous suit are the same as those in the present suit. E

(c) That the subject matter of litigation in the previous and present suits are identical.

See Oke v. Atoloye (1986) 1 NWLR (Pt. 15) 241 at 260, Idowu Alashe and ors. v. Olori Ilu (1965) NMLR 66 Fadiora v. Gbadebo (1978) 3 SC 219, Nkaun v. Onun (1977) 5 SC 13, Richard Ezeanya & ors v. Gabriel Okeke & ors (1995) 4 NWLR (Pt. 388) 142 at 161. Discussing the conditions for a successful plea of *res judicata* in the case of Aro v. Fabolude (1983) 1 SCNLR 58; (1983) 2 SC 75 Aniagolu, J.S.C. has this to say:- F G

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

The burden is on the party who sets out the defence of *res judicata* to establish the three conditions for the plea as discussed above.

In the ruling the subject matter of this appeal, the learned trial judge after recounting in extenso the arguments of counsel concluded her short ruling on page 42 of the record thus:-

"I have found as a matter of fact that there was a consent judgment in suit No. CA/12176 stamped and signed by the High Court Registry on 25/1/86 In the case of Ude v. Ojechemi & ors (1995) 32 LRCN 252; (1995) 8 NWLR (Pt. 412) 152 held, it is clearly stated that the courts are prohibited from enquiring into a matter already adjudicated upon and res judicata applies.

In the light of the above, this application is hereby granted and the suit No. C/653/93 is hereby dismissed. This suit is dismissed."

By the above ruling, the court below found as a fact and held that the earlier suit operates as a bar to the present suit. It is now trite that there is nothing inherently wrong with the use of such expression as 'I believe this' or 'I believe that' or 'I as watched his demeanour and he impressed me as a witness of truth' or 'I have found as a fact' where it can be shown that the learned trial judge actually evaluated the evidence of the witnesses who testified before him: See Obioha v. Duru (1994 8 NWLR (Pt. 365) 631. Where, however as in the case in hand, the trial court failed to evaluate the affidavit evidence before it, the use of such words as 'I believe' or 'I found as a fact' or such like expressions will not prevent the court of appeal in appropriate cases from evaluating the evidence and drawing the necessary inference: See Board of Customs & Excise v. Alhaji Ibrahim Barau (1982) 10 SC 48 at 137. The Supreme Court, per Sowemimo, J.S.C. in the case of Akibu v. Opaleye & Anor. (1974) 11 SC 189 at 202; (1974) 1 All NLR P. 344 at 356 had this to say:-

"Although this court rehears a case on appeal, it does this only on the record and where it is quite clear that evidence has been led in the lower court which establishes a fact, it will make the necessary findings which the lower court failed to make. Thomas v. Thomas (1971) S.C. 484 at pp. 187, 488; also Fatoyinbo v. Williams (1956) 1 F.S.C. 87. It is open to this court to decide such issues especially as in this case where the defence of long possession if established is sufficient to defeat the claim of the plaintiff."

In the instant case, a perusal of the ruling of the court below did not indicate how it arrived at the conclusion that the plea of res judicata had been made out. It is therefore necessary to examine the materials as contained in the affidavit evidence of the parties to see whether the conditions for a successful plea of res judicata as discussed above are present. B

This leads me to a consideration, firstly whether the parties in the present case are the same as the parties in the earlier consent judgment in suit No. C/124/76. The parties in the present suit No. C/653/95 are as set out in the title to this appeal. It shows that the six named C plaintiffs bought the action in a representative capacity for six families against the five named defendants also in a representative capacity for two families. In the earlier suit as disclosed in the statement of claim Exh. A (in the Defendants/Respondents) affidavit the parties are:-

1. Augustine Etim Okon)
2. Offiong Etim Effion)
3. Asuquo Efio Okpo) Plaintiffs
4. Lawrence Okon Etim)

AND

1. Paul Edet)
2. Felix Okon Etim) Defendants

It is quite clear that while the present suit was brought and defended in representative capacities, the action in the previous suit F was prosecuted in personal capacities of the parties. It is trite law that when an action is brought by a plaintiff in a representative capacity against another person personally and the action is prosecuted whereby the defendant succeeds, that judgment is res judicata G 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 interest the defendant may later represent in an action brought against him in a representative capacity, See Shitta-Bey and ors v. Lagos Executive Development Board and ors (1962) 2 H SCNLR 107; (1962) 1 All NLR 373; Richard Ezeanya & ors v. Gabriel Okeke & ors (1995) 4 NWLR (Pt. 388) 142 at 161. It is my judgment that apart from the fact that the names of the parties who

sued or were sued are not the same in the earlier and present suits, since the earlier suit was brought and defended in personal capacities the earlier consent judgment is not *res judicata* in respect of the present suit. I am not oblivious of the fact that the styling or B restyling of parties in actions will not prevent a court from examining the proceedings in question and determining whether the parties in the previous and the proceedings in question and determining whether the parties in the previous and present suits are the same. The affidavit evidence in the instant proceedings does not contain sufficient facts for this purpose. C From the available facts the parties in the suit under consideration have not been shown to be the same and therefore the earlier suit does not operate as *res judicata* to the present suit. The court below was in error to have found to the contrary. This conclusion is sufficient to dispose D of this appeal in favour of the appellants for as earlier stated the three conditions for a successful plea of *res judicata* must co- exist. I will however like to consider the other two conditions that is the claims and issues and the subject-matter in the two suits.

E In the present suit, the claim as set out in paragraph 21 of the statement of claim reads:-

"Whereof the plaintiffs claim against the defendants as follows:-

(a) *That the defendants render an account of the proceeds from F sale of palm oil fruits harvested from areas designated for the benefit of the entire Ikot Efiom village from October 1986 to September, 1995 (9 years) at N50,000.00 per annum - N450,000,*

(b) N50,000.00 per annum from October 1995 till judgment.

(c) *An injunction restraining the defendants, their agents or privies G from continuing to manage and or divert for their personal use the oil palm fruits and palm oil or proceeds personal use the oil palm fruits and palm oil or proceeds therefrom except otherwise properly elected or appointed by the entire village of Ikot Efiom to so manage or control the oil H palm fruits and palm oil or proceeds therefrom for development efforts in the village."*

In Exhibit A, the claim in the earlier suit as contained in paragraph 21 of the statement of claim reads:-

"21. The plaintiffs claim therefore against the 1st defendant:-

(i) A declaration that he is not vested with any lawful authority or mandate to sell or alienate any part of the communal land belonging to Ikot Efiom Odiong Ene village, Akpabuyo in the Akpabuyo Odukpani Local Government Area of the Cross River State of Nigeria. B

(ii) A declaration that the 1st plaintiff is the accredited and lawfully elected head of Ikot Efiom Odiong Ene, is the only lawful person mandated to sell or alienate the said communal land

(iii) Cancellation of any purported sale or agreement made by the defendant in respect of the said communal land. C

(iv) Perpetual injunction restraining the defendant or his agents from committing further acts of trespass to Ikot Efiom Odiong Ene Communal lands. D

The claim against the 2nd defendant is:-

(i) For N600.00 damages for trespass;

(ii) Perpetual injunction to restrain his servants and/or agents from committing further acts of trespass in respect of the said land."

From the claims as set out above, it seems to me that while the present suit is for account and management of proceeds from sale of palm oil from some portions of the communal land of the people, the previous suit is for the headship of the village, sale and trespass to communal land. In my view, the claims and the subject-matter in the two suits are not identical. E F

In the light of the foregoing, the plea of res judicata is not sustainable. I therefore allow the appeal, set aside the ruling of Mrs Ekpe J. delivered on 27th of November, 1997 and in its place remit suit No. C/653/96 to the court below for retrial by another Judge. G

OPENEJCA

I have had a preview of the judgment just delivered by my learned brother Edozie, J.C.A. I agree with him that there is merit in this appeal and that it should be allowed. H

The only issue that arose in this appeal is whether a plea of res judicata should sustain in this case. The law is clear and well settled and

it is that this court does not make it a practice to disturb the findings of the lower court unless they are shown to be perverse. See Osibakoro D. Otuedon & ors v. Ambros Olughor & ors (1997) 9 NWLR (pt. 521) 355 at . 375; Chiwendu v. Mbamali (1980) 34 SC 31; Ibodo v. Enarofia (1980) B 5 - 7 SC 42.

It is also trite that for estoppel per rem judicata to be validly sustained that the parties, issues and subject-matter in the earlier and instant case must be the same. See: Chief Karimu Ajayi Arubo v. Fatai Ayinka Aiyeleru & ors (1993) 2 SCNJ 90; (1993) 3 NWLR (Pt. 280) C 126; Innocent & Anr. v. Ume-Ohana (1993) 2 SCJN 156; (1993) 2 NWLR (Pt. 277) 510; Ojiako v. Ewuru (1995) 9 NWLR (Pt. 420) 460; Adomba v. Odiese (1990) 1 NWLR (pt. 125) 165; Owonikoko v. Arowosaiye (1997) 10 NWLR (Pt. 523) 61.

D If the learned trial judge had well and carefully examined the previous judgment on which the respondents relied on for their plea of res judicata and the present case, she would have seen that while the plaintiffs in the earlier case sued in representative capacity that the defen- E dants were sued personally; as to the subject-matter, in the present case, the claim is that defendants should render accounts of the proceeds from the sale of palm oil and palm fruits while in the previous case it is for the headship of the village.

F It can be seen that the parties and the subject-matter in the two cases are not the same and that the plea of res judicata can not apply in the present case.

For this and the fuller reasons given in the leading judgment, I am also of the view that the appeal is meritorious and that it should be G allowed.

In the result, I allow the appeal, I abide by the consequential orders made in the leading judgment.

H **EKPEJCA**

I have had the advantage of reading in draft, the leading judgment of my learned brother, Edozie, J.C.A. just delivered. I agree with his opinion and conclusion that this appeal has merit and should be al-

lowed.

However, for the purpose of emphasis, I consider it appropriate to make further contribution.

Having regard to the rules of this court, this appeal was heard on the appellants' brief of argument alone, as the respondents failed to file their own brief of argument. The sole issue in the appellants' brief for the determination of the appeal is, "Whether or not, the alleged consent judgment in suit No. C/124/76 satisfy (sic) the conditions for a successful plea of res judicata to vitiate suit No. C/653/95 from which this appeal is predicated."

The brief facts of the case leading to this appeal reveal that the appellants as plaintiffs in a representative capacity for themselves and as representing the entire families of Umanah Efio Odiong Ene, Okon Ene, Okon Efion, Nkese Akima, Etim Akabom and Arit Enoh sued the respondents as defendants in a representative capacity for themselves and as representing the families of Ekpo Effah and Ete Anam Akan in suit No. C/653/95 the subject of this appeal, at the Calabar Judicial Division of the High Court of Cross River State. In the statement of claim the appellants claimed the following reliefs:

"(a) That the defendants render an account of the proceeds from the sale of the palm oil and palm fruits harvested from areas designated for the benefit of the entire Ikot Efion village from October, 1986 to September, 1995 (9 years) at N50,000.00 per annum = N450,000.00. N450,000.00.

(b) N50,000.00 per annum from October, 1995 till judgment.

(c) An injunction restraining the defendants, their agents or privies from continuing to manage, and/or divert for their personal use the oil palm fruits and palm oil or proceeds therefrom except otherwise properly elected or appointed by the entire village of Ikot Efion to so manage or control the oil palm fruits and palm oil or proceeds therefrom for development efforts in the village."

The respondents filed their statement of defence and in paragraph 17 thereof they raised objection on points of law for dismissal of the suit. Later the respondents filed a Motion on Notice under Order 24

Rules 2 and 24 Rules 2 and 3 of the Cross River State High Court (Civil Procedure) Rules for the dismissal of the suit on the following grounds:

1. Judgment estoppel
2. Issue estoppel
- B 3. Statute bar
4. Abuse of process
5. Want of locus standi.

In the affidavit in support of the Motion, the respondents annexed the statement of claim and the consent judgment in suit No. C/124/76 as
C Exhibits A and B respectively, as the basis for the argument in support of the Motion for the dismissal of the present suit No. C/653/95 on the ground of estoppel per rem judicatam. In the short ruling after hearing the motion, the learned trial judge found as a fact that there was a con-
D sent judgment in suit No. C/124/76 which was stamped and signed by the High Court Registry on 25/1/86. He held that, "the courts are prohibited from enquiring into a matter already adjudicated upon and res judicata therefore applied." Accordingly he granted the motion and dismissed
E suit No. C/124/95 before him.

Being dissatisfied with this ruling, the appellants have now appealed to this court on one ground of appeal upon which the issue for determination of the appeal was framed in the brief of argument. The
F entire argument in the court below turned on the defence of estoppel per rem judicatam.

The defence of estoppel per rem judicatam is based on two considerations which have been for long accepted as established principles of our law, namely:

G Firstly - that of public policy, of the principle that it is in the public interest that there should be an end to litigation, once a court of competent jurisdiction has settled by a final decision the matter in contention between the parties. This is expressed in the well known Latin
H maxim "interest reipublica ut sit finis litum." Secondly - that of hardship to the individual, on the principle that no man should be vexed twice for the same cause. This also expressed in the terse Latin maxim, "Nemo debet bis vexari si constat curiae quod sit pro una eteadem causa."

It is well settled that before the principle of estoppel per rem judicatam can apply or operate it must be shown that the parties, the issues and the res (i.e. the subject matter) were the same in the previous case as those in the action (that is the new case) in which the plea of res judicata is raised. See Nwaneri & ors v. Oriuwa (1959) 4 FSC 132; B (1959) SCNLR 316; Njoku & Ors v. Eme & Ors (1975) 5 SC 293. It must also be shown that the judgment in the previous case was a final judgment given by a court of competent jurisdiction. See Afribank Ltd. v. Fadlallah Text (1997) 3 NWLR (pt. 493) 367 at 368; Nkwo v. Uchendu C (1996) 3 NWLR (Pt. 434) 1; Oyebamiji v. S.C.S.C. (1997) 5 NWLR (Pt. 503) 113 at page 115.

Now, the pertinent question is, whether the learned trial Judge was right in holding that the consent judgment operated as res judicata in the present case. To answer this question, one must of necessity compare the statement of claim in the previous case (i.e. suit No. C/124/76) with the statement of claim in the present case (i.e. suit No. C/653/95) in which the plea of res judicata has been raised. After a critical comparison, I am of the firm view that the parties in suit No. C/124/76 were not the same as those in suit, No. C/653/95. In suit No. C/124/76, the parties were:

1. Augustine Etim Okon)
2. Offiong Etim Effion)
3. Asuquo Efio Okpo) - Plaintiffs
4. Lawrence Okon Etim)

v

1. Paul Edet) - Defendants
2. Felix Okon Etim)

It is clear that in suit No. C/124/76, the plaintiffs therein personally sued the defendants in their personal capacity. But in suit No. C/653/95 the plaintiffs now appellants in a representative capacity sued the defendants now respondents in a representative capacity. It is a correct proposition H of law that 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 judg-

ment is not res judicata as he parties to the respective action are not the same, since in one action the defendant is sued personally and in the other action he is sued as representative of a class of persons. See Alabi v. Ladeji (1986) 5 NWLR (pt. 42) 423; Iyaji v. Eyigebe (1987) 3 NWLR (pt. 61) 523 (S.C.). It is also observed that the issues and the res (the subject matter) in the previous case (Suit No. C/124/76) were not the same as those in the present case (Suit No. C/653/95). Also, the reliefs claimed in suit No. C/124/76 were not the same as those claimed in suit No. C/653/95. As a matter of fact there is no similarity between suit No. C/124/76 and suit No. C/653/95 by way of parties, issues and subject matter.

Since the parties in both suits were not the same, the consent judgment in suit No. C/124/76 cannot operate as estoppel per rem judicam against those who were not parties to it, or shown to have consented to it. See Ebueku v. Amola (1988) 2 NWLR (pt. 75) 128; Talabi v. Adeseye (1972) 8-9 SC 20. Also by virtue of section 54 of the Evidence Act 1990, the consent judgment is not admissible against those persons who were neither a party to it nor shown to have consented to it. In law a transaction between parties cannot affect prejudicially a person who is not a party to it. See Owonyin v. Omotosho (1961) 2 SCNLR 57; (1961) 1 All NLR 304 at page 307. Unfortunately, the learned trial Judge in suit No. C/653/95 accepted the consent judgment in suit No. C/124/76 as if it was a trump card to resolve the issue of res judicata raised in suit No. C/653/95 without adequately examining its legal implications and this led him to a serious and fatal error in law.

This appeal therefore has merit and it hereby allowed by me. Also, I hereby set aside the decision of the learned trial judge. This suit No. C/653/95 is remitted to the court below to be tried on its merits by another judge of the Cross River State High Court. I abide by the consequential Order in the leading Judgment as to the costs of this Appeal.

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