

**SUPREME COURT OF NIGERIA**  
23RD FEBRUARY, 2001. SC. 164/1995  
**CORAM:- A. B. WALL, E. O. OGWUEGBU, U. MOHAMMED,**  
**U. A. KALGO, A. O. EJIWUNMI, JJSC.**

YAKEEN ALABI ODONIGI ..... APPELLANT  
AND  
AILERU OYELEKE ..... RESPONDENT

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**APPEALS** - *Concurrent findings of fact - Will not be disturbed unless they are shown to be perverse or substantially wrong - And will occasion a miscarriage of justice.*

**APPEALS** - *Grounds of appeal - If supported by sufficient facts - Enough to eliminate ambiguity - Should not be struck out due to technicalities.*

**APPEALS** - *Retrial - Will not be ordered - Despite judge's unwarranted remark - As it did not affect his proper handling of the case.*

**APPEALS** - *Technicalities - Court has shifted - From undue reliance on technicalities - To doing substantial justice - Between the parties before it.*

**ARBITRATION** - *Customary arbitration - Conditions for a valid customary arbitration - Were not fulfilled in this case.*

**CUSTOMARY LAW** - *Arbitration - Estoppel - Customary arbitrations are recognized as judicial proceedings - Capable of creating estoppel per rem judicatam - If some conditions are satisfied.*

**ESTOPPEL** - *Res judicata or issue estoppel - The judgment in a criminal case relied on - Cannot create estoppel - Because the parties and the issues - Are not the same in both actions.*

**JUDGMENTS** - *Findings - On evidence and issues - Not before the*

*court is unacceptable - But where supported by ample evidence - The findings will be affirmed.*

### **FACTS**

This case originated from a land dispute between the respondent as plaintiff in the trial court and the appellant as defendant arising out of an alleged trespass by the appellant on the land of the respondent for which the respondent claimed N1,000.00 as damages for trespass. By the pleadings however the parties clearly joined issues on the question of title to the land in dispute. From their evidence before the trial court the parties had been in possession of parts of the land in dispute and had made grants of portions of the land to individuals and group of authorities. In proof of their claims to possession of the land in dispute each party relied upon traditional evidence of first settlement. The appellant/defendant further testified that the Oyun local government of Kwara state had on two occasions mediated in the dispute between the parties as to the land in question and declared it to belong to the appellant. As such the respondent had in 1980 been arrested and prosecuted and convicted of criminal trespass by the Magistrate Court in Offa when he disturbed the peaceful enjoyment of the land by the appellant. Appellant contended that the evidence of those mediations by the local government council and the Magistrate Court proceedings constituted estoppel per rem judicatam or issue estoppel.

The trial judge in a considered judgment awarded the relief sought by the plaintiff for trespass and the appellant being dissatisfied appealed to the Court of Appeal which dismissed his appeal. He has further appealed to the Supreme Court raising the following issues.

### **ISSUES FOR DETERMINATION**

*“1. Whether the lower court was not in grave error in holding that the Exhibits D1, D2 and D3 do not either jointly and/or severally create any form of estoppel, either estoppel per rem judicata or issue estoppel in favour of the appellant against the respondent.*

*2. Whether the lower court was not in error in upholding or sanctioning the use of and reliance placed on an untendered document, that is, the*

*logo of Ojoku Grammar School by the learned trial judge.*

Etc., see p. 632

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

***Grounds of appeal - Supported by sufficient facts***

1. I have looked at the notice of appeal on pp. 380 –385 of the record and after carefully examining the grounds 2, 4 and 6 objected to, I discovered that in each of these grounds particulars were given of the misdirection or error of law alleged therein and where necessary extracts were quoted of the judgment to support this. It is therefore very clear that the complaint in each of the ground is covered by sufficient particulars which made it certain what the ground is all about. There is no misapprehension or ambiguity in what each of the ground is complaining about. (p. 635 D)

***Appeals - Technicalities***

2. And as was clearly stated in many of the decisions of this court, the days of sticking to technicalities as opposed to substantial justice have gone by and this court has shifted from undue reliance to technicalities to doing substantial justice between the parties before it. See Nwosu v Imo State Environmental Sanitation Authority (1990) 2 NWLR 663 AT 717; A. G. Bendel v Aideyan (1989) 4 NWLR (pt. 118) 646 at 681.

In the circumstances, I overrule the preliminary objection of the respondent and find that the grounds of appeal 2, 4, and 6 and the issues 1, 2 and 4 related thereto are valid and competent. (p. 635 E)

***Customary law - Conditions for customary arbitration***

3. And from the principles enunciated in these decisions, it can reasonably be deduced that the Nigerian law recognises arbitration at customary law provided the following conditions are satisfied:-

(1) The parties voluntarily submit their disputes to a non-judicial body, to wit their elders or chiefs as the case may be for determination.

(2) The indication of the willingness of the parties to be bound

by the decision of the non – judicial body or freedom to reject the decision where not satisfied, and

(3) neither of the parties has resiled from the decision so pronounced.

B It would appear therefore that once these conditions are satisfied, in a customary arbitration, the arbitration would be liberally treated as a judicial proceeding and could be taken to operate as or create estoppel per rem judicatam. It is my view therefore that unless Exhibits D1 and D2 pass through these tests successfully, they cannot under any stretch of C imagination create any estoppel. (p. 641 A)

***Customary law - Arbitration - Conditions were not fulfilled***

D 4. Exhibit D1 has clearly shown that the complaint on the land in dispute was made in writing to the police by the appellant alone and the matter was later referred to the Resident, Oyun Division who conducted an investigation into it. And although the Olojoku and some of his chiefs were interviewed in the course of investigation, there is nothing to show E that the Olojoku’s family submitted the matter for arbitration or settlement between them and the appellant. The question of agreeing or consenting to be bound by the decision of the Resident did not arise, and there is no such evidence in this case. From all these, it is very clear that F none of the conditions of customary arbitrations laid down in Agu’s case is satisfied in the instant case.

G Exhibit D2 is only a follow up of Exhibit D1. It is merely confirming what was conveyed in Exhibit D1. It still speaks of complying with Exhibit D2 and maintaining peace in Ojoku land. And since Exhibit D1, does not qualify as customary arbitration or judicial function of the Resident, Exhibit D2 cannot go further. (p. 642 B)

***Res judicata or issue estoppel - The judgment in a criminal case***

H 5. In the instant case, the parties are the appellant and the respondent in their persons only, whereas in the previous criminal case, the parties were the Police prosecuting on behalf of the State and the respondent and 9 members of his family as accused persons. The parties in the

present case are not therefore the same as in previous criminal case. The issue in the instant case as joined by the parties was the “ownership” of the land in dispute and in the previous criminal case whether the respondents trespassed upon the appellant’s land with criminal intent. It is not necessary to prove actual ownership of the land in dispute by the appellant in the criminal case before the respondent could be convicted; it is enough if there is proof according to law that the appellants were in possession of the land at the time the respondents criminally entered the land in dispute. It was not therefore an issue before the Magistrate to determine whether the land in dispute belonged to either of the parties. It follows therefore that the issue for determination and the nature of claim in the two cases are not the same. The question of ownership of the land in dispute was not “*directly in issue*” in the previous criminal case (Exhibit D3) so that the provision of S. 54 of the Evidence Act do not apply here. See Ezeanya v Okeke (supra). I therefore also find that Exhibit D3 did not satisfy the criteria for operating as or creating estoppel in rem judicatum or as issue estoppel in the circumstances of this case. (p. 644 A)

### ***Findings - On evidence and issues not before the court***

6. I entirely agree with the learned counsel for the appellant that the trial court or any court for that matter cannot be justified in making a finding on evidence or issues not before it. That has gone beyond speculation and will not be acceptable. But in this case, there is, in my view, ample evidence given by the witnesses to support the finding of the learned trial judge on the logo of the Ojoku Grammar School and the lower court was perfectly justified in pointing this out and dismissing the complaint as it did. I agree with them and answer this issue in the negative. (p. 645 G)

### ***Appeals - Retrial***

7. The lower court proceeded to treat the documents as valid throughout the proceedings, without any reference to the remarks made by the trial judge. It was therefore wrong for the learned counsel for the appellant to expect that the lower court should allow the appeal and send back

the case for retrial because they found that the remarks were unjustifiable. What is important as far as the main case is concerned are the documents Exhibits D1, D2 and D3 and not the scathing remarks made by the trial judge on them.

B In the circumstances I find that Exhibits D1, D2, and D3 were properly treated by the lower court in its consideration of this case before it despite the remarks of the learned trial judge. There is therefore no justification for ordering retrial of the case based merely on the remarks on them made by the learned trial judge. (p. 646 G)

### ***Concurrent findings of fact***

8. It is now well settled that this court will not disturb concurrent findings of the courts below unless it is shown that either they were perverse or that there was a substantial error either in the substantive or procedural law which if uncorrected will lead to a miscarriage of justice. In the instant case I do not find any special circumstances or anything to show that the findings of the courts below were perverse or contained any substantial error of law or procedure amounting to miscarriage of justice to warrant disturbing the decision of the lower court. (p. 648 D)

### **NOTABLE POINT OF INTEREST**

#### **KALGO JSC**

##### *1. Customary arbitration - Its effect in law*

The submissions of the learned appellant's counsel on this issue seem to suggest very strongly that Exhibits D1, D2 have the status of customary arbitration binding between the parties thereto. Although the decision of the Court of Appeal in Okpuruwa v Ekpokam (1988) 4 NWLR (pt. 90) 554 that our legal system does not recognise the practice of elders or natives constituting themselves as customary arbitration to make binding decision between parties in respect of land or other disputes cannot in all cases be correct, it is no doubt true that customary arbitration is not an exercise of judicial power under the Constitution (not a function) exercised by the courts. On the other hand it is now well settled that one of the many ways of settling disputes among African societies is to refer the dispute to either

the family head, or elders or chiefs of the community concerned for settlement, and upon subsequent acceptance of the arbitration grant or award, it becomes binding on them. The parties are however at liberty to resile at any stage of the proceedings up to that point. (p. 640 D)

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### **REPRESENTATION**

Chief Wole Olanipekun SAN with him O. Olanipekun and S. B. Basambo for the appellant.

Olaseeni Okunloye for the respondent.

C

### **CASES REFERRED TO**

Agbaka v Amadi (1998) 11 NWLR (pt. 572) 16

Fadiara v Gbadebo (1978) 3 SC 219

Cardoso v Daniel (1986) 2 NWLR (pt. 20) 1

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

Iyaji v Eyigebe (1987) 3 NWLR (pt. 61) 523

Odje v Wedje v Echanokpe (1987) 1NWLR (pt. 52) 633

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

Ukaegbu v Ugoji (1991) 6 NWLR (pt. 196) 127

Agu v Ikewibe (1991) 3 NWLR (pt. 180) 385

Commerce Assurance v Alli (1992) 2 SCNJ 145 at 116

Anyaburisi v Ugwunze (1995) 6 NWLR (pt. 401) 255

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### **LEAD JUDGMENT BY KALGO JSC**

In his amended statement of claim, the respondent herein as plaintiff in the trial court, claimed against the appellant the sum of N1,000.00 (One Thousand Naira) as damages for trespass on the respondent's family land which he described in paragraph 46 of the amended statement of claim. The appellant also filed an amended Statement of Defence in which he denied the claim (Paragraph 17) and also averred in paragraphs 19 and 20 that the land in dispute belonged to his family from time immemorial. By these assertions in their respective pleadings, the parties have clearly joined issue on the question of title to the land in dispute even though the original claim was on trespass.

G

H

At the trial both parties called witnesses to prove their case on their pleadings and at the end of the evidence, learned counsel filed in court and exchanged between themselves, written addresses on the law and evidence produced before the court. The learned trial judge Gbadeyan J. delivered a considered judgment on the 27<sup>th</sup> day of May 1991, at the end of which he said (P.232 of the record):-

*“In the circumstance, the plaintiffs action succeeds and he shall be paid the modest N1,000.00 as general damages for trespass as claimed.”*

The appellant was dissatisfied with this decision and he appealed to the Court of Appeal (hereinafter referred to as the lower court). In the lower court written briefs were filed and exchanged between the parties, the appeal was then heard and in a unanimous decision, in the lower court, the appeal was dismissed. The appellant was still not happy and he appealed to this Court.

In this court, written briefs were also filed and exchanged between the parties. When this court heard the appeal the appellant adopted and relied upon his brief of argument and the reply brief which he filed and urged the court to allow the appeal. The respondent’s counsel also adopted and relied upon his brief of argument and urged the court to dismiss the appeal.

In his brief of argument, the appellant raised 4 issues for the determination by this court. They read:-

*“1. Whether the lower court was not in grave error in holding that the Exhibits D1, D2 and D3 do not either jointly and/or severally create any form of estoppel, either estoppel per rem judicata or issue estoppel in favour of the appellant against the respondent.*

*2. Whether the lower court was not in error in upholding or sanctioning the use of and reliance placed on an untendered document, that is, the logo of Ojoku Grammar School by the learned trial judge;*

*3. Considering the unjustified scathing remarks made by the learned trial judge against the appellant and which remarks the lower court found as unwarranted, whether the lower court was right in not sending the case back for retrial before another judge.*

4. *Having regard to the totality of the evidence on record, whether the lower court was right in upholding the Judgment of the trial court.*"

The learned counsel for the respondent on the other hand formulated only 2 issues in his brief which read:-

*"1. Whether the Court of Appeal properly refused to upset the trial court's findings and conclusions regarding evidence of the ownership of the land in the High Court which were resolved in favour of the Plaintiff/Respondent;*

*2. Whether the Court of Appeal rightly held that the pleas of estoppel per rem judicatam were not available to the defendant/appellant."*

In reading through the issues framed by the parties' counsel above, I find that issue 1 of the appellant tallies exactly with issue 1 of the respondent. I also find that issue 4 of the appellant tallies with issue 2 of the respondent. Therefore I shall consider in this appeal the issues set out by the appellant's counsel in his brief.

I think it is pertinent at this stage to state albeit briefly the substance and nature of the dispute between the parties. The land in dispute which is alleged to have been trespassed upon is situate and lying in Ojoku town of Kwara State. According to the evidence before the trial court, it was very clear that both the appellant and the respondent have been in possession of part of the land. It is also evident that both parties have at different times in the past made grants of the portions of the land to individuals and group of persons or authorities. For example the appellant pleaded and led evidence to prove how his family granted portions of land where Ojoku Town Hall, the Ojoku Grammar School and low cost housing scheme were built. It was however significant to observe that the lands on which these projects were carried out were not part of the land now in dispute between the parties. In proof of their claims to the possession of the land in dispute, each party proffered and relied upon traditional evidence. The respondent's case was that his family (the Olojoku family) headed by the Olojoku of Ojoku is the traditional owner of the entire Ojoku land including the land in dispute and that it was the

ancestors of the Olojoku family who founded the entire Ojoku land and settled there first. The appellant case was that their ancestors founded the Ojoku town itself and that the respondents family met them on the Ojoku land 100 years later. The respondents family were forced on the appellant's family when the Ilorin Fulanis enthroned the respondent as Baale Ojoku. The appellant also testified that the Oyun Local Government of Kwara State had on two occasions mediated in the dispute between the parties on the land in question and on both occasions, the Oyun Local Government settled the dispute and ruled that the land belonged to the appellant. And when in 1980 after the mediation, the respondent's family members disturbed the peaceful enjoyment of the land by the appellant, the former were arrested by the police, prosecuted and convicted of criminal trespass by the Magistrates Court in Offa. Evidence of the mediations by the Oyun Local Government on the land in dispute and the Offa Magistrates Court proceedings are admitted as Exhibits D1, D2, and D3, at the trial. The contention of the appellant is that these exhibits constitute estoppel per rem judicatam or issue estoppel against the respondent's action.

Let me now deal with the preliminary objection of the respondent. In his brief of argument the learned counsel for the respondent raised a preliminary objection on the competency of grounds of appeal 2, 4 and 6 in the appellant's notice of appeal to this court and issues 1, 2, and 4 related to them in the brief. The main reason for the objection is that grounds 2 and 4 alleged misdirection in law and in fact and ground 6 alleged error in law and fact. Learned counsel pointed out that Order 8 rule 2 (2) of Supreme Court Rules 1985 does not allow this to be done and each ground must allege either an error in law or fact, a misdirection or error in law. Any ground of appeal, counsel contended, which complains of misdirection in law and fact raises two separate grounds in one and this offends the provisions of Order 8 Rule 2 (2) (Supra). He therefore submitted that since the appellant's grounds of appeal 2, 4 and 6 alleged error in law and fact and misdirection in law and fact, the grounds are incompetent and should be struck out together with issues 1, 2 and 4 related to them. He cited in support the cases of Atuyeye v Ashamu (1987) 1NWLR (pt. 49) 267;

Boogam v Awom (1995) 7 NWLR (pt. 410) 692; First Bank of Nigeria v Njoku (1995) 3 NWLR (pt. 384) 457; Nwadike v Ibekwe (1987) 4 NWLR (pt. 67) 718 at 744.

The learned counsel for the respondent in his reply brief pointed out from the decided cases of this court and the lower court that once the ground of appeal clearly states what the appellant is complaining about with sufficient particulars, such ground cannot be described as bad or incompetent. He contended that this court had moved from observing rules of technicality as to form to looking at the substance and the justice of the case. He inter alia cited in support Egolum v Obasanjo (1999) 7 NWLR (pt. 611) 355 at 413; Edokpolo & Co. Ltd v Ohenhen (1994) NWLR (pt. 358) 511 at 529; State v Gwonto (1983) 1 SC142; Aderounmu v Olowu (2000) 4 NWLR (pt.652) 253.

**I have looked at the notice of appeal on pp. 380 –385 of the record and after carefully examining the grounds 2, 4 and 6 objected to, I discovered that in each of these grounds particulars were given of the misdirection or error of law alleged therein and where necessary extracts were quoted of the judgment to support this. It is therefore very clear that the complaint in each of the ground is covered by sufficient particulars which made it certain what the ground is all about. There is no misapprehension or ambiguity in what each of the ground is complaining about. And as was clearly stated in many of the decisions of this court, the days of sticking to technicalities as opposed to substantial justice have gone by and this court has shifted from undue reliance to technicalities to doing substantial justice between the parties before it. See Nwosu v Imo State Environmental Sanitation Authority (1990) 2 NWLR 663 AT 717; A. G. Bendel v Aideyan (1989) 4 NWLR (pt. 118) 646 at 681. In the circumstances, I overrule the preliminary objection of the respondent and find that the grounds of appeal 2, 4, and 6 and the issues 1, 2 and 4 related thereto are valid and competent.**

I now come to consider the issues formulated by the appellant in his brief. Issue 1 was whether the lower court was not in grave error in holding that Exhibits D1, D2 and D3 do not either jointly or severally create

any form of estoppel per rem judicatam or issue estoppel against the respondent.

In considering this issue, it appears to me very essential to examine the background, contents and legal effect of each of Exhibits D1, D2 and D3. Exhibit D1 is a letter dated 12<sup>th</sup> April 1976, signed by one T.B. Bamidele for Resident, Ogun Division and addressed to the appellant through the Administrative Secretary, Oyun Local Government Authority, Offa. It was certified by the Principal Estate Officer, Oyun Local Government, Offa. It is pertinent to observe here that it was not copied to the respondent or his family. Exhibit D1 reads as follows:-

Mr. Alabi Odonigi,  
Odonigi's Compound,  
Ojoku.  
U. F. S.

10. The Administrative Secretary,  
Oyun Local Government Authority,  
Offa.

COMPLAINT ON LAND AT OJOKU

You are please referred to your letter of complaint  
15. addressed to the Divisional Police Office on land dispute, but which was referred back to this office, and also to the discussion which was held with you, Olojoku of Ojoku and his Chiefs at Ojoku

2. I am directed to inform you that thorough investigations have been carried out on the land in dispute with the co-operation of Olojoku of Ojoku. From these investigations it has been detected that the said land in dispute belongs to Onodigi family.

*"West-East boundaries – both sides along Offa road from Iyana Igbo-Idun is Ojoku town to River Apon marking the Eastern boundary.*

25. *South-North boundaries:- River Elewaa marks the limit in the southern end while it stretches to River Ami in the northern end.*

30. 3. Your family therefore has the right to be consulted over anything that is to take place over the said piece of land.

4. But you have been advised that you should co-operate with

your chief, Olojoku of Ojoku any time he approaches your family for the use of any part of the said land.

5. You are also further strongly advised to be always law-abiding and be warned never to put the law in your own hands over this issue which is being resolved. B

6. It should be remembered that your co-operation with your chief will enhance the progress and unity of Ojoku, and this is the only thing expected of you for any adverse report about you on this issue may have serious consequences.

(Sgd) C

(T.B. Bamidele)

FOR: Resident, Oyun Division.

15. C.T.C. D

(Sgd)

Principal Estate Officer,  
Oyun Local Government,  
Offa. 8/4/87. E

(Underlining mine).

From the contents of Exhibit D1, it is very clear that the complaints on the land in dispute was initiated by a petition written to the Divisional Police Officer by the appellant. The petition was then redirected to the Resident, F  
Oyun Division. It is also clear that thorough investigations have been carried out on the land in dispute with full co-operation of the Olojoku of Ojoku of the respondent's family, the appellant himself and the other Chiefs of Ojoku. It was not stated how or who carried out the investigations whether it was the police or the Resident, but Exhibit D1 G  
further states that:-

*"From these investigations it has been detected that the said land in dispute belongs to Odonigi family."*

The rest of the paragraphs of Exhibit D1 did not confer any title or H  
ownership of the land in dispute to the appellant's family. It only conferred on them. *"the right to be consulted"* over any dealing with the land, and warned them to keep the peace and cooperate with the Olojoku of Ojoku.

Exhibit D2, is another letter from the Secretary Oyun Local Government, Offa, dated 25<sup>th</sup> March 1980 and addressed to the Olojoku of Ojoku in connection with the land in dispute and re-confirming the findings conveyed in Exhibit D1 that the land in dispute belonged to the family of the appellant. A copy of Exhibit D1 this time was attached to remind the Olojoku of the situation. Exhibit D2 was copied to the appellant also. Exhibit D2 reads thus:-

DO/OY/POL.11/VOL.111/646

Secretary's Office,

xxxxxxxxxxxxxxxxxxxx

25<sup>th</sup> March, 1980

His Highness,  
Olojoku of Ojoku,  
Ojoku.

COMPLAINT ON LAND AT OJOKU

With reference to the discussion your Highness had with the Secretary to the Local Government, Offa on Friday, 21<sup>st</sup> March, 1980, on the land dispute at Ojoku, I am directed to make it clear to you that the record in this office show that the pieces of land in question belong to the family of Mr. Alabi Odonigi and that you had been informed accordingly. Letter No. DO/OY/POL.11/497 of 12 April, 1976 refers. 10. (A copy of the letter is attached herewith for your remembrance).

In view of the available facts, you are advised to desist from action likely to cause confusion and misunderstanding in Ojoku. You should allow the Odonigi family to use the pieces of land. You should please co-operate with the Local Government in its efforts to ensure peace in Ojoku.

(Sgd)

A. O. Agboola,

For: Secretary,

Oyun Local Government, Offa

NO.DO/OY/POL.11/Vol.111/646A

Secretary's Office,

Oyun Local Government,  
Offa.

25. 25<sup>th</sup> March, 1980.

Copy to:-

Mr. Alabi Odonigi,  
Odonigi's Compound,  
30. Ojoku

B

Above is for your information, please.

(Sgd)

A.O. Agboola,  
Secretary,

C

35. Oyun Local Government, Offa.”

Estoppel per rem judicatam or issue estoppel applies in the case of a final decision of a competent court or judicial tribunal and between the same parties or their privies. The party who loses in the decision, is estopped per rem judicatam from reopening the issue decided therein in any subsequent action. See Agbaka v Amadi (1998) 11 NWLR (pt. 572) 16; Fadiara v Gbadebo (1978) 3 SC 219; Cardoso v Daniel (1986) 2 NWLR (pt. 20) 1, Anibo v Aiyeleru (1993) 3 NWLR (pt. 280) 126. D E

The principles or doctrine of res judicata also applies where a final decision is pronounced by a court or judicial tribunal having competent jurisdiction over the cause or matter and over the parties thereto and which disposes of all the matters decided therein so that the parties or their privies cannot thereafter raise any of the matters for re-litigation between them. See Iyaji v Eyigebe (1987) 3 NWLR (pt. 61) 523; Odje v Wedje v Echanokpe (1987) 1 NWLR (pt. 52) 633; Osunrinde v Ajamagun (1992) 6 NWLR (pt. 246) 156; Ukaegbu v Ugoji (1991) 6 NWLR (pt. 196) 127. F G

Learned counsel for the appellant submitted in his brief and orally in expatiation on issue 1 that Exhibits D1 and D2 created estoppel per rem judicatam against the respondent in this case. He submitted that the parties in this case have voluntarily submitted their complaint to the Oyun Local Government for arbitration and therefore they are bound by the decision conveyed to them in Exhibits D1 and D2. He therefore further submitted that since neither party resiled from decision of the Oyun Local Govern-

ment, Exhibits D1 and D2 created estoppel per rem judicatam against any of them or their privies in attempting to challenge the decision therein. He cited in support the cases of Agu v Ikewibe (1991) 3 NWLR (pt. 180) 385; Commerce Assurance v Alli (1992) 4 SCNJ 145 at 116; Anyaburisi v Ugwunze (1995) 6 NWLR (pt. 401) 255; Ojibah v Ojibah (1991) 5 NWLR (pt. 191) 296; Adebayo v Ighodalo (1996) 5 NWLR (pt. 450) 507 at 527. Learned counsel finally submitted on this issue that the Oyun Local Government is in this case, the authority statutorily recognised by law o  
C adjudicate on the complaints of this nature as between the indigenes of the said local Government.

Learned counsel for the respondent submitted in his brief that Exhibits D1, D2 and D3 did not create issue estoppel or estoppel per rem judicatam in this case and that all the findings of the learned trial judge as  
D confirmed by the lower court were fully supported by evidence.

The submissions of the learned appellant's counsel on this issue seem to suggest very strongly that Exhibits D1, D2 have the status of customary arbitration binding between the parties thereto. Although the  
E decision of the Court of Appeal in Okpuruwa v Ekpokam (1988) 4 NWLR (pt. 90) 554 that our legal system does not recognise the practice of elders or natives constituting themselves as customary arbitration to make binding decision between parties in respect of land or other disputes cannot  
F in all cases be correct, it is no doubt true that customary arbitration is not an exercise of judicial power under the Constitution (not a function) exercised by the courts. On the other hand it is now well settled that one of the many ways of settling disputes among African societies is to refer the dispute to either the family head, or elders or chiefs of the community  
G concerned for settlement, and upon subsequent acceptance of the arbitration grant or award, it becomes binding on them. The parties are however at liberty to resile at any stage of the proceedings up to that point.

The question of customary arbitration and the conditions  
H attached thereto has been considered by our courts in many cases, some of which are:- Assampong v Amuaku & ors (1932) 1 WACA 192; Mbogu v Agochukwu (1973) 3 ESCLR (pt. 1) 90; Inyang v Essien (1957) 2 FSC 39; Idika v Erisi (1988) 2 NWLR (pt. 78) 563 at 573; Kwasi v Larbi (1952)

13 WACA 76. And from the principles enunciated in these decisions, it can reasonably be deduced that the Nigerian law recognises arbitration at customary law provided the following conditions are satisfied:-

(1) The parties voluntarily submit their disputes to a non-judicial body, to wit their elders or chiefs as the case may be for determination.

(2) The indication of the willingness of the parties to be bound by the decision of the non – judicial body or freedom to reject the decision where not satisfied, and

(3) neither of the parties has resiled from the decision so pronounced.

It would appear therefore that once these conditions are satisfied, in a customary arbitration, the arbitration would be liberally treated as a judicial proceeding and could be taken to operate as or create estoppel per rem judicatam. It is my view therefore that unless Exhibits D1 and D2 pass through these tests successfully, they cannot under any stretch of imagination create any estoppel.

In arguing this issue in his brief, the learned counsel for the appellant relied very heavily on the case of Agu (supra) and on P.11 of the brief proceeded to quote what he called the opinion of Karibi-Whyte JSC on the issue. With respect to the learned counsel what he quoted on p.11 of his brief was not the opinion of Karibi-Whyte JSC. This quotation appears on p. 413 of the report on Agu's case and it was an extract from a book called Spencer – Bower & Turner in Estoppel 2nd Edition on pp 21 – 22 which Karibi-Whyte JSC quoted to support the view that estoppel has been given a more liberal and broader definition. At the end of that quotation Karibi-Whyte JSC said on p. 414 of the report that:-

*“The above definition is broad and liberal to include decisions of arbitration’s under customary law.”*

But he set out the conditions under which such customary arbitration can satisfy the requisite of estoppel as:-

*“(i) there is evidence of voluntary submission of the (dispute to)*

*Elders of the Community*

(ii) *Initial willingness of the parties to be bound by the decisions of the Chiefs and Elders of the Community.*

(iii) *The Chiefs and Elders of the Community exercise Judicial functions accruing to custom.*

(iv) *The terms of the decision were known, final and un-conditional."*

This is not what happened in the circumstances of this case. **Exhibit D1 has clearly shown that the complaint on the land in dispute was made in writing to the police by the appellant alone and the matter was later referred to the Resident, Oyun Division who conducted an investigation into it. And although the Olojoku and some of his chiefs were interviewed in the course of investigation, there is nothing to show that the Olojoku's family submitted the matter for arbitration or settlement between them and the appellant. The question of agreeing or consenting to be bound by the decision of the Resident did not arise, and there is no such evidence in this case.** In fact at the end of the investigation Exhibit D1 conveying the decision of the Resident was not copied the Olojoku or any member of his family or the respondent. The resident who conducted the investigation on the complaint was not exercising any judicial function; he was dealing with the matter in an administrative way to ensure peace and understanding between the parties. Also except in 1980 when the charge of criminal trespass was being prosecuted against the respondent and some members of his family, the respondent was unaware of Exhibit D1. It can however be presumed that the Olojoku was fully aware of this especially after the receipt of Exhibit D2 to which Exhibit D1 was attached. Also the Police or the Resident, cannot under any stretch of imagination be regarded as chiefs or Elders of any community, they are administrative and security agents charged with the responsibility for keeping peace in the community and this was clearly manifested by paragraphs 4, 5 and 6 of Exhibit D1. **From all these, it is very clear that none of the conditions of customary arbitrations laid down in Agu's case is satisfied in the instant case.**

**Exhibit D2 is only a follow up of Exhibit D1. It is merely**

**confirming what was conveyed in Exhibit D1. It still speaks of complying with Exhibit D2 and maintaining peace in Ojoku land. And since Exhibit D1, does not qualify as customary arbitration or judicial function of the Resident, Exhibit D2 cannot go further.** Therefore I entirely agree with the lower court when it stated on p. 367 of the record per Akanbi PCA that:-

*“Exhibit D1 is a letter headed complaint on the land at Ojoku” and is dated 12<sup>th</sup> April, 1976. It was addressed by the T. B. Bamidele, Resident Oyun Division to Mr. Alabi Odonigi and copied only to the principal Estate Officer, Oyun Local Government. It is not copied to the appellant. Standing by itself, there is nothing in Exhibit D1 to show that it is a judgment that can be said to be “Conclusive of facts forming ground of the judgment against parties and privies” vide section 53 of the Evidence Act. Exhibit D1 speaks for itself. So viewed from whatever angle, it cannot be elevated to the status of a judicial proceedings or a judgment or a decision. Therein (sic) or indeed of a non-judicial body whose decision (if it is a decision at all) can be said to create an estoppel per rem judicatam or an issue estoppel. Exhibit D1 without more has not that potency and cannot produce such legal consequences. But it has been said that if it is read conjunctively with Exhibit D2, it is capable of producing such effect. Can it really? True it is, as submitted by Appellant’s Counsel, the learned trial judge gave little or no consideration to Exhibit D2, but even if he did, the situation to my mind could not have been any different. Exhibit D2 suffers from the same defect as Exhibit D1.”*

I now consider Exhibit D3. it is a criminal proceedings before the Magistrate in Offa in which the respondent and 9 other members of his family were convicted of the offence of criminal trespass under the Penal Code, and the appeal on it to the High Court was struck out. Learned counsel for the appellant submitted that Exhibit D3 created an estoppel per rem judicatam since the parties and the subject matter in this case and the criminal cases are the same and the decision of the Magistrate Court was still subsisting. He supported his argument on the cases of Ezeanuga v Okeke (1995) NWLR (pt. 388) 142 at 162-165; Adebayo v Babalola (1995)

644     Odonigi v. Oyeleke (2001) 2 KLR Kalgo JSC  
7 NWLR (pt.408) 383 at 405; Maclikenny v Chief Constable of West  
Midlands Police Force (1980) 1 AUER 227 & 3 AUER 727.

**In the instant case, the parties are the appellant and the respondent in their persons only, whereas in the previous criminal case, the parties were the Police prosecuting on behalf of the State and the respondent and 9 members of his family as accused persons. The parties in the present case are not therefore the same as in previous criminal case.** The subject matter in the previous criminal case is criminal trespass on the land in Ojoku town whereas the subject matter of the instant case is trespass on the land in Ojoku town. In each case the identity of the land was not specified but the parties would appear to know what land was in dispute. It is therefore assumed that the subject matter is the same in each case. **The issue in the instant case as joined by the parties was the “ownership” of the land in dispute and in the previous criminal case whether the respondents trespassed upon the appellant’s land with criminal intent. It is not necessary to prove actual ownership of the land in dispute by the appellant in the criminal case before the respondent could be convicted; it is enough if there is proof according to law that the appellants were in possession of the land at the time the respondents criminally entered the land in dispute. It was not therefore an issue before the Magistrate to determine whether the land in dispute belonged to either of the parties. It follows therefore that the issue for determination and the nature of claim in the two cases are not the same. The question of ownership of the land in dispute was not “*directly in issue*” in the previous criminal case (Exhibit D3) so that the provision of S. 54 of the Evidence Act do not apply here. See Ezeanya v Okeke (supra). I therefore also find that Exhibit D3 did not satisfy the criteria for operating as or creating estoppel in rem judicatam or as issue estoppel in the circumstances of this case.**

H     In concluding my consideration of this issue and having regard to what I said above, I am satisfied and accordingly find that Exhibits D1, D2 and D3 did not and cannot in this case, create any estoppel per rem judicatam or issue estoppel. I answer issue one in the affirmative.

I now come to consider issue 2. It is complaining about the findings of the learned trial judge that the gun on top of the logo of the Ojoku Grammar School badge is showing the valour of the Oluode as protector of the community. This court has no jurisdiction to hear complaints from the decision of the trial court but the lower court per Akanbi JCA on p. 373 B of the record considered this issue and held that:-

*“... the short answer to this is that oral evidence about the Odu and the gun was let in the cause of the proceeding. Indeed some of the key witnesses testified on the issue.”*

Going through the evidence of the witnesses on the record of the trial court, it is abundantly clear that P.W.1 on P. 124, P. W. 3 on p. 132, the appellant himself on p. 166 and D.W. 1 on p. 160 testified on the logo of the Ojoku Grammar School. On p. 124, P.W. 1 said:- C

*“I know that on the top of Ojoku Grammar School there are a pot D and a gun ... and that Ojoku people are warriors never vanquished in any war and that points to Olu-Ode’s family.”*

On page 132 of the record, P.,W. 3 said:-

*“We have a grammar school at Ojoku. The logo of the college E contains the hunter with a gun and an “Odu.” It shows the valour of the Olu-Ode in protecting the town day and night.”*

And DW 1 on p. 160 said:-

*“that Odu is reflected in the logo of the badge of Ojoku Grammar F School.”*

From these extracts of witnesses evidence at the trial there is no doubt that there was ample evidence on the Odu and the gun for the lower court to justify what is said on p. 373 of the record even though the logo itself was not admitted in evidence. **I entirely agree with the learned G counsel for the appellant that the trial court or any court for that matter cannot be justified in making a finding on evidence or issues not before it. That has gone beyond speculation and will not be acceptable. But in this case, there is, in my view, ample evidence H given by the witnesses to support the finding of the learned trial judge on the logo of the Ojoku Grammar School and the lower court was perfectly justified in pointing this out and dismissing the**

**complaint as it did. I agree with them and answer this issue in the negative.**

I will now deal with issue 3. This issue complained of the remarks made by the learned trial judge on the production of Exhibits D1, D2 and D3 by the appellant which the learned counsel described in his brief as “scathing remarks”. The learned counsel in his brief submitted that the use of the words “hoodwink” and “bulldoze” by the learned trial judge were an apparent attack on the credibility of the appellant and an unjustified and flagrant abuse of power amounting to breach of appellant’s right to fair hearing contrary to S. 33 of the 1979 Constitution. He submitted that the learned trial judge would appear by his remarks to have descended into the arena to attack the appellant alone instead of being an umpire in the case. He also pointed out that this attitude of the learned trial judge seemed to show that he has failed to comply with all judicial ethics of fairness in the administration of justice. Learned counsel finally contended that as a result of this conduct, the Court of Appeal should have sent the case back to another judge for retrial. He cited many decisions of this court and the Court of Appeal in support.

The lower court examined this complaint in the light of the evidence on the record and came to the inevitable conclusion, to which I entirely agree that there was no justification for the learned judge to make the scathing remarks which he did about the production by the appellant of Exhibits D1, D2 and D3. They found that the remarks were unnecessary, uncalled for and unfortunate and those documents, were genuine, regularly marked and legitimately obtained. I entirely agree with this finding of the lower court in the circumstances.

**The lower court proceeded to treat the documents as valid throughout the proceedings, without any reference to the remarks made by the trial judge. It was therefore wrong for the learned counsel for the appellant to expect that the lower court should allow the appeal and send back the case for retrial because they found that the remarks were unjustifiable. What is important as far as the main case is concerned are the documents Exhibits D1, D2 and D3 and not the scathing remarks made by the trial judge on them.**

**In the circumstances I find that Exhibits D1, D2, and D3 were properly treated by the lower court in its consideration of this case before it despite the remarks of the learned trial judge. There is therefore no justification for ordering retrial of the case based merely on the remarks on them made by the learned trial judge.** 1 B  
answer issue 3 in the affirmative.

The last issue 4 deals with the evidence available at the trial in support of the judgment of the trial court and confirmed by the lower court. The main complaint of the learned counsel for the appellant in this issue going by his brief of argument is that the learned trial judge fails to properly assess, evaluate and weigh the evidence adduced by the parties at the trial. The points raised and argued by the learned counsel in his brief in this issue, are not in my view, different from those fully argued by him in the brief he filed in the lower court. This can be seen clearly on p.274 D of the record as issues 5, 6, 7 and 8. The lower court, after examining the totality of the evidence in essential detail, concluded thus on p. 366 of the record:-

*“It is trite to say a trial court has a duty to consider and give due E weight to the evidence tendered by both parties to a dispute. His review and/or evaluation of the evidence of witnesses must reflect a dispassionate appraisal of the issues raised and his conclusions must be seen to be fair and just to the contending parties. In short the scale of justice must F throughout be evenly balanced.*

*Bearing these postulates in mind, I remain unconvinced that the learned Judge has not been fair in the appraisal of the evidence before him. I have already dealt with the findings conclusions as regards the G traditional history. Earlier on, I have shown that he did address the issue of the grants of land made to individuals and government institutions by the respondent. He held that those grants were not part of the land in dispute. These findings were not challenged in this appeal. And it has not H been suggested that all the projects carried out by the grantees were sited on the land in dispute. Furthermore, it is instructive to note that the evidence tendered by the appellant was reviewed and considered along with that of the Respondent particularly at pages 210 to 215 of the record*

*of proceedings; and it was after a critical analysis of the evidence had been made that the learned judge accepted the evidence that the Respondent's ancestor's founded Ojoku and made grants of the land to about forty-eight (48) different families including the appellant's family. There is evidence on record (including that of the first defence witness) to support this finding. And it is for this reason that the traditional history of the Respondent was preferred. I find no justification for holding a contrary view."*

I cannot agree more with this finding and conclusion in the circumstances of this particular case.

Learned counsel for the appellant also argued that he was not appealing against the concurrent findings of the trial court and the lower court. What then is he appealing against in a situation where the trial court which saw and heard the witnesses looked at the evidence before it and preferred that adduced by the respondent and the lower court on appeal agreed with it entirely.

**It is now well settled that this court will not disturb concurrent findings of the courts below unless it is shown that either they were perverse or that there was a substantial error either in the substantive or procedural law which if uncorrected will lead to a miscarriage of justice. See Akinsanya v U.B.A Ltd (1986) 4 NWLR (pt. 35) 273; Dibiamaka v Osakwe (1989) 3 NWLR (PT. 107) 101; Animashaun v Olojo (1990) 6 NWLR (pt. 154) 111; Bankole v Pelu (1991) 8 NWLR (pt. 211) 523. In the instant case I do not find any special circumstances or anything to show that the findings of the courts below were perverse or contained any substantial error of law or procedure amounting to miscarriage of justice to warrant disturbing the decision of the lower court. I answer this issue in the affirmative.**

For all the reasons stated above, I find that there is no merit in this appeal. I dismiss it and affirm the decision of the lower court. I award N10,000.00 costs in favour of the respondent.

### WALI JSC

I have had the privilege of reading in advance, the lead judgment of my learned brother Kalgo JSC, and I entirely agree with his conclusion for dismissing the appeal. My learned brother Kalgo has admirably, thoroughly and adequately treated all the issues raised in this appeal and I do not consider it necessary to expatiate on any of them. B

The appeal involves concurrent findings by the lower courts with which I am in entire agreement. I also dismiss the appeal and abide by the consequential orders, that of costs inclusive, made in the lead judgment. C

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### OGWUEGBUJSC

I had a preview of the judgment just delivered by my learned brother Kalgo, JSC. I agree entirely with his reasoning and conclusions and I adopt them as mine. I, too, would dismiss the appeal and make the same consequential orders contained in the said judgment of Kalgo, JSC including the order as to costs. D

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### MOHAMMEDJSC

I have had a preview of the judgment read by my learned brother, Kalgo, JSC, in draft and I agree entirely with him that, this appeal has failed and ought to be dismissed. I also agree that the preliminary objection raised by the respondent on the competency of grounds of appeal 2, 4 and 6 and issues 1, 2 and 4 formulated against them is without merit. Those grounds are valid grounds and as such the preliminary objection is overruled. F

The appeal is dismissed. I affirm the judgment of the Court below. I also award N10,000.00 costs in favour of the respondent. G

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### EJIWUNMIJSC

I have had the privilege of reading in advance the draft of the judgment just delivered by my learned brother Kalgo JSC. The facts relating to this appeal have been carefully set down in this judgment and H

the reasons given for dismissing this appeal with which I also agree, have similarly been set down in the said judgment.

However, I wish to add a few words of my own with regard to whether the lower Court was right to have held per Akanbi JCA that:-

B “Exhibit D1 is a letter headed complaint on the land at Ojoku”  
and is dated 12<sup>th</sup> April, 1979. It was addressed by the T. B. Bamidele,  
Resident Oyun Division to Mr. Alabi Odonigi and copied only to the  
Principal Estate Officer, Oyun Local Government. It was not copied to the  
C appellant. Standing by itself, there is nothing in Exhibit D1 to show that  
it is a judgment that can be said to be “Conclusive of facts forming ground  
of the judgment against parties and privies’ vide Section 53 of the  
Evidence Act. Exhibit D1 speaks for itself. So, viewed from whatever  
D angle, it cannot be elevated to the status of a judicial proceedings or a  
judgment or a decision. Therein or indeed of a non-judicial body whose  
decision (if it is a decision at all) can be said to create an estoppel per rem  
judicatam or an issue estoppel. Exhibit D1 without more has not that  
potency and cannot produce such legal consequences. But it has been said  
E that if it is read conjucatively with Exhibit D2, it is capable of producing  
such effect. Can it really?

True it is, as submitted by Appellants Counsel, the learned trial  
Judge gave little or no consideration to Exhibit D2 suffers from the same  
F defect as Exhibit D1. I agree that Exhibit D2 was addressed this time  
around to the Olojoku; and it made reference to a land dispute. But that  
would not make it a binding proceeding or give it the efficacy of the  
judgment (decision of a “judicial tribunal”) that can “properly be  
described as a person or body of person exercising judicial function ...”  
G vide Spencer Bower and Turner on Estoppel 2<sup>nd</sup> Edition pp 21-23  
(underlining supplied). Exhibit D2 is not the product of a body exercising  
“judicial functions”. If it be a decision at all, it is not such a decision as  
can create any estoppel whether standing by itself or read together with  
H Exhibit D1. To that extent, the case of AGU VS IKEWIBE (1991) 3 NWLR  
(pt. 180) 385 is not apposite.”

It has been argued before us by the learned Senior Advocate  
Olanipekun Esq., that the lower court was right in so holding, as he

submitted that Exhibits D1 and D2 sufficiently established issue estoppel per rem judicatam in favour of the appellant. Learned Senior Advocate L.O. Fagbemi, Esq., however took the opposite view.

I think it is desirable in the consideration of this question to have recourse to the pleadings. The appellant by paragraph 18 of his Further Amended Statement of Defence pleaded thus;-

*“The defendant shall contend at the trial of this action that the plaintiff is estopped by conduct written by the Oyun Local Government in respect of this land(sic) dispute on 12<sup>th</sup> April, 1976 and 25<sup>th</sup> March 1980 as he (the plaintiff) and/or his family head are/were the complainants who took the matter to the said Local Government. The defendant hereby specifically pleads estoppel general and issue estoppel in particular.”*

But the plaintiff in paragraphs 28, 29, 30 and 31 of his pleadings in Further Amended Statement of Claim rebutted the defendant’s claim of estoppel as he averred thus:-

‘28’ – *The Olojoku, head of the plaintiff’s family was never invited to any land inquiry by the Oyun Local Government in 1976 or at any other time.*

‘29’ – *The Olojoku’s (Plaintiff) family was never aware of any land inquiry held by the Oyun Local Government in 1976 or at other time.*

‘30’ – *The Olojoku’s (Plaintiff) was never aware of any result of a land inquiry touching and concerning their family land in 1976.*

‘31’ – *The plaintiff’s family first became aware of a document incompetently issued by the Oyun Local Government in 1976 purporting to award some land to the defendant in 1980 during a court proceeding in Offa Magistrate Court and this is the reason why the plaintiff’s family brought this action immediately.”*

Upon the state of pleadings, there can be no doubt that the lower Courts were right to consider whether the defence of estoppel per rem judicatam was available to the defendant/appellant. Secondly as parties are bound by their pleadings, they are under burden to establish by evidence their claim and counterclaim to the issue so joined. See NIPC v Thompson Organisation Ltd (1969) NWLR 99; Emegokwe v Okadigbo (1973) 4 S.C. 113 at 117; Atanda v Ajani (1989) 3 NWLR (PT. 111) 511; Agu v Ikewibe (1991) 3 NWLR (pt. 180) 385.

Now I have read through Exhibits D1 and D2, and the question that must be considered and which was addressed by the lower Court was whether the appellant established that these two documents were products of any proceedings, be it that of a judicial body or a non-judicial body, or  
 B a customary arbitration. The appellant in my respectful view was rightly found to have not brought these documents within any of the above bodies. But it has been urged before us that Exhibits D1 and D2 properly belong to the category of customary arbitration. Now there can be no doubt that  
 C if established the proceedings of a customary arbitration could quite properly be relied upon to establish a plea of estoppel. But for that plea to succeed it has been held in Assampong v Amuaku (1932) 1 WACA 192, the West African Court of Appeal that a decision given by a non judicial body can support estoppel, where the constituent elements of an estoppel  
 D per rem judicatam have been established. It is also desirable to refer to Agu v Ike (supra), where Karibi-Whyte JSC, reviewed extant authorities in respect of customary arbitration including Inyang v Essien (1957) S.C. N.L.R. 112, and he further observes thus:-

E *“In Inyang v Essien (supra) the Federal Supreme Court held that the decision of the Iman Council which was not binding because it was not acceptable by one of the parties did not constitute res-judicata.”*

In the instant appeal, the lower court has held, and with which I  
 F agree for the reasons given that the respondent was not part of whatever was decided in D1 and D2. And those documents cannot therefore be the basis for establishing the plea of estoppel in favour of the appellant. I also agree entirely with the reasons given in the lead judgment for concluding that the lower Court was also right to have held that Exhibit D3 cannot  
 G similarly be the basis for establishing a plea of estoppel in favour of the appellant.

I will therefore also dismiss this appeal for the above reasons and the fuller reasons given in the leading judgment of my learned brother Kalgo  
 H JSC. I also award costs in the sum of N10,000.00 in favour of the respondent.