

**SUPREME COURT OF NIGERIA**  
11TH MAY, 2001. SC. 99/1997  
**CORAM:- A. G. KARIBI-WHYTE, I. L. KUTIGI,**  
**U. MOHAMMED, O. ACHIKE, E. O. AYOOLA, JJSC.**

1. MACKSON IKENI

2. CHIEF EKIERIGHA OPILO AKE

(For themselves and as representing the ..... DEFENDANTS/  
Ake/Ogidi Families of Akipelai APPELLANTS  
in Ogbia Brass L.G.A.)

AND

1. CHIEF WILLIAM AKUMA EFAMO

2. GEOFREY TITUS TEMERIGHA

3. HENRY OGHOGHO ..... PLAINTIFFS/  
(For themselves and representing the RESPONDENTS  
Ekoni family of Opuma Opumatobo  
in Ogbia Brass L.G.A.)

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***ACTIONS*** - Fresh action - Declaration of title - Anchored on a previous judgment - Must be proved afresh - And the action will fail upon a successful defence of *res judicata* (H 7)

***ESTOPPEL*** - Cause of action estoppel - How it arises (H 1)

***ESTOPPEL*** - Cause of action estoppel - Defence of - What the defence connotes (H 2)

***ESTOPPEL*** - Issue estoppel - Requirements - What is required for the doctrine to be applicable (H 5)

***ESTOPPEL*** - Issue estoppel - Where a plea of cause of action estoppel cannot be raised - A party can still plead that the other party is precluded from contending the contrary of any precise point - Which has once been distinctly put in issue - And determined directly and distinctly in the first

**1604** Ikeni v. Efamo (2001) 5 KLR (pt. 122) 1603; (2001) 10 NWLR  
*action (H 3)*

**ESTOPPEL** - *Issue estoppel - Identity of parties - Where there are several parties in the previous suit - It is sufficient that those of the parties who were necessary parties to the issue in the previous suit - Are the same as in the latter suit (H 9)*

**JUDGMENTS** - *Res judicata - Counter claim - Where the judgment in a previous case could not avail the plaintiff - Dismissal of the defendant's counter claim - On the ground of res judicata - Is erroneous (H 10)*

**LAND LAW** - *Fresh suit - Declaration of title - Obtained in a Native Court suit without a plan - The plaintiff is entitled to now seek a declaration tied to a plan (H 6)*

**RES JUDICATA** - *Issue estoppel - Distinct causes of action - Where the causes of action in the earlier and latter proceedings are distinct - And separate as in the present case - What is relevant is issue estoppel (H 4)*

**RES JUDICATA** - *Plea of estoppel - Conflicting judgments - Where there are two or more conflicting judgments - It is the latest in time that constitutes res judicata (H 8)*

### **FACTS**

In the High Court of Rivers State the Plaintiffs/Respondents claimed against the Defendants/Appellants a declaration that they are entitled to the customary right of occupancy in respect of the land known as "EDUMATA EMENI" alias EDUMAYO adjudged in their favour by the Oloibiri Native Court in Suits Nos. 17/58 and 18/58 respectively which land is delineated and verged RED on Survey Plan NO. BOE/R17/90 - LD (Exhibit - P5) dated 19th November 1990; a declaration that all the issues already decided relating to the original settlement of the land dispute by Oloibiri Native Court in cases Nos. 17/58 and 18/58 are binding on both the plaintiffs and the Defendants in the present action; and an order of

perpetual injunction. The purport of present suit was to render more certain the identity of the subject matter of the judgments granted them in the Native Court suits. The Native Court judgments were not tied to any plan as none was filed. Thus the plaintiffs claimed as aforesaid.

The defendant counter claimed against the plaintiffs. They challenged the plaintiffs' claim by contending that the Native court decisions could not now be used as *res judicata* because of the decision in a latter suit whereby the title of the plaintiffs were relitigated and pronounced upon. The latter suit was the High Court of Degema Suit No. DHC/14/78 which culminated in a judgment of the Supreme Court (Exhibit D6) in appeal NO. SC 151/ 87, reported as Abomba v. Odiese (1990) 1 NWLR ( Pt.125) 165.

In the latter suit the plaintiffs had claimed among other things a declaration that they as persons adjudged in 2 Oloibiri Native Court Suits No. 17/58 and 18/58 owners and/or 'EDUMATO-EMENI' alias 'EDUMAYO' are entitled to all monies due from and payable by 2nd defendants (Nigerian Agip Oil Co. Ltd) as compensation for 2nd defendants' user, structures, loss of fishing rights and/or occupation of and their operations on and/or in EDUMATO-EMENI land aforesaid. The Supreme Court in that case, held that title was in issue and that the plaintiffs having failed to discharge the onus on them, as found by the Court of Appeal, their claim failed and was dismissed. It is immaterial that the claim was focused on compensation money. The Supreme Court further held that there was no nexus between the land decided in favour of the Plaintiffs in the Native Court Suits (Nos. 17/58 and 18/58) and the land claimed in suit No SC. 151/87.

The trial High Court gave judgment to the plaintiffs based on their claims. The High Court held that by virtue of the judgment in the Native Court Suits, the Defendants were estopped from reopening the issues of title that have been determined in those suits and struck out the paragraphs in the Defendants' pleadings relating to their title. As against the Defendant's counter claim the trial court held that the plea of *res judicata* was rightly raised. Defendants' appeal was dismissed by the Court of Appeal. They have further appealed to the Supreme Court rais-

ing two issues but the appeal was decided on a single issue.

**ISSUE FOR DETERMINATION**

*Whether the decision of this court (Exhibit D6) in Chief Uriah Akpana Adomba & Ors. v. Benjamin Odiese & Ors SC 151/1987 B (reported in [1990] 1 NWLR (Part 125) 165) (“the compensation case”) raises an estoppel against the plaintiffs from re-litigating the issue of title to the land.*

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

***Estoppel - Cause of action estoppel***

1. For cause of action estoppel to arise the cause of action in the latter proceedings must be identical with the cause of action in the earlier proceedings. (p. 1613 G)

***Cause of action estoppel - Defence of***

2. When a defence of cause of action estoppel is raised the defence E connotes that the legal rights and obligations of the parties in respect of the subject-matter of the action are conclusively or deemed to have been conclusively determined by the earlier action. (p. 1613 G)

**F Estoppel - Issue estoppel**

3. Where a plea of cause of action estoppel cannot be raised because the causes of action in the two proceedings are not the same, a party can still plead that the other party is precluded from contending the contrary of any precise point; provided, that the point in question (i) has been distinctly put in issue and (ii) has been necessarily determined directly and G with certainty in the first action. (p. 1614 A)

***Res Judicata - Issue estoppel***

H 4. In this case it cannot be said that the cause of action in the compensation suit is the same as in the present proceedings. The suit which gave rise to the appeal in which judgment was delivered by this court, as contained in Exhibit D6, was a claim of right to compensation. In the

latter proceedings with which this appeal is directly concerned, the claims are mainly to a customary right of occupancy and to protect by perpetual injunction “the right of the plaintiffs to the scope and extent already recognised and adjudged in their favour” in the Native Court suits, suits 17/58 and 18/58. The causes of action in the earlier and the earlier B proceedings are manifestly distinct and separate. There can be no doubt that what is relevant to the circumstances of the present case is the second species of res judicata described as issue estoppel. (p. 1615 F)

### ***Issue estoppel - Requirements***

5. When the question is whether the doctrine of issue estoppel is applicable to a case or not, the important questions to ask, put tersely, are whether the parties are the same; whether the issues are the same; whether the issues are material to the cause of action in the previous and in the D latter case; and, whether that issue has been resolved in the previous case. I venture to think that an issue may well be resolved by deciding that the party who put the point in issue has proved it as by deciding that he has failed to prove it. (p. 1619 A) E

### ***Land law - Fresh suit***

6. The trial court and the Court of Appeal had been at great pains to show that the plaintiffs were entitled to seek a declaration of title more definitive F than the declaration that they had obtained in the Native Court suit by having one tied to a plan. That that option was open to the plaintiffs was recognised by this court in the compensation case, Adombe v Odiese (1990) 1 NWLR (part 125) 165 at 178. It was thus an option available to the plaintiffs to seek a declaration of title tied to a plan. (p.1620E/1621B) G

### ***Fresh action - Declaration of title***

7. It needs to be pointed out that there is no cause of action known as grafting a plan to a subsisting judgment. A party who seeks to have a H declaration tied to a plan commences a fresh action and by so doing undertakes all over again to prove his entitlement to the declaration he claims. He seeks to prove his title by reliance on the previous judgment

and uses that previous judgment as conclusive proof of ownership. He may succeed in doing so, and would most probably do without much ado where there is no difficulty in convincing the court in which the fresh action is taken that the issue of title in respect of the same land has, as between the same parties or their predecessors in title, been conclusively determined by a court of competent jurisdiction. He may not succeed should he fail to prove any of these things or should the defendant be able to raise a successful defence of *res judicata* to the fresh action. (p. 1621 B)

***Plea of estoppel - Conflicting judgments***

8. Although the defendant may not be able to deny the validity of the judgment relied on by the plaintiff or challenge its correctness in the latter proceedings, if an intervening action had ensued between the proceedings relied on by the plaintiff and the subsequent proceedings, a plaintiff who has failed in the intervening action may face the risk of being defeated by a plea of *res judicata* should all the ingredients of that defence be available to the defendant. This is because the law is well settled in this jurisdiction that where there are two or more conflicting judgments, it is the latest in time that constitutes *res judicata*: Seriki v Solaru (1965) NMLR 1, Ikweakwu & Ors v Nwamkpa [1966] NSCC 83, 86.

In this case, intervening between the Native Court suits and the suit in which the plaintiffs claimed a fresh declaration, apparently in an effort to tie the judgment which they got earlier to a plan, was the compensation case. In that case they had, unsuccessfully, sought to establish their title to the land. There was thus a conflict between the judgments in the Native Court suits and the judgments of the Court of Appeal and this court in the compensation case in which it was held that the plaintiffs have not proved their title to the land. In these circumstances it was open to the defendants to rely on the latter of these two sets of judgment for their plea of estoppel. (p. 1621 F)

***Issue estoppel - Identity of parties***

9. The principle that for a defence of issue estoppel to succeed there must be identity of parties does not mean that all the parties in the previous suit must be made parties in the latter suit. It is sufficient, where there are several parties in the previous suit, that those of the parties who were necessary parties to the issue in the previous suit are the same as in the latter suit. (p. 1623 B)

***Res judicata - Counter claim***

10. In regard to the defendants' counter-claim, the trial judge having held that the judgments in the Native Court suits (exhibits P3 and P4) constituted res judicata struck out those averments, in the defendants' statement of defence and counter-claim, relating to the defendants' claimed ownership of the land. Having done so, it was inevitable that the learned judge would, as he did, dismiss the counter-claim. The judgments in the compensation case being later in time to those in the Native Court suits, have superseded the latter. The decision in the compensation case was that the plaintiffs have failed to prove their title to the land and that the judgments in the Native Court cases could not avail them. That decision is not tantamount to a declaration of any right to the defendants. The defendants' have been wrongly denied an opportunity of having their case determined on the evidence since the substance of their counter-claim has been struck out. The Court of Appeal erroneously was of the view that the trial court made "findings to the effect that the appellants (defendants) failed to prove their counter-claim and it was therefore dismissed."

The ground on which the counter-claim was dismissed is clearly erroneous. In the result, the counter-claim must be remitted to the High Court to be properly tried. At the retrial all paragraphs erroneously struck out as raising issues which have been previously determined in the Native Court suits must be restored. (p. 1623 C)

**NOTABLE POINTS OF INTEREST****AYOOLA JSC**

*1. The doctrine of issue estoppel is founded on strong principles of justice and public policy*

It is evident that the plaintiffs had in the compensation case put their title in issue without adequate preparation and on weak evidence. Having failed on the first occasion, can they now go back to the drawing board, fashion a new strategy and revamp their evidence to prove the same issue? I think not. The doctrine of issue estoppel is founded on strong principles of justice and public policy. Were parties to be allowed to relitigate the same issue over and over again, litigation will be as endless as it takes the losing party to revise his evidence and engage a more skilful lawyer to present his case. The process would go on endlessly until the party seeking to prove the point succeeds or wears his opponent down to submission. Litigation would then become a war of attrition which it is not supposed to be. (p. 1622 F)

### **KUTIGIJSC**

*2. Implication of a Native Court suit that was not tied to a plan on a subsequent suit*

It is rather unfortunate that the much older Oloibiri Native Court suits Nos. 17/58 and 18/58 (Exhibits “P.3” and “P.4” respectively), though themselves final judgments cannot avail the plaintiffs now for the simple reason that those judgments, were not tied to any plan as none was filed. Additionally the records in the suits are such that one cannot say with certainty that a surveyor will be able to produce an accurate plan of the land. (See KWADZO VS ADJEI (10 W.A.C.A. 274)). It may be noted that these Exhibits “P.3” and “P.4” were the same Exhibits “U” and “V” in the ADOMBA & ORS VS. ODIESE & ORS cited above. (p. 1624 G)

### **REPRESENTATION**

J. O. Ibik (S.A.N.) with him M.C. Okonkwo for the Appellants.  
H Alhaji. F. A. Osho (with him Chief Kola Babalola & Chief F. F. Igele) for the Respondents.

### **CASES REFERRED TO**

Agedegudu v. Ajenifuja (1963) 1 ALL NLR 109 p.111

Alade v. Awo (1975) 4 SC 215, p.228

Mills v. Cooper (1967) 2 ALL ER 100 at 104

Adombe v. Odiese (1990) 1 NWLR (part 125) 165 at 178

Okali Ojiaka (sic: Ojiako) & Ors. v. Onwuma & Ogueze & Ors (1962) B ALL NLR at p.62

Chief Uriah Akpana Adomba & Ors v. Benjamin Odiese & Ors (1990) 1 N.W.L.R. (pt.125) 165

Thoday v. Thoday (1964) 1 ALL ER 341

Fidelitas Shipping Co. Ltd v. V/O Exportchleb (1965) 2 ALL ER 4, 10

Ladega & Ors v. Durosimi & Ors (1978) NSCC 175,179

Okali Ojiako & Ors. v. Onwuma & Ogueze & Ors (1962) ALL NLR 58 at p.62

Ikweakwu & Ors v. Nwamkpa (1966) NSCC 83, 86

### **BOOK REFERRED TO**

Halsbury's Laws of England (4th Edition) paragraph 977

### **LEAD JUDGMENT BY AYOOLA JSC**

This appeal arose from the decision of the High Court of the Rivers State (Ndu, J) by which judgment was entered for the present respondents (then and now referred to as “the plaintiffs”) against the present appellants (then and now referred to as “the defendants”) in the following terms:

*“1. A declaration is hereby made to the effect that the Plaintiffs herein, (i.e. the Ekoni family of Opume or Opomatobo) are entitled to the Customary right of occupancy in respect of the land known as “EDUMATA EMENI” alias “EDUMAYO” adjudged in their favour by the Oloibiri Native Court in Suits Nos. 17/58 and 18/58 respectively which land is delineated and verged RED on Survey Plan No. BOE/R17/890 – LD (exhibit P5) dated 19<sup>th</sup> November 1990.*

*2. A declaration is hereby made that all the issues already decided relating to the original settlement of ‘EDUMATA EMENI’ alias “EDUMAYO” land by the Oloibiri Native Court in cases Nos. 17/58 and*

*18/58 are binding on both the Plaintiffs and the Defendants in this present action.*

B 3. *The defendants, i.e. the Ake and Ogidi families of Akipelai their privies servants and agents, are hereby restrained by an order of perpetual injunction from interfering with the rights of the Plaintiffs to the scope and extent already recognised and adjudged in their favour by the Oloibiri Native Court in suits Nos. 17/58 and 18/58 as shown and verged RED on Survey Plan No. BOE/R17/90 – LD dated 19<sup>th</sup> November 1990 (Exhibit – P5)”*

C That court also dismissed the defendants’ counter claim. The defendants not being satisfied with the decision, appealed to the Court of Appeal which in an unanimous decision dismissed their appeal and confirmed the decision of the High Court.

D The plaintiffs’ claim was substantially in terms of the declaration granted them by the High Court. The suit was, apparently, to render more certain the identity of the subject-matter of the judgments in their favour granting them title to the lands claimed by them as against the defendants in actions instituted by them in the Oloibiri Native Court, suits Nos. 17/58 E (Exhibit P3) and 18/58 (exhibits P4), (“the Native Court suits”). They had sought to do this by obtaining declarations of right to customary right of occupancy based on ownership of the land litigated upon in those suits tied to a plan.

F The High Court held that by virtue of the judgment in those suits the defendants were estopped from re-opening the issues of title that have been determined in those suits and struck out the paragraphs in the defendants’ pleadings relating to their title. As against the defendants’ G counter-claim he held that the plea of res judicata was rightly raised. The Court of Appeal, upheld that decision.

On this appeal it seems to me to be common ground that the plaintiffs did obtain judgments in their favour in the Native Court suits. H There is no challenge by the defendants to the finding that the parties, issues and subject-matter in the Native Court suits are the same as in the present suit, or that the judgments in those suits, being valid, final and subsisting, were capable of sustaining a plea of res judicata. What the

defendants, however, contend is that those decisions could not now be used as *res judicata* because of the decision in a latter suit, whereby the title of the plaintiffs were relitigated and pronounced upon. The latter suit was No. DHC/14/78 which culminated in a judgment of this court (exhibit D6) in appeal No. SC 151/1987. In the latter suit the plaintiffs had claimed among other things a declaration that, “*they as persons adjudged in 2 Oloibiri Native Court Suits Nos. 17/58 and 18/58 owners and/or owners in possession of the land known as ‘EDUMATO-EMENI’ alias ‘EDUMANYO’, are entitled to 9a0 all monies due from and payable by 2<sup>nd</sup> defendants as compensation for 2<sup>nd</sup> defendants’ user, structures, loss of fishing rights and/or occupation of, and their operations on and/or in EDUMATO-EMENI land aforesaid...*”

The defendants’ case on this appeal is encapsulated in the two issues for determination formulated by the defendants as follows:

“(a) *whether the concurrent finding of the lower court on the plea of res judicata is perverse (grounds 1 and 2)*

(b) *whether the concurrent finding of the lower court dismissing the Counter-Claim is perverse.*”

It is manifest, having regard to the issues thus formulated, that the decisive question is whether the decision of this court (Exhibit D6) in Chief Uriah Akpana Adomba & Ors. v. Benjamin Odiese & Ors SC 151/1987 (reported in [1990] 1 NWLR (Part 125) 165) (“the compensation case”) raises an estoppel against the plaintiffs from re-litigating the issue of title to the land.

To put that question in proper perspective, it is convenient to distinguish between cause of action estoppel, even though both are species of *res judicata* estoppel. **For cause of action estoppel to arise the cause of action in the latter proceedings must be identical with the cause of action in the earlier proceedings. When a defence of cause of action estoppel is raised the defence connotes that the legal rights and obligations of the parties in respect of the subject-matter of the action are conclusively or deemed to have been conclusively determined by the earlier action.** Cause of action estoppel requires identity not only of subject-matter but also of parties and issues in the latter and

earlier proceedings.

However, **where a plea of cause of action estoppel cannot be raised because the causes of action in the two proceedings are not the same, a party can still plead that the other party is precluded from contending the contrary of any precise point; provided, that the point in question (i) has been distinctly put in issue and (ii) has been necessarily determined directly and with certainty in the first action.** The principle is stated thus in Volume 16 Halsbury's Law of England (4<sup>th</sup> Edition) paragraph 977:

*"A party is precluded from contending the contrary of any precise point which, having once been distinctly put in issue, has been solemnly and with certainty determined against him. Even if the objects of the first and second actions are different, the finding on a matter which came directly (not collaterally or incidentally) in issue in the first action, provided it is embodied in a judicial decision that is final, is conclusive between the same parties and their privies."*

Diplock, L.J., in Thoday v. Thoday (1964) 1 ALL ER 341 regarded "issue estoppel" as a "second species" of estoppel per rem judicatam. He described that second species thus at p. 352:

*"There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues as there are conditions to be fulfilled by the plaintiff in order to establish his cause of action; and there may be cases where the fulfillment of an identical condition is a requirement common to two or more different causes of action. If in litigation on one such cause of action any of such separate issues whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either on evidence or on admission by a party to the litigation, neither party can, in subsequent litigation between them on any cause of action which depends on the fulfillment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was."*

The doctrine of issue estoppel has been traced to the late eighteenth

century in the Duchess of Kingston case [1775-1802] All ER Rep 623, but its formulation has not been fixed and static. Indeed it has been expanded in several cases to meet circumstances which call for application of the policy of law that underlies the doctrine of estoppel per rem judicata, namely that there must be an end of litigation. Such extension of the doctrine are found in Fidelitas Shipping Co. Ltd v. V/O Exportchleb [1965] 2 ALL ER 4, 10 where it was applied to issues determined at the interlocutory stage. That the doctrine has been received into our laws by a long line of authority is beyond doubt. It will be tedious and unnecessary to list out those decisions, particularly when they have not advanced the well established principles of the common law beyond what have been developed by English courts. However, there is the case of Ladega & Ors v. Durosimi & Ors [1978] NSCC 175, 179 which would appear to be of some particular relevance. In that case Eso, JSC, stated the principle thus: D

“A party is precluded from contesting the contrary of any precise point which has been distinctly put in issue and with certainty determined.”

In that case issues were joined before the court in regard to a larger area, whereas the claim for declaration of title was in regard to smaller area. Those issues were determined by the court. It was held that the doctrine of issues estoppel would apply in such circumstances so as to make those issues to create an issue estopped in a subsequent litigation between the same parties over a larger area. E

**In this case it cannot be said that the cause of action in the compensation suit is the same as in the present proceedings. The suit which gave rise to the appeal in which judgment was delivered by this court, as contained in Exhibit D6, was a claim of right to compensation. In the latter proceedings with which this appeal is directly concerned, the claims are mainly to a customary right of occupancy and to protect by perpetual injunction “the right of the plaintiffs to the scope and extent already recognised and adjudged in their favour” in the Native Court suits, suits 17/58 and 18/58. The causes of action in the earlier and the earlier proceedings are manifestly distinct and separate. There can be no doubt that what is relevant to the circumstances of the present case is the second** F G H

**species of res judicata described as issue estoppel.**

As can be gathered from the judgment of this court in the compensation suit, SC 151/1987 (Exhibit D6), the main plank of the plaintiffs' case in those proceedings was that they have already been adjudged owners of the land in respect of which compensation was claimed and were by that reason entitled to the compensation they claimed. They also pleaded traditional history of the entire land verged green in the plan admitted in that case as Exhibit N. The defendants on the other hand claimed to be the owners in possession of the land, then described as "the land in dispute." The High Court on the basis of the judgments in the Native Court suits, exhibits P3 and P4 in this case (then U & V) awarded to the plaintiffs the land in dispute. The Court of Appeal (Aseme, Aikawa, JJ. CA and Katsina-Alu, J.C.A., (as he then was) proceeding on the footing that title to the land in dispute was in issue in the compensation claim, reversed the judgment of the High Court on the ground, among others, that the plaintiffs have failed to adduce evidence in proof of the issues joined on the pleadings and, apparently, that they have failed to relate the Native Court judgments to the land in dispute. On the appeal to this court by the plaintiffs, this court adopted the following issues for determination.

*"(a) Was the Court of Appeal correct in dealing with the case on the footing that the title to the dispute land was in issue at the trial?"*

*(b) If so, is the Court of Appeal also correct in holding that the onus of proof rested with the plaintiffs?"*

*(c) And if so, did the plaintiffs adduce at the trial, enough legal evidence (duly accepted) in proof of their case so as not to warrant interference by the appellate court with the primary function of the trial court in fact finding?"*

This court proceeded in that case on the footing that the plaintiffs had put title in issue in the compensation case. Part of the leading judgment of the court delivered by Nnaemeka-Agu, JSC (at page 179 of the Law Reports) read:

*"They did not simply put forward Exhs. U and V and decide to stand or fall by them. They pleaded other facts such as their tradition and numerous acts of possession and ownership even though their claim on the*

*writ set out above was more narrowly formulated... As it is so, the learned counsel for the appellants cannot be right when he submitted that title having been awarded to the appellants already, was no longer in issue. He put it in issue by his pleadings."*

In that case this court held that the plaintiffs having put their title to the land described as Edumato-Emeni in issue sought to prove that title first, by reliance on the judgments, in the Native Court suits; and, in the alternative, by proving their title afresh should they fail in the first option. Having failed to prove the identity of the land to which the Native Court suits related and their title by the evidence of tradition pleaded, they had failed to prove their title to the land. In the concluding passage of the leading judgment, the learned Justice of the Supreme Court said (at p. 182):

*"But in this case after disregarding such materials as Exhs. J1 to J5 which the learned Judge treated as evidence establishing the truth of what were averred therein, which they could not be, and considering carefully other evidence and circumstances such as the failure of the appellants to establish a nexus between the land, the subject of the case, and those of Exhs. U and V, the lack of established facts within living memory to make their evidence of tradition more probable: See Agedegudu v Ajenifuja (1963) 1 All NLR 109 p. 111; Alade v Awo (1975) 4 SC 215, p. 228, I have come to the conclusion that the Court of Appeal came to the correct decision when it decided that the appellants did not prove their case."*

Agbaje, JSC, who delivered the only other reasoned judgment in the appeal approached the matter, not on the footing that title was not in issue, but on the footing that although title was in issue, the plaintiffs had relied on the judgments in the native Court suits as conclusively determining the issue of title in their favour so that by the operation of the doctrine of issue res judicata that issue should be taken as established. He said at page 184:

*"By the plaintiffs' claim as framed and as pleaded in the statement of claim, there was a straight forward question of issue estoppel raised at the trial court as regards title to the land in respect of which compensation is payable by the second set of defendants. The plaintiffs' case is not for a declaration of title to the land but for a declaration that*

*they are persons entitled to the compensation in respect of the land. To succeed on that claim they have to establish the grounds of their entitlement which are, according to them, that they are owners of the land.*” (Emphasis mine)

B Agbaje, JSC, drew and emphasised the distinction between cause of action estoppel and issue estoppel. That title was in issue in the compensation case was thus a unanimous opinion of the court.

C In the present proceedings, the Court of Appeal accepted that the land in respect to which title has been put in issue in the compensation case was the same as that to which the present proceedings related. Rowland, JCA. who delivered the leading judgment of that court said at the outset of the judgment:

D *“In 1990 the present respondents (as plaintiffs) again commenced the instant proceedings over the same land (the subject matter in dispute in the aforementioned suit No. DHC/14/78) claiming per their writ of summons inter alia a declaration that they are entitled to customary right of occupancy thereto...”* (Emphasis mine)

E The learned Justice, mentioning a passage from the evidence of the 3<sup>rd</sup> defence witness, had said that piece of evidence introduced differences into the identify of the subject-matter. Had he, however, adverted to the evidence of the 1<sup>st</sup> plaintiffs’ witness that, *“in terms of the area of land shown in the two plans (i.e. exhibits D2 [N in the precious suit] and P5) they are substantially the same, but details concerning features and boundaries were not shown in that exhibit N”*, he would not have found any material difference. At the end of the day he, nevertheless, was able to conclude later in this judgment that:

G *“There is no doubt from the evidence and the pleadings in the instant case that Exhibits P1-P4 are related to Exhibits P5 and D7.”*

H The plaintiffs’ case in the present proceedings is that the land adjudged to them in the Native Court suits (exhs P3 and P4) known to them and called “Edumata-Emesi alias Edumayo” was shown and delineated in a survey plan No. BOE/R17/90-LD which was admitted as exhibit P5 in the present proceedings. In the compensation case, as the leading judgment of the Court of appeal, delivered by Aseme, JCA, showed, their

case was put thus:

**When the question is whether the doctrine of issue estoppel is applicable to a case or not, the important questions to ask, put tersely, are whether the parties are the same; whether the issues are the same; whether the issues are material to the cause of action in the previous and in the latter case; and, whether that issue has been resolved in the previous case. I venture to think that an issue may well be resolved by deciding that the party who put the point in issue has proved it as by deciding that he has failed to prove it.** Once again, I adopt the general observation of Diplock, L.J., on issues estoppel in Mills v. Cooper [1967] 2 All ER 100 at 104 as follows:

*“This doctrine, so far as it affects civil proceedings may be stated thus: a party to civil proceedings is not entitled to make as against the other party an assertion, whether of fact or of the legal consequences of facts the correctness of which is an essential element in his cause of action or defence if the same assertion was an essential element in his previous cause of action or defence in previous civil proceedings between the same parties or their predecessors in title and was found by a court of competent jurisdiction in such previous proceedings to be incorrect.....”.*

In the compensation case although the cause of action was entitlement to compensation, as has been seen, title was an essential element of that cause of action. In the proceedings which led to this appeal, title was also an essential element of the cause of action in the claim to customary right of occupancy to the same land that was claimed to be owned by the plaintiffs in the two proceedings. Having failed to prove their title in the compensation case, as decided by the Court of Appeal in exhibit D5, and by this court in exhibit D6, they have by the present proceedings attempted to prove their title once again, relying this time on the judgments in the Native Court suits alone. The trial judge, Ndu, J, and the Court of Appeal, held that they could.

Ndu J., reasoned that:

*“What the Plaintiffs lost was their suit wherein they claimed to be entitled to certain compensation money. In this present suit they are not claiming to be entitled to that certain compensation money”; and also,*

that, “in this present action... the plaintiffs are asking for declaration tied to the survey plan which now represents the land adjudged to them previously in exhibits P3 and P4.”

The Court of Appeal, agreeing with Ndu, J., held that the radical claim in the compensation case “was purely for compensation and not for title etc. Therefore any findings of title is subsidiary to the main issue” Rowland, JCA, in the leading judgment of that court said:

“It seems to me... that the findings in Exhibits D5 and D6 cannot be transferred into the present case. See *Dike v. Nzekwa*. It seems to me therefore that the contentions of the appellants that the decision in exhibits D5 and D6 are binding on Exhibits P1 and P4 is untenable and lacks legal basis.”

It is evident that the trial court and the Court of Appeal were in error when they proceeded on the footing that the question was one of cause of action estoppel, whereas what was in issue was issue estoppel. The distinction between cause of action estoppel and issue estoppel is not always material, but when it is, as in the present case, it is sufficient to lead to a conclusion that a decision which proceeded on the footing that the question raised in a case was one of cause of action estoppel when it was one of issue estoppel, is fundamentally flawed. Such conclusion must follow in this case.

**The trial court and the Court of Appeal had been at great pains to show that the plaintiffs were entitled to seek a declaration of title more definitive than the declaration that they had obtained in the Native Court suit by having one tied to a plan. That that option was open to the plaintiffs was recognised by this court in the compensation case, *Adombe v Odiese* (1990) 1 NWLR (part 125) 165 at 178, where Nnaemeka –Agu, JSC, said that “a person who has had a judgment in his favour in a land case in a Native Court may, in a present suit adopt one or the other of three courses of action, depending on the circumstances.” One of those options, material to the present proceedings, he put thus:**

“Secondly, he may recognise the potential weakness in his judgment in a land case conducted with a plan. He could in such case go

*to, say, the High Court and file a fresh case, and file a plan reflecting the Native Court judgment. Even though the existing decision in the Native Court is no less binding than the High Court judgment, he is entitled to add something to it by getting the second declaration tied unto a plan. See Okali Ojiaka (sic: Ojiako) & Ors. v Onwuma & Ogueze & Ors (1962) All B NLR 58 at p. 62."*

It was thus an option available to the plaintiffs to seek a declaration of title tied to a plan. However, it needs to be pointed out that there is no cause of action known as grafting a plan to a subsisting judgment. A party who seeks to have a declaration tied to a plan commences a fresh action and by so doing undertakes all over again to prove his entitlement to the declaration he claims. He seeks to prove his title by reliance on the previous judgment and uses that previous judgment as conclusive proof of ownership. He may succeed in doing so, and would most probably do without much ado where there is no difficulty in convincing the court in which the fresh action is taken that the issue of title in respect of the same land has, as between the same parties or their predecessors in title, been conclusively determined by a court of competent jurisdiction. He may not succeed should he fail to prove any of these things or should the defendant be able to raise a successful defence of res judicata to the fresh action. Although the defendant may not be able to deny the validity of the judgment relied on by the plaintiff or challenge its correctness in the latter proceedings, if an intervening action had ensued between the proceedings relied on by the plaintiff and the subsequent proceedings, a plaintiff who has failed in the intervening action may face the risk of being defeated by a plea of res judicata should all the ingredients of that defence be available to the defendant. This is because the law is well settled in this jurisdiction that where there are two or more conflicting judgments, it is the latest in time that constitutes res judicata: Seriki v Solaru (1965) NMLR 1, Ikweakwu & Ors v Nwamkpa [1966] NSCC 83, 86.

In this case, intervening between the Native Court suits and

the suit in which the plaintiffs claimed a fresh declaration, apparently in an effort to tie the judgment which they got earlier to a plan, was the compensation case. In that case they had, unsuccessfully, sought to establish their title to the land. There was thus a conflict between the judgments in the Native Court suits and the judgments of the Court of Appeal and this court in the compensation case in which it was held that the plaintiffs have not proved their title to the land. In these circumstances it was open to the defendants to rely on the latter of these two sets of judgment for their plea of estoppel.

To be considered even more damaging to the case of the plaintiffs are the findings of this court, and the reasons given by it for so finding, that the judgments obtained by the plaintiffs in the Native Court suits were of no avail to the plaintiffs. Nnaemeka-Agu, JSC, put it this way in exhibit D6 (at p.181 of the Law Reports):

*“When in a subsequent suit in which the judgment should have been useful it turns out that a plan produced as a purported reflection of the judgment cannot be related to the features and the boundaries of the land, the subject of the previous suit, the previous judgment though valid, becomes unavailable. So it is in this case. The appellants’ plan, Exh. N, should have been a mirror of the distinctive features in Exhs U and V. But it is not”*

It is evident that the plaintiffs had in the compensation case put their title in issue without adequate preparation and on weak evidence. Having failed on the first occasion, can they now go back to the drawing board, fashion a new strategy and revamp their evidence to prove the same issue? I think not. The doctrine of issue estoppel is founded on strong principles of justice and public policy. Were parties to be allowed to relitigate the same issue over and over again, litigation will be as endless as it takes the losing party to revise his evidence and engage a more skilful lawyer to present his case. The process would go on endlessly until the party seeking to prove the point succeeds or wears his opponent down to submission. Litigation would then become a war of attrition which it is not supposed to be.

It is evident from all that have been said that the reasons given by

the court below for upholding the decision of the trial court are untenable. Of these reasons the only one that has not been dealt with can be disposed of shortly. That Nigeria Agip Oil Company Ltd which was a party to the compensation was not a party to the instant case is inconsequential as the issue of title was between the parties to the present case who were also parties to the compensation case. **The principle that for a defence of issue estoppel to succeed there must be identity of parties does not mean that all the parties in the previous suit must be made parties in the latter suit. It is sufficient, where there are several parties in the previous suit, that those of the parties who were necessary parties to the issue in the previous suit are the same as in the latter suit.**

**In regard** to the defendants' counter-claim, the trial judge having held that the judgments in the Native Court suits (exhibits P3 and P4) constituted res judicata struck out those averments, in the defendants' statement of defence and counter-claim, relating to the defendants' claimed ownership of the land. Having done so, it was inevitable that the learned judge would, as he did, dismiss the counter-claim. The judgments in the compensation case being later in time to those in the Native Court suits, have superseded the latter. The decision in the compensation case was that the plaintiffs have failed to prove their title to the land and that the judgments in the Native Court cases could not avail them. That decision is not tantamount to a declaration of any right to the defendants. The defendants' have been wrongly denied an opportunity of having their case determined on the evidence since the substance of their counter-claim has been struck out. The Court of Appeal erroneously was of the view that the trial court made "findings to the effect that the appellants (defendants) failed to prove their counter-claim and it was therefore dismissed."

The ground on which the counter-claim was dismissed is clearly erroneous. In the result, the counter-claim must be remitted to the High Court to be properly tried. At the retrial all paragraphs erroneously struck out as raising issues which have been previously

**determined in the Native Court suits must be restored.**

For the reasons I have given, I allow this appeal. I set aside the judgments of the High Court and the Court of Appeal. In place therefore I enter judgment dismissing the plaintiffs' case. I order that the defendants' counter-claim be remitted to the High Court to be reheard by another judge of that court and that at such rehearing those paragraphs of the statement of defence and counter-claim which were struck out by Ndu, J., be restored. The defendants are entitled to the costs of the trial in the High Court and costs of the appeals in the Court of Appeal and in this court which I assess, respectively, N2,500.00, N5,000.00 and N10,000.00.

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**KARIBI-WHYTE JSC**

I have read in advance the leading judgment just read in this appeal by my learned brother Ayoola JSC. I agree completely with his reasoning and conclusion allowing the appeal. I also hereby allow the appeal. I agree with the Order remitting the Defendants' Counter-claim as filled and pleaded to the High Court for rehearing before another Judge.

Respondents shall pay N10,000.00 as costs to Appellants.

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**KUTIGI JSC**

I read in advance the judgment just delivered by my learned brother Ayoola J.S.C. I agree with his reasoning and conclusions. I agree that by the earlier decision of this court in CHIEF URIAH AKPANA ADOMBA & ORS VS BENJAMIN ODIESE & ORS (1990) 1 N.W.L.R. (PT. 125) 165, (Exhibit D.6 in the proceedings), which was fought between the same families herein, the Plaintiffs/Respondents are estopped from relitigating the issue of title to the land in dispute, which had in fact been resolved against them in the said judgment. It is rather unfortunate that the much *older* Oloibiri Native Court suits Nos. 17/58 and 18/58 (Exhibits "P.3" and "P.4" respectively), though themselves final judgments cannot avail the plaintiffs now for the simple reason that those judgments, were not tied to any plan as none was filed. Additionally the

records in the suits are such that one cannot say with certainty that a surveyor will be able to produce an accurate plan of the land. (See KWADZO VS ADJEI (10 W.A.C.A. 274). It may be noted that these Exhibits “P.3” and “P.4” were the same Exhibits “U” and “V” in the ADOMBA & ORS VS. ODIESE & ORS cited above. B

I will therefore, though not without difficulties also allow the appeal and set aside the judgments of the two lower courts. The Plaintiffs’ claim are accordingly dismissed while the Defendants’ Counter-Claim is remitted to the High Court for trial before another judge. I endorse the order for costs. C

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**MOHAMMED JSC**

I agree that this appeal ought to be allowed. I have had the preview D of the judgment of my learned brother, Ayoola, J.S.C., in draft and for the reasons given in that judgment it is quite clear that this appeal has merit. I therefore, allow it and remit the defendants’ counter claim to the High Court for rehearing before another judge. I abide by the order on costs E made in the lead judgment.

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**ACHIKE JSC**

I have had the privilege of reading in advance, the judgment of my F learned brother, Ayoola, J.S.C. I am in full agreement with his conclusion that the appeal deserves to succeed and should be allowed. I wish however to make a brief contribution.

The controversy between the parties culminating in the present G appeal traces its origin from Oloibiri Native Court of Rivers State in 1958 and has had a prolonged chequered history. Put chronologically, by the Oloibiri Native Court Suits Nos. 17/58 and 18/58 the plaintiffs herein were awarded a declaration of title to the land in dispute against the respondents H herein. Be it noted that no appeal was filed against these judgments, which for all intents and purposes, remain valid and subsisting.

The position of the parties is brought into proper perspective by

the High Court of Degema Suit No. DHC/14/78 instituted by Ekoni Family of Opumatobo, as plaintiffs/respondents against the representatives of Ake Family and Akipelai Community on the one part, and Nigerian Agip Oil Co. Ltd, on the other part, as co-defendants and claimed the following

B reliefs:

“(1) A declaration that they, as persons adljudget in 2 Oloibiri Native Court Suits Nos. 17/58 and 18/58 owners and/or owners in possession of the land known as ‘EDUMATO-EMENI’ alia “EDUMANYO” are entitled to

C (a) all monies due from and payable by the 2<sup>nd</sup> defendants as compensation for 2<sup>nd</sup> defendants’ user, structures, loss of fishing rights and/or occupation of, and their operations on and/or in EDUMATO-EMENI land aforesaid;

D (b) all monies and/or sums due from and payable by the 2<sup>nd</sup> defendants in respect of plaintiffs’ communally owned economic trees growing on the said land which were destroyed by the 2<sup>nd</sup> defendants;

E (2) An Order that the sum of N143,234.28 deposited by the 2<sup>nd</sup> defendants with the Accountant-General Rivers State, or any sum or larger sum due from and payable by the 2<sup>nd</sup> Defendants as claimed in 1(a) and (b) above be paid over to the plaintiffs.

F (3) Perpetual injunction against the 2<sup>nd</sup> defendants their servants and/or agents paying any monies as claimed by plaintiffs in 1 and 2 above to any person or persons other than the plaintiffs.”

G Conspicuously in their pleadings, the plaintiffs averred traditional history of land verged green in Plan admitted as Exhibit N which encompasses the land in dispute in the Oloibiri Native Courts Suits Nos. 17/58 and 18/58. They further pleaded acts of possession and ownership. The co-defendant short of filing its pleadings was granted leave not to participate in the trial, having deposited the compensation money with the Accountant-General of the Rivers State and expressed desire to abide the H outcome of the Suit.

The plaintiffs obtained judgment at the trial court but on appeal, the Court of Appeal, Enugu Division reversed the decision of the trial court, having held that the plaintiffs notwithstanding the judgments in Suits Nos.

17/58 and 18/58 had again put in issue the question of title to the land in dispute, and having failed to discharge the burden of proof on them, their claim was dismissed. The plaintiffs then appealed to the Supreme Court as Suit No. SC. 151/87, reported as Abomba v Odiese (1990) 1 NWLR (Pt. 125) 165. The Supreme Court affirmed the decision of the lower court B and held that title was in issue but that the plaintiffs having failed to discharge the onus on them, as found by the Court of Appeal, their claim failed and was dismissed, and it was of no moment that the claim was focused on compensation money. It is worthy of note that the Supreme C Court expressly held that there was no nexus between the land decided in favour of the Respondents in the Native Courts Suits (Nos. 17/58 and 18/58) and the land claim in Suit SC. 151/87. Again, the plaintiffs, herein respondents, sued the defendants, herein appellants. The trial High Court, D gave judgment for the plaintiffs in the following terms:

*“1. A declaration is hereby made to the effect that the plaintiffs herein, (i.e. the Ekoni family of Opume or Opomatobo) are entitled to the Customary right of Occupancy in respect of the land known as “EDUMATA EMENI” alias “EDUMAYO” adjudged in their favour by the Oloibiri E Native Court in Suits Nos. 17/58 and 18/58 respectively which land is delineated and verged RED on Survey Plan No. BOE/R17/90 – LD (exhibit – P5) dated 19<sup>th</sup> November, 1990.*

*2. A declaration is hereby made that all the issues already decided F relating to the original settlement of “EDUMATA EMENI” alias “EDUMAYO” land by the Oloibiri Native Court in cases Nos. 17/58 and 18/58 are binding on both the Plaintiffs and the Defendants in this present action.*

*3. The defendants, i.e. the Ake and Ogidi families of Akipelai G their privies servants and agents, are hereby restrained by an order of perpetual injunction from interfering with the rights of the Plaintiffs to the scope and extent already recognised and adjudged in their favour by the Oloibiri Native Court in suits Nos. 17/58 and 18/58 as shown and verged H RED on Survey Plan No. BOER/R17/90 – LD dated 19<sup>th</sup> November 1990 (Exhibit – P5)”*

The Court also dismissed the appellants’ counter-claim. Appellants’

appeal was dismissed by the lower court and hence their present further appeal to this Court.

The defendants/appellants postulated three issues for determination, namely,

B “(a) *Whether the concurrent finding of the lower court on the plea of res judicata is perverse (grounds 1 and 2)*

(b) *Whether the concurrent finding of the lower court dismissing the Counter-Claim is perverse (ground 3)*

C (c) *Whether the concurrent finding of the lower court is sustainable in view of lack of jurisdiction of the trial Court regarding customary right of occupancy (ground 4)”.*

The respondents’ also identified three issues for determination which are similar to those of the appellants and I need not reproduce them D in this judgment.

The main plank in this appeal is Issue No.1. Both counsel have canvassed far-reaching submission in this regard. It bothers on the question whether the two lower courts, applying the plea of res judicata, E were right in entering judgment in favour of the respondents/plaintiffs. I shall deal with the matter rather succinctly in view of the fact that the issue had been discussed at some length in the leading judgment. It is important to bear in mind that in the two Native Courts Suits Nos. 17/58 and 18/58 title to land was in issue. It was decided in favour of the present F respondents within the scope and uncertainty in which the two judgments were shrouded. Those decisions were not tied to any survey plan. Again, in the Supreme Court decision, Suit No. SC. 151/87, title was put in issue by the respondents herein but they failed to discharge the onus of proof G on them. That Court dismissed the respondents’ appeal. Finally, in the present appeal in what looks like fresh matter, the plaintiffs, herein respondents, claimed afresh for declaration of title to the land litigated in Native Court Suits No. 17/58 and 18/58, save that the claim is now tied up H to the plan annexed thereto. The plan now shows that it is the same land in Suit No. SC. 151/87 that is also being claimed in the present suit.

It is manifestly common ground that the parties in the first two Suits (native Court Suits and the Supreme Court decision in SC. 151/87)

are the same with those in the present suit. Furthermore, in these three cases, title is expressly put in issue by the plaintiffs herein respondents. And thirdly, the fact that the subject-matter of the dispute is in respect of the same parcel of land cannot be seriously argued. The leading judgment herein has properly and lucidly encapsulated the similarities of the subject matter and issue in the three cases on a manner that can hardly be excelled. This is how the learned Justice of the Supreme Court put it:

*“It is manifest that the plaintiffs have put their title in issue in respect of one and the same land in the native court suits, in the compensation case and in the present case. In my judgment, learned counsel for the defendants summed up the positions properly when it was submitted in the appellants’ brief that, “it is common ground that the land in dispute in the previous suit No. DHC/14/78 as shown in the respective parties’ plan (sic: plans) tendered as evidence in the subsequent suit No DHC/13/90”.*

It is unquestionably not in doubt that the respondents (again, as plaintiffs) having been frustrated in their effort to establish title in the compensation case, as held by the Court of Appeal in Exhibit D5, and affirmed by the Supreme Court in Exhibit D6, unrelentlessly in the suit leading to the present appeal before us, have again relied on Native Court Suits Nos. 17/58 and 18/58 to prop up their discredited claims. Of course, they must be stopped. It is now beyond peradventure that once a dispute has been finally and judicially determined by a court of competent jurisdiction neither the parties thereto nor their privies can subsequently be allowed to relitigate such matter in court. This is a matter predicated on public policy that there must be an end to litigation.

In the final analysis, I am clearly of the view that the learned trial judge fell into serious error when he failed to appreciate the bindingness on him of the effect of the decision in Exhibits D5 and D6. The lower court of course was equally in error to have confirmed the trial court’s decision reached per incuriam of the decision encapsulated in Exhibits D5 and D6. Put very tersely, Exhibits D5 and D6 were and are still bars to fresh litigation instituted by the respondents, as plaintiffs, in a matter that was previously dismissed against them. To uphold the concurrent judgment

of the two lower courts would tantamount to compounding the serious errors of oversight of those courts. And, indeed, this court would unwittingly be seen as sitting on appeal over its previous decision in Exhibit D6. This must be roundly rejected.

B The ground on which the counter-claim was erroneously dismissed by the trial court was unfortunate and I do not intend to comment on it as it has been fully dealt with in the leading judgment. Again, the support and confirmation by the Court of Appeal of the dismissal of the  
C appellants' counter-claim by the trial court does not call for any serious consideration. Suffice it to say that the decisions of the two lower courts in this connection were erroneously arrived at and cannot be left to stand. In the result, the only proper order that remains to be made in the circumstance is to remit the counter-claim for a proper trial by another  
D judge of the same jurisdiction.

For all I have said and the fuller reasons contained in the leading judgment, I, too, would allow the appeal. Accordingly, I set aside the judgment of the Court of Appeal and dismiss the plaintiffs/respondents'  
E claim. I also order a retrial of the counter-claim by another judge in the same jurisdiction. I abide by the orders as to costs contained in the leading judgment.

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