

SUPREME COURT OF NIGERIA

13TH JULY, 2001. SC. 28/1996

**CORAM:- A. G. KARIBI-WHYTE, E. O. OGWUEGBU, A. I.
IGUH, A. I. KATSINA-ALU, E. O. AYOOLA, JJSC.**

UMEANO ACHIAKPA & ANOR. PLAINTIFFS/APPELLANTS
(For themselves and on behalf of Umuonewe
family of Isikwe Achi)

AND

JOSIAH NDUKA & ORS. DEFENDANTS/RESPONDENTS

***APPEALS** - Error of lower court - The court of appeal was in error - In reversing the finding of the trial court - As to location of land (H 16)*

***APPEALS** - Finding not appealed against - The court of Appeal was in error - To reverse a finding not appealed against (H 18)*

***APPEALS** - Findings of trial court - Supreme Court will not interfere with such findings - Except there is a miscarriage of justice - Or violation of law or procedure (H 10)*

***APPEALS** - Issue for determination - An issue that was not raised in the grounds of appeal - Is incompetent (H 13)*

***APPEALS** - Issues - Any issue not covered by the grounds of appeal - Is incompetent and will be struck out (H 17)*

***APPEALS** - Retrial - Will be ordered - When there has been an error in law - Or a vital irregularity in procedure - But not in this case (H 15)*

***APPEALS** - Suo motu issue - Fair hearing - Failure to hear the defendants on the suo motu issue - Amounted to a denial of fair hearing (H 20)*

***APPEALS** - Suo motu issue - If raised by the court - The parties must be*

given an opportunity to be heard (H 19)

ESTOPPEL - *Res judicata* - Nature - It is a shield not a sword - And cannot avail the plaintiff but the defendant (H 1)

ESTOPPEL - *Res judicata* - Previous judgment - May be pleaded by a plaintiff - As mere estoppel not as estoppel per rem judicatam (H 2)

ESTOPPEL - *Res judicata* - Subject matter of the 1st suit - And the present suit are not the same - As the 1st relates to only part of the land - While this relates to the whole land (H 8)

ESTOPPEL - *Res judicata* - What a party must prove - To succeed in this defence (H 4)

JUDGMENTS - Evidence - A case should be determined - On appraisal and evaluation of relevant evidence - And not on swearing of juju oath (H 5)

JURISDICTION - Native court - Estoppel - The procedure adopted by the native court - Was in excess of jurisdiction - And its judgment was null - And cannot support an estoppel (H 7)

JURISDICTION - Native or inferior courts - Their jurisdiction depends on statutes - To be proved by the party asserting the jurisdiction (H 6)

LAND LAW - Title - Acts of ownership and possession - Must be numerous and positive - To warrant inference of exclusive ownership (H 9)

LAND LAW - Title - Identity of land - The land contested by both parties are the same - Going by the features in the different survey plans - Tendered by the parties (H 14)

LAND LAW - Title - Traditional evidence - The plaintiffs failed to

prove the necessary facts - And their claim must fail (H 12)

LAND LAW - Title - Traditional Evidence - Party relying on traditional evidence - Cannot plead vaguely - But must prove some facts - Such as who founded the land (H 11)

PLEADINGS - Estoppel - Res judicata - Must be specifically pleaded - And not casually pleaded (H 3)

FACTS

The appellants as plaintiffs instituted an action in a representative capacity jointly and severally against the defendants at the Enugu judicial division of the High Court of old Anambra State on the 1st day of June 1976. They claimed for declaration of title to the parcel of land known as "Masa" and "Obu" as well as for N1000 damages for trespass and an injunction against the defendants.

At the trial, the plaintiffs' case was that the land in dispute was owned by their family and their forbears from time immemorial. They had made maximum use of the land as owners even putting tenants including family members of the defendants on the land. They pleaded that following some acts of trespass they had sued the defendants at the Achi Native court in 1925 and obtained judgment. They had however allowed the defendants to continue with their occupation of the land granted to their ancestor after some friendly intervention by a reverend priest. The defendants had however commenced various acts of trespass on the land after the Nigerian civil war and were claiming ownership thereof hence this action. Thus they relied on traditional evidence, res judicata, acts of ownership and possession as well as possession of adjacent land in proof of their title. The defendants denied the claims and asserted their ownership of the land relying on traditional evidence, and positive acts of possession and ownership in and over the land in dispute.

At the end of the trial the learned trial judge dismissed the plaintiffs' claims in their entirety. The plaintiffs lodged an appeal against the judgment to the Court of Appeal, Enugu division which unanimously

dismissed the appeal. The plaintiffs have finally appealed to the Supreme Court and the defendants with leave of the court, cross-appealed on the reversal by the Court of Appeal of the finding of the trial court as to the identity of land in dispute.

B ISSUES FOR DETERMINATION

1. *Whether the Native Court judgment, Exhibit C, created an estoppel per rem judicatam against the defendants/respondents and was enough to award title of the land in dispute, Masa, to the plaintiffs/appellants.*
2. *Whether the plaintiffs/appellants succeeded in establishing their title to the land in dispute.*
3. *Whether this is an appropriate case in which the court below ought to have ordered a retrial.*

HELD (Unanimously dismissing the appeal per lead judgment of IGUH JSC)

Res judicata - Shield not a sword

1. The principle of law is well settled that the plea of estoppel per rem judicatam is a shield rather than a sword. Accordingly the plea is not available to a plaintiff in his Statement of Claim as he would thereby be impugning the jurisdiction of the court to which he has brought his action, since its successful plea would, in effect, oust the jurisdiction of the court before which it is raised. Learned counsel for the respondents was therefore right in his submission that the plea of estoppel per rem judicatam is normally not available to plaintiffs in a case but to defendants who may set it up as a shield to protect themselves against any harassment by the plaintiffs who may desire to relitigate a cause of action already adjudicated upon between the same parties or privies and involving the same subject matter and the same issues. A plaintiff cannot bring an action and at the same time plead estoppel per rem judicatam in the case.
- This is because that will suggest that the action he has brought is in abuse of the process of the court, the cause having been previously adjudicated upon by a court of competent jurisdiction and pronounced upon. Such a situation will necessary oust the jurisdiction of the trial court to entertain

the suit all over again. (p. 2506 A)

Res judicata - Previous judgment

2. It is thus settled that a plaintiff in an action may plead and rely on a previous judgment in his favour not as estoppel per rem judicatam but simply as an estoppel in the sense that it constitutes a relevant fact to the issue in his present action and the judgment will be conclusive of the facts which it decided. See Ukaegbu and others v. Ugoji and another (supra), Esan v. Olowo (1974) 3 S.C. 125. Accordingly, although the doctrine of estoppel per rem judicatam cannot be made the basis of an action by a plaintiff, a defence can be based entirely on it. (p. 2507 A)

Res judicata - Must be specifically pleaded

3. A close study of the above paragraphs of the plaintiffs' Statement of Claim discloses that it cannot be asserted with any degree of clarity or certainty that the plaintiffs thereby specifically pleaded the judgment, Exhibit C, to found a plea of estoppel per rem judicatam. It cannot be over-emphasised that the plea of estoppel, to be effective, must be specifically pleaded as going to be relied on per rem judicatam and not merely pleaded in a casual manner such as has been done in the present case. (p. 2507 G)

Res judicata - What a party must prove

4. At all events, it is trite law that for the plea of estoppel per rem judicatam to succeed the party relying on it must establish the following, namely:-

- (1) *That the parties or their privies involved in both the previous and present proceedings are the same.*
- (2) *That the claim or issue in dispute in both proceedings are the same.*
- (3) *That the res or the subject matter of the litigation in the two cases is the same.*
- (4) *That the decision relied upon to support the plea is valid, subsisting and final and*

(5) *That the court that gave the previous decision relied upon to sustain the plea is a court of competent jurisdiction."*

Unless all the above pre-conditions are established, the plea of estoppel per rem judicatam cannot be sustained. The burden is on the party who sets up the defence of estoppel per rem judicatam to establish the above pre-conditions conclusively. (p. 2508 A)

Evidence - A case should not be determined on swearing of juju oath

5. I think, speaking for myself, that there is considerable merit in these views of both courts below. In my view, the justice of any case does warrant that it be determined not on the basis of the swearing of juju Oath but on the appraisal and evaluation of all the competing evidence adduced by the parties before the court. Learned Senior Advocate, Mr. Enechi Onyia, however, tried in his brief to justify the method of trial adopted in Exhibit C. which he described as a final decision. This he did by reference to the case of Nthah v. Benniah 2 W.A.C.A. 1 in which it was decided that decisions of Native Tribunals on matters which are peculiarly within their knowledge, arrived at after a fair hearing on relevant evidence should not be disturbed without very clear proof that they are wrong. I am in full agreement with this decision of Her Majesty's Privy Council. I need, perhaps, to point out that the Privy Council in that case advisedly made reference to the acceptability of decisions of Native Tribunals arrived at after a fair hearing on relevant evidence and not after the swearing of any juju oath. (p. 2510 B)

Jurisdiction of native courts depends on statutes

6. Turning now to the question whether the Achi Native Court acted within or in excess of its jurisdiction in the procedure it adopted in the determination of Exhibit C, it ought to be observed that an inferior court, such as a Native Court or Tribunal, is not presumed to have any jurisdiction but that which is expressly provided and the party against whom a Native Court judgment was offered in evidence could under Section 53 of the Evidence Act establish its invalidity by showing that the court from which it emanated had no jurisdiction to do what it did. See Timitimi

v. Chief Amabebe (1953) 14 W.A.C.A. 374 at 377. The jurisdiction of a Native Court depends on Statute and the onus of proof is upon the party asserting the jurisdiction. (p. 2510 F)

Jurisdiction - Native court - Acted in excess of jurisdiction

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7. In Exhibit C, what the Native Court did was not to get the plaintiffs or defendants therein to swear to the juju oath as to their ownership of the land in dispute. Most amazingly it was the order of the court that the Umuakpu people, total strangers to the suit, should swear to the juju oath. I entertain no doubt that the Native Court by this strange procedure and following which it purportedly awarded the land in dispute to the plaintiffs of Umuonewe family acted in excess of its jurisdiction. It is, of course, well settled that a judgment by a court acting without or in excess of jurisdiction is a nullity and cannot consequently found an estoppel. (p. 2511 A)

C

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Res judicata - Subject matter

8. It is a basic principle of law that parties are bound by their pleadings. It can thus be said that having regard to the roots of title of the lands in dispute in both cases, the subject matter of the 1925 case, Exhibit C, cannot be the same as the land in dispute in the present proceeding as ownership of land by gift is totally different from original ownership of land by first settlement from time immemorial.

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In the second place, the evidence of P.W. 1, Umeano Achiakpa with regard to the land in dispute in Exhibit C went thus:-

"My forebears in accordance with our customary rites swore the juju and thereafter the elders who sat in judgment during the dispute declared ownership of the portion of Masa land as vested in us."

G

The above evidence does clearly show that only a portion of Masa land and not the whole was allegedly awarded to the plaintiffs in Exhibit C. This is as against the present action in which the whole of Masa land is claimed by the plaintiffs. It cannot be in dispute that a part cannot be equal to a whole. It is therefore clear to me that on the evidence of the plaintiffs, the subject matter of the 1925 case is not the same as the

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subject matter in the present case. Even if estoppel per rem judicatam is available to the plaintiffs, and I have clearly held that it is not, the subject matter in both the 1925 case and the present action are not the same. (p. 2511 G)

B

Title - Acts of ownership & possession

9. With regard to the other acts of ownership and possession allegedly exercised by the plaintiffs over the land in dispute, the law is settled that a party relying on acts of possession and ownership as proof of title to land must show that such acts not only extend over a sufficient length of time but that they are numerous and positive to warrant the inference of exclusive ownership of such land. In other words there must be proof that from the nature of such massive and persistent acts exercised nec clan, nec vi, nec precario, that is to say, openly and without force or stealthily, any person asserting a contrary title would have known of such exercise and be expected to assert his contrary title and/or ward off the perceived intruder or trespasser thereupon. A few of such acts which are isolated in nature and which the adversary was not in position to have known about will not suffice. (p. 2513 C)

Appeals - Findings of trial court

10. In this regard, the point must be made that an appellate court will not ordinarily interfere with the findings of the trial court except in circumstances such as where the trial court has not made a proper use of the opportunity of seeing and hearing the witnesses at the trial or where it has drawn wrong conclusions from accepted credible evidence or has taken an erroneous view of the evidence adduced before it or its findings of fact are perverse or unsupported by the evidence. In particular the said findings are concurrent findings of facts of both courts below which this court will not interfere with except there is established a miscarriage of justice or violation of some principles of law or procedure.(p. 2515 F)

Title - Traditional evidence - Not to be pleaded vaguely

11. The point cannot be over-emphasised that it is not sufficient for a

party who relies for proof of title to land on the basis of traditional evidence to merely plead vaguely that he and his predecessors in title had owned and possessed the land from time immemorial. Such a party, to succeed, must plead and prove such facts as :-

- (1) *Who founded the land,* B
- (2) *How the land was founded, and*
- (3) *Particulars of the intervening owners through whom he claims.*

See Akinloye v. Eyiola (1968) N.M.L.R. 92. (p. 2516 D)

Traditional evidence - Plaintiffs failed to prove the necessary facts C

12. In the present case these vital particulars were neither pleaded nor given in evidence by the plaintiffs and it is clear to me that on this alone their claim to title to the land in dispute on the basis of traditional evidence is bound to fail. (p. 2516 G) D

Appeals - Issues for determination

13. This question was no where raised by the plaintiffs in their grounds of appeal or in the issues distilled therefrom for the determination of this appeal. Consequently that issue must be regarded as baseless and incompetent as an appellate court can only hear and decide on issues raised on the grounds of appeal filed before it. See Management Enterprises v. Olusanya (1987) 2 N.W.L.R. (Part 55) 179. (p. 2518 E) F

Title - Identity of land

14. It is crystal clear from the above features that the land claimed by the defendants verged yellow in Exhibit D is part and parcel of the land in dispute verged green in the plaintiffs' plan, Exhibit A. It cannot therefore be correct, as contended by the learned Senior Advocate, that the defendants were fighting for a piece or parcel of land in the present case that is different from the one claimed by the plaintiffs. (p. 2520 C) G

Retrial - When it will be ordered H

15. An order for a new trial may be made where there has been an error in law or an irregularity in procedure of such a nature that on the one

hand the trial was not rendered a nullity and on the other hand the court is unable to say that there has been no miscarriage of justice. Both courts below not only considered the plaintiffs' traditional evidence, they also considered the 1925 Native Court proceedings, Exhibit C and the evidence of various acts of possession and ownership of the land in dispute tendered at the trial. I have myself given a careful consideration to the decisions of both courts below and can identify no error in law or an irregularity in procedure in those proceedings capable of resulting in any failure of justice. Issue 3 is accordingly resolved against the plaintiffs. (p. 2521 C)

Appeals - Error of lower court

16. With the greatest respect to the court below, it cannot be correct to hold, as the Court of Appeal did, that from a visual examination of the two plans Exhibit A and D, the pieces of land shown as Nkpo Uno and Ugbo Nduka in the defendants' plan, Exhibit D, do not fall within that area of land in the plaintiffs' plan, Exhibit A, described as Ani Obu land. It is crystal clear to me that had the court below taken the trouble to identify the common permanent features in both plans, particularly the road to Umuakpu village, its junction with the road to Iyiagu stream and the said compounds of Godfrey Ikedinma and Umeano Achiakpa, it would have had not other option than to hold that the said Nkpo Uno and Ugba Nduka land as shown in Exhibit D fall within the Ani Obu land as shown in Exhibit A. The court of Appeal, with respect, was therefore in error when it reversed the finding of the trial court to the effect that the land the plaintiffs called Ani Obu which the defendants described as Nkpo Uno and Ugba Nduka land refer to one and the same parcel of land. (p. 2523 B/G)

Issue not covered by the grounds of appeal

17. In the second place it is trite law that an appellate court can only hear and decide on issues raised on the grounds of appeal filed before it and an issue not covered by any ground of appeal is incompetent and will be struck out. The Court of Appeal has no business whatsoever to deal with

issues not placed before it. (p. 2524 A)

Finding not appealed against

18. It is thus clear that the plaintiff nowhere appealed against that finding of the trial court where it held that Nkpo Uno and Ugba Nduka lands of the defendants were what the plaintiffs called Ani Obu. The issue was therefore not before the Court of Appeal and that court lacked competence to deal with such an issue not placed before it. I think the Court of Appeal was in error to have reversed the said finding of the trial court when no such issue was placed before it. (p. 2524 F)

Suo motu issue - Parties to be heard

19. In the third place, the issue in question was raised suo motu, by the Court of Appeal without giving the defendants opportunity to be heard. In this regard it ought to be emphasised that when a court raises a point suo motu, the parties must be given an opportunity to be heard on the point, particularly the party that shall be aggrieved as a result of the resolution of the point. (p. 2524 H)

Suo motu issues - Denial of fair hearing

20. In the present case, the Court of Appeal raised suo motu the issue of the link between Nkpo Uno, Ugba Nduka and Aniobu lands and drew conclusion thereon without giving the defendants an opportunity to be heard and was therefore in breach of the defendants' right to fair hearing. In my view the Court of Appeal was in error by raising the issue of Nkpo Uno and Ugba Nduka land in relation to Ani Obu land and drawing conclusion there upon without giving the defendants an opportunity to be heard, thus occasioning a miscarriage of justice. (p. 2525 B)

REPRESENTATION

Enechi Onyia Esq. SAN with him is C. I. Enechi-Onyia Esq. for the appellants.

Dr. G. C. Oguagha for the respondents.

CASES REFERRED TO

- Yoge v. Olubode (1974)1 ALL N.L.R. (Pt.2)118 at 126-127
Esan v. Olowo (1974)3 SC. 125
Omeazu Chukwurah v. A.J. Ofochebe (1972)12 SC. 187 at 195
B Omidokun Owoniyi v. Omotosho (1961) ALL N.L.R. 304
Oke v. Atoloye (1985)1 NWLR (Pt.15) 241 at 260
Fadiora v. Gbadebo (1978)3 SC. 219 at 229
Jacob Ukaemezie vs. Maciver Nwadiashi (1976) E.C.S.L.R. 173
Nthah v. Benniah 2 W.A.C.A. 1
C Timitimi v. Chief Amabebe (1953)14 W.A.C.A. 374 at 377
Akrobotu v. Normeshie (1953)14 W.A.C.A. 290
Wakefied v. Cooke (1940) A.C. 31 H.L.
Kobina Ababio v. Ohene Akyin (1935)2 W.A.C.A. 380 at 381
D

LEAD JUDGMENT BY IGUH JSC

- By a writ of summons issued on the 1st day of June, 1976, the plaintiffs, for themselves and on behalf of the Umuonewe family of Isiekwe
E Achi in Anambra State instituted an action jointly and severally against the defendants of Umumduka family of Obinagu, Isikwe, Achi at the Enugu Judicial Division of High Court of Justice, Anambra State claiming as follows:-

- F *"(a) Declaration of title to the pieces or parcels of land known as "MASA" and "OBU" shown in Survey Plan No. FCO/125/76.*
(b) N1,000.00 (One thousand Naira) being general damages for trespass and
(c) Injunction restraining the defendants, their agents, servants
G *and/or privies from acting in any way contrary to their rights of ownership of the plaintiffs in the said land without the previous consent or approval of the plaintiffs"*

- Pleadings were ordered in the suit and were duly settled, filed
H and exchanged.

At the subsequent trial, both parties testified on their own behalf and called witnesses.

The case for the plaintiffs, briefly, is that the land in dispute is

owned and possessed by their family and, before them, their forebears from time immemorial. As owners thereof, they made maximum use of the same by planting and reaping economic trees and by cultivating and building houses thereon. They also put tenants including family members of the defendants on the land. They described the defendants as the descendants of a war captive, Nduka, who lived with Onewe and was protected by the said Onewe who was a member of the plaintiffs' family. It was to Nduka that the plaintiffs' ancestor, Onewe, granted the land verged yellow in Exhibit A. The plaintiffs further pleaded that following some acts of trespass, they were obliged to sue the defendants at the Achi Native Court in 1925 and obtained judgment. This is suit No. 6/11/25, Exhibit C. However, by the intervention of one Rev. S. Okolo, D.W.7, the plaintiffs allowed the defendants to continue with their occupation of the land granted to their ancestor by Onewe. The defendants, after the Nigerian civil war was commenced various acts of trespass on the land in dispute and claimed ownership thereof hence this action. Essentially the plaintiffs relied on traditional evidence, the 1925 Achi Native Court judgment, Exhibit C. numerous acts of ownership and possession on the land and possession of adjacent or connected land in proof of their title to the land in dispute.

The defendants denied the plaintiffs' claims and asserted their ownership and possession of the land in dispute, also, from time immemorial. They relied inter alia on traditional evidence, numerous and positive acts of possession and ownership in and over the land in dispute from time beyond human memory and the 1940 settlement between the parties in respect of their Nkpo Uno and Ugba Nduka pieces of land shown in their plan, Exhibit D.

At the conclusion of hearing, the learned trial Judge, Nwazota, J., as he then was, after a most meticulous and exhaustive review of all the evidence on the 21st day of July, 1986 dismissed the plaintiffs' claims in their entirety. He concluded as follows:-

"In conclusion, may I observe that bearing the foregoing in mind, and noting, as I do, my preference of the material aspects of Defence evidence to that of the plaintiffs and their witnesses, I am firm in my

judgment that the plaintiffs have failed to adduce satisfactory and credible evidence as to the precise nature of title for which they seek a declaration, and have also failed to adduce satisfactory and credible evidence of a title of the nature claimed by them to justify my making the declaration they seek. I am equally satisfied that no satisfactory and credible evidence has been adduced by them to support and sustain their claim for damages in trespass. Besides, I am also unable to discern any basis for their claim for an Order of Injunction restraining the defendants, their agents, servants and/or privies from acting in any way contrary to their alleged rights of ownership in or over the parcels of land described as "MASA" and "ANI OBU" as shown on their Survey Plan No. FCO/D25/76 filed along with their Statement of Claim. It is my judgment therefore that Plaintiffs' claims against the Defendants are not proved and must be and are hereby dismissed."

Dissatisfied with this decision of the trial court, the plaintiffs lodged an appeal against the same to the Court of Appeal, Enugu Division, which court in a unanimous decision on the 13th day of April, 1992 dismissed the appeal. It stated:-

"In this case the plaintiffs never succeeded in making a prima facie case to which the defendants could react to. This arose mainly from poor and insufficient pleading.

In the final conclusion, it is my view that the plaintiffs' case deserved to fail before the lower court as was the case. This appeal fails and is accordingly dismissed with N750.00 costs in favour of the defendants/respondents."

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

I think I need to point out that the Court of Appeal in the course of the preparation of its judgment appeared to have examined and compared on its own and unaided the plans tendered by the plaintiffs and the defendants, Exhibit A and D respectively. At the end of this exercise, it found itself unable, by visual examination of both plans to conclude that the land shown as Nkpo Uno and Ugba Nduka in Exhibit D are the same as the land depicted as Ani Obu in Exhibit A. Said the Court of Appeal:-

"I am therefore unable to conclude as the trial judge did that a visual examination of the two plans will yield the conclusion that Nkpouno/ Ugba Nduka lands in exhibit 'D' are the same as Aniobu land in exhibit 'A'."

The above finding of the court below is as against that of the learned trial Judge who after the testimony of both surveyors called by the parties and a close study of the said Exhibits A and D decided as follows:-

"I am satisfied that the identity, area, extent and boundaries of 'Nkpo Uno' and 'Ugba Nduka' parcels of land then in issue between the parties were well known to the 2 families, and in particular, in the absence of any satisfactory contradictory evidence, are as identified and bounded on defendants' Survey Plan No. EC 324/76 dated 13/12/76 - Exh. D. From my detailed study of Exhs. 'A' and 'D' and accepting as I do the material evidence of the licensed surveyors called by both sides, I am satisfied and find as a fact that the area verged PINK on plaintiffs' survey plan which they allege is the subject matter of their current claim falls totally within defendants' Ugba Nduka and Nkpo Uno parcel of land rightly adjudged by D.W.7 and his team to be owned by defendants s far back as 1940. In spite of plaintiffs tagging the area 'Aniobu' (plaintiffs") for 'Nkpo Uno' and Ugba Nduka (defendants') refer to one and the same parcel of land i.e. defendants Ugba Nduka and Nkpo Uno parcels of land."

Later in his judgment, the learned trial Judge emphasised

"May I for the avoidance of any doubt emphasise the point that from my detailed study of Exhibit A and D and the legends thereon, I am satisfied that both Survey Plans reflect various parcels of land whose ownership the parties had at some time or other contested. From the evidence of the Defendants which evidence I accept as true, I have no doubt whatever that the parcels of land as variously verged by Plaintiffs' Exhibit A are well within Defendants' 'Nkpo Uno' and 'Ugbanduka' parcels of land."

The defendants, being dissatisfied with the said reversal of the above finding of the trial court by the court below with regard to Nkpo

Uno and Ugba Nduka lands as shown in Exhibit D vis-a-vis the Ani Obu land as claimed by the plaintiffs in Exhibit A have, with the leave of this court, cross-appealed on that issue.

Pursuant to the Rules of this courts the parties filed and exchanged their written briefs of argument. In the plaintiffs/appellants' brief of argument, the following four issues are set out as arising for determination in the main appeal, that is to say:-

"1. Whether the Court below correctly stated the Law on judgment of Native Courts and ancient document when it held "I am in agreement with the trial judge that Exhibit "C" cannot create an estoppel per rem judicatam against the defendants"?"

2. Whether the Court below after agreeing that Aniobu in Exhibit A and Nkpo-Uno and Ugba Nduka in Exhibit D are not the same was not wrong when it dismissed the case of the Appellants in respect of Aniobu?

3. Whether the plaintiffs/Appellants' case was based only on traditional history and or on acts of ownership and possession rooted in traditional history?

4. Whether this is a case in which the Court below would have ordered a retrial?"

The defendants/respondents, on the other hand, also submitted four issues in their brief of argument for the resolution of this appeal. These are as follows:-

"1. Whether Exhibit C was enough for the Court of Appeal to decide that the land Masa in the present case is the property of the plaintiffs.

2. Whether the Court of Appeal was right in disagreeing with the finding of the trial Court that Nkpo Uno and Ugba Nduka lands of the defendants were what the plaintiffs were claiming as Aniobu in the present case, when the plaintiffs did not appeal against the finding of the learned trial Judge.

3. Assuming (but it is not conceded) that the Court of Appeal was right in disagreeing with the trial Court on that finding, is that finding of the Court of Appeal an 'obiter dictum' or a 'ratio decidendi'?"

4. *Whether or not a retrial is necessary in this case."*

I have closely considered the two sets of issues identified in the respective briefs of argument of the parties in the main appeal and in-as-much-as they essentially cover identical questions, the following issues seem to me ample for the determination of this appeal namely:- B

1. *Whether the Native Court judgment, Exhibit C, created an estoppel per rem judicatam against the defendants/respondents and was enough to award title of the land in dispute, Masa, to the plaintiffs/appellants.*

2. *Whether the plaintiffs/appellants succeeded in establishing their title to the land in dispute.* C

3. *Whether this is an appropriate case in which the court below ought to have ordered a retrial.*

In respect of the cross-appeal, three issues were identified on D behalf of the defendants/cross-appellants for the determination of the cross-appeal. These are set out as follows:-

"1. *Whether the Court of Appeal was right to have disagreed with the finding of the learned trial Judge in connection with Nkpo Uno E and Ugba Nduka lands and Aniobu land when there was no appeal against that findings.*

2. *Whether the Court of Appeal was right to have raised the issue suo motu and acted on it to the detriment of the defendants/cross-appellants when the said Court did not give the defendants/cross-appellants opportunity to be heard.* F

3. *Whether the Court of Appeal was right to have disagreed with the said finding of the trial Court which based its conclusion on the visual examination of the two plans, Exhibit A and D, as well as the evidence of the surveyors called by the parties, while the Court of Appeal G relied only on visual examination of the two plans, Exhibits A and D."*

For the plaintiffs/cross-respondents, two issues were distilled from their grounds of appeal for the determination of the cross-appeal. H These are set out thus:-

"1. *Whether there is any ground of appeal in which the Court of Appeal based its findings?*

2. *Whether the Court of Appeal raised suo motu, the issue of Nkpo Uno and Ugba Nduka in relation to Aniobu?*

I think having regard to the grounds of the cross-appeal filed, the issues raised on behalf of the defendants/cross-appellants are sufficiently comprehensive for my determination of the cross-appeal.

At the oral hearing of the appeals, learned counsel for the parties adopted their respective briefs of argument. Learned Senior Advocate of Nigeria, Enechi Onyia Esq., S.A.N. also proffered additional submissions in amplification of his arguments under issue 2 of his brief of argument in the main appeal.

Essentially, the contention of Mr. Enechi Onyia at the oral hearing of the appeal is that the defendants joined issue with the plaintiffs in respect of a piece or parcel of land different from the claimed by the plaintiffs/appellants in the present suit. I will say one or two words with regard to this submission later in this judgment. It is my intention presently to examine the relevant issues set out above for the resolution of the main appeal. I will consider issues 1 and 3 together.

Under issue 1 it is the argument of the appellants that the 1925 decision of the court in Enugu Achi Native Court proceedings was at all material times a valid subsisting judgment and that it is an ancient document and should have been treated as evidence of possession in respect of the land in dispute by the appellants. Relying on the decision in Kwesi kwaa v. Kofi Kwakwa (1937) 3 W.A.C.A. 176, learned Senior Advocate for the appellants submitted that the judgment in Exhibit C was obtained regularly and that what matters in proceedings before a Native Court is the substance of the claim and not the form. He argued that the judgment. Exhibit C, is final and did pronounce on the rights of the parties and must therefore operate in favour of the appellants as estoppel per rem judicatam against the respondents. He also stressed that Exhibit C additionally constitutes act of possession and enjoyment of the land in dispute by the appellants. On issue 3, learned Senior Advocate submitted that apart from reliance on Exhibit C, the appellants principally based their claim on traditional evidence and acts of ownership and possession of the land. He asserted that the appellants inherited the land in dispute

from time immemorial from their forebears. Citing the decision in Chief Nderake Akpan & others v. Chief Udokang Otong and others (1996) 12 S.C.N.J. 213 at 228 he submitted that the appellants were not bound to establish more than one of the several methods of proving title to land before they can succeed in their claim for title to the land in dispute. B

Learned counsel for the respondents, Dr. G. C. Oguagha in his reply submitted that Exhibit C cannot create estoppel per rem judicatam in favour of the appellants as the plea is never available to plaintiffs in a case but to defendants. He argued that the Masa land involved in the 1925 case, Exhibit C, is not the same as the Masa land in dispute in the present action. To drive his point home, learned counsel pointed out that the Masa land is dispute in Exhibit C shows ex facie that it is a piece of land which originally belonged to Umuakpu people and which the said Umuakpu people granted to the appellants. He distinguished that piece or parcel of land from the Masa land in dispute in the present action which, on both the appellants' pleadings and viva voce evidence, originally belonged to the appellants from time immemorial. He submitted that both pieces of land are not and cannot be the same. He referred to the judgment in Exhibit C as "juju judgment" as it was entered as a result of the swearing of some juju. He argued that judgment of courts, including Native Courts, must be based on evidence before the court and the evaluation of such evidence and not as a result of the swearing of any juju. He pointed out that what is patently strong about Exhibit C is the fact that the alleged juju oath was sworn to by Umuakpa people who were strangers to the proceeding and not by the parties to Exhibit C. He contended that by getting strangers to swear to the juju instead of the appellants, the Native Court acted outside its jurisdiction. He argued that Exhibit C created no estoppel per rem judicatam against the respondents and that it was not therefore enough to award title of the land in dispute to the appellants. He further submitted that the appellants' evidence on all the relevant issues concerning their ownership and possession of the Masa land in dispute together with their traditional evidence were all rejected by the trial court. He added that this rejection of their evidence was affirmed by the Court of Appeal. In the circumstance, he argued that the

appellants were therefore unable to establish their title to the land in dispute.

The principle of law is well settled that the plea of estoppel per rem judicatam is a shield rather than a sword. Accordingly the plea is not available to a plaintiff in his Statement of Claim as he would thereby be impugning the jurisdiction of the court to which he has brought his action, since its successful plea would, in effect, oust the jurisdiction of the court before which it is raised. See Yoge v. Olubode (1974) 1 ALL N.L.R. (Part 2) 118 at 126 - 127. Emmanuel Igwego and others v. Fidelis Ezengo and Another (1992) 6 N.W.L.R. (Part 249) 561 at 587. Learned counsel for the respondents was therefore right in his submission that the plea of estoppel per rem judicatam is normally not available to plaintiffs in a case but to defendants who may set it up as a shield to protect themselves against any harassment by the plaintiffs who may desire to relitigate a cause of action already adjudicated upon between the same parties or privies and involving the same subject matter and the same issues. A plaintiff cannot bring an action and at the same time plead estoppel per rem judicatam in the case. This is because that will suggest that the action he has brought is in abuse of the process of the court, the cause having been previously adjudicated upon by a court of competent jurisdiction and pronounced upon. Such a situation will necessary oust the jurisdiction of the trial court to entertain the suit all over again.

A distinction must however be drawn between estoppel per se and estoppel per rem judicatam. As this court per Babalakin, J.S.C. explained the position in Sylvester Ukaegbu and others v. Idunu Ugoji and others (1991) 6 N.W.L.R. (Part 196) 124 at 144.

"In my view, when a party pleads a judgment as estoppel, what he is telling the court is that the court should take that judgment into consideration in considering the totality to the present case before the court. Whereas when he pleads res judicata, he is saying that although he has already got judgment on the piece or parcel of land, he wants the court to adjudicate on the matter that has already been adjudicated upon

in his favour. This is contradiction in terms - he is asking the court to judge what has already been judged hence in Yoye's case above it was said that res judicata ousts the jurisdiction of the court".

It is thus settled that a plaintiff in an action may plead and rely on a previous judgment in his favour not as *estoppel per rem judicatam* but simply as an *estoppel* in the sense that it constitutes a relevant fact to the issue in his present action and the judgment will be conclusive of the facts which it decided. See Ukaegbu and others v. Ugoji and another (supra), Esan v. Olowo (1974) 3 S.C. 125. Accordingly, although the doctrine of *estoppel per rem judicatam* cannot be made the basis of an action by a plaintiff, a defence can be based entirely on it. I think it will now be necessary to examine the plaintiffs' Statement of Claim with a view to determining in what respect the 1925 Achi Native Court action Exhibit C, was pleaded by the plaintiffs.

The material averments relating to Exhibit C were pleaded by the plaintiffs in paragraphs 23 - 25 of their Statement of Claim. These aver as follows:-

"23. When in 1925 the Umunduka family members trespassed into the land of the plaintiffs outside the part verged Yellow in the plaintiffs' Plan the plaintiffs objected and when they persisted in the trespass the plaintiffs felt that the Umunduka family had committed abomination and took out the Native or Customary Court action.

23. The plaintiffs got judgment against the Umunduka family in the Native or Customary Court.

25. As a result of the judgment the Umunduka withdrew from the land including the part edged yellow in the plaintiffs' plan."

A close study of the above paragraphs of the plaintiffs' Statement of Claim discloses that it cannot be asserted with any degree of clarity or certainty that the plaintiffs thereby specifically pleaded the judgment, Exhibit C, to found a plea of *estoppel per rem judicatam*. It cannot be over-emphasised that the plea of *estoppel*, to be effective, must be specifically pleaded as going to be relied on *per rem judicatam* and not merely pleaded in a casual manner such as

has been done in the present case. See *Omeazu Chukwurah v. A.J. Ofochebe* (1972) 12 S.C.189 at 195, *Omidokun Owoniyi v. Omotosho* (1961) ALL N.L.R. 304 etc.

At all events, it is trite law that for the plea of *estoppel per rem judicatam* to succeed the party relying on it must establish the following, namely:-

- (1) *That the parties or their privies involved in both the previous and present proceedings are the same.*
- (2) *That the claim or issue in dispute in both proceedings are the same.*
- (3) *That the res or the subject matter of the litigation in the two cases is the same.*
- (4) *That the decision relied upon to support the plea is valid, subsisting and final and*
- (5) *That the court that gave the previous decision relied upon to sustain the plea is a court of competent jurisdiction."*

Unless all the above pre-conditions are established, the plea of **estoppel per rem judicatam** cannot be sustained. See *Oke v. Atoloye* (1985) 1 N.W.L.R. (Part 15) 241 at 260, *Yoye v. Olabode and others* (1974) 1 ALL N.L.R. (Part 2) 118 at 122, *Fadoira v. Gbadebo* (1978) 3 S.C. 219 etc. The burden is on the party who sets up the defence of *estoppel per rem judicatam* to establish the above pre-conditions conclusively.

On the issue of whether or not the judgment, Exhibit C, created estoppel per rem judicatam, the learned trial Judge commented thus:-

".....The question must be answered whether or not the judgment as recorded in Exhibit C did found and create an Estoppel per rem judicatam between the parties and their descendants? Without hesitation, I answer the question in the negative - for it is my considered view that where, as in the reflected on Exhibit C, the judgment of the Native Court was based solely on the swearing of Oath and not on the appraisal and evaluation of competent evidence as adduced by the parties, a superior, nay, any reasonable and unbiased Court of Record, must be hesitant in accepting what amounted to a judgment of a juju - an extra judicial

object - unless it is manifestly shown (and there is no such evidence *ex facie* from Exhibit C) that the party who swore the juju implicitly irretrievably and religiously believed in the excruciating and definitive potency and finality of the juju, and that, in addition, once the Oath is taken the Party taking the Oath had no means of thwarting or placating its Wrath - were the Party to have deliberately and misleadingly sworn falsely on the Oath. It is equally my considered view that not only must the parties have accepted the finality of the settlement of the dispute consequent upon the Oath swearing, but also, for the Oath to operate as an estoppel *per rem judicatam*, the form, nature and effect of the Oath must be strictly proved and the records must show that the Oath refers unequivocally to the subject matter of the Oath e.g. as in that case the land in dispute between the parties, and that it relates to and encompasses the question of title to the land. I have no doubt whatever that the judgment embodied in Exhibit C did not meet any of the foregoing criteria. See Jacob Ukaemezie vs. Maciver Nwadiashi (1976) E.C.S.L.R. 173."

The Court of Appeal, for its own part, dealing with the same subject had this to say:-

"I am in agreement with the trial Judge that exhibit 'C' cannot create an estoppel *per rem judicatam* against the defendant..... In the instant case, the parties were by the judgment of the Native Court to swear to an Oath and indeed the case was adjourned by the Native Court for the Oath taking. Such judgment cannot be regarded as a final one and it is almost laughable that appellants' counsel made the submission that we should treat it as one. It is my humble view that a judgment which enjoins the parties to swear to a juju Oath or to do further acts ascertained or unascertained in order to determine where the merits of the case lie is not a final judgment as it is not a pronouncement on the rights of the parties which are in dispute; and it cannot operate as estoppel per rem judicatam."

It is apparent from the above passages of the judgments of the two courts below that they were ad idem on the issue that Exhibit C could not constitute estoppel per rem judicatam given is that the termina-

tion of that proceeding rested solely and entirely on the swearing of some juju Oath with a view to determining where the merits of the case lie and not on the appraisal and evaluation of competing evidence adduced by the parties before the court. It is their view that such archaic and unconventional method for the determination of the justice of a cause can neither stand the test of time nor qualify any purported decision arrived at thereby as final to sustain the plea of estoppel per rem judicatam.

I think, speaking for myself, that there is considerable merit in these views of both courts below. In my view, the justice of any case does warrant that it be determined not on the basis of the swearing of juju Oath but on the appraisal and evaluation of all the competing evidence adduced by the parties before the court. Learned Senior Advocate, Mr. Enechi Onyia, however, tried in his brief to justify the method of trial adopted in Exhibit C. which he described as a final decision. This he did by reference to the case of *Nthah v. Benniah* 2 W.A.C.A. 1 in which it was decided that decisions of Native Tribunals on matters which are peculiarly within their knowledge, arrived at *after a fair hearing on relevant evidence* should not be disturbed without very clear proof that they are wrong. I am in full agreement with this decision of Her Majesty's Privy Council. I need, perhaps, to point out that the Privy Council in that case advisedly made reference to the acceptability of decisions of Native Tribunals arrived at *after a fair hearing on relevant evidence* and not after the swearing of any juju oath.

Turning now to the question whether the Achi Native Court acted within or in excess of its jurisdiction in the procedure it adopted in the determination of Exhibit C, it ought to be observed that an inferior court, such as a Native Court or Tribunal, is not presumed to have any jurisdiction but that which is expressly provided and the party against whom a Native Court judgment was offered in evidence could under Section 53 of the Evidence Act establish its invalidity by showing that the court from which it emanated had no jurisdiction to do what it did. See *Timitimi v. Chief Amabebe* (1953) 14 W.A.C.A. 374 at 377. The jurisdiction of a Native Court depends

on Statute and the onus of proof is upon the party asserting the jurisdiction. See *Akrobotu v. Normeshe* (1953) 14 W.A.C.A. 290.

In Exhibit C, what the Native Court did was not to get the plaintiffs or defendants therein to swear to the juju oath as to their ownership of the land in dispute. Most amazingly it was the order of the court that the Umuakpu people, total strangers to the suit, should swear to the juju oath. I entertain no doubt that the Native Court by this strange procedure and following which it purportedly awarded the land in dispute to the plaintiffs of Umuonewe family acted in excess of its jurisdiction. It is, of course, well settled that a judgment by a court acting without or *in excess* of jurisdiction is a nullity and cannot consequently found an *estoppel*. See *Timitimi v. Amabebe* (supra), *Wakefield v. Cooke* (1904) A.C. 31. H.L. etc.

There is finally what appears to me to be the most vital aspect of whether or not Exhibit C may sustain the plea of estoppel per rem judicatam against the defendants. I have earlier on in this judgment set out the pre-conditions that must be established for the plea of *res judicata* to be sustained. One of these is that the *res* or the subject matter of the litigation in the two cases must be the same. The onus is on the party who seeks to set up the defence of estoppel per rem judicatam to establish this fact. And I ask myself whether the plaintiffs were able to establish that the res in both Exhibit C and the present action is the same. I think not.

This is, firstly, because the Masa land in dispute in Exhibit C shows ex facie that it was a piece or parcel of land belonging to Umuakpu people who were not parties to that case and which land the said Umuakpu people purportedly gave to the plaintiffs. That piece or parcel of land is clearly different from the Masa land in dispute in the present case which, on the pleadings of the plaintiffs and their evidence before the court originally belonged to them from time immemorial. **It is a basic principle of law that parties are bound by their pleadings.** It can thus be said that having regard to the roots of title of the lands in dispute in both cases, the subject matter of the 1925 case, Exhibit C, cannot be the same as the land in dispute in the present proceeding as

ownership of land by gift is totally different from original ownership of land by first *settlement from time immemorial*.

In the second place, the evidence of P.W. 1, Umeano Achiakpa with regard to the land in dispute in Exhibit C went thus:-

B "My forebears in accordance with our customary rites swore the juju and thereafter the elders who sat in judgment during the dispute declared ownership of the portion of Masa land as vested in us."

C The above evidence does clearly show that *only a portion Masa land and not the whole* was allegedly awarded to the plaintiffs in Exhibit C. This is as against the present action in which the *whole of Masa land* is claimed by the plaintiffs. It cannot be in dispute that a part cannot be equal to a *whole*. It is therefore clear to me that on the evidence of the plaintiffs, the subject matter of the 1925 case is not D the same as the subject matter in the present case. Even if *estoppel per rem judicatam* is available to the plaintiffs, and I have clearly held that it is not, the subject matter in both the 1925 case and the present action are not the same. Accordingly no question of the creation of *estoppel per rem judicatam* by the 1925 case, Exhibit C, against E the present defendants arises in this action. This being the case, the second question of whether Exhibit C was enough to award title of the land in dispute to the plaintiffs becomes a *non-sequitur* and does not therefore arise.

F Turning to issue 3, the question is whether the plaintiffs succeeded in establishing their title to the land in dispute. In this regard, it cannot be disputed that the plaintiffs' claims from the averments in their Statement of Claim were grounded on the 1925 Native Court judgment, G Exhibit C, traditional evidence, acts of ownership extending over a long period of time and long possession and enjoyment of the land in dispute and/or adjoining land. The trial court most meticulously considered each of these claims by the plaintiffs and had no difficulty in dismissing each H and every one of them as not established. The Court of Appeal, for its own part, after a careful review of the said findings of the trial court had no reason to interfere with them.

Although enough has been said about the judgment, Exhibit C, in

the context that it cannot operate as estoppel per rem judicatam in the present case, it ought to be observed that it can properly constitute prima facie act of possession where it pertains to the land in dispute. See Chief Ndarake Akpan & others v. Chief Udokang Otong (1996) 10 N.W.L.R. (Part 476) 108., James Uluba v. Chief Silo (1973) 1 S.C. 37, Kobina Ababio v. Ohene Akyin (1935) 2 W.A.C.A. 380 at 381 etc. But as I have already stated, the subject matter of Exhibit C cannot be the same with the res in the present action. The plaintiff may not therefore rely on Exhibit C as act of possession in respect of the land in dispute.

With regard to the other acts of ownership and possession allegedly exercised by the plaintiffs over the land in dispute, the law is settled that a party relying on acts of possession and ownership as proof of title to land must show that such acts not only extend over a sufficient length of time but that they are numerous and positive to warrant the inference of exclusive ownership of such land. In other words there must be proof that from the nature of such massive and persistent acts exercised *nec clan, nec vi, nec precario*, that is to say, openly and without force or stealthily, any person asserting a contrary title would have known of such exercise and be expected to assert his contrary title and/or ward off the perceived intruder or trespasser thereupon. A few of such acts which are isolated in nature and which the adversary was not in position to have known about will not suffice. See Ekpo v. Ita II N.L.R. 68 at 69, Piario v. Tenalo (1976) 12 S.C. 31 at 41, Idundun v. Okumagbe (1976) 9 - 10 S.C. 246, Anyanwu v. Mbara (1992) 5 N.W.L.R. (Part 242) 386 at 401.

The learned trial Judge, after a close analysis of the evidence adduced by the plaintiffs on the questions of acts of ownership and possession of the land in dispute stated thus:-

"I am unable to accede to P.W. I's evidence that the plaintiffs' own MASA land having inherited same from their forebears and I equally reject as false plaintiffs' contention that they have been in exclusive possession of the land from time immemorial and have during that period of time cultivated it planting and reaping thereon and therefrom various

economic crops. I reject as false P.W. 1's evidence that their forebears resided on the land in their lifetime and on their death they and their successors continued so to do. On the contrary, I prefer as true Defence evidence on the issue. Bearing in mind my acceptance of Defendants' evidence as to their uninterrupted multi acts of ownership and possession of the land, I reject as false plaintiffs' evidence that they cultivate the land as of right and without interruption from any adverse quarter. I do not believe them."

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

"Although it is his evidence (i.e. P.W. 3) that the Defendants, trespassed into their 'MASA' and 'Aniobu' parcels of land, I am satisfied that his evidence in that regard is false and reject same, holding on the contrary that the defendants, acting lawfully and in consonance with their visible and sustained possessory rights in and over 'Masa' land cleared same during the farming season aforesaid. In this connection I note and accept as true defence evidence in support of their pleadings in paragraphs 19 and 20 of their Statement of Defence, which pleadings are in answer to Plaintiffs' assertions in paragraph 21 of their Statement of Claim. I am satisfied that at all material times to this suit the Defendants were lawfully in possession of 'Nkpouno', 'Ugba Nduka' and 'Masa' parcels of land and that their cultivation of them, and their other activities on those parcels of land were in lawful consolidation of their rights over them."

He continued:-

"I equally reject as false plaintiffs' evidence per P.W. 5 that their family granted a portion of the land to Holy Sabbath Church Isikwe for the purpose of their erection of a Church house. I have considered the evidence of the witnesses for the Defence and have no doubt whatever that in the main, the material aspects of their evidence is preferable to that of the plaintiffs."

He concluded:-

"In conclusion, may I observe that bearing the foregoing in mind, and noting, as I do, my preference of the material aspects of Defence

evidence to that of the Plaintiffs and their witnesses, I am firm in my judgment that the plaintiffs have failed to adduce satisfactory and credible evidence as to the precise nature of title for which they seek a declaration, and have also failed to adduce satisfactory and credible evidence of a title of the nature claimed by them to justify my making the declaration they seek." B

It is thus clear from the above passages of the judgment of the trial court that it specifically rejected the case of the plaintiffs. The learned trial Judge saw the witnesses as they testified in the witness box and, as he was entitled to do, preferred the evidence of the defendants to that of the plaintiffs which he expressly rejected. C

The court below had no difficulty in affirming the said findings of the trial court which are amply supported by the evidence before the court. After setting out various passages of the judgment of the learned trial Judge, the Court of Appeal stated:- D

"In the above passage the trial Judge specifically rejected the case of the plaintiffs. There was evidence before the lower court upon which to accept or reject the case of the plaintiffs. The lower court saw the witnesses testify. We do not have that opportunity in this court. I cannot therefore interfere with the conclusions of the lower court drawn from the evidence led." E

In this regard, the point must be made that an appellate court will not ordinarily interfere with the findings of the trial court except in circumstances which as where the trial court has not made a proper use of the opportunity of seeing and hearing the witnesses at the trial or where it has drawn wrong conclusions from accepted credible evidence or has taken an erroneous view of the evidence adduced before it or its findings of fact are perverse or unsupported by the evidence. See Okpiri v. Jonah (1961) ALL N.L.R. 102 at 104 - 5, Woluchem v. Gudi (1981) 5 S.C. 291 at 295 - 6 and 326, Ike v. Ugboaja (1993) 6 N.W.L.R. (Part 301) 539 at 555 etc. In particular the said findings are concurrent findings of facts of both courts below which this court will not interfere with except there is established a miscarriage of justice or violation of some principles of law or proce- F G H

dure. See National Insurance Corporation of Nigeria v. Power and Industrial Engineering Co. Ltd. (1986) 1 N.W.L.R. (Part 14) 1 at 36, Enang. v. Ado (1981) 11 - 12 S.C. 25 at 42, Mora v. Okonkwo (1987) 3 N.W.L.R. (Part 60) 314 at 321, Igwego v. Ezeugo (1992) 6 N.W.L.R. (Part 249) at B 574.

There is next the plaintiffs' claim based on traditional evidence. In this regard, the plaintiffs' evidence was grounded essentially on the fact that they, and before them, their forebears had been the owners of the land in dispute from time immemorial and nothing more. It was not pleaded the name of their ancestor who first acquired the land and how he acquired by purchase or by first settlement, by conquest, by gift or otherwise. The plaintiffs' Statement of Claim was silent on these vital details.

The point cannot be over-emphasised that it is not sufficient for a party who relies for proof of title to land on the basis of traditional evidence to merely plead vaguely that he and his predecessors in title had owned and possessed the land from time immemorial. Such a party, to succeed, must plead and prove such facts as :-

- (1) *Who founded the land,*
- (2) *How the land was founded, and*
- (3) *Particulars of the intervening owners through whom he claims.*

See Akinloye v. Eyiylola (1968) N.M.L.R. 92, Olujinle v. Adeogbo (1988) 2 N.W.L.R. (Part 75) 238, Adejumo v. Ayantegbe (1989) 3 N.W.L.R. (Part 110) 417, Anyanwu v. Mbara (1992) 5 N.W.L.R. (Part 242) 386 at G 399 etc.

In the present case these vital particulars were neither pleaded nor given in evidence by the plaintiffs and it is clear to me that on this alone their claim to title to the land in dispute on the basis of traditional evidence is bound to fail. I think the Court of Appeal was right when on the same issue and after setting out the relevant paragraphs of the plaintiffs' Statement of Claim on the question of traditional evidence it observed thus:-

"The plaintiffs in the paragraphs reproduced above did not plead who of their forebears or ancestors had first owned the land in dispute. It was not pleaded how the plaintiffs' ancestors had come to own the land in the first place. Had they purchased the land? Had they been the first settlers thereon. Was it by conquest or gift? The pleading was silent on these vital details. The plaintiffs traced their genealogy to Achi. They claimed to be the descendants of Achi through Onewe. But the said genealogy was not in anyway linked to a devolution of the land in dispute through the plaintiffs' family..... The position is that as at the close to the plaintiffs' case, there was no evidence before the lower court as to a root of the title claimed by the plaintiffs."

There is finally the plaintiffs' claim for title to the land in dispute based on proof of their alleged possession of connected or adjacent land in circumstances rendering it probable that they are also owners of the land in dispute. This aspect of the plaintiffs' case was thoroughly considered by the learned trial Judge along side their claims to title to the land in dispute based on traditional evidence and acts of ownership and possession of the land in dispute. In the end the learned trial Judge, after setting out the well known 5 methods by which ownership of land may be proved as adumbrated in Idundun v. Okumagba (1976) 9 - 10 S.C. 227 concluded thus:-

"Bearing the foregoing in mind, I am satisfied that plaintiffs' evidence is not such as would justify my preferring their traditional evidence to that of the Defence. I am also satisfied that they failed to adduce sufficient and credible evidence entitling them to a declaration of title to the parcels of land they claim on the basis of acts of persistent and permanent acts of ownership and long possession and enjoyment of either the parcels of land in respect of which their claim relates, or of connected or adjacent parcels of land in circumstances rendering it probable, nay, indeed, that they are owners also of adjoining parcels of land. In this connection may I observe that where the root of title is known and pleaded and not lost in antiquity and historical oblivion, the circumstances for any inference of title created by acts of ownership and long possession need not arise..... I am thus unable to sustain plaintiffs'

claim for a declaration for title on any of the 5 ways listed in Idundun's case (*supra*). It is also noteworthy that from the evidence of the Parties, the Defendants are at least, in possession of the parcels of land to which plaintiffs' claim relates and there is no evidence before me to justify any holding that plaintiffs'; alleged title to the 2 parcels of land is superior to that of the Defendants. Again, there is no credible evidence before me to justify my holding that the plaintiffs are in exclusive possession of the parcels of land to which their claim relates."

The Court of Appeal similarly reviewed the findings of the trial court on the various grounds relied by them for their proof of title to the land in dispute and had no reason to interfere with them. It concluded:-

"In the final conclusion, it is my view that the plaintiffs' case deserved to fail before the lower court as was the case."

I have myself given a most careful consideration to the above finding of both courts below and can find no reason to fault them. I will now turn to the contention of the learned Senior Advocate to the effect that the plaintiffs' survey plan, Exhibit A, has no relationship with the defendants' plan, Exhibit D, and that the defendants were consequently fighting for a piece or parcel of land different from the one claimed by the plaintiffs.

This question was no where raised by the plaintiffs in their grounds of appeal or in the issues distilled therefrom for the determination of this appeal. Consequently that issue must be regarded as baseless and incompetent as an appellate court can only hear and decide on issues raised on the grounds of appeal filed before it.

See *Management Enterprises v. Olusanya* (1987) 2 N.W.L.R. (Part 55) 179. Be that as it may, but with profound respect to learned Senior Advocate, I find it difficult to accept the above submission as well founded. It is, perhaps, convenient at this stage to cast a glance at the pleadings of the parties.

Paragraphs 6, 8 and 9 of the plaintiffs'[Statement of claims aver as follows:-

"6. The land the subject matter of this Suit (*hereinafter*) called the land in dispute is known and called "MASA" and "ANIObU"

7.

8. *The land in dispute is clearly shown in Survey Plan No. FCO/D25/76 filed with this Statement of claim and is verged green therein.*

9. *The land in dispute is bounded as shown in the said Survey Plan No. FCO/D25/76 filed with this Statement of Claim."*

B

The defendants in answer to the above paragraphs of the plaintiffs' Statement of Claim averred thus:-

"6. *In connection with paragraph 6 of the Statement of Claim, the defendants deny that the land in dispute is known as and called "MASA" and "ANIOBU". The introduction of the name "ANIOBU" by the plaintiffs is an afterthought.*

C

7.....

8. *The defendants deny paragraph 8 of the Statement of Claim and say that the land in dispute is more accurately shown on Plan No. EC / 324 / 76 filed with this Defence. The land in dispute is "MASA". Nkpo Uno land and Ugba Nduka land have been settled in favour of defendants since about 1940. Masa is still in dispute hence one C.I. Achiakpa of the plaintiffs' family wrote a letter to the 4th defendant dated 9th July, 1973 to come and settle the matter. The letter will be founded upon.*

D

9. *The defendants deny paragraph 9 of the Statement of Claim, and say that the plaintiffs' plan deliberately extended the land in dispute in order to create confusion."*

F

It is plain that the defendants by paragraph 6, 8 and 9 of their Statement of Defence denied the averments in paragraphs 6, 8 and 9 of the plaintiffs' Statement of Claim, stressing that the plaintiffs' survey plan No. FCO/D25/766, Exhibit A, "deliberately extended the land in dispute" and that the said land is "more accurately shown on plan No. EC/324/76," filed by the defendants. The plaintiffs in paragraph 31(a) of their Statement of Claim then claimed Declaration of title to the "pieces or parcels of land known as Masa and Ani Obu shown in survey plan No. FCO/D25/76, Exhibit A.

G

H

A close examination of Exhibit A shows without the slightest doubt that Masa and Aniobu lands, the subject matter of the plaintiffs' action are therein shown verged green. Paragraph 8 of the plaintiffs'

Statement of Claim clearly so indicates. Now, the land claimed by the defendants is shown verged yellow in their plan Exhibit D. It is clear that the entire eastern boundary of the land in dispute in both plans is indicated by the road from Inyiagu stream to Oji River - Awgu road. There is also the south eastern boundary of the land in dispute in both plans which is indicated by an ancient ekpe boundary wall. At the northern end of the both plans is shown the compound of Godfrey Ikedinma. There is next the road to Umuakpu which traverses the land in dispute in both plans. Additionally, there is also the Sabbath Mission Church premises shown west of the said road to Inyiagu stream but within the land in dispute in both plans. There is finally the house of the 1st plaintiff which is south but outside the land claimed by the defendants and within the land claimed by the plaintiffs. **It is crystal clear from the above features that the land claimed by the defendants verged yellow in Exhibit D is part and parcel of the land in dispute verged green in the plaintiffs' plan, Exhibit A. It cannot therefore be correct, as contended by the learned Senior Advocate, that the defendants were fighting for a piece or parcel of land in the present case that is different from the one claimed by the plaintiffs.**

It is by now crystal clear that Exhibit C did not create estoppel per rem judicatam against the defendants in the present case and that the plaintiffs woefully failed to establish their title to the land in dispute. In the circumstance, issues 1 and 3 must be resolved against the plaintiffs.

There is finally issue 2 which poses the question whether this is an appropriate case in which the court below ought to, have ordered a retrial. The submission of the plaintiffs is that the interest of justice demands that this action should be remitted for a retrial as the court below in its judgment misdirected itself as to the nature of the plaintiffs' case and made a wrong approach to the assessment of evidence by holding that the plaintiffs' case before the trial court rested only on traditional evidence.

For the defendants, it was submitted that it would not be right for the court to order a retrial in order to allow the plaintiffs who lost their case in both courts below to have a second bite at the cherry. Re-

lying on the case of Fadlallah v. Arewa Textile Ltd. (1997) 7 S.C.N.J. 202, it was submitted on their behalf that a retrial will be ordered where the error of the lower court has occasioned a miscarriage of justice. They contended that in the instant case, the plaintiffs had not shown how the court below or, indeed, the trial court had erred in this proceeding. B They argued that the plaintiffs were beating about the bush trying to rely on all the 5 ways of proving title to land as enunciated in the case of Idundun v. Okumagba (supra) but ended up not satisfying the court on any one of them.

An order for a new trial may be made where there has been C an error in law or an irregularity in procedure of such a nature that on the one hand the trial was not rendered a nullity and on the other hand the court is unable to say that there has been no miscarriage of justice. See *Bakare v. Apena* (1986) 4 N.W.L.R. (Part 33) D 1, *Abibu v. Bincetu and others* (1988) 1 N.W.L.R. (Part 68) 57, *Fadlallah v. Arewa Textiles Ltd.* (1997) 8 N.W.L.R. (Part 518) 546. Both courts below not only considered the plaintiffs' traditional evidence, they also considered the 1925 Native Court proceedings, Exhibit C and E the evidence of various acts of possession and ownership of the land in dispute tendered at the trial. I have myself given a careful consideration to the decisions of both courts below and can identify no error in law or an irregularity in procedure in those proceedings F capable of resulting in any failure of justice. Issue 3 is accordingly resolved against the plaintiffs. I will now turn to the cross-appeal.

The cross-appeal has arisen following the dismissal of the plaintiffs' appeal by the court below wherein that the court found itself G unable to agree with the learned trial Judge that Nkpo Uno and Ugba Nduka lands adjudged in favour of the defendants in 1940 are the same as Ani Obu land which the plaintiffs claimed in the present action. There can be no doubt that if that remark is an obiter dictum, the, of course, it will be a mere passing observation of no consequence which can not be H the subject matter of an appeal. If, however, that finding is a ratio decidendi, it will become vitally significant and may therefore be appealed against by any party thereby aggrieved. The defendants took no chances

and were prepared to concede that the said finding is not a mere obiter dictum but a ratio decidendi and have therefore cross-appealed against the same, urging this court to set aside the said finding of the Court of Appeal and restore the decision of the trial court on the point.

B Arguing the cross-appeal, learned counsel for the defendants referred to the decision in African Petroleum Ltd. V. Awodunni (1991) 8 N.W.L.R. (Part 210) 391 and submitted that the plaintiffs not having appealed against the relevant finding of the trial court in issue, the Court of Appeal was incompetent to rake up a matter which was not placed before it. It was submitted that the Court of Appeal raised the issue suo motu and formed its own opinion thereon without giving the defendants an opportunity to be heard. The plaintiffs concluded by stressing that the finding of the trial court was reached after a mature consideration of the relative facts and ought not to have been interfered with by the Court of Appeal. They urged the court to allow the cross-appeal.

The plaintiffs for their part, submitted that the finding of the trial court that Masa is the parcel of land in dispute when the defendants claimed a different piece of land is fatal to the case of the defendants. They argued that the Court of Appeal did not raise the issue suo motu as it is contained in the grounds of appeal, issues for determination and the briefs of the plaintiffs. They urged the court to dismiss the cross-appeal. I will now consider issue 1 of the cross-appeal.

F It is apparent from the conclusions I have reached in the main appeal that the Court of Appeal, quite rightly, dismissed the plaintiffs' appeal before it. However, that court in dismissing the appeal stated thus:-

G *"I have several times examined and compared the plans tendered by the plaintiffs and the defendants which are exhibits A and D respectively. I find that it is impossible by a visual examination of both to conclude that the lands shown as Nkpouno and Ugba Nduka in exhibit H 'D' are the same as the land depicted as 'Aniobu' in exhibit A. The only distinct common feature in the two plans are the lands of Umuezeogbara and Umuama lying to the north-west of both plans. The Southern boundaries of Nkpouno/Ugba Nduka and Aniobu lands do not seem to have*

common features. I am therefore unable to conclude as the trial judge did that a visual examination of the two plans will yield the conclusion that Nkpouno/Ugba Nduka lands in exhibit 'D' are the same as Aniobu land in exhibit 'A'."

With the greatest respect to the court below, it cannot be correct to hold, as the Court of Appeal did, that from a visual examination of the two plans Exhibit A and D, the pieces of land shown as Nkpo Uno and Ugba Nduka in the defendants' plan, Exhibit D, do not fall within that area of land in the plaintiffs' plan, Exhibit A, described as Ani Obu land. In the first place, the triangle of land enclosed in the north, east and west by two roads, to wit, the roads to Iyiagu stream and to Umuakpu village and in the south by ancient Ekpe boundary wall in both plans are unmistakably clear. That is the land which, according to the defendants, is Masa land in dispute in this action. For the plaintiffs, however, the land in dispute, from the pleadings, comprises, not only the said Masa land but also Ani Obu land which the plaintiffs have shown immediately west of the said Umuakpu road on their plan Exhibit A. The defendants, on the other hand, showed the same land west of the same Umuakpu road in their own plan, not as Ani Obu land, but as Nkpo Uno and Ugba Nduka pieces of land. However having regard to the compounds of Godfrey Ikedinma and Umeano Achiakpa shown immediately north and south respectively of the defendants Ugba Nduka land but which compounds are also indicated within the said land described as Ani Obu land by the plaintiffs, it is crystal clear that 'Nkpo Uno and Ugba Nduka pieces of land as shown in the defendants' plan, Exhibit D, fall within the land described as Ani Obu land in Exhibit A by the plaintiffs. **It is crystal clear to me that had the court below taken the trouble to identify the common permanent features in both plans, particularly the road to Umuakpu village, its junction with the road to Iyiagu stream and the said compounds of Godfrey Ikedinma and Umeano Achiakpa, it would have had not other option than to hold that the said Nkpo Uno and Ugba Nduka land as shown in Exhibit D fall within the Ani Obu land as shown in Exhibit A.** The court of Appeal, with respect, was therefore in error when

it reversed the finding of the trial court to the effect that the land the plaintiffs called Ani Obu which the defendants described as Nkpo Uno and Ugba Nduka land refer to one and the same parcel of land.

In the second place it is trite law that an appellate court can only hear and decide on issues raised on the grounds of appeal filed before it and an issue not covered by any ground of appeal is incompetent and will be struck out. See *Adelaja v. Fanoiki and Another* (1990) 2 N.W.L.R. (Part 131) 137 at 148, *Attorney-General, Anambra State v. Onuselogu Enterprises Ltd.* (1987) 4 N.W.L.R. (Part 66) 547 and *Management Enterprises v. Okusanya* (1987) 2 N.W.L.R. (Part 55) 179. **The Court of Appeal has no business whatsoever to deal with issues not placed before it.**

In the plaintiffs' grounds of appeal too the court below, the following were raised:-

"1. The learned trial Judge erred in law by holding the D.W.7's evidence was more credible than that of plaintiffs' witnesses.

2. The learned trial Judge erred in law when he held that the plaintiffs' Survey Plan did not clearly define the land in dispute.

3. The learned trial Judge erred in law by failing, refusing or neglecting to understand the issues to be determined by the court as pleaded by the parties and supported by evidence at the hearing.

4. Judgment is against the weight of evidence."

It is thus clear that the plaintiff nowhere appealed against that finding of the trial court where it held that Nkpo Uno and Ugba Nduka lands of the defendants were what the plaintiffs called Ani Obu. The issue was therefore not before the Court of Appeal and that court lacked competence to deal with such an issue not placed before it. See too *African Petroleum Limited v. J. K. Awodunni* (1991) 8 N.W.L.R. (Part 210) 391. I think the Court of Appeal was in error to have reversed the said finding of the trial court when no such issue was placed before it.

In the third place, the issue in question was raised *suo motu*, by the Court of Appeal without giving the defendants opportunity to be heard. In this regard it ought to be emphasised that when a

court raises a point *suo motu*, the parties must be given an opportunity to be heard on the point, particularly the party that shall be aggrieved as a result of the resolution of the point. See *Atanda v Lakanmi* (1976) 3 S.C. 109, *Adegoke v. Adibi* (1992) 5 N.W.L.R. (Part 242) 410 and 420, *Ejowhomu D. Edok - Eter Mandilas Ltd.* (1986) 5 B N.W.L.R. (Part 31) 1.

In the present case, the Court of Appeal raised suo motu the issue of the link between Nkpo Uno, Ugba Nduka and Aniobu lands and drew conclusion thereon without giving the defendants an opportunity to be heard and was therefore in breach of the defendants' right to fair hearing. See *Ugo v. Obiekwe* (1989) 1 N.W.L.R. (Part 9) 566 at 581, *Oje v. Babalola* (1991) 4 N.W.L.R. (Part 185) 867 at 280, *Alhaji Aliyu Ibrahim v. Judicial Service Committee, Kaduna State* (1998) 14 N.W.L.R. (Part 584) 1. **In my view the Court of Appeal was in error by raising the issue of Nkpo Uno and Ugba Nduka land in relation to Ani Obu land and drawing conclusion there upon without giving the defendants an opportunity to be heard, thus occasioning a miscarriage of justice.** All three issues raised on behalf of the defendants in the cross-appeal are hereby resolved in favour of the defendants. C

In the final result and for all the reasons that I have given above, the main appeal is without substance and it is hereby dismissed. The cross-appeal has definite merit and it is hereby allowed. The judgment of the trial court dismissing the plaintiffs' claims as affirmed by the Court of Appeal is hereby further confirmed. There will be costs to the defendants against the plaintiffs which I assess and fix at N10,000.00. D

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KARIBI-WHYTE JSC

I have read the judgment of my learned brother Iguh, JSC in this appeal. I agree with the reasons therein for dismissing the appeal. I too will and hereby dismiss the appeal with N10,000 as costs against the Appellants. F

OGWUEGBU JSC

I have had the advantage of a preview of the judgment just delivered by my learned brother Iguh, JSC. I agree with the reasoning and conclusions reached in the said judgment and also with the order as to costs.

KATSINA-ALU JSC

I have had the privilege of reading in draft the judgment which has just been delivered by my learned brother IGUH, JSC. I entirely agree with it. The issues have been meticulously and sufficiently dealt with that I find myself unable to add anything meaningfully. For the reasons which my learned brother IGUH, JSC. has given. I, too, would dismiss the main appeal as lacking in merit. The cross appeal is allowed. I would also affirm the judgment of the Court of Appeal with N10,000.00 costs to the defendants.

E

AYOOLA JSC

I have had the privilege of reading in advance the judgment just delivered by my learned brother, Iguh, JSC. For the reasons he gives, I too would dismiss the main appeal. The reason for the cross-appeal is not immediately evident. It is probably to put it beyond doubt that the finding of fact complained of should not be allowed to stand so as to create an issue estoppel. To that extent a pronouncement of this court to the effect that the determination of that particular issue of fact by the court below was erroneous is of some use. For the reasons given by my learned brother, Iguh, JSC and for that purpose mentioned above, I too allow the cross-appeal and set aside the finding of fact complained of in the cross-appeal. The result of this is that the finding of fact made by the trial judge on the issue is restored.

I too will order N10,000 costs against the appellants.