

SUPREME COURT OF NIGERIA
13TH JULY, 2001. SC. 140/1996
CORAM:- S. U. ONU, A. I. IGUH, A. I. KATSINA-ALU,
O. ACHIKE, E. O. AYOOLA, JJSC.

OKAFOR ADONE & 2 ORS.

(For themselves and on behalf of PLAINTIFFS/APPELLANTS
members of Ire village Enugwu-Ukwu)

AND

1. OZO GABRIEL IKEBUDU & 2 ORS.

(For themselves and on behalf of
members of Umuriam DEFENDANTS/RESPONDENTS
Obunese Family Nawfia)

4. LAZARUS CHINWUKO & 2 ORS.

(Joined by Order of court made on
15th July, 1985)

ESTOPPEL - Cause of action estoppel - When raised - Normally the cause of action estoppel is raised as a defence to the Plaintiff's action (H 1)

ESTOPPEL - Res judicata - Issue estoppel - Proper place for a Plaintiff to raise the question - Is in the reply to the statement of defence - But where raised in the statement of claim - It should be with particularity (H 2)

JUDGMENTS - Estoppel - Proof - Issue of fact - Where not sufficiently proved - The issue must be resolved against the party - On whom the burden of proof lies (H 4)

LAND LAW - Possession - Judgments - Dismissal of claim where there is no counter claim - Does not ipso facto lead to an order that the claimant - Should cease to enjoy the use and possession of the land in dispute (H 5)

LAND LAW - *Title to land - Declaration of - Plaintiff succeeds on the strength of his case - And not on the weakness of the defence (H 3)*

FACTS

In the High Court of Anambra State, the Plaintiffs/Appellants claimed against the Defendants/Respondents for a declaration that they are the "*rightful people*" for the grant of customary right of occupancy to land Coloured Pink on a Plan NEC/205/80, damages for trespass and injunction. The Appellants relied on traditional evidence and acts of ownership for their claim. They averred that the land which was part of a larger piece of land belonging to the Appellants known as Mgbenu Awani Ire was founded by their ancestor, Ire, and that by succession it devolved on the community consisting of the six quarters of Ire village. They averred further that the land in dispute had been owned and cultivated by them from time immemorial and, that they performed other acts of ownership such as, burying their dead and building market stalls on it. They alleged that the respondents, sometime in April, 1980, destroyed a poultry building and corn crops on the land. Hence, they instituted this action claiming as hereinbefore stated. They further averred that the respondents (as Plaintiffs) in a previous suit (No. AA/23/71) sued them over the same land and lost. They relied on the said suit and on Plan No. MEC/98/72 used in that suit as constituting issue estoppel..

The respondents denied the claim. It was their case that the area then in dispute is different from that in dispute in the present proceedings. At the conclusion of hearing, the learned trial judge found that the area litigated on in 1971 suit is different from the land in dispute in the present proceedings and that therefore, *res judicata* could not be relied on "*for ownership of the land now in dispute*". He then proceeded to consider the evidence of traditional history and acts of ownership. He found that the evidence of traditional history adduced by the appellants was vague and the evidence of acts of ownership was not established. Accordingly he dismissed the action. The Appellants appealed unsuccessfully to the Court of Appeal. They have now further appealed to the

Supreme Court and only one issue arose for determination.

ISSUE FOR DETERMINATION

Whether the court below was right in holding that issue estoppel did not avail the appellants.

HELD: (Unanimously dismissing the appeal per leading judgment of **AYOOLA JSC**)

Cause of action estoppel

1. Normally, the place for raising the plea of estoppel is in the defence where the cause of action estoppel is raised as a defence to the plaintiff's action (See Yoye v Olubode & ors [1975] 3 SC 220, 222). A plaintiff who seeks relief from the court in an action is not expected to raise the self-defeating plea that the same cause of action has been conclusively determined and had merged in the judgment in a previous action.

(p. 2375 E)

Res judicata - Issue estoppel

2. Where the specie of res judicata relied on by a plaintiff is issue estoppel the proper place for a plaintiff to raise the question is in the reply to the statement of defence after the issues arising in the case up to the stage of defence would have been ascertained and the plaintiff would be in a position to know and state with clarity the issues he would contend the defendant is precluded from raising by virtue of the judgment in a previous action. Where he chooses to raise it in his statement of claim he should do so with particularity, stating the facts and circumstances relied on and the facts which the defendant ought not be admitted to deny. The proper manner of such pleading has been put in Bullen & Leake & Jacob's Precedents of Pleadings (13th ed.) at p. 1148 (p. 2375 G)

Title to land - Declaration of

3. It is common ground that since the appellants were defendants in the 1971 suit and did not counter claim in the suit nothing was awarded them in that suit. The law is clear and without per adventure that in an action for declaration of title to land the plaintiff succeeds on the strength of his

case and not on the weakness of the defence: Kodilinye v Odu (1935) 2 WACA 336. That a plaintiff in an action for declaration of title failed to prove the title he claims, either by traditional history or by acts of ownership, is not tantamount to such finding as would preclude the plaintiff in a subsequent action for declaration of title to land, in which he is the defendant, from denying the title of the plaintiff who was defendant in the previous action. (p. 2377 H)

Estoppel - Proof - Issue of fact

4. An issue of fact may be proved by an aggregate of facts. Where the aggregate of facts relied on to establish an issue of fact is insufficient, that issue must be resolved against the party who has to establish the issue. The issue of fact in the 1971 case was whether by reason of acts of ownership averred by the respondents as plaintiffs in that case they were owners of the land they claimed. That issue was resolved against them. They are precluded from raising that same issue as between themselves and the appellants in respect of the same land. But that is not the same as saying that when in their turn the appellants, now plaintiffs, raised a similar issue the respondents, now defendants, are precluded from insisting that they must establish such aggregate of facts as would justify a resolution of the issue in the appellants' favour, particularly in regard to a different parcel of land. The learned counsel for the appellants misinterpreted the judgment in the 1971 suit when he argued that it determined that the appellants were in possession and owners of the land in dispute notwithstanding that they did not counter-claim in that suit. I feel no hesitation, in agreement with the court below, in holding that res judicata of whatever specie does not avail the appellant. (p. 2379 D)

Land law - Possession - Judgment

5. Quite apart from the fact the lands in the two suits are not the same and that the purport of the findings in the judgment in the 1971 suit has been misunderstood and exaggerated, a dismissal of the appellants' case does not ipso facto lead to an order that they should cease to enjoy the use and possession of land since the respondents in this appeal have not

counter-claimed for any such relief in the case. (p. 2380 B)

NOTABLE POINTS OF INTEREST

AYOOLA JSC

1. Reliance on previous judgment - Necessity for proper pleadings

B

This prefatory reference to the distinction between cause of action estoppel and issue estoppel is indicative of the character of estoppel that is relevant to this appeal and draws attention to the need for proper pleadings when a plaintiff seeks to rely on the judgment in a previous action. Progressive condonation of laxity in matter of pleadings by court can only obfuscate the issues in a case and make determination of cases more tedious than it should be in a system of pleadings. (p. 2375 C)

D

2. How to raise issue estoppel in the statement of claim

For the plaintiff to purport to raise issue estoppel by his statement of claim without particularity leads to speculation and uncertainty as to what issue the defendant is to be precluded from raising. (p. 2376 C)

E

3. Party not to set up different cases at different levels of proceedings

A party should not be allowed to set up different cases at different stages of the proceedings, from the trial court through the intermediate appellate Court to the final appellate Court. (p. 2377 F)

F

4. Pleadings are not amended by argument of counsel on appeal

No doubt the appellants appreciated, albeit very late in the day, the deficiency in their pleadings and, they tried to rectify the deficiency in their arguments. However, pleadings are not amended by address of counsel nor, *a fortiori*, by arguments of counsel on appeal. It was not an issue in the case that the judgment in the 1971 suit decided any question of ownership beyond that put in issue by the respondent in respect of the land they claimed in that suit. All these considerations put the case outside the principle in Ladega v Durosinmi [1978] NSCC 174 where this court held that where issues are joined before the court in regard to a larger area,

G

H

whereas the claim for declaration of title is in regard to a smaller area, *and those issues are determined by the court*, those issues will create an issue estoppel in a subsequent litigation between the same persons over the larger area. (p. 2379 A)

B
IGUHJSC

5. Estoppel plea - What must be established for success

C For the plea of estoppel per rem judicatam to succeed, however, the party relying on it must establish the following requirements or pre-conditions, namely:-

(1) *That the parties or their privies are the same in both the previous and present proceedings;*
 (2) *That the claim or issue in dispute in both actions is the same;*

D (3) *That the res or the subject matter of the litigation in the two cases is the same;*

E (4) *That the decision relied upon to support the plea of estoppel per rem judicatam must be valid, subsisting and final and*

(5) *That the court that gave the previous decision relied on to sustain the plea must be a court of competent jurisdiction.*

F It is necessary to stress that unless all the above constituent elements or requirements of the doctrine are fully 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. (p. 2386 F)

G *6. Land in dispute - How determined*

I should, perhaps, start by stressing that the land in dispute in any claim for declaration of title to land or entitlement to a grant of statutory or customary right of occupancy in respect of land is, none other than that put in issue and claimed by the plaintiff. It is usually more particularly delineated in his survey plan and in respect of which the parties join issues. It must be clearly stated that the land in dispute in any suit is not that shown or claimed by the defendant in his Statement of Defence and/or in his survey plan unless such a defendant counter-claimed against the

plaintiff in respect of such land. (p. 2390 F)

REPRESENTATION

Frank Ezekwueche with Miss Irene Ekweozoh for the appellants
A. N. Anyamene SAN with C. N. Ekweozoh for the respondents

B

CASES REFERRED TO

Ukaegbu & Ors v. Ugoji & Ors. (1991) 6 NWLR (Part 196) 127 at 168

Fadiora & Anor v. Gbadebo & Anor (1978) 3 SC 219

C

Yoye v Olubode & ors [1975] 3 SC 220, 222

Sosan v Ademuyiwa [1986] 3 NWLR (pt.27) 241

Kodilinye v Odu (1935) 2 WACA 336

Ladega v Durosinmi [1978] NSCC 174

Osunrinde v. Ajamogun (1992) 6 NWLR (Part 246) 156

D

Fidelitas Shipping Co. Ltd. v. V.O. Exportchleb (1966) Q.B. 630

Bassil v. Honger 14 WACA 569 at 572

Joe Iga & Ors. v. Chief Amakiri (1976) 11 SC. 1 at pages 12-13

Ezeudu v. Obiagwu (1986) 2 NWLR (Part 21) 208

E

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

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

BOOK REFERRED TO

Bullen & Leake & Jacobs Precedents of Pleadings (13th ed.) p. 1148

F

LEAD JUDGMENT BY AYoola JSC

This is an appeal from the decision of the Court of Appeal Ejigunmi, JCA (as he then was), Tobi and Adamu, JJ.C.A, dismissing the appeal of the appellants from a decision of the High Court of Anambra State whereby the appellants' claim against the respondents for a declaration that they are "*the rightful people*" for the grant of customary right of occupancy to land coloured pink on a plan MEC/205/80 damages for trespass and injunction, was dismissed.

In the High Court the appellants relied on traditional evidence and acts of ownership for their claim; They averred that the land which

was part of a larger piece of land belonging to the plaintiffs known as Mgbenu Awani Ire and more particularly delineated and coloured blue on the plaintiffs' Plan No. MEC/205/80 attached to the Statement of Claim was founded by their ancestor, Ire, and that by succession it devolved on the community consisting the 6 quarters representing his six children and thereby became communal property of the six quarters of Ire village. They averred, further, that the land known and called "*Mgbenu Awani Ire land*" had been owned and cultivated by them from time immemorial and, that they performed other acts of ownership such as burying their dead and building market stalls on it. They alleged that the respondents, sometime in April, 1980, destroyed a poultry building and corn crops on the land. They then instituted the action which spawned this appeal. In their statement of claim as finally amended, they averred that the respondents (as plaintiffs) sued them over the same land and lost. They gave notice that: "*The plaintiffs in the current case would plead the said suit, No. A A/23/71 and will rely on the said suit*" and on a plan No. MEC/98/72 used in that suit.

The original defendants who are 1st -3rd respondents, and the joined defendant, who are the 4th to 6th respondents, in this appeal denied that the land in dispute, which is the area edged "*pink*" on a plan MEC/205/80 attached to the appellants' statement of claim "*is owned, or has ever been owned*" by the plaintiff or that it was a part or a larger parcel of land belonging to the plaintiffs and called Mgbenu Awani Ire. They averred that the land fell within the land originally owned in common by the family of Umuriam Obunese which, following *successive sharing of progenitors land in accordance with custom now comprises lands allotted to descendants of Oguno and are specifically dwelling lands allotted to Lazarus Chinwuko, Edward Chinwuko and Ikechukwu Okeke Oguno.*" These persons mentioned were 4th to 6th defendants joined by order of the High Court. They averred occupation of contiguous lands and land within the area in dispute in paragraphs 8, 9, 6, 13 and acts of ownership in paragraph 16 and 17. The joint statement of the 4th to 6th respondents was on similar lines. The respondents averred that the area in dispute in suit No. AA/23/71 in which the original defendants

herein were plaintiffs, was the area verged "green" on their plan MG/AN. 423/81 and on the 4th - 6th respondents' plan No. MG/AN.423/85. It was the respondents' case that the area then in dispute is different from that in dispute in the present proceedings.

At the trial, the appellants relied on the decision in the previous suit ("*the 1971 suit*") as constituting issue estoppel. In the 1971 suit they were the defendants and the respondents' family claimed against the present appellants "*declaration of title to land known as Owelle-Amadi and shown verged Pink in plan No. OKE/ D31/ 72*", possession of the land and damages for trespass. They relied on traditional evidence and acts of ownership in support of their claim. As shown by the judgment of the High Court (Aseme, J. (as he then was)) in the case the two main issues in the case were:

"(1) *whether the Plaintiffs are owners of the land in dispute verged pink on Plan Exhibit A and the defendants their customary tenants thereof.*"

"(2) *whether the Plaintiffs challenged the defendants when the building which was later leased to multi Co-operative Society, they being erected by the Defendants on the land in dispute.*"

Aseme, J., observed that the land in dispute formed part of a larger piece of land which both sides claimed to be their own and that "*pursuant to this both sides have shown on their respective plans various acts of possession or ownership within this greater piece of land apart from the land in dispute.*" But he cautioned that:

"*apart from these alleged acts, any consideration regarding the area outside the land in dispute verged Pink in Exhibit A would be going outside the scope of the claim and issues joined by the parties.....*"

He found specific acts alleged by the respondents (then plaintiffs) not proved. Such were: the use of portion as burial ground, farming on the land "*immediately outside the land in dispute*", some building on the land. At the end, the learned judge found that "*the plaintiffs never exercised those acts in enjoyment of the area surrounding the land in dispute as they contend.*" As for a Multi-Purpose Co-operative Society building he found that the present appellants exercised acts of ownership over the

building '*nec clam nec precario*' before the outbreak of the Nigeria civil war.

As for evidence of tradition. Aseme, J., found "*the testimony of the plaintiff on the issue of tradition concocted.*" He therefore dismissed the claim to the land then in dispute by the present respondents. Aseme, J's judgment was confirmed by the Court of Appeal.

In the High Court they contended that the present proceedings and the 1971 suit were in respect of the same land. The area in dispute in the present proceedings is that area shown on the plan No. MEC/205/80, admitted in evidence as Exhibit A. The area in dispute in the 1971 case was shown on the respondents' plan No. MG/AN. 423/85 tendered as exhibit H and verged green thereon. The respondents' surveyor (DW 4) said in his evidence that he super-imposed Exhibit A on his own plan Exhibit H and that it was easy for him to mark out the area cause of action verged red in exhibit H and that it is pink in Exhibit A.

The trial judge found that the area litigated on in the 1971 suit is different from the land in dispute in the present proceedings and that, therefore, *res judicata* could not be relied on "*for ownership of the land now in dispute.*" He then proceeded to consider the evidence of tradition and acts of ownership. He found that the evidence of traditional history adduced by the appellants was vague and incomprehensible and unrelated to features inserted in Exhibit A. On evidence of acts of ownership he was of the opinion that the appellant's witness "*merely referred to enjoyment of economic crops and farming without specifying the area involved.*" He observed that only act of ownership mentioned was the lock-up store, not shown in exhibit A and, that the poultry house destroyed was also not inserted in Exhibit A by the licensed surveyor PW4. It was clear from his findings that on the preponderance of evidence he considered the respondents' case more probable. He found that:

"Evidence given tilts in favour of the defendants who have established by various acts of ownership that they have been in possession of the land in dispute for twenty years."

In the event, he dismissed the action because as the put it:

"Putting in focus the authorities cited above and evidence ad-

duced, the answers to the questions raised earlier in this judgment are in the negative for res judicata cannot apply and no credible evidence has been given to support acts of ownership or passed the litmus test propounded (sic: propounded) in relation to traditional history to warrant judgment for plaintiffs."

The appellants appealed from the decision of the High Court to the Court of Appeal raising two main issues, namely:

(1) *whether the judgment in the 1971 suit did not constitute issue estoppel with respect to the entire land verged blue in Exhibit A so as to avail the appellants;*

(2). *whether the judgment was not against the weight of evidence.*

The court of Appeal dismissed the appellants' appeal. In the leading judgment delivered by Adamu, JCA, with which the rest of the court agreed, the learned Justice of Court of Appeal held that both res judicata and issue estoppel did not avail the appellants and, that as their case virtually rested on the question of res judicata the second main issue must be resolved against them.

On this further appeal, the only issue is whether the court below was right in holding that issue estoppel did not avail the appellants. Learned counsel for the appellants put the appellants' case on this appeal this way in the appellants' brief:

".....the appellant argues that in suit AA/23/71 Exhibit C the main/principal claim of the Respondents against the Appellants is that as owners of the land in dispute in Exhibit G they have been in of (sic) the land in dispute from time immemorial who granted customary tendency to the appellants..... thus the issue which was joined between the Appellants and the Respondents in Suit No. AA/23/71 was whether the Appellants or Respondents were the owners of the land in dispute in Exhibit B and G respectively."

It was contended that in the resolution of that issue Aseme, J., (as he then was) made *"Far reaching findings of fact on ownership and acts of possession."* Some of the findings, highlighted, were that the present respondents (then plaintiffs) *"never exercised those acts in enjoyment of*

the area surrounding the land in dispute as the contend"; that he did not form the impression that the respondents' people ever farmed on the land immediately outside the land in dispute. That the appellants (then defendants) in 1963 commenced to build lock up stalls within the land in dispute; that the respondents not being in possession of the land, the claim for trespass was misconceived; and, that the testimony of the respondents on the issue of tradition was highly unconvincing and unreliable. In the submission of learned counsel for the appellants, from all these findings:

"..... on a proper interpretation of the judgment in Suit AA/234/71 Exhibit /C decided that it was the Appellants and not the Respondents who were in possession and owners of the land in dispute of the land (sic) notwithstanding the fact that the Appellants did not counter-claim in the Suit, and that issue estoppel as far as title to the land was concerned operated against the Respondents in the present Suit."

It was further argued that Aseme, J., settled the issue of ownership, possession and acts of ownership not only in respect of the land in dispute in Exhibit A and G but farming in surrounding lands and in favour of the appellants. It was submitted that what was put in issue in the 1971 suit was title to the land denoted in Exhibit B and G in the present suit and that there being identity of subject matter and parties res judicata availed the appellants by virtue of the judgment of the High Court and the Court of Appeal in the 1971 suit, respectively exhibits C and D in the present proceedings.

In agreement with the trial High Court and the Court of Appeal the substance of the argument of counsel for the respondent is that the subject matter of the two suits were not the same and that consequently, res judicata, of whatever specie, did not avail the appellants. Learned counsel for the respondents referred to the appellants' brief in the court below in which it was conceded that the lands in dispute in the two suits were not the same.

The distinction between cause of action estoppel and issue estoppel is long standing and has been pronounced upon in several cases coming before this court. Both are regarded as species of the doctrine of

res judicata. In Ukaegbu & Ors v. Ugoji & Ors. (1991) 6 NWLR (Part 196) 127 at 168 Akpata, JSC. stated the distinction between the two thus:

"The classification of estoppel under estoppel by judgment is related to the purpose for which the judgment is used. If it is intended to be used to permit another suit founded on the same cause of action as the original suit, the decision in the original action is said to constitute res judicata. If on the other hand, the subsequent proceedings as looked at on a different cause of action....as in the instant case, issue estoppel can operate only to prevent certain issues which were decided in the original action from arising for further consideration by the court. See also, Idigbe, JSC, in Fadiora & Anor v. Gbadebo & Anor (1978) 3 SC 219."

This prefatory reference to the distinction between cause of action estoppel and issue estoppel is indicative of the character of estoppel that is relevant to this appeal and draws attention to the need for proper pleadings when a plaintiff seeks to rely on the judgment in a previous action. Progressive condonation of laxity in matter of pleadings by court can only obfuscate the issues in a case and make determination of cases more tedious than it should be in a system of pleadings.

Normally, the place for raising the plea of estoppel is in the defence where the cause of action estoppel is raised as a defence to the plaintiff's action (See Yoye v Olubode & ors [1975] 3 SC 220, 222; Sosan v Ademuyiwa [1986] 3 NWLR (pt.27) 241.) A plaintiff who seeks relief from the court in an action is not expected to raise the self-defeating plea that the same cause of action has been conclusively determined and had merged in the judgment in a previous action. Where the specie of res judicata relied on by a plaintiff is issue estoppel the proper place for a plaintiff to raise the question is in the reply to the statement of defence after the issues arising in the case up to the stage of defence would have been ascertained and the plaintiff would be in a position to know and state with clarity the issues he would contend the defendant is precluded from raising by virtue of the judgment in a previous action. Where he chooses to raise it in his statement of claim he should do so with

particularity, stating the facts and circumstances relied on and the facts which the defendant ought not be admitted to deny. The proper manner of such pleading has been put in Bullen & Leake & Jacob's Precedents of Pleadings (13th ed.) at p. 1148 thus:

B *"The plea of estoppel can only be raised in the manner of defence, but it could appear in the statement of claim, e.g. to found an 'estoppel by convention'. It usually contains the allegation, either before or after stating with full particular the facts and circumstances relied on, that the opposite party 'is estopped from saying' or 'not to be admitted to say'".*

C *For the plaintiff to purport to raise issue estoppel by his statement of claim without particularity leads to speculation and uncertainty as to what issue the defendant is to be precluded from raising. It is because the*
D *appellants merely pleaded in this case that the "plaintiffs in the current case would plead the said Suit No. AA/23/7 and will rely on the judgment of the said suit and on the said plan No. MEC/98/72 dated 18/11/72"*
E *that much confusion had arisen at the trial and on the appeal, not only as to the specie of res judicata that is said to have been pleaded but also, as to what issue it was later contended the respondents were to be precluded from re-litigating. It was by reason of this state of pleadings that the learned trial judge could not go beyond holding that:*

F *"the principle of res judicata cannot be relied upon by the plaintiffs for ownership of the land now in dispute as it is quite a different land litigated upon in Exhibit C & D and further more the dismissal of current defendants' case in Suit No. AA/23/71 in which they were plaintiffs does not confer ownership of the land in Exhibit G to present plaintiffs."*

G *The Court of Appeal, apparently out of abundance of caution, considered both species of res judicata, trying the best they could, in regard to issue estoppel, to fathom what the issues were that the respondents were to be*
H *precluded from litigating. It was in this context that Adamu, JCA, who delivered the leading judgment of that court said:*

".....I must first of all indicate that in his address at the lower court the learned counsel for plaintiffs/appellants stated that they were

using the previous judgment of 1971 suit against the defendants/respondents for the issue of traditional history (see page 141). However in the appellants' brief (at page 18) it is stated that: 'On the state of the pleadings as shown issues were joined, principally on the identity of land in dispute in the 1971 and the present suits.' "I will accept the above version from the brief as correct and take it that the purpose for which the plaintiffs/appellants sought to use the previous judgment of 1971 suit as an issue estoppel was to preclude the defendant/respondents from either pleading or adducing evidence on the identity of the land in dispute which had been settled in the said previous judgement." (Emphasis mine) Now on this appeal, as has been seen, the appellants say the issues that the respondents should be estopped from raising are as to ownership and acts of ownership. This, surely, is an unsatisfactory state of affairs which would have been avoided had there been sufficient adherence on the part of counsel to and, firmness on the part of the trial court in enforcing, the rules of pleadings.

Be that as it may, I turn to the substance of the appeal as argued. There is considerable force in the submission of counsel for the respondents that the land in dispute in the 1971 suit and that in the present proceedings are not the same. I do not see how the appellants could with any justification contend to the contrary on this appeal when in the court below they were emphatic in the brief filed on their behalf, as pointed out by counsel for the respondents, that: "In this present case, the appellants who were defendants in the 1971 suit are themselves suing for title with respect to a different piece of land." (Emphasis is mine). A party should not be allowed to set up different cases at different stages of the proceedings, from the trial court through the intermediate appellate Court to the final appellate Court.

Since the lands in dispute in the two suits are not the same, counsel for the appellants tried to show what issues determined in the 1971 suit the respondents should be precluded from relitigating in this case. **It is common ground that since the appellants were defendants in the 1971 suit and did not counter claim in the suit nothing was awarded them in that suit. The law is clear and without per**

adventure that in an action for declaration of title to land the plaintiff succeeds on the strength of his case and not on the weakness of the defence: Kodilinye v Odu (1935) 2 WACA 336. That a plaintiff in an action for declaration of title failed to prove the title he claims, either by traditional history or by acts of ownership, is not tantamount to such finding as would preclude the plaintiff in a subsequent action for declaration of title to land, in which he is the defendant, from denying the title of the plaintiff who was defendant in the previous action. The essential finding where a plaintiff claims declaration of title to land is whether the evidence of traditional history adduced by him is acceptable or not. In regard to acts of ownership, that the plaintiff has failed to establish acts of ownership sufficient to establish the probability of his title to the land he claims, does not logically translate to a finding that the defendant who has not counter-claimed has proved such acts of ownership as would lead to the probability that he owns the land.

In this case the findings highlighted by counsel for the appellants cannot reasonably be held to preclude the respondents from denying that the appellants exercised such acts of ownership in regard to the land in dispute or land related thereto by contiguity as to raise the probability that they were owners, particularly, of land different from that litigated upon in the previous suit. Although Aseme, J., did observe that the land in dispute formed part of a larger piece of land which both sides claimed to be their own, he was careful to confine his consideration of the case to the land in dispute for, he said:

"Any consideration regarding the area outside the land in dispute verged pink in Exhibit A would be going outside the claim and issue joined by the parties" (Emphasis mine)

Besides, learned counsel for the respondents was right when he argued that in their pleading in the present suit the appellants did not plead as they argued in their brief in the court below, that *"the present cause of action forms part of their larger piece of land which was the subject of the 1971 suit wherein the respondents as plaintiffs lost. "or, that "The judgment were pleaded to show that they were delivered with respect to the entire*

land verged blue in the two plans of which the present cause of action forms part." No doubt the appellants appreciated, albeit very late in the day, the deficiency in their pleadings and, they tried to rectify the deficiency in their arguments. However, pleadings are not amended by address of counsel nor, *a fortiori*, by arguments of counsel on appeal. It was not an issue in the case that the judgment in the 1971 suit decided any question of ownership beyond that put in issue by the respondent in respect of the land they claimed in that suit. All these considerations put the case outside the principle in Ladega v Durosinmi [1978] NSCC 174 where this court held that where issues are joined before the court in regard to a larger area, whereas the claim for declaration of title is in regard to a smaller area, *and those issues are determined by the court*, those issues will create an issue estoppel in a subsequent litigation between the same persons over the larger area.

An issue of fact may be proved by an aggregate of facts. Where the aggregate of facts relied on to establish an issue of fact is insufficient, that issue must be resolved against the party who has to establish the issue. The issue of fact in the 1971 case was whether by reason of acts of ownership averred by the respondents as plaintiffs in that case they were owners of the land they claimed. That issue was resolved against them. They are precluded from raising that same issue as between themselves and the appellants in respect of the same land. But that is not the same as saying that when in their turn the appellants, now plaintiffs, raised a similar issue the respondents, now defendants, are precluded from insisting that they must establish such aggregate of facts as would justify a resolution of the issue in the appellants' favour, particularly in regard to a different parcel of land. The learned counsel for the appellants misinterpreted the judgment in the 1971 suit when he argued that it determined that the appellants were in possession and owners of the land in dispute notwithstanding that they did not counter-claim in that suit. I feel no hesitation, in agreement with the court below, in holding that *res judicata* of whatever specie does not avail the appellant.

Learned counsel for the appellants took one final point in the alternative. He argued that should we hold that *res judicata* does not avail the appellants, we should, nevertheless, hold that the appellants who have been found to be in possession of the land in dispute and enjoying the use and possession of surrounding lands cannot be deprived of such use and possession. **Quite apart from the fact the lands in the two suits are not the same and that the purport of the findings in the judgment in the 1971 suit has been misunderstood and exaggerated, a dismissal of the appellants' case does not ipso facto lead to an order that they should cease to enjoy the use and possession of land since the respondents in this appeal have not counter-claimed for any such relief in the case.**

For the reasons which I have given, the appeal fails entirely and is hereby dismissed with N10,000.00 costs to the respondents.

ONU JSC

I had the advantage of reading in draft the judgment just read by my learned brother, Ayoola, JSC and with it I am in agreement that this appeal is without substance and it ought therefore to fail.

My learned brother has so meticulously considered the relevant facts and law pertinent to dispose of this appeal, that I will only make a brief comment in elaboration where necessary, of the two issues which each set of the parties herein has submitted for our determination. Indeed, as these two sets of issues clearly overlap each other or are inter-related, I propose to consider together only those proffered by the Appellants as, in my view, they will suffice to dispose of the appeal. These two Appellants' issues asks:

(i) *Was the Court of Appeal right to hold that based on Exhibit C and D the question of issue estoppel cannot avail the Appellants since Exhibit C did not make any specific order capable of enforcement and affecting the rights of the parties before the Court;*

(ii) *Was the Court of Appeal right to hold that the 3rd conditions, and in another breath the 2nd condition for the application of res*

judicata has not been satisfied?

The first issue is as to whether the Court of Appeal (hereinafter in the rest of this judgment referred as the court below) was right in holding that issue estoppel did not avail the Appellants in the case herein on appeal. The second question, on the other hand, is as to whether the finding of fact in the earlier Suit No. AA/23/71 (Exhibit C), are relevant in the determination of this Suit. B

To begin with, what is an estoppel?

In the case of Ukaegbu v Ugoji (1991) 6 NWLR (Part 196) 127 at 143 - 144, this Court defined estoppel as :- C

".....an admission or something which the law views as equivalent to an admission. By its very nature, it is so important, so conclusive, that the party whom it affects is not allowed to plead against it, or adduce evidence to contradict it..... Estoppel prohibits a party from proving anything which contradicts his previous acts or declarations to the prejudice of party, who relying upon them, has altered position." D

See also Section 151 of the Evidence Act in Part VIII thereof. In the above excerpts, there must be some previous act, declaration, act or omission intentionally made by a person which caused or permitted the other person to believe to be true and upon which the latter acted to his detriment. See Osunrinde v. Ajamogun (1992) 6 NWLR (Part 246) 156. E

The Supreme Court stated the law in Odjevwedje v. Echanokpe (1987) 1 NWLR (Part 52) 633 at 634 that there are two kinds of estoppel in the following words: F

"Now, there are two kinds of estoppel by record inter partes or per rem judicata, as it is generally known. The first is usually referred to as "cause of action estoppel" and it occurs where the cause of action is merged in the judgment, what is Transit in rem judicatam (see King v. Hoare (1844) B.M. & W.495 at 504). Therefore on this principle of law (or rule of evidence) once it appears that the same cause of action was held to lie (or not to lie) in a final judgment between the same parties, or their privies, who are litigation in the same capacity (and on the same subject-matter), there is an end of the matter. They are precluded from litigating the same cause of action. There is however a second kind of G H

estoppel inter partes and this usually occurs where an issue has earlier on been adjudicated upon by a court of competent jurisdiction and the same issue comes incidentally in question in any subsequent proceedings between the same parties (or their privies); in these circumstances, "issue estoppel" arises. This is based on the principle of law that a party is not allowed to i.e. he is precluded from contending the contrary or opposite of any specific point which having been once distinctly put in issue, has with certainty and solemnity been determined against him. See Outram v. Morewood (1803) 3 East 346. Issue estoppel applies whether the point involved in the earlier decision is one of fact or law or one of mixed fact and law."

Continuing, this Court further held:

"Moreover, for the principle to apply in any given proceedings all the pre-conditions to a valid plea of *estoppel inter partes* or *per rem judicatam* must apply, that is:

(1) The same question must be for decision in both proceedings (which means that the question for decision in the current suit must have been decided in the earlier proceedings.

(2) The decision relied upon to support the plea of *issue estoppel* must be final.

(3) The parties must be the same (which means that parties involved in both proceedings must be the same *per se* or by their privies)."

The term privies was considered by this Court in Coker v. Sanyaolu (1967) 9 and 10 SC. 203 at 223 wherein Idigbe, JSC of blessed memory said:

"Privies are of three classes and they are:

(1) Privies in blood (as ancestor and heir)

(2) Privies in law (as testator and executor, intestate and administrator)

(3) Privies in Estate as Vendor and Purchaser, lessor and lessee. See also 15 Halsbury Laws of England 3rd Edition page 196 Article 372 and also the case of Oyerogba v. Olaopa (1986) 2 C.A. 1 at page 11."

Indeed, the law on *issue estoppel* is well laid down in Samuel Fadiora v.

Festus Gbadebo & Ors. (1978) 3 SC. 219 where the Supreme Court quoted Lord Denning M.R's explanation from Fidelitas Shipping Co. Ltd. v. V.O. Exportchleb (1966) Q.B. 630 at page 640 thus:

"The issue having been decided by the court, can it be re-opened before the Umpire? I think not. It is a case of issue estoppel" as distinct from cause of action estoppel" a distinction which was well explained by Diplock L.J. in Thoday v. Thoday (1964) 2 NLR 371, 385. The law, as I understand it, is this; if one party brings an action against another for particular cause and judgment is given upon it, there is a strict rule of law that he cannot bring another action against the same party for the same cause. Transit in rem judicatum: See King v. Hoare (supra). But within one cause of action, there may be several issues raised which are necessary for the determination of the whole case.

The rule then is that once an issue has been raised and distinctly determined between the parties then as a general rule, neither party can be allowed to fight that issue all over again. The same issue cannot be raised by either party again in the same or subsequent proceedings except in special circumstance. See Bada Bee v. Habib Merican Noordin (1909) E AC 615 per Lord Macnaghten. And within one issue there may be several points available which go to aid one party or the other in his efforts to secure a determination of the issue in his favour. The rule then is that each party must use reasonable diligence to bring forward every point which he thinks would help him.

If he omits to raise any particular point from negligence, inadvertence or even accident (which would or might have decided the issue in his favour), he may find himself shut out from raising that point again, at any rate in any case where the self same issue arises in the same or subsequent proceedings."

Finally, estoppel it is stated, prohibits a party from proving anything which contradicts his previous acts or declaration to the prejudice of a party who, relying upon them, has altered his position. It shuts the mouth of a party - see Bassil v. Honger 14 WACA 569 at 572 and Joe Iga & Ors. v. Chief Amakiri (1976) 11 SC. 1 at pages 12-13. See also Ezeudu v. Obiagwu (1986) 2 NWLR (Part 21) 208.

Now, applying the principle of res judicata and issue estoppel to our present case, I think it will portray a better picture to us if we put the parties in the suit before Aseme, J. in suit No. AA/23/71 verged pink in the plan No. OKE/31/72 (Exhibit G), and compare same with the piece or
 B parcel of No. OKE/31/72 (Exhibit G), and compare same with the piece or parcel of land currently in dispute verged pink in the present Appellants' plan No. MEG/205/80 (Exhibit A) whereof the learned trial judge, Obiesie, J. in his judgment had this to say:-

*"In the evidence adduced, the plaintiffs maintained that the same
 C piece of land was involved and tendered Exhibit A and B to that effect while the defendants in contradicting this piece of evidence tendered Exhibits G and H. The Suit in question is AA/23/71 and in the said case Chief S.N.C. Okeke and others for themselves and on behalf of Umuriam
 D Obunese Family of Nawfia filed the action as plaintiffs and tendered Exhibit A, now Exhibit G where the land, the cause of action is verged pink. The defendants, currently plaintiffs, all of Ire village Enugwu Ukwu tendered Exhibit B, now Exhibit B. Accordingly to present defen-
 E dants, land verged pink in Exhibit G, cause of action in Suit AA/23/71, is verged Green in Exhibit H. Exhibits A and H. are the same piece of land..... Exhibit B tendered by defendants in Suit AA/23/71 represented the plan of the piece of land which was not adjudicated upon by the court
 F in either Exhibit C or Exhibit D. From the above, it has been established to my utmost satisfaction that:*

- a) Exhibit A and H relate to the same piece of land and*
 - b) Exhibit G has not been shown to be the same piece of land as Exhibit A as contended by the plaintiffs.*
- G A thorough examination of Exhibit A shows definitely that it is larger than Exhibit G as Exhibit G does not extend beyond the Enugu-Onitsha Road."*

Seised of the appeal lodged from the trial court, the court below, H in what I consider to be a well considered judgment, opined (while dismissing the appeal) inter alia:-

"It is also stated by the Supreme Court in the above cited case that for the principles of issue estoppel to apply in any given proceedings

all the pre-conditions to a valid plea of estoppel inter partes or per rem judcatam must apply..... It is on this basis that I will hold that for the same grounds or reasons that res judcata (or cause of action estoppel) cannot be relied upon by the plaintiffs/appellants at the lower court - i.e. because the subject-matter was not shown to be the same in the two cases..... issue estoppel cannot also avail the said plaintiffs/appellants. I therefore accept the submissions in the respondents' brief on the point."

The court below finally concluded by saying:-

"Finally, on this first issue, I will hold that both res judicata and issue estoppel did not apply to the case of plaintiffs/appellants at the lower court."

I cannot agree more.

For the foregoing reasons and the more detailed ones set out in the leading judgment of my learned brother Ayoola, JSC, I too will answer the two joint issues argued together in the affirmative.

In the result, I too dismiss this appeal as completely devoid of substance and abide by the order as to costs therein contained.

IGUH JSC

I have had the privilege of reading in draft the judgment just delivered by my learned brother, Ayoola, JSC and I agree that this appeal is without substance and should be dismissed.

A close study of the briefs of arguments filed by both parties in this appeal does disclose that two issues arise for determination. The first is whether the Court of Appeal was right in holding that issue estoppel did not avail the appellants in the present case. The second question which, without doubt, is related to the first issue is whether the findings of fact in the earlier suit No. AA/23/71, exhibit C, are relevant in the determination of this suit. These issues are inter-related and it is convenient to treat them together.

It is judicially recognised by a long line of cases that estoppel per rem judicatam, usually referred to as estoppel by record is of two categories. There is the cause of action estoppel which precludes a party to

an action from asserting or denying as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in a previous litigation between the same parties. This is because it is against the rule of public policy for any one to be vexed twice on the same issues. See Adomba v. Odiese (1990) 1 N.W.L.R. (Part 125) 165 at 178. It is also an application of the rule of public policy that there should be an end to litigation. See John Omokhafa v. Esekhome (1993) 8 N.W.L.R. 58. In an appropriate case, the parties affected are estopped per rem judicatam from bringing a fresh action before any court on the same cause and on the same issues already decided or pronounced upon by a court of competent jurisdiction in a previous action. See Oyelakin Balogun v. Adedosu Adejobi (1995) 2 N.W.L.R. (Part 376) 131.

There is the second category of estoppel per rem judicatam known as issue estoppel, the rule being that once one or more issues have been raised in a cause of action and distinctly determined or resolved between the same parties in a court of competent jurisdiction, then as a general rule, neither party or his agent or privy is allowed to relitigate that or those decided issues all over again in another action between the same parties or their privies on the same issues. See Lawal v. Yakubu Dawodu (1972) 1 ALL N.L.R. (Part 2) 270 at 272, Olu Ezewani v. Nkali Onworli and others (1986) 2 N.W.L.R. (Part 33) 27 at 42 - 43, Samuel Fadiora and Another v. Festus Gbadebo and Another (1978) 3 S.C. 219 at 228-229.

For the plea of estoppel per rem judicatam to succeed, however, the party relying on it must establish the following requirements or pre-conditions, namely:-

- (1) *That the parties or their privies are the same in both the previous and present proceedings;*
- (2) *That the claim or issue in dispute in both actions is 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 of estoppel*

per rem judicatam must be valid, subsisting and final and

(5) That the court that gave the previous decision relied on to sustain the plea must be a court of competent jurisdiction.

It is necessary to stress that unless all the above constituent elements or requirements of the doctrine are fully 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, Idowu Alase and others v. Sanya Olori Ilu (1965) N.M.L.R. 66, Samuel Fadiora and Another v. Festus Gbadebo and Another (supra). So, in Ihenacho Nwaneri and others v. Nnadikwe Oriwa (1959) 4 F.S.C. 132, this court, per Abbot, F.J. giving the main conditions necessary for the operation of estoppel by record stated:-

"It is well known that before this doctrine (of estoppel per rem judicatam) can operate it must be shown that the parties, issues and subject matter were the same in the previous case as those in the action in which the plea of res judicata is raised."

(Words in brackets supplied)

Similarly in Samuel Fadiora and Another v. Festus Gbadebo and Another (supra), this court per Idigbe, JSC at pages 228-229 stated as follows:-

"Issue estoppel applies whether the point involved in the earlier decision is one of fact or law or one of mixed fact and law. However, for the principle to apply, in any give proceedings, all the preconditions to a valid plea of estoppel inter partes per rem judicatam must apply, that:-

(1) the same question must be for decision in both proceedings (which means that the question for decision in the current suit must have been decided in the earlier proceedings.

(2) the decision relied upon to support the plea of issue estoppel must be final.

(3) the parties must be the same (which means that the parties involved in both proceedings must be the same).

See too Odjewedje and Another v. Echanokpe (1987) 3 S.C. 47 at 70 - 71. The burden is on the party who sets up the plea of res judicata or issue estoppel to establish all the above pre-conditions conclusively.

In determining whether the issues, the subject matter of the two actions and the parties are the same, the court is permitted to study the pleadings, the proceedings and the judgment in the previous action. It may also examine other relevant facts to discover what was in issue in the previous case. See Samuel Fadiora v. Festus Gbadebo (supra). It is entirely a question of fact whether the parties and their privies, the facts in issue and the subject matter of the claim are the same in both the previous and the present suits. It is in the light of the above principles of law pertaining to estoppel per rem judicatam and issue estoppel that I must now consider if the decisions in the previous suit No. AA/23/71, Exhibit C and D constitute issue estoppel in the present proceedings as contended by the appellants or whether the court below was right in holding that the plea did not avail the appellants by reason of their failure to establish that the res, that is to say, the subject matter of the litigation in the two cases are not the same.

The central point that arises from the issues under consideration is whether or not the appellants were able to establish that the res or the subject matter of the litigation, that is to say, the land in dispute in both the previous proceedings, Exhibit C and D and the present action are the same.

In this regard the learned trial Judge after a close consideration of the evidence before the court together with the survey plans tendered had no difficulty in coming to the conclusion that the piece or parcel of land in dispute in suit No. AA/23/71 verged pink in the plan No. OKE/31/72, Exhibit G, is totally different from the piece or parcel of land in dispute in the present proceeding verged pink in the present plaintiffs' plan No. MEC/205/80, Exhibit A. Said the learned trial Judge:-

"In the evidence adduced, the plaintiffs maintained that the same piece of land was involved and tendered Exhibit A and B to that effect while the defendants in contradicting this piece of evidence tendered Exhibits. G and H. The suit in question is AA/23/71 and in the said case, Chief S.N.C. Okeke and others for themselves and on behalf of Umuriam Obunese family of Nawfia filed the action as plaintiffs and tendered Exhibit A, now Exhibit G where the land, the cause of action is verged

pink. The defendants, currently plaintiffs, all of Ire village Enugwu Ukwu tendered Exhibit B, now Exhibit B. According to present defendants, land verged pink in Exhibit G, cause of action in Suit AA/23/71, is verged green in Exhibit H, Exhibit A and Exhibit H are the same piece of land Exhibit B tendered by defendants in suit AA/23/71 represented the plan of the piece of land which was not adjudicated upon by the court in either Exhibit C or Exhibit D. B

From the above, it has been established to my utmost satisfaction that:

- (a) Exhibit A and H relate to the same piece of land and
- (b) Exhibit G has not been shown to be the same piece of land as Exhibit A as contended by plaintiffs. C

A thorough examination of Exhibit A shows definitely that it is larger than Exhibit G as Exhibit G does not extend beyond the Enugu-Onitsha Road." D

The above finding of the learned trial Judge was carefully examined by the Court of Appeal at the end of which exercise it had no reason to interfere with the same. That court per the leading judgment of Adamu J.C.A. with which Ejunmi, J.C.A., as he then was, and Tobi JCA. E agreed, stated:-

"It is therefore clear that the plaintiffs/appellants adduced evidence in the lower court to support their pleading that the subject-matter in both the old and the new suits (i.e. the land in dispute) was the same. F This evidence was however challenged and controverted by the defence witnesses. The defence also called their own private surveyor and tendered their own plan which was different from that of the plaintiffs/appellants in support of their denial. For the above reasons and on the basis of the pleadings and evidence adduced by the parties at the lower court, it cannot be positively said that the 3rd condition for the application of res-judicata (i.e. that the cause of action or subject-matter was the same in both the previous and the current suits). In the result I must hold that the second condition for the application of estoppel by judgment per rem judicatam has not been satisfied." G H

Turning more specifically to the question whether issue estoppel availed the appellants in the present case by virtue of the judgments,

exhibits C and D, the Court of Appeal commented:-

"It is also stated by the Supreme Court in the above cited case that for the principles of issue estoppel to apply in any given proceedings all the pre-conditions to a valid plea of estoppel inter partes or per rem judicata must apply..... It is on this basis that I will hold that for the same grounds or reasons that res judicata (or cause of action estoppel) cannot be relied upon by the plaintiffs/appellants at the lower court - i.e. because the subject-matter was not shown to be the same in the two cases..... issue estoppel cannot also avail the said plaintiffs/appellants. I therefore accept the submissions in the respondents' brief on the point." The court of Appeal then concluded:-

Finally, on this first issue, I will hold that both res judicata and issue estoppel did not apply to the case of plaintiffs/appellants."

I have myself given a most careful consideration to the above concurrent findings of both courts below and confess that I can find no reason to fault them. It is clear to me that the appellants' reliance on the plea of issue estoppel is based on the gross misconception that the land in dispute in the previous suit No. AA/23/71 is the same as the land in dispute in the present proceeding. In my view, nothing can be further from the truth, having regard to the evidence together with the survey plans tendered by the parties in both suits. I think it is convenient at this stage to examine the plans filed by the parties in both suits.

I should, perhaps, start by stressing that the land in dispute in any claim for declaration of title to land or entitlement to a grant of statutory or customary right of occupancy in respect of land is, none other than that put in issue and claimed by the plaintiff. It is usually more particularly delineated in his survey plan and in respect of which the parties join issues. It must be clearly stated that the land in dispute in any suit is not that shown or claimed by the defendant in his Statement of Defence and/or in his survey plan unless such a defendant counter-claimed against the plaintiff in respect of such land.

Now, the land in dispute in respect of which the respondents, as plaintiffs, claimed declaration of title in the earlier suit No. AA/23/71 is clearly shown and delineated in their survey plan in that case. That sur-

vey plan was tendered in evidence by the respondents in these proceedings as Exhibit G. The land in dispute then claimed is clearly shown and delineated in the said Exhibit G and therein verged pink. The respondents, as defendants in the present case, also tendered a survey plan of the land in dispute. This survey plan is Exhibit H which is a composite B plan. Exhibit H shows not only the land in dispute claimed by the appellants, as plaintiffs, in the present case verged pink, it also shows the land in dispute in suit No. AA/23/71 therein superimposed and verged green in the said survey plan. Additionally it shows the piece or parcel of land C claimed by the appellants, as plaintiffs, in the present case verged pink.

The appellants for their part and as defendants, in suit No. AA/23/71 also filed their survey plan of the land Exhibit B. This survey plan encompassed a vast and almost limitless area of land which covered the land in dispute as claimed by the respondents, as plaintiffs, in that suit D together with vast other lands. This extensive area of land the appellants claimed is verged pink in their said plan. They also filed another survey plan as plaintiffs in the present case. That survey plan is Exhibit A and it is a replica of their plan in the 1971 case, Exhibit B. The piece or parcel E of land put in issue and claimed by the appellants, as plaintiffs, in the present case is more particularly delineated in the said plan Exhibit A and is therein verged pink.

I need hardly repeat that it is trite law that the land in dispute in F the previous suit No. AA/23/71 is that piece or portion of land verged pink in the respondents' plan, Exhibit G. So, too, the land in dispute in the present proceedings is clearly none other than that piece or parcel of land shown verged pink in the plaintiffs plan, Exhibit A.

Two very prominent and permanent features have been shown G by both parties in all their four survey plans, to wit, the appellants' Exhibit A and B and the respondents' Exhibit H and G. These are the Onitsha-Enugu Trunk a major road and a second road which branches off the said Onitsha - Enugu road to Umuatulu Village. H

With these two features in view in all four survey plans, it must be crystal clear, seen to the blind, that the piece or parcel of land in dispute in suit No. AA/23/71 verged pink in Exhibit G lay west of the said

Onitsha to Enugu road. The plaintiffs/respondents in that suit did not put any land east of that trunk road in issue in that case.

On the other hand, the land in dispute claimed by the Plaintiffs/appellants in the present suit is shown verged pink in Exhibit A and B being a replica of Exhibit A. Again, that piece or parcel of land is clearly east of the same Onitsha-Enugu road.

The precise situs of the respective parcels of land in dispute in the two cases as above indicated is a matter of fact which, apart from the evidence accepted by both courts below, is as I have already observed, visible even to the blind, having regard to the survey plans of the parties. These survey plans clearly speak for themselves. The matter, is made even clearer from the respondents' composite plan, Exhibit H in which the land in dispute in suit AA/23/71 is shown verged green and that in dispute in the present action is also shown verged pink. The piece or parcel of land claimed in the previous suit is more particularly shown west of the said Onitsha-Enugu road whilst the piece of land in dispute in the present action is shown east thereof. With profound respect, I find it strange it was suggested that the piece or parcel of land in dispute in the 1971 case is the same as the parcel of land in dispute in the present action. I do not hesitate to accept the concurrent findings of both courts below on the issue as transparently accurate and well founded.

In this regard, reference must be made to the following submission of the appellants in their brief of argument before the Court of Appeal. They argued:-

(a) *The original suit is the 1971 suit. The cause of action in that suit is the portion verged red in Exhibit G. The Respondents claimed title to that piece of land. They lost.*

(b) *In the present suit, the cause of action is the portion verged red in Exhibit A. It is different from the cause of action in Exhibit G. The Appellants/Defendants in the 1971 suit, are now claiming title. Res judicata could only have availed the Appellants if, after they had lost in 1971, the Respondents again sued them with respect to the same portion of land verged red in Exhibit G in a subsequent action. That certainly is not the case here.*

In this present case, the Appellants who were Defendants in the 1971 suit are themselves suing for title with respect to a different piece of land. Even if they had sued with respect to the portion verged red in Exhibit G. They could not have relied on res judicata as the operation of that principle ousts the jurisdiction of the court." B

It is beyond dispute from the above submission that the appellants before the court below quite rightly conceded that res judicata did not avail them as the parcels of land in dispute in both cases are totally different. Speaking for myself, I find it difficult to appreciate why they now found it appropriate to somersault and adopt a different but indefensible posture on the same very issue. This is more so when there was no attempt whatsoever by them to challenge the accuracy of the superimposition in Exhibit H nor did PW4, Chief Mathias Chukwurah, their surveyor, dispute the locations of the parcels of land in dispute in both suits as superimposed. C D

The conclusion I have therefore reached is that whether it was the second or the third condition for the operation of the plea of res judicata that the court below stated was not established, the correct position remains that the res or the subject matter of the litigation in the two cases being different, the appellants failed to establish all the ingredients for a successful invocation of issue estoppel. No question of issue estoppel precluding the respondents from raising issues of possession and acts of ownership in respect of the land in dispute by virtue of the judgments, Exhibits C and D therefore arises in this case. E F

The appellants did however further submit in the alternative that such estoppel arose from the said judgment of Aseme, J. preventing the respondents from raising such issues of possession and acts of ownership in respect of lands surrounding the parcel of land in dispute. For the respondents, it was submitted that nothing can be further from the correct position in law. I need only state that it is clear from the judgment, Exhibit G, that all the issues considered by the learned trial Judge were in relation to the land in dispute verged pink in Exhibit G in these proceedings. Indeed, the learned trial Judge who tried the previous suit No. AA/23/71 carefully confined himself only to the land in dispute and did, quite G H

rightly, warn himself thus:

"any consideration regarding the area outside the land in dispute verged pink in Exhibit A would be going outside the scope of the claim and issues joined by the parties."

B He went on:-

"It was on this ground that I refused the application or invitation of learned counsel for the plaintiffs for inspection of the northern boundary of the land outside the area verged pink, the plaintiffs having not claimed that area."

C In my view, the court below, cannot be faulted when it held that no findings of fact in Exhibit C establish possession of the land in dispute in the present case in the appellants.

D It is for the above and the more detailed reasons contained in the judgment of my learned brother, Ayoola, JSC that I, too, dismiss this appeal as totally devoid of substance. I abide by the order as to costs therein made.

E

KATSINA-ALU JSC

My Lords, I have had the privilege of reading in draft the judgment or my Learned brother Ayoola, JSC. in this appeal. I entirely agree with it. I have nothing useful to add.

F For the reasons he has given, I also would dismiss this appeal with N10,000.00 costs to the Respondent.

G

ACHIKE JSC

I have had the privilege of reading the leading judgment of my learned brother, Ayoola, JSC. I agree with his reasoning and the conclusion that the appeal fails entirely. I, too, would dismiss this appeal with H N10,000.00 costs to the respondents.