

SUPREME COURT OF NIGERIA
FRIDAY 8TH FEBRUARY, 2002. SC. 176/1995
CORAM:- S. M. A. BELGORE, I. L. KUTIGI, A. I. IGUH,
A. I. KATSINA-ALU, E. O. AYOOLA, JJSC

CHIEF O. N. NSIRIM APPELLANT
AND
ALERUCHI ETCHESON NSIRIM RESPONDENT

LAND LAW - Title - Proof - Plaintiff must succeed on strength of his case - And not on weakness of defence - Except where defendant's case supports that of plaintiff (H1)

EVIDENCE - Pleadings - Contradictions in - Effect - Where evidence of party is at variance with his pleadings - His claim will fail (H2)

PLEADINGS - Binding nature of - Effect - Parties are bound by their pleadings - And evidence which is at variance with pleadings - Goes to no issue - And should be disregarded by court (H3)

CUSTOMARY LAW - Proof - Such law and customs must be proved - Except where court has taken judicial notice of them (H4)

CUSTOMARY LAW - Customs - Proof - Such law being an issue of fact - Places onus of proof on a party - Who alleges its existence (H5)

COURTS - Findings of facts - Where trial judge makes proper findings - Court of Appeal should not interfere - Save if the findings are perverse (H6)

APPEALS - Concurrent findings - Supreme Court does not interfere - Save where there is violation of principles of law - Or that such findings are perverse (H7)

ESTOPPEL - By conduct - Principle - Where party induces another to believe the existence of a thing - Such party is precluded from averring against the other - An existence of a different state of things (H8)

FACTS

Plaintiff/appellant is an uncle to defendant/respondent. Both parties having been living as members of the same family, until when appellant instituted this action against respondent at the High Court of Rivers State, Holden at Port Harcourt. Appellant's contention is that respondent is not a member of his (appellant's) family and therefore not entitled to any right over property of appellant's great grand father. Appellants also claimed damages for trespass and injunction restraining respondent from interfering with the said property. At the trial, appellant gave traditional evidence of how he inherited the land as the only surviving son of his father.

Appellant further contended that respondent's mother was married to DW1. As such, respondent is disqualified from inheriting anything from appellant's great grand father. Respondent on his own part contended that he bought the property in dispute from one Okpoko family and a receipt of purchase and conveyance was issued to him. Respondent further stated that his father never married his mother under the Ikwere Customary Law. Hence, he was a full member of appellant's family and thus entitled to share in the family's property. At the end of trial, the court dismissed appellant's claim. Appellant appealed to the Court of Appeal, Port Harcourt. That court also dismissed his claim. Aggrieved, appellant filed another appeal at Supreme Court.

ISSUES FOR DETERMINATION

"1. Whether the Plaintiff/Appellant has proved title to the land in dispute.

2. Whether the Plaintiff/Appellant proved the existence of any marriage between the Appellant's sister DW2 and the Defendant's/ Respondent's father; DW1, so as to disentitle the Defendant / Respondent from inheriting any part of NSIRIM's property.

3. Whether on the facts of this case, the pleas of estoppel, laches and Acquiescence avail the Defendant/ Respondent."

HELD (Unanimously dismissing the appeal per **IGUH JSC**)

LAND LAW - Title - Proof

1. It is trite law that in a claim for declaration of title to land, the onus of proof lies on the plaintiff who must succeed on the strength of his case and not on the weakness of the defendant's case except, of course, in cases where the defendant's case itself supports the plaintiff's case and contains evidence on which the plaintiff is entitled to rely. (p. 320 C)

EVIDENCE - Pleadings - Contradictions in - Effect

2. This discrepancy seems to me fatal to the appellant's case for if the evidence of a party is at variance with his pleadings, the claim would fail and stand dismissed. (p. 322 B)

PLEADINGS - Binding nature of

3. Parties are bound by their pleadings and evidence which is at variance with averments in the pleadings goes to no issue and should be disregarded by the court. (p. 322 C)

Native law & Customs - Proof

4. In this regard, the point must be made that native law and custom, otherwise also referred to as customary law, are matters of evidence on the facts presented before the court and must therefore be proved in any particular case unless, of course, they are of such notoriety and have been so frequently followed or applied by the courts that judicial notice thereof would be taken without evidence required in proof.
(p. 323 G)

Customs - Proof

5. The proof of customary law, being an issue of fact, clearly lies on the party alleging its existence. (p. 324 A)

COURTS - Findings of facts

6. In the first place, it is trite law that a trial Judge having had the opportunity of hearing witnesses and watching their demeanour in the witness box is entitled to select witnesses to believe or facts he finds proved and the Court of Appeal should not interfere with such facts unless they are perverse.
(p. 324 H)

APPEALS - Concurrent findings

7. So too, this court will not ordinarily interfere with the concurrent findings of the trial High Court and the Court of Appeal on essentially issues of fact where there is sufficient evidence on record to support them and where there is no substantial error apparent on the record of proceedings unless special circumstances are shown as violating of some principle of law or procedure or where such findings are shown to be perverse or patently erroneous and a miscarriage of justice will result if they are allowed to stand. (p. 325 A)

Estoppel - By conduct - Principle

8. Before considering the relevant facts as found by the trial court and affirmed by the Court of Appeal, it needs be restated that where one by his words or conduct willfully causes another to believe the existence of certain state of things and induces him to act on that belief so as to alter his own previous position, the former is precluded from averring against the latter a different state of things as existing at the same time. This is how the rule in estoppel by conduct otherwise also known as estoppel by matter in pais has been stated. I think both courts below are again on firm grounds by holding that on the facts, the appellant was estopped from denying that the respondent is a member of the family of the former. A clear case of estoppel was therefore established by the respondent in this case and I agree from the established facts that the appellant is estopped from denying respondent's membership of the Nsirim Ngba family. Issue 3 in so far as it pertains to the question of estoppel is hereby resolved against the appellant. (pp. 325 E/327 F)

REPRESENTATION

H Worgu Boms Esq. for the appellant
M. O. Abudu Esq. for the respondent

CASES REFERRED TO

Kodilinye v. Mbanefo Odu (1935) 2 WACA 336

Woluchem v. Gudi (1981) 5 SC 291
 Oduaran v. Asarah (1972) 1 All NLR (Pt. 2) 137
 Emegokwe v. Okadigbo (1973) 4 SC 113
 Odumesu v. African Continental Bank Ltd. (1976) 11 SC 261
 Kalu Njoku & Ors v. Ukwu Eme & Ors (1973) 5 SC 293
 Taiwo v. Dosunmu & Anor. (1965) All NLR (Reprint) 417 B
 Chinwendu v. Mbamali (1980) 3-4 SC 31
 Enang v. Adu (1981) 11-12 SC 25
 Igwego v. Ezengo (1992) 6 NWLR (Pt. 249) 561
 Lokoyi v. Olojo (1983) 8 SC 61 C
 Joe Iga & Ors v. Ezekiel Amakiri & Ors (1976) 11 SC 1
 Ude v. Nwara & Anor. (1993) 2 NWLR (Pt. 278) 638
 Nwadike v. Ibekwe (1987) 4 NWLR (Pt. 67) 718
 Giwa & Anor. v. Erinmilokun (1961) 1 SCNLR 377

D

LEAD JUDGMENT BY IGUH JSC

By a writ of summons issued on the 22nd day of November, 1985 in the Port Harcourt Judicial Division of the High Court of Justice, Rivers State, the plaintiff, who is now appellant, instituted an action against the defendant now the respondent claiming as follows: E

“(1) A declaration that the Defendant is the son of Adele Nlerum of Oro-owo in Rumueme and therefore not entitled to any share of properties or any rights over any properties of Akwaka Kpakani, the plaintiff’s Great Grand Father.

(2) The sum of N15,000.00 being damages for trespass committed by the Defendant when he broke and entered into Ekwu-Mgbabokwu land inherited by the Plaintiff from his Great Grand Father.

(3) Perpetual injunction restraining the Defendant, his servants or agents from further acts of trespass on the said Ekwu-Mgbabokwu or in any way laying claims to any properties or rights deriving from the said Plaintiff’s Great Grand Father - Akwaka Kpakani.”

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

The case accordingly proceeded to trial and the parties testified on their own behalf and called witnesses.

Essentially, the plaintiff’s case as pleaded is that the land in

dispute formed part of a larger piece or parcel of land which originally belonged to his ancestor Kpakani with members of his family who founded the same and became the first settlers thereon. The said plaintiff's ancestor allocated portions of the new found land to his three sons, the eldest of whom was Akwaka. On the death of their
B father, each of his three sons inherited the portion of the land allocated to him. Similarly on the death of his said sons, their respective portions of the land were inherited by their succeeding descendants. The plaintiff averred that the land in dispute formed part of the portion of their family land which was allocated to his great grand father,
C Akwaka, and that he inherited the same as the only surviving male child of his late father. He stated that the defendant was only the son of D.W.2, his elder sister of full blood, whose husband was D.W.1, one Adele Nlerum. He averred that the defendant being the son of
D the said D.W.1 who did not belong to their family was not entitled to inherit the property of the plaintiff's great grand father. The plaintiff claimed that the defendant unlawfully broke into the land and started construction work thereon without his prior consent hence this action.

E The defendant, for his own part, claimed that the land in dispute formed no part of the land which belonged to Kpakani. He averred that the land belonged to the Okpoko family who acquired the same as a spoil of war after successfully fighting the Rumueme and Rumopara war. The defendant claimed that he bought the land
F in dispute from the Okpoko family in 1978 and was issued with a receipt for the money he paid. He also obtained a conveyance in respect of the transaction. He further claimed to have farmed on the land for a while before he erected his New Era Hotel thereon without let or hindrance from the plaintiff or any one else. He completed
G the erection of his hotel on the land in 1981. Consequently he relied on the plea of laches and acquiescence as part of his defence. More importantly, the defendant asserted that his father, D.W.1, at no time married his mother, D.W.2 under their applicable Ikwere customary
H law. As a result he was a full member of the family. He contended that as a member of that family, he had equal rights with the plaintiff and the other male members of the family in respect of the enjoyment of their family properties including land. The defendant in support of his assertion relied on the plea of estoppel as a bar to the

plaintiff's denial that he is a member of that family. He argued that the plaintiff having regard to his various conduct which he particularized was estopped from claiming that the said defendant did not belong to the plaintiff's family.

At the conclusion of hearing, the learned trial Judge, Niki Tobi, J., as he then was after an exhaustive review of the evidence B dismissed the plaintiff's claims in their entirety. Said he:-

"After a very careful consideration of the pleadings and the oral evidence before me, I am of the opinion that the plaintiff has not proved his case on the balance of probabilities. His case fails. I therefore dismiss it." C

Dissatisfied with this decision of the trial court, the plaintiff lodged an appeal against the same to the Court of Appeal, Port Harcourt Division. The Court of Appeal in a unanimous decision on the 7th December, 1994 dismissed the plaintiff's appeal as lacking in D substance and unmeritorious.

Aggrieved by this decision of the Court of Appeal, the plaintiff has further appealed to this court. I shall hereinafter refer to the plaintiff and the defendant in this judgment as the appellant and the respondent respectively. E

Two original and four additional grounds of appeal were filed by the appellant against this decision of the Court of Appeal. It is unnecessary to reproduce them in this judgment. It suffices to state that pursuant to the Rules of this court, the parties through their F respective counsel filed and exchanged their written briefs of argument.

In the appellant's brief of argument the following issues were identified as arising for determination in this appeal, namely:-

"(a) Whether the Appellant needed to adduce evidence on his G ancestors deforestation of the land in dispute and acts of possession and ownership when (i) he had adduced sufficient evidence that his ancestors were the original founders of the land, and (ii) when the traditional histories of parties were not in conflict.

(b) Whether a significant aspect of the Respondent's case H supported the case of the Appellant and, at the same time, destroyed the basis or foundation of the case of the Respondent.

(c) Whether there was any legal evidence on record supporting the Respondent's pleas of laches and acquiescence, and if an-

swered in the negative, then whether the decision of the High Court upholding those pleas and the decision of the Court of Appeal confirming that High Court decision are not perverse.

(d) *The Fourth Issue for determination consists of three sub-issues namely:-*

B (i) *Whether or not the proper issue joined in respect of Appellant's Relief No. (1) is that the Respondent is disentitled from inheriting his maternal grandfather's properties under Rumueme Native Law and Custom or that he is entitled to inherit those properties under Ikwerre Custom, Culture and Tradition since his mother was unmarried.*

C (ii) *whether the decision of the High Court on the matter of estoppel (which was confirmed by the Court of Appeal) was not arrived at as a result of a misconception of the proper issue joined in the pleadings on the matter on Respondent's right of inheritance; and*

(iii) *Whether from the pleadings and evidence on record, the Appellant established the Rumueme Native Law and Custom he relied on.*

E (e) *The Fifth Issue for determination consists of three sub-issues namely:-*

(i) *whether the capacity of the parents of the Respondent to marry was an issue joined in the pleadings;*

F (ii) *the Court of Appeal was correct in raising that issue and deciding it against the Appellant without first affording an opportunity for the parties to be heard on it; and*

G (iii) *whether the Court of Appeal was correct in applying in the provisions the Marriage Law of Eastern Nigeria which came into force long after the contended marriage of the parents of the Respondents had taken place in 1944."*

H The respondent, on the other hand, submitted that having regard to the appellant's grounds of appeal, only three main issues arise for the determination of this appeal. These are set out as follows:-

"1. *Whether the Plaintiff/Appellant has proved title to the land in dispute.*

2. *Whether the Plaintiff/Appellant proved the existence of any marriage between the Appellant's sister DW2 and the Defendant's/*

Respondent's father, DW1, so as to disentitle the Defendant / Respondent from inheriting any part of NSIRIM's property.

3. Whether on the facts of this case, the pleas of estoppel, laches and Acquiescence avail the Defendant/ Respondent. "

I have closely examined the two sets of issues identified in the respective briefs of argument of the parties and it is clear to me that the three issues formulated on behalf of the respondent are sufficiently precise and comprehensive for the determination of this appeal. I shall in this judgment, therefore, adopt the set of issues formulated in the respondent's brief of argument for my determination of this appeal.

At the oral hearing of the appeal before us, both learned counsel for the parties adopted their respective briefs of argument and proffered additional submissions in amplification thereof.

The main contention of learned counsel for the appellant, W. Boms Esq. Under issue 1 is that the traditional evidence led by the appellant in support of the acquisition of the land in dispute by first settlement by his ancestors was sufficient to establish his title to the said land. He argued that there were no conflicts in the traditional histories of the parties to warrant the necessity by the court below to resort to the application of the rule in *Kojo v. Bonsie* (1957) 1 W.L.R 1223. He concluded by submitting that the evidence of D.W.3 supported the traditional evidence of the appellant and did destroy the traditional history relied upon by the respondent. He urged the court to resolve issue 1 in favour of the appellant.

Learned counsel for the respondent, M. O. Abudu Esq. in his reply submitted that the appellant completely failed to establish his ownership of the land in dispute. He pointed out that apart from the appellant, none out of his four witnesses testified as to the version of the traditional evidence relied upon by him in proof of his ownership of the land in dispute. He contended that even the solitary version of the appellant's traditional history as to how his ancestors allegedly acquired the land in dispute by first settlement was carefully considered and was rejected by the trial court. He pointed out that this rejection of the appellant's traditional evidence was affirmed by the court below. Learned counsel contended that on these concurrent findings of both courts below alone, the appellant's claim of title to the land in dispute is bound to fail. He submitted that the respon-

dent on the findings of both courts below purchased the land in dispute from the original owners, the Okpoko family for the sum of N1,500.00. This was on the 14th January, 1978. The respondent also presented to his vendors the tribute of one goat, a bottle of schnapps, a carton of beer and 8 tubers of yam as required by customary law in respect of this purchase. He was subsequently issued with a Certificate of Occupancy, Exhibit J. in respect of the land in 1987. He completed the erection of houses on the land in 1980 / 81 without let or hindrance from any one whatever. He urged the court to resolve issue I against the appellant.

It is trite law that in a claim for declaration of title to land, the onus of proof lies on the plaintiff who must succeed on the strength of his case and not on the weakness of the defendant's case except, of course, in cases where the defendant's case itself supports the plaintiff's case and contains evidence on which the plaintiff is entitled to rely. See Kodilinye v. Mbanefo Odu (1935) 2 W.A.C.A. 336 at 337, Woluchem v. Gudi (1981) 5 S.C. 291, Oduaran v. Asarah (1972) 1 All N.L.R. (Part 2) 137 etc.

In the first place, the appellant's root of title is pleaded in paragraph 4 of his amended Statement of Claim and this goes thus:-

"The said land originally belonged to the family unit in Rumueme now known and called Rumukpakani. It was occupied as MGBU (settlement) by the members of Kpakani family and has continued to be in the possession of the said family members."

In his evidence in court, the appellant testified as to his said root of title as follows:-

"The land in dispute originally belonged to Kpakani... Kpakani settled on the land in dispute. At a later time, Kpakani shared the land amongst his 3 children by name Akwaka, Chukwukena and Owkhonda. The children occupied the land. Kpakani is dead. On the death of Kpakani, his three sons continued occupying the portion of land allocated to them by their late father. When the three children died, the portion allocated to each of them passed unto their children. I am now the owner of the land verged red in Exhibit B."

The learned trial Judge after a critical examination of the testimony of the appellant as against the averment in paragraph 4 of his said amended Statement of Claim in so far as the appellant's root of

title to the land in dispute was concerned had this to say:-

“The traditional history is not quite clear to me. Plaintiff claimed in his evidence in-chief that Kpakani settled on the land in dispute. While this is likely to mean that Kpakani deforested the land in dispute as the first person to set his legs and eyes on the land, there is no evidence of the traditional historical circumstances which led to the settlement. As if that is not enough problem, I do not see anywhere in the Amended Statement of Claim where it is averred that Kpakani settled on the land in dispute.” B

He went on:-

“Certainly the averment in paragraph 4 is different from the evidence of the plaintiff in that respect. The members of Kpakani family which are averred in paragraph 4, I would like to believe, are different from Kpakani as an individual. And what is more, paragraph 4 claims that the land originally belonged to the family unit in Rumueme now known and called Rumukpakani. Plaintiff in his evidence in-chief said that Kpakani settled on the land, and if by settlement plaintiff meant the original founder of the land, then there is some discrepancy. Certainly no court of law can resolve the discrepancy in favour of the plaintiff.” C D E

The Court of Appeal in an equally analytical consideration of the above findings of the learned trial Judge observed thus:-

“The learned trial Judge after a review of the evidence and the law concluded that Appellant failed to establish superior title or better right to possession and refused the claim for trespass. This finding of fact in a broad consideration of the matter by the learned trial Judge is amply justifiable, his conclusion was sound and not perverse. As an appellate court there is no justification to disturb this finding of fact and also of law that Appellant failed to establish his better title to the land in dispute, thereby holding that Appellant was not in possession of the land in dispute which rightly in my assessment led to the dismissal of the claim for trespass afortiori also the dismissal of the claim for injunction.” F G

Now, reverting to the appellant's root of title and/or traditional evidence in support thereof, it cannot be disputed, as pointed out by the learned trial Judge and affirmed by the court below, that there is apparent discrepancy between the averment in paragraph 4 of the appellant's amended Statement of Claim and his viva voce H

evidence in support thereof. This pertains to the all important issue of the traditional evidence relied on by the appellant in proof of his claim of title to the land in dispute. Whereas by the appellant's pleadings, the land in dispute was founded by and therefore originally belonged to members of Kpakani family by dint of first settlement or
 B occupation, the appellant's evidence on the same issue was that the said land originally belonged to Kpakani who was the first settler or occupier thereof and that it was at a later date that he shared the land amongst his three children. ***This discrepancy seems to me fatal to the appellant's case for if the evidence of a party is at variance with his pleadings, the claim would fail and stand dismissed. Parties are bound by their pleadings and evidence which is at variance with the averments in the pleadings goes to no issue and should be disregarded by the court.*** See
 C D Emegokwe v. Okadigbo (1973) 4 S.C. 113; Odumesu v. African Continental Bank Ltd. (1976) 11 S.C. 261 at 264; Kalu Njoku and others v. Ukwu Eme and others (1973) 5 S.C. 293 etc.

In the second place, there is the more important fact that the learned trial Judge after a close consideration of the traditional evidence relied upon by the appellant in proof of his title to the land in
 E dispute found himself, rightly in my view, unable to accept the same as established. Said he:-

*"I am of the firm view that the plaintiff has not been able to
 F prove to the satisfaction of this court that the land in dispute belongs to him".*

He went on:-

*"The only evidence that Plaintiff could show by way of recent event is the so called Exhibit B. This is against Exhibits D., K. and
 G J of the defendant. I am of the firm view that the plaintiff has not been able to prove to the satisfaction of this Court that the land in dispute belongs to him.."*

The above findings were affirmed by the court below and I can find no reason to fault them. Issue I must accordingly be resolved
 H against the appellant.

Issue 2 seems to me the most vital question for consideration in this appeal. This is because the appellant in this case did not just make a claim of declaration of title to the land in dispute against the respondent. The claim is a declaration that the respondent not being

a member of the appellant's Akwaka Kpakani family is not entitled to any share of or right over the properties of the Akwaka Kpakani family. In other words, even if the appellant was able to have established original ownership of the land in dispute in his Akwaka Kpakani family, the declaration he claimed would only have succeeded if he was further able to establish that the respondent was not a member of the said Akwaka Kpakani family. The case for the appellant was founded on an alleged marriage between D.W.1 and D.W.2 in 1944 in accordance with Rumueme customary law. The contention of the appellant is that the respondent, being a child of the aforesaid customary law marriage, did not belong to the appellant's family and could not therefore inherit any of the landed properties of the said Akpaka Kpakani family. He claimed that this is because under the Rumueme customary law, only male children could inherit the landed property of their deceased father.

The respondent, on the other hand, denied the existence of the alleged customary marriage between D.W.1. and D.W.2 and averred that D.W. 2 at all material times was unmarried and remained with her father's family in their compound. The respondent claimed that under Rumueme and, in fact, Ikwerre customary law, children born by D.W.2 in her father's house while unmarried belonged to her father and are entitled to enjoy all the rights and privileges of the other children of her father over the latter's property.

Resolution of issue 2, therefore, would depend on whether, as insisted by the appellant, D.W. 2, the mother of the respondent and sister of full blood of the appellant was married to D.W. 1, the respondent's biological father thus disentitling the said respondent from inheriting any part of Nsirim's landed property. In other words the issue posed is whether the appellant proved the existence of a marriage between the appellant's sister, D.W.2 and the respondent's father, D.W.1.

In this regard, the point must be made that native law and custom, otherwise also referred to as customary law, are matters of evidence on the facts presented before the court and must therefore be proved in any particular case unless, of course, they are of such notoriety and have been so frequently followed or applied by the courts that judicial notice thereof would be taken without evidence required in proof. See Liadi

Giwa and Another v. Erinmilokun (1961) 1 S.C.N.L.R. 377. ***The proof of customary law, being an issue of fact, clearly lies on the party alleging its existence.*** See Taiwo v. Dosunmu and Another (1965) All N.L.R (Reprint) 417.

B The learned trial Judge after a most comprehensive review of the evidence led on both sides on the issue of whether or not D.W.1 and D.W.2 were lawfully married in accordance with customary law declared thus:-

C *“I am of the firm view that the plaintiff has not been able to prove the existence of the alleged marriage between D.W.1 and D.W.2... Plaintiff who alleged the existence of a customary law marriage had a duty in law to prove it; and the plaintiff is never exonerated from this duty merely because there are inconsistencies or discrepancies in the evidence of defence witnesses”.*

D The Court of Appeal was in total agreement with the above finding of the trial court to the effect that no marriage between D.W.1 and D.W.2 was established by the appellant. Said the Court of Appeal:-

E *“The learned trial Judge after consideration of the evidence and the applicable law found as a fact and in law that the Appellant on whom lies the burden failed to establish subsisting customary marriage between the 1st and 2nd DWS.*

F *This being a finding of fact raises the issue and attitude of an appellate court towards finding of fact by the lower court.... In the instant appeal and after a careful consideration of the facts and the law with reliance on the authorities coupled with the reliance on the credibility of the witnesses, I am satisfied that the finding of the trial Judge is very sound and not perverse. Issue I in Respondent’s brief is*
 G *that the learned trial Judge was right that Appellant failed to prove the existence of customary marriage between the Respondent’s biological father (1st DW) and mother (2nd DW) and elder sister of full blood with the Appellant. I see no reason to disturb this finding.”*

H I think both courts below are perfectly right in the above findings.

In the first place, it is trite law that a trial Judge having had the opportunity of hearing witnesses and watching their demeanour in the witness box is entitled to select witnesses to believe or facts he finds proved and the Court of Appeal

should not interfere with such facts unless they are perverse. See Kodilinye v. Mbanefo Odu (supra). So too, this court will not ordinarily interfere with the concurrent findings of the trial High Court and the Court of Appeal on essentially issues of fact where there is sufficient evidence on record to support them and where there is no substantial error apparent on the record of proceedings unless special circumstances are shown as violation of some principle of law or procedure or where such findings are shown to be perverse or patently erroneous and a miscarriage of justice will result if they are allowed to stand.

See Chinwendu v. Mbamali (1980) 3-4 S.C. 31 at 75, Enang v. Adu (1981) 11 - 12 S.C. 25 at 42, Nwadike v. Ibekwe (1987) 4 N.W.L.R (Part 67) 718; Igwego v. Ezengo (1992) 6 N.W.L.R (Part 249) 561 etc. I have myself given a most careful consideration to the above concurrent findings in respect of various material issues of fact in controversy between the parties in this case and have no reason to fault them. Issue 2 must accordingly be resolved against the appellant.

There is finally issue 3 which poses the question whether on the facts of this case, the pleas of estoppel, laches and acquiescence avail the respondent. As it is my view that the issues of laches and acquiescence hardly arise on the facts of this case, I propose to consider the question of estoppel only under issue 3 in this appeal.

Before considering the relevant facts as found by the trial court and affirmed by the Court of Appeal it needs be restated that where one by his words or conduct willfully causes another to believe the existence of certain state of things and induces him to act on that belief so as to alter his own previous position, the former is precluded from averring against the latter a different state of things as existing at the same time. This is how the rule in estoppel by conduct otherwise also known as estoppel by matter in pais has been stated.

See Joe Iga and others v. Ezekiel Amakiri and others (1976) 11 S.C. 1. Gregory Ude v. Clement Nwara and Another (1993) 2 N.W.L.R (Part 278) 638 at 662 - 663.

Turning now to the facts, the learned trial Judge after a painstaking review of the evidence found thus:-

"I find the following facts proved in this matter:

(1) That plaintiff built a house in his father's compound for the

defendant and his mother (D.W2)...

(2) That the plaintiff trained the defendant...

(3) That the defendant was not only a member of the Rumupakani Development Union but once a treasurer of that Union...

(4) That the plaintiff and the defendant sued jointly and were also jointly sued. They jointly sued "for themselves and on behalf of the Nsirim Mgba family of Rumueme." The defendant in that suit is Bekwele Worgu. See Exhibit C.

(5) The defendant still bears the name Nsirim. As a matter of fact he is so addressed by the plaintiff. See Exhibit M."

He went on:-

"I have seen from the totality of the above findings of fact that the plaintiff is estopped from denying that the defendant is not a member of his family and therefore "not entitled to any share of properties or any rights over any properties of Akwaka Kpakani, the plaintiff's Great Grand Father." If the defendant was never a part of the plaintiff's father's family, how did he come about building a house there for him and the mother (D.W.2). He did so because defendant is his nephew, being the son of D.W. 2 his elder sister. He did so because he believed that defendant belongs to his (plaintiff) father's family. By this conduct he is estopped from contending the contrary."

He continued:-

"It is clear from Exhibit C that the plaintiff and the defendant sued together "for themselves and on behalf of the Nsirim Mgba family of Rumueme." Although plaintiff managed to deny this fact, Exhibit 'C' is so clear on it. I have not the slightest doubt in my mind that from Exhibit C the plaintiff is estopped from denying the defendant as a member of the Nsirim Mgba Family of Rumuene. He cannot do that in law.

The defendant still bears the name of Nsirim. This is not a situation where the defendant unilaterally arrogates to himself the right to use that great family name, but it is recognised either expressly or tacitly by the plaintiff. And here, Exhibits C and M, amongst other evidence before me are relevant. I have already dealt with Exhibit C: I now go to Exhibit M. Plaintiff wrote Exhibit M. He signed it. And in Exhibit M, plaintiff addressed the defendant as Mr. E. A. Nsirim and the address is Rumupakani village, Rumueme Town, Port Harcourt. Exhibit M bears the same address in respect of the

plaintiff.”

The trial court next turned to the respondent’s name and commented:-

“Defendant bears the same surname as the plaintiff. For purposes of repetition and at the expense of sounding prolix, it is NSIRIM. The spelling is the same. It is a six letter name. And it is likely to be an Ikwerre name. And by the evidence before me the defendant has been bearing this name right from his birth. And he is now above forty years. The question is this: Why did the plaintiff allow the defendant to use his dear father’s name for so long a time. Why should he now challenge the defendant’s right to use the same after more than forty long years? Again, the plaintiff is caught by the plea of estoppel and he cannot run away from it in law. No, he cannot.”

In the same vein, the court below on this issue of estoppel stated as follows:-

“The defence of the Respondent was that from the various acts of the Appellant who had presented him as a member of NSIRIM NGBA family that now that the grapes are sour between them the Appellant cannot now state that the High Court should declare him not a member of NSIRIM’s family. The learned trial Judge rightly in my judgment had justification for refusal to grant the Appellant that Respondent is not a member of NSIRIM family.

That court concluded:-

“For the above reasons the attack by Appellant on this issue lacks substance and is unmeritorious, as Appellant is estopped by his conduct to say that the Respondent should desist to regard himself as a member of NSIRIM FAMILY.”

I think both courts below are again on firm grounds by holding that on the facts, the appellant was estopped from denying that the respondent is a member of the family of the former. A clear case of estoppel was therefore established by the respondent in this case and I agree from the established facts that the appellant is estopped from denying respondent’s membership of the Nsirim Ngba family. Issue 3 in so far as it pertains to the question of estoppel is hereby resolved against the appellant.

I think I should finally make reference to the observation of the learned trial Judge on the whole case where he stated as follow:-

“This looks to me like a case, if not really a case where the plaintiff wants to blow hot and cold with the same breath. It looks like a case, if not really one where the plaintiff wants to approbate and reprobate with the same breath. I should not encourage him do so or facilitate that process for in the course of it, he could suffocate himself to “death”. The people of Rivers State need him. We all need him. This is a clear case where when the going was smooth and cordial, the parties danced the English dance of Waltz or the South American dance of tango together and when they started missing their steps when the relationship got sour or strained, one of the parties in the dance denies that there was a dance at anytime.

After a very careful consideration of the pleadings and the oral evidence before me, I am of the opinion that the plaintiff has not proved his case on the balance of probabilities. His case fails. I therefore dismiss it.”

A similar observation was made by the Court of Appeal as I have quoted earlier on in this judgment.

I need only add my own voice to the effect that I have no reason to disagree with those observations.

The conclusion I therefore reach is that this appeal is without substance and ought to fail. I hereby dismiss it with costs to the respondent against the appellant which I assess and fix at #10,000.00.

BELGORE JSC

I agree with the judgment of my learned brother, Iguh, JSC that this appeal lacks merit. For the reasons he has adumbrated therein I also dismiss the appeal with #10,000.00 costs to respondents.

KUTIGI JSC

I read before now the judgment just delivered by my learned brother Iguh J.S.C I agree with him that the appeal lacks merit and ought to be dismissed. The appellant failed to show why we should at this stage interfere with the concurrent findings of the trial High Court and the Court of Appeal (see for example LOKOYI v. OLOJO (1983) 8 S.C. 61, CHINWENDU v. MBAMALI (1980) 3-4 S.C. 31)

The appeal is accordingly dismissed with @10,000.00 costs

in favour of the Defendant/Respondent.

KATSINA-ALU JSC

I agree with my learned brother IGUH JSC. That this appeal should be dismissed. There are concurrent findings of fact by the trial court and the Court of Appeal. The appellant has not shown that these concurrent findings are perverse. For the reasons which my learned brother gives, I too dismiss the appeal with #10,000.00 costs to the respondent.

B

C

AYOOLA JSC

I agree that this appeal should be dismissed. At the end of the day this appeal turns on facts and in regard thereto there are concurrent findings of fact by the trial High Court and the Court of Appeal. The appellant has embarked on a rather tedious process of minutely going over the evidence again. In the process learned counsel for the appellant wrote a 37 page brief. While not deprecating the industry learned counsel put in the preparation of his brief, I am of the view that there is no cause for this court to go over the facts again. The concurrent findings of the two courts are by no means perverse. For these reasons and the fuller reasons in the judgment of my learned brother, Iguh, JSC which I have been privileged to read in draft I too dismiss the appeal with #10,000.00 costs to the respondent.

G

H