

SUPREME COURT OF NIGERIA
FRIDAY 3RD MAY, 2002. SC. 59/1996
CORAM:- M. E. OGUNDARE, U. MOHAMMED, A. I. IGUH,
A. O. EJIWUNMI, E. O. AYOOLA, JJSC

1. OKPALA EZEOKONKWO & 2 ORS APPELLANTS
(For themselves and on behalf of
Umu Muora family of Aguluezechukwu)

AND

1. NWAFOR OKEKE & 2 ORS RESPONDENTS
(For themselves and on behalf of Umu
Ohuekwe family in Aguluezechukwu)

LAND LAW - Title - Proof - Onus is on plaintiff to prove his title - By relying on strength of his case - And not on weakness of defence - Save where his case is supported by defence (H1)

LAND LAW - Title - Proof - Traditional history - Relevance of - Where evidence of such history is not contradicted and is found to be cogent by court - The same can support a claim for declaration of title (H2)

LAND LAW - Root of title - Proof - Party that relies on traditional history - Must plead founder and how land was founded - As well as particulars of intervening owners - Through whom he claims (H3)

LAND LAW - Title - Acts of long possession - Proof - Party relying on such acts as evidence of title - Must show that the same was extensive - And positively numerous to warrant - Inference of exclusive ownership (H4)

COURTS - Land law - Finding of trial judge - Correctness of - Trial judge was right in his finding - That Evidence Act s. 46 operated more in favour of respondents than appellants (H5)

LAND LAW - Trespass - Right of action - It is only a person in possession of land - That can maintain an action for damages for trespass (H6)

LAND LAW - Trespass - Right of action - Conflicting possession - Where two parties claim possession of a piece of land - Trespass will be at the suit of party - Who can show that title is in him (H7)

ESTOPPEL - Res judicata - Plea - Condition precedent - Party relying on the plea must prove sameness of parties and subject matter - And a valid final decision - Delivered by court of competent jurisdiction (H8)

ESTOPPEL - Res judicata - Proof - Onus of - Party who sets up the defence - Has the onus to establish - Conditions necessary to sustain the plea (H9)

LAND LAW - Title - Smaller land - Proof - Where plaintiff in a claim for title to land - Succeeds in proving boundaries and title to a smaller parcel of such land - He would be given title over the smaller land (H10)

COURTS - Admission or default of defence - Declaration of right - Basis for grant - Court does not make declarations on admissions or in default of defence - Without hearing evidence and being satisfied with same (H11)

FACTS

Plaintiffs/appellants instituted this action in representative capacity against defendants/respondents at the High Court of Anambra State, claiming declaration of title to a piece of land called “Ani Owele” situate at Aguluezechukwu-Anambra State, N100 damages for trespass and injunction restraining respondents from further trespass on the land. At the trial, each party called his witnesses and led traditional evidence in support of his case. Both parties also relied on the presumption in sections 46 of the Evidence Act in a bid to establish title to the disputed land.

At the conclusion of hearing, the learned trial judge found for respondents and dismissed appellants’ claim. The judge was of the view that appellants’ traditional evidence was weakened by material contradictions and was therefore not credible. The court was equally

of the view that appellants' plea of estoppel per rem judicatam based on suit no: 181/31 is not applicable to present action, since the disputed land in both suits are not the same. Dissatisfied, appellants lodged an appeal at the Court of Appeal, Enugu division which unanimously dismissed the appeal and affirmed the judgment of the trial court. Aggrieved again, appellants appealed to Supreme Court.

ISSUES FOR DETERMINATION

"1. Whether having regard to the pleadings and evidence led, the Court of Appeal was right in affirming the judgment of the trial court on the issue of declaration of title, trespass and perpetual injunction in respect of the land in dispute.

2. Whether the Court of Appeal was right in affirming the decision of the trial court, to the effect that the Mbamisi Native Court case No. 181/31, Exhibit B, did not constitute estoppel per rem judicatam in the present case.

3. Whether the Court of Appeal was right to have affirmed the refusal by the trial court to enter judgment for the appellants with regard to the two small parcels of land jutting out on the east and west of the land in dispute and forming part and parcel of the said land in dispute shown verged pink in the appellants' plan, Exhibit A, when the respondents did not join issue with the appellants in respect thereof."

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

Title - Proof

1. It is a basic principle of law that in a claim for declaration of title to land, the onus lies on the plaintiff to satisfy the court that he is entitled on the evidence brought by him to the declaration sought. Plaintiff must rely on the strength of his own case and not on the weakness of the defence. If this onus is not discharged, the weakness of the defendant's case will not help him and the proper judgment will be for the defendant. This rule, however, is subject to the important exception that in some cases, the defendant's case may itself support the plaintiff's case and contain evidence on which the plaintiff is

entitled to rely. (p. 1197 H)

Title - Proof - Traditional history - Relevance of

2. Without doubt, evidence of traditional history, where this is not contradicted or in conflict and is found by the court to be cogent can support a claim for declaration of title to land.
(p. 1198 D)

Root of title - Proof

3. In this regard, it cannot be over-emphasized that it is not sufficient for a party who relies for proof of title to land on traditional history to merely plead that he, and before him, his predecessors in title had owned and possessed the land from time beyond human memory. He must also plead and prove:-
(i) who founded the land, (ii) how the land was founded and (iii) particulars of the intervening owners through whom he claims.

In the present case, apart from the glaring contradictions in the evidence of the appellants with regard to their traditional history, all that they managed to present before the court is that the land in dispute had been the property of their family from time immemorial. There was neither evidence of who founded the land nor how it was founded by the appellants' ancestors. There was also no attempt to establish any particulars, no matter how vague, of the intervening owners of the land through whom they claimed title to the land in dispute.

Put differently, the appellants failed to plead satisfactorily or lead evidence to show the root of their title and before them that of their ancestors which is a sine qua non in cases where a plaintiff relies on evidence of traditional history in proof of his title to land in dispute. A plaintiff who seeks title to land and relies on traditional history must, to succeed, plead the root of his title and the names and history of his ancestors and lead satisfactory evidence in proof thereof. These the appellants failed to do in the present case and I think this must be regarded as fatal to their claim for title to the land in dispute in so far as this is based on traditional history.
(p. 1199 A)

Title - Acts of long possession - Proof

4. The appellants also founded their claim for title to the land in dispute on acts of ownership and long possession. In this regard, it has long been settled that a party relying on acts of possession and ownership as evidence of title to land must show that such acts not only extend over a sufficient length of time but that they are numerous and positive to warrant the inference of exclusive ownership. A few and isolated of such acts which the adversary might not have been in a position to know will not suffice. (p. 1200 G) B
C

Land law - Finding of trial judge - Correctness of

5. It is obvious that the appellants' claim in respect of the operation of Section 46 of the Evidence Act in their favour was rejected by the trial court. On the contrary, it was the finding of the learned trial Judge that the said Section 46 of the Evidence Act operated more in favour of the respondents than the appellants and it is clear to me that he is right in this regard. (p. 1202 G) D
E

LAND LAW - Trespass - Right of action

6. In the present case the appellants have been unable to establish their title to the land in dispute. They also failed to establish possession of the land in dispute. It is a basic principle of law that only a person in possession of land can maintain an action for damages for trespass. (p. 1204 A) F

LAND LAW - Trespass - Right of action

7. Similarly, where, as in the present case, two parties are on a piece or parcel of land claiming possession thereof, the possession being disputed, trespass will be at the suit of that party who can show that title of the land is in him. The appellants having failed to establish their title to the land in dispute cannot in such circumstance maintain an action for damages for trespass against the respondents. No case for permanent injunction was also made out by the appellants against the respondents. In these circumstances the answer G
H

to issue one must be in the affirmative. (p. 1204 B/E)

Res judicata - Plea - Conditions precedent

8. In this regard, the law is firmly established that for the plea of estoppel per rem judicatam to succeed, the party relying on it must prove that:-

1. the parties or their privies are the same in both the previous and present proceedings.

2. the claim or the issue in dispute in both proceedings is the same.

3. the res or subject matter of the litigation in the two cases is the same.

4. the decision relied upon to support the plea of estoppel per rem judicatam must be valid, subsisting and final and

5. the court that gave the previous decision relied upon to sustain the plea must be a court of competent jurisdiction. Unless the above pre-conditions are established, the plea of estoppel per rem judicatam cannot be sustained. (p. 1204 H)

Res judicata - Proof - Onus of

9. I should also add that it is a question of fact whether or not 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 cases. The burden is on the party who sets up the defence of res judicata to establish the above pre-conditions necessary to sustain the plea. (p. 1205 D)

Title - Smaller land - Proof

10. Without doubt, where a plaintiff who is claiming a declaration of title to land succeeds in proving the boundaries and title to a smaller parcel of such land, he would be entitled to a declaration of title in respect of the smaller parcel of land in dispute, the title and boundaries of which he has proved with certainty. (p. 1207 C)

COURTS - Admission or default of defence

11. The appellants now seek declaration of title to the said

two small portions of land on the sole ground that the respondents made no claim to them. My reaction to this claim is to restate that the court does not make declarations of right either on admission or in default of defence without hearing evidence and being satisfied with such evidence. (p. 1207 G)

B

REPRESENTATION

D. U. Okorowo Esq., for the Appellants
Respondents unrepresented

CASES REFERRED TO

Okechukwu v. Okafor (1961) All NLR (Pt. 4) 685

Okugo v. Nwokedi (1997) 8 NWLR (Pt. 517) 467

Woluchem v. Gudi (1981) 5 SC 291

Akinola v. Oluwo (1962) 1 All NLR (Pt. 2) 224

Oduaron v. Asarah (1972) 1 All NLR (Pt. 2) 137

Alade v. Lawrence Awo (1975) 4 SC 215

Olujebu of Ijebu v. Oso (1972) 5 SC 143

Idundun v. Okumagba (1976) 9-10 SC 227

Bello v. Eweka (1981) 1 SC 101

Motunwase v. Sorungbe (1988) 4 NWLR (Pt. 92) 90

Wallersteiner v. Moi (1974) 3 All ER 217

Araba v. Asanlu (1980) 6-7 SC 74

Udeze v. Chidebe (1990) 1 NWLR (Pt. 125) 141

STATUTE REFERRED TO

Evidence Act s. 46 & s. 146

LEAD JUDGMENT BY IGUH JSC

By a writ of summons issued on the 15th day of August, 1973, at the High Court of Justice of the now defunct East Central State of Nigeria, Amawbia /Awka Judicial Division, the plaintiffs, for themselves and on behalf of the Umu Muora family of Eziagu village, Aguluezechukwu instituted an action against the defendants jointly and severally, for themselves and on behalf of the Umu Ohuekwe family of Eziagu, Aguluezechukwu claiming as follows:-

“(1) Declaration of title to all that piece of land called “Ani Owele” situate in Aguluezechukwu.

(2) *N100.00 damages for trespass.*

(3) *Injunction restraining the defendants, their servants, and/or agents from further trespass on the plaintiffs' "Ana Owele" land".*

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

B The case accordingly proceeded to trial and the parties testified on their own behalf and called witnesses. Each side led evidence which showed that it relied on traditional history, acts of ownership and long possession and presumptions based on the provisions of Sections 46 and 146 of the Evidence Act to establish its claim of title to the land in dispute.

From the amended Statement of Claim, the plaintiffs asserted their ownership of the land in dispute from time immemorial. In particular, paragraphs 4, 5, 6 and 7 thereof aver as follows:-

D *"4. The land in dispute has been the property of the plaintiffs' family from time immemorial. The plaintiffs and their ancestors before them have exercised maximum acts of ownership over the said land in dispute without let or hindrance. Plaintiffs farm the land, reap the fruits of the economic trees and also live on the land.*

E *5. Plaintiffs' Village, Eziagu, consists of two sub-divisions, namely, Eziagu Uhuala and Eziagu Ngbago. The plaintiffs belong to Eziagu Uhuala section and are the head of all the families that make up Eziagu Uhuala. The plaintiffs' family acquired the land in dispute as their own share when the families that make up Eziagu Uhuala shared their land according to custom many generations ago.*

F *6. North of the land in dispute is a portion of plaintiffs' land granted to one Nkwonwe, 3rd defendant's grandfather, by plaintiffs' ancestor called Muora. Nkwonwe lived on the land and some of his descendants still live on the land as a result of grant from plaintiffs' family.*

G *7. In 1931 one Okeke Ibeanu, the 1st defendants' father trespassed on the plaintiffs' "Ana Owele" land and was promptly sued to court by one Ezeokonkwo, the 1st plaintiff's father, claiming possession and N10 damages for trespass at the Mbamisi Native Court in Case No. 181/31 and Ezeokonkwo obtained judgment. One Oraenyem, who was 3rd defendant's father, testified for the plaintiff in the case. The judgment in this case will be founded upon by the plaintiffs."*

The above averments were stoutly denied in paragraphs 5, 6, 7, 8, 10, 11 and 12 of the amended Statement of Defence in which it was pleaded as follows:-

"5. Paragraph 4 of the Amended Statement of Claim is emphatically denied. The defendants, and before them their ancestors, are the owners in possession of the entire Ohuekwe family land and which includes the land presently in dispute.

6. The defendants, and before them their ancestors, have been exercising maximum acts of ownership over the entire "Ani Umuchuekwe" such as by reaping all manner of economic crops on the land, putting tenants on the land and worshipping jujus on the said land without any hindrance and/or interference from anybody whatever including the plaintiffs and their people.

7. Save that the defendants admit that Eziagu consists of Uhuala and Ngbago and that plaintiffs by accepted habit identified themselves with the Uhuala Eziagu, the defendants deny other statements in paragraph 5 of Amended Statement of Claim. In further answer to this paragraph, the defendants aver that one Chigbo, the Plaintiff's grandfather, came from Adazi and settled at Nkwo Aguluezechukwu. Later on and on request the Umuohuekwe showed Chigbo a place at Isigwuapani to build a house. There, he lived and got a son by name Muora who in turn got Ezeokonkwo and Ezeobi. Where Chigbo lived is shown in Defendants' Plan as "Muora's land". The plaintiffs till date worship their juju in that place. They do not take part in Umuezenwa customary performances.

8. About the influenza period, Abunike, a member of Defendant's family of Umuohuekwe died and Muora became friendly with Abunike's wife by name Mgbeke. As a result of their friendship Muora moved to Abunike's house and started living with Mgbeke who by then had only one sickly female issue that later died.

9. ...

10. The Defendants deny paragraph 6 of the Amended Statement of Claim and will put the plaintiffs to the strictest proof. The land North of the land in dispute belongs absolutely to the defendants and, before them, their ancestors. The defendants and their ancestors have exercised maximum acts of ownership over the said land. In 1952 the defendants fell and sawed one Iroko tree on this part of their land. In 1964, the 3rd defendant was prosecuted by the

Health Office Aguata in charge No. 66c/64 for failing to abate nuisance on this land. Also in 1965, in Charge No. 7c/65, the 3rd Defendant together with 3 others were again prosecuted for not complying with Abatement Notice in respect of this land.

B 11. *In further answer to paragraph 6 of the Amended Statement of Claim the defendants aver that members of their family own houses not only North of the land in dispute but all over the Umuohuekwe land.*

C 12. *In answer to paragraph 7 of the Statement of Claim, the Defendants aver that Suit No. 181/31 did not at all concern the land now in dispute. The judgment in that case was not final and was in any event res inter alios acta. The extent of Ani Isigwu-apani which the defendants aver was involved in that case is vague and can not be determined”.*

D At the conclusion of hearing the learned trial Judge, Uyanna, J., (as he then was) after a close review of the evidence on the 29th day of June, 1987 found for the defendants and dismissed the plaintiffs’ claims. On the issue of the plaintiffs’ traditional evidence, it was the view of the learned trial Judge that the same was not only weakened by material contradictions but that it was also not credible. He said:-

F “Quite apart from the conflict in the evidence of the plaintiffs as regards who the original ancestor was, there was equally strange contradiction between P.W. 1 and P.W. 3 as to who gave the land in dispute to ancestors of the defendants. While the P.W. 1 gave in evidence as pleaded by the plaintiffs that the land North of the land in dispute was given to Nkwonwe, ancestor of the 3rd defendant, by Muora, P.W.3 testified it was Ezeokonkwo who gave it to Ezeokoye and Ilobulum. And P.W.2 in one breath said it was Muora and yet in another breath said something else as to who gave the land to the defendants... It should be clear to the Court what case a party is stating and clearer still that it is the case that he has stated that he is proving”.

H On the issue of acts of ownership and long possession of the land in dispute claimed by both parties, the learned trial Judge was of the view that if the evidence of the plaintiffs in that regard was compared with that of the defendants, that of the plaintiffs paled into insignificance. He rounded up the claims of the parties in respect of

traditional history and acts of ownership and long possession on the land as follows:-

“From the traditional history, the plaintiffs’ account of the ownership of the disputed land is inconclusive. What is more, their acts of ownership and possession on the land in dispute had not been without let or hindrance”.

On the Mbamisi Native Court suit No. 181/31 heavily relied on by the plaintiffs, the trial court found that although the parties and their privies in that case and those in the present suit are the same, the land in dispute in both suits are not the same. The plaintiffs’ claims for trespass and perpetual injunction were dismissed.

Dissatisfied with this judgment, the plaintiffs lodged an appeal against the same to the Court of Appeal, Enugu Division which court in a unanimous decision dismissed the appeal and affirmed the judgment of the trial court on the 17th day of December, 1990. Aggrieved by this decision of the Court of Appeal, the plaintiffs have further appealed to this court. I shall hereinafter refer to the plaintiffs and the defendants in this judgment as the appellants and the respondents respectively.

Three grounds of appeal were filed by the appellants 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 appellants, through their learned counsel settled and filed their brief of argument on the 19th day of May, 1999. Although the appellants’ brief of argument was duly served on the respondents, no respondents’ brief of argument was filed in reply thereto and no application for extension of time within which to file the same was filed by the respondents.

The four issues identified on behalf of the appellants for the resolution of this appeal are as follows:-

“(i) Was the Court of Appeal right in upholding or confirming the decision of the learned trial Judge to the effect that the Native Court case No. 181/31 (Exhibit B) “had no connection with the land in dispute so as to constitute estoppel or in any way confer title on the Plaintiffs/Appellants”.

(ii) Was the Court of Appeal right in holding that Appellants did not discharge the onus of proving the material averments in their plan when the Defendants/Respondents did not put or properly put

the said features in issue.

(iii) *Whether it was right for the Court of Appeal to fail to apply the provisions of Order 33 Rule 9 of the former High Court Rules of Anambra State and the decision in Okechukwu & Ors v. Okafor & Ors (1961) All NLR (Part 4) 685 at 688 to the benefit of the Appellants based on the wrong reasons given by the learned trial Judge and Justices of the Court of Appeal.*

(iv) *Whether it was right for the Court of Appeal to have upheld the dismissal of the case of the Appellants having regard to the issues raised, evidence adduced, and conclusions of the trial court”.*

As I have already indicated, the respondents up to the date this appeal was heard did not in compliance with the provisions of Order 6 Rule 4(2) of the Supreme Court Rules, 1985, as amended, file any brief of argument. Consequently, the appeal was treated as argued on the appellants’ brief of argument only.

I have closely examined the issues set out in the appellants’ brief of argument and they appear to me amply covered by the under-mentioned three issues, to wit;

“1. *Whether having regard to the pleadings and evidence led, the Court of Appeal was right in affirming the judgment of the trial court on the issue of declaration of title, trespass and perpetual injunction in respect of the land in dispute.*

2. *Whether the Court of Appeal was right in affirming the decision of the trial court, to the effect that the Mbamisi Native Court case No. 181/31, Exhibit B, did not constitute estoppel per rem judicatam in the present case.*

3. *Whether the Court of Appeal was right to have affirmed the refusal by the trial court to enter judgment for the appellants with regard to the two small parcels of land jutting out on the east and west of the land in dispute and forming part and parcel of the said land in dispute shown verged pink in the appellants’ plan, Exhibit A, when the respondents did not join issue with the appellants in respect thereof.”*

Accordingly, I shall adopt the above three issues for my consideration of this appeal.

At the oral hearing of the appeal, D. U. Okorowo Esq., learned counsel for the appellants adopted his brief of argument and stressed that the appellants were relying heavily on the Native Court judg-

ment, Exhibit B which he considered operated against the respondents as estoppel per rem judicatam. He contended, relying on the decision in Okugo v. Nwokedi (1997) 8 N.W.L.R. (Part 517) 467, that where the plea of res judicata is raised in a land matter and the portion of land in the earlier action is less than that in the subsequent suit, the judgment of the court could be entered for the party raising the plea in respect of that part of his claim which is proved. He submitted that both courts below were in error by failing to enter judgment for the appellants in respect of title to the entire land in dispute or, at the very worst, to the two small portions of land to the east and west of the land in dispute which parcels of land the respondents did not claim. Learned counsel for the appellants in his brief made reference to conflicts in the evidence of the appellants and their witnesses. These conflicts and contradictions were frankly accepted by G. N. A. Okafor Esq., learned counsel for the appellants before the trial court. He was of the view, however, that the conflicts were of no consequence having regard to the fact that the persons giving the evidence were illiterates. He submitted that the court below was wrong in affirming the judgment of the trial court on the issue of title to the land in dispute, trespass and injunction as the evidence of the appellants and their witnesses in those regard was overwhelming Turning lastly to issue 3, learned counsel pointed out that in-as-much-as the two small pieces of land to the east and west of the land in dispute were not claimed by the respondents, both courts below ought to have entered judgment in favour of the appellants in respect of those two parcels of land. In this regard, learned counsel placed reliance on the decision of this court in Okechukwu and others v. Okafor and others (1961) All N.L.R. 685. He urged the court to allow this appeal and enter judgment for the appellants as claimed or in the alternative, to remit the case for retrial before another Judge of the High Court of Anambra State.

Now, issue I poses the question whether having regard to the pleadings and evidence led, the court below was right in affirming the judgment of the trial court on the issue of declaration of title, trespass and perpetual injunction in respect of the land in dispute. ***It is a basic principle of law that in a claim for declaration of title to land, the onus lies on the plaintiff to satisfy the court that he is entitled on the evidence brought by him to the decla-***

ration sought Plaintiff must rely on the strength of his own case and not on the weakness of the defence. If this onus is not discharged, the weakness of the defendant's case will not help him and the proper judgment will be for the defendant.

See Kodilinye v. Mbanefo Odu 2 W.A.C.A. 336 at 337; Frempong v.

^B Brempong 14 W.A.C.A. 13; Woluchem v. Gudi (1981) 5 S.C. 291.

This rule, however, is subject to the important exception that in some cases, the defendant's case may itself support the plaintiff's case and contain evidence on which the plaintiff is entitled to rely. See Akinola v. Oluwo (1962) 1 All N.L.R. (Part 2)

^C 224 at 225; Oduaron v. Asarah (1972) 1 All N.L.R. (Part 2) 137.

This exception does not appear to be applicable to the facts of the present case.

The plaintiffs relied inter alia on evidence of traditional history
^D in proof of their title to the land in dispute. **Without doubt, evidence of traditional history, where this is not contradicted or in conflict and is found by the court to be cogent can support a claim for declaration of title to land.** See Alade v. Lawrence

Awo (1975) 4 S.C. 215 at 228; Olujebu of Ijebu v. Oso (1972) 5

^E S.C. 143 at 151; Idundun and others v. Daniel Okumagba (1976) 9 - 10 S.C. 227. From the facts of the case as presented by the appellants, it would appear that the traditional history they relied upon as the basis for their ownership of the land in dispute is as pleaded in

paragraphs 4 and 5 of their amended Statement of Claim. The appellants therein pleaded, in effect, that they acquired the land in dispute called "*Ana Owelle*" from time immemorial as part of their family land. They acquired it when the village of Eziagu Uhuala shared or partitioned its land in accordance with their customary laws and us-

^F ^G ^H ages among the respective families that comprise the said village. This partition of family land was done several generations ago and the appellants had since been in possession of the land in dispute and exercised maximum acts of ownership over the same. These averments, as I indicated earlier on in this judgment, were denied by the respondents.

The learned trial Judge after a careful consideration of the appellants' said traditional history, was of the view that the evidence in support thereof was not only weakened by contradictions but was also not credible.

In this regard, it cannot be over-emphasized that it is not sufficient for a party who relies for proof of title to land on traditional history to merely plead that he, and before him, his predecessors in title had owned and possessed the land from time beyond human memory. He must also plead and prove:-

- (i) who founded the land,***
- (ii) how the land was founded and***
- (iii) particulars of the intervening owners through whom he claims.***

See Anyanwu v. Mbara (1992) 5 N.W.L.R. (Part 242) 388 at 399; Adejumo v. Ayantegbe (1989) 3 N.W.L.R (part 110) 417; Olujinle v. Adeagbo (1988) 2 N.W.L.R. (Part 75) 238.

In the present case, apart from the glaring contradictions in the evidence of the appellants with regard to their traditional history, all that they managed to present before the court is that the land in dispute had been the property of their family from time immemorial. There was neither evidence of who founded the land nor how it was founded by the appellants' ancestors. There was also no attempt to establish any particulars, no matter how vague, of the intervening owners of the land through whom they claimed title to the land in dispute.

Turning also to paragraph 5 of the amended Statement of Claim, no particulars of whatever nature was either pleaded or testified to in proof of the families that make up the appellants Eziagu Uhuala section of Eziagu village. In these circumstances, it can hardly be said that the appellants succeeded in establishing the traditional evidence they relied upon in proof of their original ownership of the land in dispute. ***Put differently, the appellants failed to plead satisfactorily or lead evidence to show the root of their title and before them that of their ancestors which is a sine qua non in cases where a plaintiff relies on evidence of traditional history in proof of his title to land in dispute.*** See Mogaji v. Cadbury Nigeria Ltd. (1985) 2 N.W.L.R. (Part 7) 393 at 423, 431; Ojo v. Adejobi (1978) 3 S.C. 65. ***A plaintiff who seeks title to land and relies on traditional history must, to succeed, plead the root of his title and the names and history of his ancestors and lead satisfactory evidence in proof thereof.*** See Total (Nig.)

Ltd. v. Wilfred Nwako (1978) 5 S.C. 1 at 12; Elias v. Omo-Bare (1982) 5 S.C. 25 at 57-58. **These the appellants failed to do in the present case and I think this must be regarded as fatal to their claim for title to the land in dispute in so far as this is based on traditional history.**

B I think it can be said that the learned trial Judge was not oblivious of the want of proof by the appellants to establish the traditional evidence they relied on. Indeed, apart from the observations of the learned trial Judge on the issue which I have set out earlier on in this judgment, he went on to observe thus:-

C *"In the present case PW.3 and PW. 4 said in evidence that the land in dispute originally belonged to Dimiheoma while PW. 1 told the court that the original owner was Muoha. Then there was the evidence of the plaintiffs as to how their ancestors got the land. The land in dispute was part of their family's share of the 3 families which make up Uhuala when the land belonging to Uhuala was shared. The land in dispute was their own share of the land shared. Defence Counsel pointed out that there was no evidence as to how the family land was shared, what custom guided the sharing. Custom is a question of fact to be proved unless judicially taken notice of by the Court - Section 14 Evidence Act. Again the traditional evidence of the plaintiffs is further weakened by the contradictions among their witness as to who was the original owner of the land."*

F The Court of Appeal for its own part commented on the same issue as follows:-

G *"So apart from the contradictions pointed out by the learned trial Judge in respect of the evidence in support of the so-called traditional history, the failure to plead properly and lead evidence accordingly was fatal to the plaintiffs' claim of title."*

I think that the court below was quite right when it affirmed the dismissal of the appellants' claim for declaration of title to the land in dispute.

H **The appellants also founded their claim for title to the land in dispute on acts of ownership and long possession. In this regard, it has long been settled that a party relying on acts of possession and ownership as evidence of title to land must show that such acts not only extend over a sufficient length of time but that they are numerous and positive to war-**

rant the inference of exclusive ownership. Ekpo V. Ita 11 N.L.R. 68 at 69. **A few and isolated of such acts which the adversary might not have been in a position to know will not suffice.** See too Piaro v. Tenalo (1976) 12 S.C. 31 at 41; Idundun V. Okumagba (1976) 9-10 S.C. 246; Anyanwu v. Mbara (1992) 5 N.W.L.R. (Part 242) 386 at 401. B

In this regard, the learned trial Judge after a close examination of the alleged acts of possession and ownership by the appellants on the land in dispute described the same as “hardly convincing” He said:-

“But plaintiffs’ evidence on acts of possession is hardly convincing for at one point one of the witnesses said part of the land in dispute was pledged to Onwukaeme, a relation of the defendants- there was no Onwukaeme indicated on plaintiffs’ plans, Exhibits A and C; the land of Onwukaeme is shown in defendants’ plan, Exhibit D, near the Southern tip. Plaintiffs again on the issue of acts of ownership and possession at one stage by one of their star witnesses answered that the land was shown to the defendants and another of their witnesses (plaintiffs) said the land was given to the defendants. A witness or party who chops and changes between what he has pleaded and his evidence in Court is not consistent and is contrary to the basic rules in pleading...” C

On the other hand, for the most part, the story of the defendants have been more consistent even by the plaintiffs’ admission. The D. W. 3 lives on the land and said it was the defendants who had put him on the land, that before him, his father had worked on the land. P. W. 2 in cross-examination admitted that the 3rd defendant on record has been reaping the economic trees on the land and farming the land which the plaintiffs are claiming. Further, although the plaintiffs inserted Udogu juju shrine in their plan - there is no such pleading in their amended Statement of Claim. On the other hand the defendants pleaded that they worship jujus on the disputed land and they gave this in evidence and indicated these in their plans. Evidence from both sides confirm that boundary owners of the land in dispute are predominantly members of the defendants’ family - Mogboh Ezeilegbunam, Onwuka Nwosu, Egbesionu Nwosu, Ezeokereke Ezeilegbunam, Monagoro Ebelendu - all these from the defendants. On the question of acts of ownership and possession by F G H

the plaintiffs, if the evidence of plaintiffs is compared with that of defendants that of the plaintiffs pales to insignificance. The account of the defendants on the points appears more probable, more numerous and positive. There did not seem to be any act of the plaintiffs on the land that was decisive, that is, without being challenged
B taking the evidence of the plaintiffs as a whole.”

The above finding of the trial court was quoted with approval by the Court of Appeal when after recounting them it observed:-

“That was the learned trial judge’s overall view of the acts of
C possession and by and large he seems right to be of that impression.”

It is evident from the findings of the learned trial Judge as affirmed by the Court of Appeal that the assertion of acts of ownership and possession by the appellants in respect of the land in dispute was clearly not established.

D There is next the application of Sections 46 and 146 of the Evidence Act which both parties relied on. This, too, was carefully considered by the trial court. It concluded:-

“P. W. 3 said in evidence that 3rd defendant who is the D. W. 1
E lives within the land in dispute. I shall return later to the term “land in dispute” in the present suit. P. W. 1 under cross examination said that the house of Damian Ohaenyem, meaning 3rd defendant, is near to his own. This answer is most significant. If the majority of boundary owners of the land in dispute are members of defendants’ family and the defendants and their relations live within the land which plaintiffs
F claim is in dispute - (for instance see in Exhibit D - Onwukaeme’s compound, Elias Ezeokonkwo and Damian Ohaenyem) - within the land in dispute then appropriately the inference deducible under section 45 (now section 46) Evidence Act will apply more in favour of
G defendants than plaintiffs.” (Words in brackets are mine)

**It is obvious that the appellants’ claim in respect of the operation of Section 46 of the Evidence Act in their favour was rejected by the trial court. On the contrary, it was the finding of the learned trial Judge that the said Section 46 of
H the Evidence Act operated more in favour of the respondents than the appellants and it is clear to me that he is right in this regard.**

I think it is desirable to refer finally to the findings and decision of the learned trial Judge when he stated thus:-

"Plaintiffs say that the defendants are strangers to the land but from their own mouths, the defendants' family is one of the three families just like the plaintiffs' which comprise Uhuala section of Eziagu village, Agulu-Ezechukwu. Plaintiffs are not able to say how the sharing of the land among the families of Uhuala was done. Why should the defendants be excluded from the sharing? In the circumstances of this case the onus is on the plaintiffs to prove that they are entitled to exclusive ownership of the disputed land - this they have not done. If anything the evidence has shown that the plaintiffs and defendants live intermingled." He went on:-

"In the present case the whole substratum of the plaintiffs' case is without basis. Their evidence of traditional history was unconvincing and inconclusive, their plea of estoppel per rem judicatam could not be sustained nor could they show by positive and numerous acts of ownership extending over a sufficient period of years that they are exclusive owners of any part of the disputed land."

I have given careful thought to the evidence of both parties. The plaintiffs have not discharged the onus on them that by a preponderance of evidence that they are entitled to get from the court the decree of declaration of customary right of occupancy nor of the order of perpetual injunction."

As regards the claim for damages, P. W. 1 had said in examination in chief - "Damian" meaning 3rd defendant who is the D. W. 1 still lives on the land given to Nkwonwe by his (1st plaintiff's) grandfather. He also said that Romanus still lives on the land granted by his (1st plaintiff's) grandfather. If that is so, for what reason should the 3rd defendant pay damages to the plaintiffs? On the whole the plaintiff's are not entitled as claimed. Accordingly their action is dismissed."

The Court of Appeal in affirming the above decision of the trial court had this to say:-

"I have no doubt that the raison d'être is right. The plaintiffs have indeed failed to plead facts and lead evidence that could support traditional history of ownership; their acts of possession are not such contemplated by law; they could not establish estoppel per rem judicatam." It concluded:-

"I am of the clear view that the case presented by the plaintiffs was not such as would entitle them to any of the reliefs they sought."

Their action was rightly dismissed by the lower court. Consequently, I hereby dismiss this appeal as totally lacking in merit."

In the present case the appellants have been unable to establish their title to the land in dispute. They also failed to establish possession of the land in dispute. It is a basic principle of law that only a person in possession of land can maintain an action for damages for trespass. See Olugbenro v. Ajagungbade 111 (1990) 3 N.W.L.R. (Part 136) 37; Adebajo v. Brown (1990) 3 N.W.L.R. (Part 141) 66. Similarly, where, as in the present case, two parties are on a piece or parcel of land claiming possession thereof, the possession being disputed, trespass will be at the suit of that party who can show that title of the land is in him. See Awoonor Renner v. Daboh 2 W. A. C. A. 258 at 259 and 263; Umeabi v. Otukoya (1978) 4 S.C. 33.

Both the appellants and respondents appear to be claiming to be in possession of the land in dispute. Possession is disputed between the two parties and it is the finding of the trial court not only that the appellants' alleged possession of the land in dispute is "unconvincing", but that the respondents' account of their possession thereon appear more probable, more numerous and positive than that of the appellants. ***The appellants having failed to establish their title to the land in dispute cannot in such circumstance maintain an action for damages for trespass against the respondents. No case for permanent injunction was also made out by the appellants against the respondents. In these circumstances the answer to issue one must be in the affirmative.***

Issue 2 concerns Mbamisi Native Court suit No. 181/31, Exhibit B, in respect of which the appellants raised the plea of estoppel per rem judicatam. The respondents in reply averred that the said suit in no way concerned the land now in dispute. The question posed under issue 2 is whether the Court of Appeal is right in affirming the decision of the trial court to the effect that the said suit did not operate as res judicata against the respondents in the present case.

In this regard, the law is firmly established that for the plea of estoppel per rem judicatam to succeed, the party relying on it must prove that:-

1. the parties or their privies are the same in both the

previous and present proceedings.

2. the claim or the issue in dispute in both proceedings is the same.

3. the res or subject matter of the litigation in the two cases is the same.

4. the decision relied upon to support the plea of estoppel per rem judicatam must be valid, subsisting and final and B

5. the court that gave the previous decision relied upon to sustain the plea must be a court of competent jurisdiction.

Unless the above pre-conditions are established, the plea of estoppel per rem judicatam cannot be sustained. See Oke v. Atoloye (1985) 1 N.W.L.R. (Part 15) 241 at 260; Yoye v. Olabode and others (1974) 1 All N.L.R. (Part 2) 118 at 122; Fadiora v. Gbadebo (1978) 3 S. C. 219 at 229. Once they are established, such previous judgment is conclusive and estops the plaintiff from making any claim contrary to the decision in the previous judgment. **I should also add that it is a question of fact whether or not 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 cases. The burden is on the party who sets up the defence of res judicata to establish the above pre-conditions necessary to sustain the plea.** C D E

In the present case, no issue was joined by the parties as to the validity and/or finality of the native court proceedings, Exhibit B and as to whether the case was tried by a court of competent jurisdiction. The learned trial Judge was also of the view that the parties and/or their privies together with the claim or issue in dispute between the parties are the same in both the previous and present case. It is on the question of the identity of the land in dispute that the parties stoutly joined issue. The learned trial Judge, after a close consideration of the issue concluded thus:- F G

“Further there was evidence in the earlier suit that the land in dispute then had no boundary with any land in which any of the defendants or their relations was then living. But as can be seen from the evidence and from the plans Exhibits A, C and D - defendants and plaintiffs have common boundaries. It is therefore doubtful whether the present land in dispute has any thing to do with the land in suit No. 181/31. In the circumstances I am not satisfied that the H

decision in Suit No. 181/31 constitutes estoppel on which a plea could be raised by the plaintiffs to found their claim in the present suit.”

Earlier on in his judgment, the learned trial Judge had declared:-

“Therefore, it is unlikely the land in dispute in the present suit
B is the same as that in Exhibit B - suit No. 181/31.”

The above finding of the trial court was affirmed by the Court of Appeal when it observed thus:-

“I think also that he was right in holding that the Native Court
C case No. 181/31 which the plaintiffs had relied on had no connection with the land in dispute so as in any way to constitute estoppel, or confer title on the plaintiffs in respect thereof.”

The above findings have not been faulted in any way. They are also concurrent findings of fact of both the trial court and the
D Court of Appeal which this court will not disturb unless there is established a miscarriage of justice or violation of some principle of law or procedure or a substantial error apparent on the face of the record of proceedings is shown or where such findings are perverse. See Enang v. Adu (1981) 11 - 12 S.C. 25; Igwego v. Ezengo (1992) 6
E N.W.L.R. (Part 249) 561; Lamai v. Orbih (1980) 5 - 7 S.C. 28; Woluchem v. Gudi (1981) 5 S. C. 291. I am satisfied that there exists no ground for my interference with the said concurrent findings of both courts below. Issue 2 is accordingly answered in the affirmative.

There is finally issue 3, the question being whether the Court
F of Appeal was right to have affirmed the refusal by the trial court to enter judgment for the appellants with regard to the two small parcels of land jutting out on the east and west of the land in dispute and forming part and parcel of the land in dispute shown verged pink in
G the appellants’ plan Exhibit A when the respondents did not join issue with the appellants in respect thereof. For a better understanding of this issue, it is necessary to recount that the appellants, as plaintiffs, in the trial court tendered a survey plan, Exhibit A in which the entire land in dispute over which they claimed declaration of title is
H therein verged pink. In answer to the appellants’ case, the respondents tendered their own plan, Exhibit D, in which they showed the extent of land claimed by them. Exhibit D was superimposed on Exhibit A from which exercise it appeared that the respondents were not claiming the said two small pieces of land abutting on the east

and west of the plan, Exhibit A but within the area in dispute by the appellants and therein verged pink. It is the appellants' contention that having regard to the "no - contest" stance taken by the respondents in respect of the said two small pieces of land, the said appellants are entitled to a declaration of title in respect thereof.

The first point that must be made is that the two small pieces of land in question are not only part and parcel of the land in dispute verged pink in Exhibit A, they constitute a compact whole with the said land in dispute. On the strength of the appellants' amended Statement of Claim, the traditional history of the entire land in dispute including the said two small pieces of land is the same. Similarly the entire evidence in respect of the appellants' claim for declaration of title in respect of the land in dispute, including the said two small pieces of land is the same. ***Without doubt, where a plaintiff who is claiming a declaration of title to land succeeds in proving the boundaries and title to a smaller parcel of such land, he would be entitled to a declaration of title in respect of the smaller parcel of land in dispute, the title and boundaries of which he has proved with certainty.*** See *Araba v. Asanlu* (1980) 6 - 7 S.C. 74 at 85 - 87; *Udeze v. Chidebe* (1990) 1 N.W.L.R. (Part 125) 141; *Ima v. Okegbe* (1993) 9 N.W.L.R. (part 316) 159 at 175.

In the present case, however, the appellants proceeded to prove the declaration of title claimed in respect of one compact piece or parcel of land verged pink in Exhibit A, a compact piece or parcel of land which included the two small portions of land in question but failed. The appellants led the same evidence in respect of the entire compact piece or parcel of land in dispute which included the said two portions of land but failed to satisfy both courts below on the issue of their title thereto. ***The appellants now seek declaration of title to the said two small portions of land on the sole ground that the respondents made no claim to them. My reaction to this claim is to restate that the court does not make declarations of right either on admission or in default of defence without hearing evidence and being satisfied with such evidence.*** See *Vincent Bello v. Magnus Eweka* (1981) 1 S.C. 101; *Motunwase v. Sorungbe* (1988) 4 N.W.L.R. (Part 92) 90; *Wallersteiner v. Moi* (1974) 3 All E. R. 217. The appellants having failed to prove their title to the land in dispute which includes the two small portions of

land in issue cannot be entitled to a declaration of title in respect of the said two portions of land simply because the respondents showed no interest in them. As the Court of Appeal observed:-

“The evidence led in the case by them was on the whole weak. They would never have been granted a declaration in respect of any
B *part of the land in issue even if the defendants had specifically conceded it to them.”*

I think the Court of Appeal is right in the above observation and issue 3 must be resolved against the appellants. The conclusion I
C therefore reach is that this appeal lacks merit and the same is hereby dismissed. As the Respondents took no part in the appeal, I make no order as to costs.

D **OGUNDARE JSC**

I agree entirely with the judgment of my learned brother Iguh JSC just delivered. He has adequately dealt with all the issues arising in this appeal. I have nothing more to add. I adopt his reasoning and conclusion as mine.

E I too dismiss the appeal. And as the Respondents took no part in the appeal I make no order as to costs.

F **MOHAMMED JSC**

I am in agreement with my learned brother Iguh, J.S.C. in the judgment just delivered. I have no desire to add to the conclusions expressed in that judgment. In the result I concur in holding that the appeal should be dismissed. This appeal having been brought against
G two concurrent findings of fact must not be disturbed unless there is some miscarriage of justice and violation of some principle of law and procedure. None of such errors had been identified by the appellants in this appeal. The appeal is dismissed. I affirm the concurrent decisions of the two courts below. I abide by the order made in the
H lead judgment on costs.

EJIWUNMI JSC

As I have had the opportunity of reading in advance the draft

of the judgment of Iguh, JSC just delivered, I agree entirely with the reasoning and the conclusion that led my learned brother to dismiss this appeal.

For the reasons so articulately set out in the said judgment, I also dismiss the appeal.

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AYOOLA JSC

For the reasons given in the judgment just delivered by my learned brother, Iguh, JSC I too dismiss this appeal.

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