

SUPREME COURT OF NIGERIA
FRIDAY 11TH APRIL, 2003. SC. 115/1998
CORAM:- S. M. A. BELGORE, I. L. KUTIGI,
A. O. EJIWUNMI, D. MUSDAPHER, JJSC

1. NWOPARA OGBOGU
 2. ANTHONY NJAKA
 3. AJOMIWE IYOKU
 4. ANOSIKE OSUAGWU
 5. JOHN ANUEYIAGU
 6. LOUIS NWIWU
- (For themselves and as representing
Ezemanaha village of Eziam Obair)
- AND
1. EGBUCHIRI UGWUEGBU
 2. GABRIEL NDUKWU AMUZIE

ACTIONS - Pleadings - Binding nature - Parties and the court are bound by pleadings - And parties will not be allowed to set up cases different from their pleadings (H1)

ESTOPPEL - Issue estoppel - Binding nature - Appellants are bound by issue estoppel - With regard to traditional history of the parties - Pleaded and upheld in suit no. HOR/47/75 (H2)

EVIDENCE - Evaluation - Interference - Justification - Where trial court wrongly evaluated evidence - Appellate court can intervene - Moreso where credibility of witnesses is not involved (H3)

FACTS

Appellants and respondents have been in conflicts over the land in dispute. Litigation between the parties started with suits Nos. HOR/45/75 and HOR/68/75. The present appeal is the third one between them. The appeal was commenced as suit No. HOR/118/92 at the High Court of Imo State, Orlu. Respondents jointly and severally for themselves and on behalf of the Ndimbara village instituted this action against appellants jointly and severally claiming the sum of Five Million Naira as exemplary damages for trespassing on

the disputed land.

At the hearing, respondents called five witnesses in support of their case, while appellants called two witnesses. The learned trial Judge in a considered judgment dismissed the claims of respondents. As the respondents were dissatisfied with the judgment, they appealed to the Court of Appeal, Port Harcourt Division. The appeal was allowed. Aggrieved, appellants appealed to the Supreme Court.

ISSUES FOR DETERMINATION

“(1) Whether the proceedings in the trial court as in suit No. HOR118/92 as well as the proceedings in the Court of Appeal in the Appeal No/CA/PH/64/92 are null and void for want of jurisdiction?”

“(2) Whether the lower court was right in setting aside the judgment of the trial court on the basis that the defendants/appellants were estopped per rem judicatam by its judgment in the Appeal No. CA/E/109/88 from litigating over the land in dispute in suit No. HOR/68/75?”

“(3) Whether the lower court correctly applied the final decisions of the Supreme Court in suits Nos. HOR/47/75 and HOR/68/75 in its determination of the present case and did it give a dispassionate consideration of the defendants’/appellants’ case?”

“(4) Whether the lower court was right in holding that the trial court was wrong in its conclusion on the traditional history of the plaintiffs/respondents in the present case and that the said traditional history supports the plaintiffs’/respondents’ title to the land in dispute in this case?”

“(5) Whether on the pleadings and the evidence in the case the lower court was right in setting aside the judgment of the trial court in the case and in entering judgment for the plaintiffs/respondents?”

HELD (Unanimously dismissing the appeal per

EJIWUNMI JSC)

Pleadings - Binding nature

1. In consideration of the issue raised I must, in my view, begin with the principle that in a civil action tried on pleadings, parties and the court are bound by their pleadings filed in the case. And they will not be allowed to set up cases different

from their pleadings. The parties must therefore limit themselves severely to the issues raised in their pleadings.
(p. 1232)

Issue estoppel - Binding nature

2. It is clear that having regard to the clear decision of this court, the defendants/appellants are firmly bound by the doctrine of issue estoppel with regard to the traditional history of the parties pleaded and upheld in HOR/47/75. By that decision of this court, there is no room for the quibbling averment made by the defendants/appellants in paragraph 2 of their pleadings in the instant case. (p. 1234 G)

EVIDENCE - Evaluation - Interference - Justification

3. The duty of the trial court was to determine the case presented by the plaintiffs/respondents on the basis of the evidence presented by them. Where as in this case, the learned trial Judge came to the wrong conclusion on evidence properly admitted (sic) that the Court of Appeal has the duty to intervene and arrive at the right decision. Moreso, where as in the instant case the evidence does not involve the determination of the credibility of witnesses. (p. 1241 C)

REPRESENTATION

G. R. I. Egonu, SAN with C. A. Nyigide, Esq., for Appellants
A. Akpomudje, SAN with C. A. Ajuyah, Esq., for Respondents

CASES REFERRED TO

Nnajofo v. Ukonu (1986) 4 NWLR (Pt.36) 505
Ogbogu v. Ndiribe (1992) 6 NWLR (Pt.245) 40
Ojogbue v. Nnubia (1972) 1 All NLR (Pt.2) 226
N.I.P.C. Ltd v. Bank of West Africa (1962) 1 ANLR (Pt.4) 556
Nkanu v. Onun (1977) 5 SC 13
Sagay v. M.N.I. (1977) 5 SC 143
Udofia v. Afia (1940) 6 WACA 216
Olusanmi v. Oshasona (1992) 6 NWLR (Pt.245) 22
Emiri v. Imieyeh (1999) 4 NWLR (Pt.599) 442
Kalio v. Kalio (1975) 2 S.C. 15

N.I.P.C. v. The Thompson Organisation (1969) 1 ANLR 138

George v. Dominion Flour Mills Ltd. (1963) 1 SCNLR 117

STATUTE REFERRED TO

Evidence Act, Cap. 112, Vol. VIII, Laws of the Federation of Nigeria,
B 1990, s. 46

LEAD JUDGMENT BY EJIWUNMI JSC

This appeal is against the judgment of the Court of Appeal,
C Port-Harcourt Division. It is hoped that the litigation between the parties
will finally end the conflicts over land in that area between the parties.
Litigation between the parties started with suits Nos. HOR/45/75
and HOR/68/75 and which eventually ended separately in this court.
The appeal under consideration is the third one between them. This
D was commenced as suit No. HOR/118/92 at the High Court, Orlu.
The claim before that court was instituted by the plaintiffs now the
respondents, against the defendants who are the appellants in this
appeal.

With leave of the trial High Court sitting at Orlu, an amended
E claim was filed and which read thus: -

*"1. The plaintiffs jointly and severally for themselves and on
behalf of the Ndimbara village claim against the defendants jointly
and severally the sum of Five Million Naira (N5m) as exemplary damages
F for trespassing into Ndimbara land, land of the plaintiffs situate
at Ndimbara Village, Eziamma Obairi Autonomous Community of the
Nkwere Local Government Area within jurisdiction.*

*2. Perpetual injunction restraining the defendants, their agents,
servants, representatives and successors in title from entering into the
G Ndimbara land in dispute.*

DATED THIS 10th day of May, 1993."

Following the order for pleadings, pleadings were filed and
exchanged by the parties. At the hearing, the respondents called five
witnesses in support of their case, while the appellants called two
H witnesses. Several documentary exhibits were also tendered and admitted
during the trial. With the conclusion of the hearing of oral evidence,
learned counsel for the parties addressed the court. The learned trial
Judge then adjourned to deliver a considered judgment. By the said
judgment, the claims of the plaintiff/respondents were

dismissed.

As the respondents were dissatisfied with the judgment of the trial court, they appealed to the court below, and the appeal was successful in that court. The defendants/appellants, who lost in the court below, have now appealed to this court. Pursuant thereto, the defendants/appellants by their original notice of appeal filed three grounds of appeal with particulars to each of them. But with the leave of court, an amended notice of appeal with ten grounds of appeal and their particulars were filed for the appellants by their learned counsel. The grounds of appeal without their particulars read as follows: -

“1. Both the trial court and the Court of Appeal erred in law in entertaining respectively suit No. HOR/118/92 and the appeal therefrom No. CA/PH/64/96 when neither the trial court nor the Court of Appeal had jurisdiction to hear the suit or the appeal.

2. The Court of Appeal erred in law in relying on its conclusion in the appeal No. CA/E/1098/88 as per the judgment of His Lordship, the Honourable Kolawole, JCA, in which it held that the present defendants appellants were estopped per rem judicatam from litigating over the land in dispute in suit No. HOR/68/75 to set aside the judgment of the learned trial Judge in the present suit No. HOR/118/92.

3. The Court of Appeal misdirected itself in law in its application of the decisions in Omoni v. Biriya (1976) 6 SC 49 and Balogun v. Akanji (1988) 1 NWLR (pt. 70) 301.

4. The Court of Appeal misdirected itself in law and in the following passage of its judgment:

In other words the present respondents lost as defendants in suit No. HOR/47/75 and as plaintiffs in suit No. HOR/68/75. The combined effect is that as regards the land in dispute in the present appeal which is virtually what the two earlier suits covered taken together, the present respondents have very unsteady legs to stand on.

5. The Court of Appeal misdirected itself in law in the following passage of its judgment:

The respondents can hardly be allowed to assert now that the land in dispute is in their village. That will amount to reopening their claim to customary right of occupancy, which claim was dismissed earlier as between the same parties.

6. *The Court of Appeal misdirected itself in law in the following passage of its judgment:*

In the present case the respondents did worse than previously. They have nothing by way of what they can point to as forming the basis of their claiming that they have a better title than the appellants in respect of the land in dispute. There is no assertion of any traditional history; no evidence of long, numerous and positive acts of possession.

They purported to have conceded the area verged brown in their survey plan exhibit H (now exhibit CA/3) to the appellants. I do not know how that can be. You cannot concede, as if a former owner, a portion of a larger parcel of land you never owned or proved to have owned.

7. *The Court of Appeal misdirected itself in law in the following passage of its judgment:*

I think it was unfortunate that the learned trial Judge had a wrong focus and kept to it irretrievably. The learned trial Judge was not entitled to confine the traditional history to an area of land less than what the appellants put in issue and in respect of which they clearly led their evidence of the said history. It was a misconception on his part. The said traditional history relied on by the appellants was capable of supporting their title to the land in dispute.

8. *The Court of Appeal erred in law in setting aside the judgment of the learned trial Judge in this suit and in entering judgment therein for the plaintiffs/respondents.*

9. *The Court of Appeal misdirected itself in law in the following passage from its judgment:*

It is plain from the respondents' plan that they are laying claim to a large portion of the land in dispute across the northern part and in the west. It is verged green in the northerly part and pink in the westerly part. They indicate therein acts of possession in order to show their presence. That is evidence of trespass when it is clear that they have no right to be on the appellants' land having previously failed to prove title.

10. *The judgment is against the weight of evidence."*

In accordance with the rules of this court, briefs of arguments were filed and exchanged. And with the leave of court, learned counsel for the parties filed an amended appellants' brief and an amended

respondents' brief respectively. At the hearing, counsel adopted and placed reliance on the said briefs for the appeal. In two amended appellants' brief, the following are the issues distilled from the grounds of appeal for the determination of the appeal:-

"(1) Whether the proceedings in the trial court as in suit No. HOR118/92 as well as the proceedings in the Court of Appeal in the Appeal No/CA/PH/64/92 are null and void for want of jurisdiction?" ^B

(2) Whether the lower court was right in setting aside the judgment of the trial court on the basis that the defendants/appellants were estopped per rem judicatam by its judgment in the Appeal No. CA/E/109/88 from litigating over the land in dispute in suit No. HOR/68/75?" ^C

(3) Whether the lower court correctly applied the final decisions of the Supreme Court in suits Nos. HOR/47/75 and HOR/68/75 in its determination of the present case and did it give a dispassionate consideration of the defendants/appellants' case?" ^D

(4) Whether the lower court was right in holding that the trial court was wrong in its conclusion on the traditional history of the plaintiffs/respondents in the present case and that the said traditional history supports the plaintiffs/respondents' title to the land in dispute in this case?" ^E

(5) Whether on the pleadings and the evidence in the case the lower court was right in setting aside the judgment of the trial court in the case and in entering judgment for the plaintiffs/respondents?" ^F

And in the plaintiffs/respondents' brief, the following issues are identified for the determination of the appeal.

"(1) Was there jurisdiction in both the High Court and the Court of Appeal to determine this suit [Ground 1 of Appeal]."

(2) Did the several pronouncements, legal authorities and quoted passages from the judgment of the Court of Appeal and other previous suits occasion any miscarriage of justice to warrant the judgment of the lower court being set aside [Grounds 2, 3, 4, 5, 6, 6 and 9]" ^G

(3) Was the Court of Appeal right in its consideration and conclusion reached on the evidence and the legal issues raised at the trial court and in doing so did the lower court correctly apply the Supreme Court decision in the previous suits between the parties and relied on by both parties during the trial of this case?" ^H

After due consideration of the issues raised in the briefs of the parties, it is my view that I will consider this appeal on the basis of the issues set down in the defendants/appellants' brief as they encompass more effectively their grounds of appeal. Before considering the issues to determine the merit of the appeal, I will refer to the pleadings filed as a setting for the background facts of this appeal. I think it is clear from the pleadings that the defendants/appellants are not disputing their relationship with the plaintiffs/respondents as they admitted by paragraph 1 of their statement of defence, the averments of the plaintiffs/respondents in paragraphs 1 and 2 of their statement of claim. By these pleadings, it is averred that the plaintiffs/respondents and the defendants/appellants are farmers. The plaintiffs/respondents are natives of Ndimbara village of Eziamma Obaire Autonomous Community in the Nkwere Local Government Area of Imo State, while the defendants/appellants though from the same Eziamma Obaire Autonomous Community are natives of Ezemenaha village of Eziamma Obaire also of Autonomous Community.

In paragraphs 3, 4 & 5 of their statement of claim the plaintiffs/respondents pleaded their ancestry thus: -

"3. The plaintiffs are descendants of Ezemoha (m) who founded their village of Ndimbara; while the defendants are descendants of Ezemelaha (m), the founder of their village of Ezemanaha.

4. Both parties in this suit trace the origin of their descent back to a common progenitor by name Nwoma (m) who beget Ezeanoruo or Ezeanorue (m), the father of Ezerioha and Ezemelaha aforementioned.

5. The original founder of the land in dispute in this suit was Ezeanorue Nwoma who had four (4) sons, the eldest among whom being Ezerioha, the plaintiffs forebear aforesaid.

The defendants/appellants in answer to the above averments pleaded in paragraph 2 of their statement of defence that -

"In answer to paragraphs 3, 4 and 5 of the statement of claim, the defendants say that the plaintiffs' traditional evidence in suit No. HOR/47/75 was accepted in preference to the defendants' traditional evidence. The said acceptance by the trial court was said to be binding on the parties in suit No. HOR/68/75. The defendants do not admit the correctness of the plaintiffs' traditional history but cannot contest it."

The averments made in the respective pleadings of the parties, in my view, reveal the claim of each side to the disputed land, and why the plaintiffs/respondents decided to commence this action against their kinsmen. For the plaintiffs/respondents, they pleaded in paragraphs 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 18 & 19 of the statement of claim as follows:-

“6. This action is supported by survey plan No. US636/IMD10/93 dated 24/5/93 prepared by Surveyor Ray Ubajekwe Licensed Surveyor, duly filed along with this statement of claim. This plan superseded the plan of the plaintiffs used in HOR/68/75. Also copy of the plan of the defendants which they, used in HOR/68/75 plan No. DS7170/IM219513/86 dated 7 - 11 - 86 and duly served on the plaintiffs is herein pleaded.

7. The land in dispute forms but part of the land given by Ezeanoruo to Ezerioha who was a brave warrior to enable him repulse attacks and aggression from border and neighbouring settlements.

8. During his lifetime, the plaintiffs’ ancestor, Ezerioha, exercised maximum acts of ownership, dominion and possession over the entire land given to him as aforesaid by building, working and farming on same without let or hindrance from anyone including the ancestors of the defendants.

9. On the death of the plaintiffs’ forebear Ezerioha, his children and descendants not only inherited his proprietary rights, including the land now in dispute; but also exercised in a maximum manner, acts of ownership, dominion and possession in respect of the land in dispute from the plaintiffs and their people.

10. The land in dispute is well known to the parties herein, the same having been put in dispute by the defendants qua defendants in suit No. HOR/47/75 and qua plaintiffs in suit No. HOR/68/75 which were actions fought between the parties in this honourable court.

11. The plaintiffs aver that both suits HOR/47/75 and HOR/68/75 were contested by the parties right up to the Supreme Court of Nigeria where the plaintiffs won the appeals, and obtained not only full affirmation of the facts in support of the plaintiffs’ traditional history as pleaded in paragraph 3-8 thereof; but also conclusive confirmation of the rejection by the lower courts of the law version of traditional history to the contrary put forward by the defendants.

12. *In real terms, by the judgments referred to in the preceding paragraph hereof, reported in (1986) 4 NWLR (Pt. 36) 505; (1989) 5 NWLR (Pt. 123) 599; and (1992) 6 NWLR (Pt. 245) 40; also (1992) 6 SCNJ (Pt. 11) 301, the plaintiffs secured unimpeachable judgments against the defendants for declaration of entitlement to customary right of occupancy over Okohia Ndimbara piece of land, damages for trespass coupled with an order of perpetual injunction in relation to the said piece of land.*

13. *Furthermore, this Honourable Court made specific binding findings of fact, which were confirmed by the appellate courts, concerning the acts of ownership and possession exercised by the plaintiffs on the land now in dispute which was described as "surrounding area or parcels of land" in relation to the smaller Okohia Ndimbara piece of land put in dispute by the plaintiffs in suit No. HOR/47/75. Appeal FCA/E/141/81; and SC. 179/8 reported in (1986) 4 NWLR (Pt. 36) 505.*

14. *The plaintiffs contend that having regard to the facts and judgments pleaded above, particularly in paragraphs are concluded and estopped from ever re-opening or denying the bindings findings of facts against them and in favour of the plaintiffs. In short, the plaintiffs will in this connection rely on the plea of issue estoppel and on the provisions of section 46 of the Evidence Act, Cap. 112, Vol. VIII, Laws of the Federation of Nigeria, 1990.*

15. *Notwithstanding the binding judgments of the courts of competent jurisdiction as well as the facts pleaded above, the defendants, relying on their numerical strength and the assured support of the wealthy elements of their village who apparently have more wealth than sense of justice in these matters, deliberately, outrageously and provocatively entered the land in dispute with force of arms on diverse occasions, including 28th, and 29th September, 5th December, 1992, and 5th January, 1993, dispute (sic) the plaintiffs' warnings and objections.*

18. *The plaintiffs aver that they duly reported the acts of the defendants complained of to the Nigeria Police Command Office, Owerri, but to no avail.*

19. *Indeed, the stalwarts among the defendants, with the concurrence of their leaders, have on numerous occasions boasted publicly that they would not obey the court judgments given against them;*

and they would instead continue and intensify their acts of trespass on the land in dispute.”

And in respect of the defendants/appellants, paragraphs 3, 4, 5, 6, 7, 8, 11 and 12 of their statement of defence are relevant.

“3. Paragraph 6 of the statement of claim is not admitted. Plaintiffs’ survey plan No. US 2636/IMD10/93 of 20/5/93 does not represent the correct boundaries, features of the areas of the land in dispute. The correct boundaries features and abutments of the area of land in dispute are as shown in defendants’ survey plan No. DS 25290/IM 277D/93 filed with this statement of defence. At the trial the defendants shall rely on the boundaries and features of the areas of land in dispute as shown in the said defendants’ plan No. DS 25290/IM 277D/93 as if the same were specifically pleaded herein.

4. The defendants do not admit paragraphs 7, 8 and 9 of the statement of claim. The defendants shall contend that the traditional history of and acts of ownership and possession by the plaintiffs relate and are confined to only the areas of land identified and proved to belong to the plaintiffs. The area of land to which the plaintiffs’ traditional history relate and over which the plaintiffs exercise acts of ownership and possession are verged yellow and brown in the defendants’ survey plan No. DS 25290/IM 277D/93.

5. Save that plaintiffs and defendants were parties to suit No. HOR/47/75 and HOR/68/75 and that the plaintiffs were ultimately successful in both cases, paragraphs 10, 11, 12, 13 and 14 of the statement of claim are not admitted.

6. The plaintiffs were plaintiffs in suit No. HOR/47/75 and the land in dispute was called “Okohia” by the plaintiffs won the case up to the Supreme Court. The case was reported in (1986) 4 NWLR (Pt. 36) 505. In that case plaintiffs filed a survey plan No. PO/E247/75 while the defendants filed Survey Plan No. E/GA3215/75. The defendants shall rely on the two plans used in HQR/47/75. The plaintiffs are hereby given NOTICE to produce the said two plans.

7. One of the findings made by the learned trial Judge in HOR/47/75 was:- that the plaintiffs’ houses are close to the trench which in turns is close to the forest, I hold therefore that section 45 of the Evidence Law should apply to the plaintiffs that they own the forest in dispute.”

???? check omissions/italics??? The Supreme Court in affirming

the above finding of fact said:-

“...on the issue of possession, the learned trial Judge found that the plaintiffs/respondents have been exercising acts of ownership and possession in respect of the land in dispute as well as the surrounding area of land”.

B The defendants shall contend that the judgment of the Supreme Court did not give the plaintiffs more land than the trial Judge gave them in HOR/47/75.

8. The defendants were plaintiffs???? exh. F in HOR/68/75.

C The defendant, as plaintiffs, tendered Survey Plan DS 7170/IM2195 D/86 while the plaintiffs, as defendants in that case, tendered Survey Plan No. AS.A/IMD 34/87. The defendants shall rely on the said two plans and hereby give the plaintiffs NOTICE to produce them. Defendants, as plaintiffs in that case, won at the High Court but were D successively unsuccessful at the Court of Appeal and the Supreme Court. The judgment of the Court of Appeal was reported in (1992) 6 NWLR (pt.245) 40.

11. Owing to the judgment of the Supreme Court, following the appeal against the concurrent findings in HOR/47/75 the plaintiffs felt that they were given a blank cheque by the phrase *“the surrounding area of land. Consequently in HOR/68/75 the plaintiffs began to lay claim to ownership and possession of the area verged pink in defendants’ plan No. DS 25290/IM277/93.*

F 12. When based on *“issue estoppel”*, the defendants’ appeal was dismissed in that case which started as suit No. HOR/68/75, the plaintiffs began to invade the area verged green in defendants’ Survey Plan No. DS 25290/IM277D/93 - a piece of land over which they had neither laid claim nor joined issues with the defendants in G both HOR/47/75 and HOR/68/75.”

The issues raised in the appeal will now be considered. Issue (1) will however not be necessary for consideration as it was abandoned by learned counsel for the defendants/appellants, G.R.I. Egonu, SAN when he opened his argument before us. Issue (1) is accordingly struck out. He then proceeded to present his arguments in respect of the other issues. Issues (2) and (3) were argued together in the defendants’/appellants’ brief and before us. The contention of learned counsel appeared to be that as the plaintiffs/respondents had H claimed for trespass and possession, the issue of title to the disputed

land had been raised. Therefore, he argued that the plaintiffs/respondents have the burden of proving their title to the disputed land. But that burden was not discharged as there was no positive proof of the identity of the land that they are claiming, and there is no evidence also of how the land became their own. In support of that submission, the case of *Ogbogu v. Ndiribe* (1992) 6 NWLR (Pt.245) 40 was cited. Learned counsel conceded in the course of his submissions that there had been two previous cases which ended in this court between the same parties. The first case is *Ezeala Nnajiolor & Ors. v. Linus Ukonu & Ors.* (1986) 4 NWLR (Pt.36) 505 at 512 - 513. And the second one is *Nwopara Ogbogu & Ors. v. Nwonuma Ndiribe & Ors.* (1992) 6 NWLR (Pt.245) 40 at 61. B
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With regard to suit No. HOR/47/75 learned counsel for defendants/appellants admitted that HOR/47/75 went up to the Supreme Court and the plaintiffs/respondents were awarded customary right of occupancy over “Okohia Ndimbara”, and that they were also exercising acts of ownership over “the surrounding area of land”. But this said area was never defined or demarcated in the High Court, Court of Appeal or the Supreme Court. In respect of suit No. HOR/68/75, he submitted that though the Supreme Court again gave its judgment in favour of the plaintiffs/respondents as the defendants/appellants, but the plaintiffs in this case were met with the defence of issue estoppel that arose from the decision in suit No. HOR/47/75. It is however the contention of learned counsel that estoppel does not vest title on any person in respect of the subject of estoppel and in support, he referred to *Simm & Ors. v. Anglo-American Telegraph Company* (1879) 5 Q.B.D. 188 at 206. He also argued that the defence of *res judicata* is not also available to the plaintiffs/respondents as they failed to establish it in suit No. HOR/68/75. The Court of Appeal was therefore wrong to have based its decision on suits Nos. HOR/47/75 and HOR/68/75. And he further submitted that the court below failed to give dispassionate consideration to the issues raised before it. The case of *Polycarp Ojogbue & Anor. v. Ajie Nnubia & Ors.* (1972) 1 All NLR (Pt.2) 226 at 232 was cited in support of this his final submission. E
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In response to the arguments for the defendants/appellants, learned counsel for the plaintiffs/respondents A. Akpomudje, SAN in his brief and in oral arguments before us, agreed with the submission

made for the defendants/appellants that as plaintiffs, they have the burden of establishing their claim. And he then submitted that the plaintiffs/respondents duly discharged that burden. In order to discharge that burden, learned counsel argued that they proved their traditional history at the trial, apart from the fact that the defendants/
 B appellants admitted same. Learned counsel also submitted that having regard to the decision of this court in respect of suits Nos. HOR/47/75 and HOR/68/75, the parties are bound by the doctrine of issue estoppel in respect of their traditional history. And he went on
 C to contend that the plaintiffs/respondents should not be penalized for ensuring that their case succeeded. For this submission, he referred to *Balogun v. Akanji* (1988) 1 NWLR (Pt.70) 301. It is also the contention of learned counsel that the plaintiffs/respondents duly proved the identity of the land in dispute. The land in dispute, described, as
 D “the surrounding area of land in HOR/68/75 was, he argued, part and parcel of the land, which the defendants/appellants litigated upon and lost.

In consideration of the issue raised I must, in my view, begin with the principle that in a civil action tried on pleadings, parties and the court are bound by their pleadings filed in the case. And they will not be allowed to set up cases different from their pleadings. The parties must therefore limit themselves severely to the issues raised in their pleadings. See
 E *N.I.P.C. Ltd. & Anor. v. Bank of West Africa* (1962) 1 ANLR (Pt.4) at p. 556; *Kalio & Ors. v. Kalio* (1975) 2 S.C. 15; *N.I.P.C. v. The Thompson Organisation & Ors.* (1969) 1 ANLR p.138; *George & Ors. v. Dominion Flour Mills Ltd.* (1963) 1 SCNLR 117; (1963) 1 ANLR 71; *Nkanu v. Onun* (1977) 5 SC 13; *Sagay v. M.N.I.* (1977) 5 SC
 F 143.
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Following from this settled principle, it is clear that the parties, in the instant case and the court must be held as bound by their pleadings. Some of the paragraphs of the pleadings have been set out above in this judgment. And I have also observed that the parties
 H to the suit, who belong to separate villages, they are not strangers to each other as they are all farmers and natives of Ezicama Obairé Autonomous Community. See paragraphs 1 and 2 of the plaintiffs/respondents’ statement of claim which were admitted by the defendants/appellants in paragraph 1 of their statement of defence.

With regard to their traditional history, the averments of the plaintiffs/respondents and that of the defendants/appellants have also been set out in this judgment. By the said pleadings of the plaintiffs/respondents, they pleaded that the parties are descendants of Ezerioha (m) who founded the village of Ndimbra; while the defendants/ap-
 B
 appellants are descendants of Ezemelaha, the founder of their village of Ezemanaha. Both parties in this suit have a common progenitor by name Nwoma (m) who begat Ezeanoruo or Ezeanorue (m), the father of Ezemelaha (m), mentioned above. The original founder of the land in dispute was Ezeanorue Nnoma who had four sons, the
 C
 oldest among them was Ezerioha, the plaintiffs/respondents forbearer. It is interesting that the defendants/appellants gave an equivocal answer to this clear averments of the plaintiffs/respondents about their traditional history in paragraph 2 of their statement of defence, where they pleaded inter alia thus: -

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“the defendants say that the plaintiffs’ traditional evidence in suit No. HOR/47/75 was accepted in preference to the defendants’ traditional evidence. The said acceptance by the trial court was said to be binding on the parties in suit No. HOR/68/75. The defendants do not admit the correctness of the plaintiffs’ traditional history but
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cannot contest it.”

By the above averment of the defendants/appellants, there can be no doubt that they must be understood to have admitted the traditional history pleaded by the plaintiffs/respondents. It is pertinent to refer to suit No. HOR/68/75, reported in Ogbogu v. Ndiribe
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 (1992) 6 NWLR (Pt.245) 40 at pages 68-69 quoted inter alia the following passage from the judgment of Diplock L.J. in Fidelitas Shipping Co. Ltd. v. V/O Exportchleb (1966) 1 QB. 630 at 68, which reads:

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“This is but an example of a specific application of the general rule of public policy, nemo debet bis vexari pro una et eadem causa. The determination of the issue between the parties gives rise to what I ventured to call in Thoday v. Thoday an ‘issue estoppel’. It operates
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in subsequent suits between the same parties which the same issue arises. A fortiori operates in any subsequent proceedings in the same suit in which the issue has been determined. The principle was expressed as long ago as 1843 in The words of Wigram V. C. in Henderson v. Henderson (1843) 3 Hare 100, 114 which were ex-

pressly approved by the judicial Committee of the Privy Council in Hoystead v. Commissioner of Taxation (1926) AC 155, 170. I would not seek to better them:

I believe I state the rule of the court correctly when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

Then said at page 69: -

"This case has been cited with approval by this court in a number of cases - see for example: Lawal v. Dawodu & Anor. (1972) 1 All NLR (Pt.2) 270, 282; Aro v. Fabolude (supra) at pp. 101-103. The appellants cannot re-open the issues decided in those findings merely on the ground that they can now produce better evidence see: Ojo v. Abadie (1955) 15 WACA 54. It was wrong of the learned trial Judge to have allowed them to adduce evidence on a traditional history which had in an earlier suit been rejected by courts of competent jurisdiction."

It is clear that having regard to the clear decision of this court, the defendants/appellants are firmly bound by the doctrine of issue estoppel with regard to the traditional history of the parties pleaded and upheld in HOR/47/75. By that decision of this court, there is no room for the quibbling averment made by the defendants/appellants in paragraph 2 of their pleadings in the instant case. The Court of Appeal also recognised very clearly this point that the parties are bound by the traditional history of the parties that was affirmed by this court in HOR/47/75.

But the real question raised in this appeal is, whether the court

below was right in setting aside the judgment of the trial court on the basis that the defendants/appellants were estopped per rem judicatam by its judgment in the appeal No: CA/IE/109/68 from litigating over the land in dispute in suit No. HOR/68/75. The plaintiffs/respondents have however argued in their brief that the defendants/appellants appeared to have misconceived the judgment of the court below in this point. The arguments of the plaintiffs/respondents put briefly appear to be that though the question of traditional history need not be proved again in this case, they did so, out of abundance of caution, and the learned trial Judge accepted the evidence. Secondly the plaintiffs/respondents to prove the extent of the land they are claiming, tendered their survey plan exhibit "A", now A CA/3 which is exactly the same area of land in appellants' plan exhibit "H" now CA/3 and also identical to appellants' plan exhibit 'F' in suit No. HOR/47/75.

It is I think pertinent to quote relevant passages in the judgment of the court below in order to determine whether the complaint made on behalf of the defendants/appellants is not misconceived. In the judgment of the court below Uwaifo, JCA (now JSC) in the course of his judgment referred to the decision of this court in Ogbogu v. Ndiribe (1992) 6 NWLR (Pt.245) 40 and then said: -

"The Supreme Court dismissed the appeal as reported in Ogbogu v. Ndiribe (1992) 6 NWLR (Pt.245) 40. At page 70, Ogundare, JSC who delivered the leading judgment which was unanimously supported by the other learned justices, said:
In conclusion, this appeal fails and it is hereby dismissed. The judgment of the court below dismissing appellants' claims in the trial High Court is affirmed.

In other words, the present respondents lost as defendants in suit No. HOR/68/75. The combined effect is that as regards the land in dispute in the present appeal which is virtually what the two earlier suits covered taken together, the present respondents have unsteady leg to stand. They cannot contest the traditional history relied on by the appellants and in fact did not attempt to do so. An issue estoppel arises from that and this was said in plain terms by the Supreme Court in the second suit No. HOR/68/75 as reported in Ogbogu v. Ndiribe (supra) at page 69 per Ogundare, JSC. In Ezewani v. Onwordi (1986) 4 NWLR (Pt.33) 27, the issue estoppel there raised was inci-

dentally also in respect of the traditional history in an earlier proceeding between the same parties. The one relied on by one of the parties was accepted and that of the other whose claim was dismissed was rejected. In a later action by the loser against the winner, the winner relied on their earlier traditional history while the other party tried to
 B *set up history different from what it earlier relied on. It was held that the issue of traditional history could not be reopened.”*

From a careful reading of the above passage, it should be manifest that the statement “that the respondents, now appellants, have no steady legs to stand on” was not meant to mean that the
 C court below had concluded that the dismissal of the defendants/appellants’ claim in HOR/68/75 would mean that the plaintiffs/respondents would succeed on the principle of res judicata as argued by the defendants/appellants. It is however clear that what was affirmed in
 D the above passage is that the question with regard to the traditional history and as I have earlier stated, cannot now be re-litigated between the same parties and the same cause of action.

I have earlier set down paragraphs 5, 6, 7, 8 and 9 where the plaintiffs/respondents pleaded their survey plan showing the extent
 E of the land and also acts of possession and ownership. Based upon that evidence and the other pieces of evidence and the documentary exhibits tendered at the trial which included the survey plan exhibit A, now CA1 and exhibit H, now CA3, the trial Judge first held that
 F he preferred exhibit H to exhibit A, and then went on to dismiss the claim of the plaintiffs/respondents, when he concluded his judgment at pages 466 - 467 thus: -

“In the final result, it being trite law that the plaintiff must succeed on the strength of his own case and not on the weakness of the
 G *defence, I am satisfied that the plaintiffs in the present action have failed to prove their case. In other words, they have failed to clearly, emphatically and satisfactorily identify or define the term “surrounding area of land” as used in suit No. EOR/47/75. Having so failed, I find their claim of damages for trespass against the defendants un-*
 H *proved. They are therefore not entitled to the relief of perpetual injunction or any injunction whatsoever restraining the defendants either jointly or severally by themselves, their agents, servants, or representatives and successors in title from entering the Ndimbara land in dispute which land the plaintiffs failed to identify in their present*

action. On the other hand, I find and hold as a fact that the defendants have, by their Survey Plan No. DS25290/1M 27713/93 dated 12/8/93, defined to my satisfaction and acceptance the term “surrounding area of land”. See the area verged “Brown” in the defendants’ Survey Plan No. DS25290/1M27713/93. I accept the area verged “Brown” in the defendants’ plan as approximating to the term “surrounding area of land” as used in No. HOR/47/75. I dismiss the plaintiffs’ claim.”

Now, it is pertinent to refer to some of the issues that must properly fall for consideration by the court below. For this purpose, issues i, ii & iii culled from the appellants (plaintiffs/respondents) brief are reproduced:

“i. From the pleadings/evidence led and the findings of the trial Judge, was the identity of the land put in dispute in doubt and was the trial Judge right to have dismissed the appellants’ claim on the ground only that the appellants did not establish conclusively the identity of the land in dispute.

ii. Did appellants prove title to the disputed land and therefore entitled to judgment?

iii. Was the learned trial Judge right in holding that the piece of land verged ‘violet’ on the respondents’ plan exhibit ‘H’ belongs to the respondents.”

The court below, per the judgment of Uwaiifo, JCA (as he then was) then reviewed the evidence of the witnesses who gave evidence at the trial beginning with PW1:

“The plaintiffs and the defendants have a common ancestor known as Ezeanorue. The said Ezeanorue gave his son Ezerioha this piece of land in appreciation of his gallantry as a warrior so that he would live there and be able to ward off attacks from border neighbours. The said Ezerioha lived there and farmed there as well. On the death of Ezerioha his children which included the present plaintiffs inherited the land in dispute.”

This witness, later tied exhibit CA/2 (formerly exhibit AO to the land with particular reference to “the surrounding area of land. He said:

“...the High Court, the Court of Appeal and the Supreme Court are all agreed that the Ndimbara people own the land known as ‘Okohia Ndimbara’ and the surrounding lands ...

And after adverting to the evidence of the respondents (defendants/appellants) given by their first witness, Nze Barnabas Bekee Nriajiofor who said:

"I know the lands in dispute. The lands in dispute are situate (sic) in Ezemenaha Village. We surveyed the land in dispute. We filed the Survey Plan of the land in court and also served same on the plaintiffs. The plan was admitted as exhibit 'H' ... exhibit 'F' is the Survey Plan we used in suit No. HOR/68/75 in a land dispute we had with the plaintiffs. There is no difference between exh. 'F' and exh. 'H' except the colours used in demarcating the areas in dispute."

Uwaifo, JCA (as he then was) noted thus:

"It will be noted that exhibit F was the plan relied on by the respondents as plaintiffs in suit No. HOR/68/75 D which they lost and their claim was dismissed. It is the same as the plan, exhibit H, they filed in the present case. That exhibit H is now exhibit CA/3. The respondents can hardly be allowed to assert now that the land in dispute is in their village. That will amount to reopening their claim to a customary right of occupancy, which claim was dismissed earlier as between the same parties."

And his Lordship then continued thus: -

"The learned trial Judge failed to realise that when the appellants gave evidence of traditional history in this case (which was not controverted) they did so in respect of the land in dispute in the present case as depicted in their survey plan, exhibit CA/2 and therein verged red. The learned trial Judge accepted the evidence of traditional history but he seemed not to have appreciated its full implication as related to the evidence of PW.1.

He observed:

This traditional history, in my humble view, is no longer necessary in the present action having regard, more particularly, to the above outlined conceded areas of land. It seems the area of land to which the traditional history account pertains is the very area of land settled in suit No. HOR/47/75 in favour of the present plaintiffs as well as the 'surrounding area of land' when defined quite clearly.

The learned trial Judge made similar observations in other parts of his judgment and seemed to have been unable to remove his mind from the phrase 'surrounding area of land' which he referred to in his judgment some 38 times. I think it was unfortunate that the

learned trial Judge had a wrong focus and kept to it irretrievably. The learned trial Judge was not entitled to confine the traditional history to an area of land less than what the appellants put in issue and in respect of which they clearly led their evidence of the said history. It was a misconception on his part. The said traditional history relied on by the appellants was capable of supporting their title to the land in dispute: see *Alade v. Lawrence Awo* (1975) 4 SC 215 at 228; *Akhionbare v. Omoregie* (1976) 12 SC 11 at 27 which decided that when evidence of traditional history is not contradicted or in conflict and found to be cogent, it can support a claim for declaration of title. That is the position here and such a declaration which ought to be made in favour of the appellants would entitle them to the right to possession of the said land as against the respondents who had nothing at all upon which to resist an action for trespass: see *Omoni v. Biriya* (1976) 6 SC 49 at 54. In addition, the appellants showed a number of acts of possession, even though there was no real duty on them to do so: see *Balogun v. Akanji* (1988) 1 NWLR (Pt. 70) 301 at 314 per Uwais, JSC, (now CJN). Again the appellants filed and relied on a survey plan. The said plan corresponds with the land to which they lay claim and relates to the land in dispute: see *Aro v. Obaloro* (1968) NMLR 238; *Okosun Epi v. Aigbedion* (1973) 1 NMLR 31 at 34. The survey plans of both parties were admitted without objection. The appellants' plan is adequately orientated and the extent of the land put in dispute is known by both parties and is clear. It is open to the respondents to argue that the identity of the land in dispute was not proved: see *Akpagbue v. Ogu* (1976) 6 SC 63. They have nothing with which to show their entitlement to any part of the land upon which to insist on this. Besides, both they and the learned trial Judge seem to me, with due respect, to have engaged in unmitigated error to find a definition or meaning of 'surrounding area of land' when, indeed the extra effort taken by the appellants to delineate the land in dispute in their survey plan in line with the tenor of their averments should have spared them that labour if it had been considered."

And he went on to make the following after referring to paragraph 9 of the statement of defence thus: -

"Even so, the Supreme Court dealt with the point in *Nnaji* for *Ukonu* (supra) at pages 519-521. But in particular at page 520,

reference was made to the document relied on, which was meant to prove a fact of ownership, and the court said:

“..... the admission of the document will not make the evidence of facts not pleaded relevant.”

B Furthermore, it was observed that the learned trial Judge did not make any finding based on that piece of evidence. I will add that (1) there is no evidence establishing that the land bought by the said Godwin Iwuchukwu, if he did, is within the land in dispute; (2) there is nothing to show that the said man did so on behalf of the Ndimbara village community; and (3) although such a sale, if there was one, C may be evidence of one act of ownership, but because the defendants/respondents in this case have failed completely to show how they came to own the land, that alleged sale would be an act of trespass, if the appellants prove a better title.”

D Commenting upon the case in hand in terms of the evidence led by defendants/appellants, His Lordship Uwaifo, JCA (as he then was) said as follows: -

“In the present case, the respondents did worse than previously. They have nothing by way of what they can point to as forming the basis of their claiming that they have a better title than the appellants in respect of the land in dispute. There is no assertion of any traditional history; no evidence of long, numerous and positive acts of possession. They purported to have conceded the area verged brown in their survey plan exhibit H (now exhibit CA/3) to the appellants. I do not know how that can be. You cannot concede, as if a former owner, a portion of a larger parcel of land you never owned or proved to have owned. I have already shown that they lost suit No. HOR/47/75 to the appellants (as plaintiffs) and they as defendants. In suit No. HOR/68/75 in which they were plaintiffs and claimed title, injunction and damages in respect of the land reasonably approximating to the land now in dispute, the learned trial Judge himself having acknowledge this, at least in comparison with the survey plans, exhibits CA/1 and CA/3, the claim was dismissed.”

H A careful reading of the above passage from the judgment of Uwaifo, JCA (as he then was) shows that the judgment of the trial court was reversed because the trial Judge failed to consider the case of the plaintiffs/respondents as pleaded. Before now the pleadings of the parties have been set out. It seems clear enough that what was

before the trial court was to determine whether the plaintiffs/respondents had established their claim upon the evidence led. The plaintiffs/respondents had in their favour evidence of traditional history which they tied to the land they laid claim to and which was identified by the survey plan, exhibit A now exhibit CA. See *Udofia v. Afia* (1940) 6 WACA 216; *Olusanmi v. Oshasona* (1992) 6 NWLR (Pt.245) 22; *Emiri v. Imieyeh* (1999) 4 NWLR (Pt.599) 442. I think the learned trial Judge was wrong to have failed to recognise that the survey plan - exhibit A now (exhibit CA) is that which the plaintiffs/respondents sought to prove the area and boundaries of the land they are claiming. It is not for the learned trial Judge to prefer the survey plan of the defendants/appellants to that of the plaintiffs/respondents. ***The duty of the trial court was to determine the case presented by the plaintiffs/respondents on the basis of the evidence presented by them. Where as in this case, the learned trial Judge came to the wrong conclusion on evidence properly admitted (sic) that the Court of Appeal has the duty to intervene and arrive at the right decision. Moreso, where as in the instant case the evidence does not involve the determination of the credibility of witnesses.*** See *Ebba v. Ogodo* (1984) 1 SCNLR 372. E

With due respect to learned Senior Counsel, it is my humble view that the Court of Appeal did not, as argued for the defendants/appellants, interpret the decisions of this court in suit No. HOR/47/75 and suit No. HOR/68/75. For the above reasons, I have come to the conclusion that the learned Justices of the Court of Appeal had very good reasons for reversing the decision of the trial court. In this case, it is obvious that the trial Judge has failed to draw the proper inference from the evidence before him and, in those circumstances, the court below was in as good a position to draw the proper inference. G See *Dr. Ladipo Maja v. Dr. Stocco* (1968) NMLR 372; *Akpapuna v. Nzeka* (1983) 2 SCNLR 1; *Okafor v. Idigo III* (1984) 1 SCNLR 481; (1984) 6 SC 1; *Olale v. Ekwelendu* (1989) 4 NWLR (Pt.115) 326 at 347. In the instant case, I am satisfied that the Court of Appeal drew the correct inferences from the documentary exhibits tendered. The documents adequately support the plaintiffs' claim. H

The other aspect of this appeal is whether the court below was right to have held that the defendants/appellants were liable in trespass. I have read the pleadings and the evidence considered by the

court below in coming to that conclusion and I agree entirely with their reasoning that led to finding the defendants/appellants liable in trespass that resulted in their being mitigated in damages. The argument urged upon the court for the defendants/appellants against the findings of the court below has not persuaded me to the contrary. In the result, this appeal lacks merit and it is hereby dismissed. The judgment and orders made by the court below are hereby affirmed. For the avoidance of doubt, I award damages in the sum of N50,000.00 against the defendants/appellants; and order of perpetual injunction is hereby also ordered against the defendants/appellants by themselves, their servants, agents and privies or otherwise howsoever from further trespassing or remaining on any of the land in dispute in Ndimbara Village, verged red in the Survey Plan No. US 2636/TMD10/93 earlier admitted as exhibit A in the trial court but exhibit CA/2 in the court below. The costs awarded in favour of the plaintiffs/respondents for the trial court, fixed at N2,500.00 and the sum of N3,500.00 in the court below are hereby affirmed. The sum of N10,000.00 is also hereby awarded in this court in favour of the plaintiffs/respondents.

E

UWAIS CJN

I have had the opportunity of reading in draft the judgment read by my learned brother, Ejiwunmi, JSC. I agree with him that this appeal lacks merit. Accordingly, I too hereby dismiss the appeal and adopt the consequential order contained in the lead judgment.

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BELGORE JSC

I agree with the judgment of my learned brother, Ejiwunmi, JSC that this appeal lacks merit and I also dismiss it for the full reasons in the said judgment. I make the same orders as to costs as made in the lead judgment.

H

KUTIGI JSC

I read in advance the judgment just rendered by my learned brother, Ejiwunmi, JSC. I agree with his reasoning and conclusions.

The Court of Appeal properly construed and applied the final decisions of this court in suits No. HOR/47/75 and HOR/68/75 in the determination of this case, and rightly set aside the judgment of the trial court and entered judgment for the plaintiffs/respondents.

The appeal therefore fails and it is hereby dismissed. Accordingly the judgment of the Court of Appeal is affirmed in its entirety. Costs of N10,000.00 are awarded to the plaintiffs/respondents against the defendants/appellants.

MUSDAPHER JSC

I have had the honour to read in advance the draft of the judgment of my Lord Ejiwunmi, JSC just delivered. I entirely agree with the reasoning and the conclusion arrived at. For the same reasons, I too, dismiss the appeal as lacking in merit. I abide by the order costs contained in the aforesaid judgment. Appeal dismissed.

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