

**SUPREME COURT OF NIGERIA**  
28TH MAY, 2004. SC. 144/1999  
**CORAM:- I.L. KUTIGI, U. MOHAMMED, A.I. KATSINA-ALU,**  
**U.A. KALGO, S.O. UWAIFO, JJSC**

M.O. ODUTOLA ..... DEFENDANT/APPELLANT  
AND

1. CHIEF ZAACHEUS ODERINDE

(Bale of Ijako)

2. NATHANIEL OLAOMO ..... PLAINTIFFS/RESPONDENTS

3. J.K. OGUNSEYE

(For themselves and on behalf of Ijako Community, Otta)

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APPEALS - Competence of appeal - Date of filing - Interlocutory or final decision - A decision is final - Where the matter will not be brought back to that court - As in this case (H1)

ESTOPPEL - Res judicata - Plea of - Four conditions that must be satisfied - To sustain the plea - Includes - Sameness of issue and subject matter (H2)

ESTOPPEL - Res judicata - Plea of - Was rightly rejected - As the issue and subject matter - Are not the same (H3)

COURTS - Issue - Suo motu raising of - By the Court of Appeal - Though wrong - Did not occasion a miscarriage of justice (H4)

**FACTS**

Before the Ogun State High Court Otta, plaintiffs/respondents filed an action against the defendant /appellant. Plaintiffs claimed entitlement to right of occupancy in respect of the land in dispute, damages for trespass and injunction. Defendant became the sole defendant upon the withdrawal of the claim against the other defendants who were then struck out from the suit. After the parties have filed and exchanged their pleadings, defendant filed a motion on notice praying for an order setting

down for hearing the plea of res judicata raised in his statement of defence. He relied on two past judgments exhibits A and B attached to his affidavit.

The plaintiffs opposed the claim, attached several documents to their counter affidavit including a survey plan. After hearing submissions of counsel on both sides, the trial court ruled that the plea of res judicata was not established. Defendant's appeal to the Court of Appeal was also dismissed. He has further appealed to the Supreme Court raising 5 issues, but the final court found the 5th issue sufficient in determining the appeal.

**ISSUE FOR DETERMINATION**

Whether the Court of Appeal was right in not upholding the plea of "*estoppel per rem judicatam*."

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

***Competence of appeal - Date of filing***

1. Alhaja Ayoola, learned counsel for the defendant, on the other hand, argued that the decision of the Court of appeal is final and not interlocutory, because as far as that court is concerned it has nothing more to do with the case. It is a final decision by the Court of Appeal in an appeal brought before it from an interlocutory decision of the High Court, and there was nothing left for the Court of Appeal to do in the case. She said the leave granted to the defendant by the Court of Appeal on 14/9/99 and the Notice of Appeal filed on 20/9/99 were well within the three (3) months period prescribed by Section 31(2) of the Supreme Court Act. That the mere fact that the appeal to the Court of Appeal was from an interlocutory decision of the High Court did not make the decision of the Court of Appeal interlocutory but final.

I say straight away that I endorse the submissions of learned counsel for the defendant/appellant above. The test which the court adopts in deciding whether an order or decision is interlocutory or final was finally put to rest by this court in Akinsanya v. U.B.A. Ltd. (1986) 4 NWLR (Pt. 35) 273. And order or decision is final when it finally disposes of the rights of the parties, that is to say, the decision or order

given by the court is such that the matter would not be further brought back to the court itself, as in this case. The preliminary objection to the competency of the appeal is accordingly over-ruled. It is dismissed. (p. 1492 D)

***Res judicata - Four conditions that must be satisfied***

2. It is settled law to sustain a plea of “res judicata”, the party pleading it must satisfy the following conditionalities, to wit-

1. The parties (or their privies as the case may be) are the same in the present case as in the previous case;

2. That the issue and subject matter are the same in the previous suit as in the present suit;

3. That the adjudication in the previous case must have been given by a court of competent jurisdiction; and

4. That the previous decision must have finally decided the issues between the parties. Failure to satisfy any of these conditions means failure of the plea in its entirety. (p. 1495 A)

***Res judicata - Plea of - Was rightly rejected***

3. I have carefully read through the record myself and my irresistible conclusion is that the lower courts were right in their rejection of the plea of res judicata relied upon by the defendant in this case. The issue and subject matter in the previous suit (23/CV/75 and the present suit (HCJ/ 6/89) are not the same. These are sufficient for the plea to have collapsed as it did. (p. 1496 F)

***COURTS - Issue - Suo motu raising of***

4. I am aware that the Court of Appeal in its judgment on page 283 held, rightly in my view, that the judgment in 23/CV/75 was not a final judgment because an appeal was lodged against the said judgment in the High Court (AB/13A/84), and a further appeal also was lodged to the Court of Appeal CA/1/62/84), which finally ordered a retrial of the case. This point was taken suo motu by the Court of Appeal and without giving the parties or their counsel opportunity to address on it. I think Alhaja Ayoola

was right to have complained here now. But I am unable to agree with her that any miscarriage of justice has occurred in the case. As I have stated above the appeal would still have failed even if the judgment in 23/CV/75 was final (and it was not) as contended by learned counsel.

B (p. 1496 G)

**REPRESENTATION**

ALHAJA R.O. AYOOLA, FOR THE DEFENDANT/APPELLANT.

C KOLAWOLE ALAWODE, FOR THE PLAINTIFFS/RESPONDENTS.

**CASES REFERRED TO**

Madukolu & Ors v. Nkemdilim (1962) 1 AII NLR 587 at 588

Iyaji v. Eyigebe (1987) 3 NWLR (Pt. 61) 523 at 532

D Ajao v. Akano (1988) 1 NWLR (Pt.71) 431 at 440

Aro v. Fabolude (1983) 2 S.C. 73 at 84, 85

Nkanu & Ors. v. Onum & Ors. (1977) 5 S.C. 11

Dzungwe v. Gbishe (1985) 2 NWLR (Pt.8) 528

E Udo v. Obot (1989) 1 S.C. (Pt. 1) 64, (1989) 2 NWLR (Pt. 95) 59)

**STATUTES REFERRED TO**

Supreme Court Act s. 31(2)

F High Court Rules of Ogun State 1987, O. 24 r. 2

Rules of Supreme Court of England O. 33 r. 3

**LEAD JUDGMENT BY KUTIGI JSC**

G In the Ogun State High Court holden at Otta, the plaintiffs claimed against the defendant-

(1) to be the persons entitled to the Statutory Right of Occupancy in respect of the land situate, lying and being at Ijako Village near Otta, Ogun State of Nigeria;

H (2) the sum of N200,000.00 against the 1<sup>st</sup> defendant being damages for trespass etc.

(3) injunction restraining the 1<sup>st</sup> defendant, his agents, servant, or privies from committing further trespass and or entering the said land

etc.

(4) injunction restraining the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants from accepting and or approving and granting and or registering and or processing any application for Certificates of Occupancy from the 1<sup>st</sup> defendant etc.

It should be noted that the defendant/appellant became the sole defendant upon the withdrawal of the claim against the other defendants who were then struck-out from the suit.

After the parties had filed and exchanged their pleadings, the defendant filed a Motion on Notice praying for an order setting down for hearing the plea of “*res judicata*” raised by him in his pleadings. The motion was supported by an affidavit to which were attached judgments in suits No. 23/CV/75 (Exhibit A) and No. AB/13A/84 (Exhibit B). The defendant claimed that the plea was based on the two judgments.

The plaintiffs countered by filing a counter affidavit to which several documents including a Survey Plan No. OG/790/76 were attached.

After hearing argument from counsel on both sides the learned trial Judge in a reserved ruling held that on the materials before him the plea of “*res judicata*” was not established. Consequently, the application was dismissed.

Dissatisfied with the ruling, the defendant appealed to the Court of Appeal holden at Ibadan. In a unanimous judgment, the Court of Appeal held that the appeal was completely devoid of merit and dismissed it accordingly.

Still aggrieved by the decision of the Court of Appeal, the defendant has further appealed to this court. Eight (8) grounds of appeal were filed from which five (5) issues have been distilled in the appellant’s brief for determination by this court. I have read them all. However, having regard to the interlocutory nature of the application, it is my considered view that the single most important issue relevant in this appeal is defendant’s issue (5) which reads-

(5) Whether the Court of Appeal was right in not upholding the plea of “*estoppel per rem judicatam*.”

In obedience to the Rules of court, the parties through their coun-

sel filed and exchanged briefs of argument. These were adopted at the hearing of the appeal during which additional oral submissions were made and additional authorities cited.

Before considering issue (5) of the appeal above, I will have to  
 B rule first on the Preliminary Objection to the hearing of the appeal raised  
 by the plaintiffs/respondents in their brief. Mr. Alawode, learned counsel  
 for the plaintiffs contended that having regard to the nature of the pro-  
 ceedings before the Court of Appeal and the order made thereupon, the  
 C Notice of Appeal filed by the defendant on 20/9/99, concerned an inter-  
 locutory decision of that court and in which case the Notice of Appeal  
 ought to have been filed within 14 days of the judgment as provided for  
 under Section 31(2) of the Supreme Court Act. He said the Court of  
 Appeal in this case delivered its judgment on 24/6/99. The appeal filed on  
 D 20/9/99 is therefore incompetent and ought to be struck out. He cites Ibe  
v. Onuora (1996) 9 NWLR (Pt. 474) 624 in support.

**Alhaja Ayoola**, learned counsel for the defendant, on the other  
 hand, argued that the decision of the Court of appeal is final and  
 E not interlocutory, because as far as that court is concerned it has  
 nothing more to do with the case. It is a final decision by the Court  
 of Appeal in an appeal brought before it from an interlocutory deci-  
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Ltd. (1986) 4 NWLR (Pt. 35) 273. And order or decision is final  
 when it finally disposes of the rights of the parties, that is to say,

**the decision or order given by the court is such that the matter would not be further brought back to the court itself, as in this case. The preliminary objection to the competency of the appeal is accordingly over-ruled. It is dismissed.**

I will now return to issue (5) of the appeal already reproduced B above.

Alhaja Ayoola submitted that on the totality of the materials before the Court of Appeal, that court was wrong in not upholding the plea of *“estoppel per rem judicatam”*. She said in the earlier suit No. 23/CV/75 the plaintiffs claimed for a declaration of title to the area of land verged RED on their plan, and bounded “on the 1<sup>st</sup> side by Arinko land, on the 2<sup>nd</sup> side by Isaka land, on the 3<sup>rd</sup> side by Tetiku land, on the 4<sup>th</sup> side by Isorosi and Oko Osi land.” And in the present suit No. HCJ/6/89 the plaintiffs are claiming a declaration that they are the persons entitled to a Statutory right of Occupancy of the same vast piece or parcel of land bounded by traditional boundary men, Arinko, Isaka, Tetiku and Isorosi and Oko Osi.” It was submitted that the basis for the claim of title in both suits is the same, namely the plaintiffs claimed to be descendants of the original owner IJAKO through one EBISA. That in suit No. 23/CV/75, it was decided that plaintiffs are not the descendants of Ijako but that it was the FALUYI family, (the grantors of the defendant), that are descendants of Ijako through Ebisa. That the issue can therefore not be relitigated by the plaintiffs in the present suit.

They are *“estopped per rem judicatam”*. It was further submitted that the parties in the two suits are the same, the defendant being a privy in estate to Faluyi family who were co-defendants in 23/CV/75 who joined issues with the plaintiffs on the ownership of Ijako land verged RED on the plan. She said the judgment in 23/CV/75 is final and subsisting and the defendant has therefore fulfilled all the conditions for the plea of *“estoppel per rem judicatam”* to succeed. She referred to case of Madukolu & Ors v. Nkemdilim (1962) 1 AII NLR 587 at 588 and to Section 54 of the Evidence Act. The court was urged to allow the appeal.

Responding, Mr. Alawode for the plaintiffs submitted as follows:-

(1) A plea of *“res judicata”* cannot be considered in vacuo and

without the surrounding back ground facts as agreed or conceded or facts as found by the court.

(2) The facts which a party raising a “plea of res judicata” must establish in a case in order to sustain the plea are facts showing that-

B (a) the parties in the action in which the plea is raised are the same as in the previous case;

(b) the decision between the parties is in respect of the same cause of action, and

C (c) the subject matter of the action in which the plea is raised is the same as in the previous case.

Unless all the conditions above are satisfied, a plea of “res judicata” must be rejected. A number of cases were cited in support which include Iyaji v. Eyigebe (1987) 3 NWLR (Pt. 61) 523 at 532, Ajao v. D Akano (1988) 1 NWLR (Pt.71) 431 at 440, Aro v. Fabolude (1983) 2 S.C. 73 at 84, 85

3. The respondent based his plea of res judicata on the judgments in suit No. 23/CV/75 and Appeal No. AB/13A/84.

E 4. On whether the parties in this case are the same as the parties in suit No. 23/CV/75, the High Court ruled that although the plaintiffs (in 23/CV/75 and HCT/6/89) are the same, he cannot precisely say that the defendants are the same and which can only be settled or established by F evidence. The Court of Appeal agreed and did not reverse the finding.

5. The plaintiff who claimed to be a privy in estate of Faluyi family failed to establish it as his purported purchase receipt (Exhibit E) showed no plan or size of the land allegedly sold to him by his vendors.

G 6. In suit No. 23/CV/75, the cause of action was the violation of Plaintiffs’ right in respect of the area verged GREEN on Survey Plan No. OG/790/76. In this case the cause of action was the violation of the area verged GREEN in Plan No. OG/373AB/77. The area verged GREEN in Plan OG/790/76 is verged BROWN in Plan OG/373AB/77. The trespass H upon the area verged GREEN in Plan OG/373AB/77 in 1985 precipitated this present action.

It is crystal clear, therefore, that the cause of action in this case is different from the cause of action in suit No. 23/CV/75. Both the trial



High Court and the Court of Appeal have found that the cause of action is not the same.

7. The court was urged to dismiss the appeal and confirm the concurrent findings of the lower courts.

**It is settled law to sustain a plea of “*res judicata*”, the party B pleading it must satisfy the following conditionalities, to wit-**

**1. The parties (or their privies as the case may be) are the same in the present case as in the previous case;**

**2. That the issue and subject matter are the same in the C previous suit as in the present suit;**

**3. That the adjudication in the previous case must have been given by a court of competent jurisdiction; and**

**4. That the previous decision must have finally decided the D issues between the parties (See for example Nkanu & Ors. v. Onum & Ors. (1977) 5 S.C. 11, Dzungwe v. Gbishe (1985) 2 NWLR (Pt.8) 528, Udo v. Obot (1989) 1 S.C. (Pt. 1) 64, (1989) 2 NWLR (Pt. 95) 59).**

**Failure to satisfy any of these conditions means failure of the plea in its entirety. E**

Dealing with the plea, the learned trial Judge in his ruling said as follows:

*“In this case the applicant’s arguments are that the parties are the same, the issues are the same and the subject matters are the same. I F found that in 23/CV/75 the area of land involved is only three (3) acres. The plaintiff raised this point at paragraph 4 of this counter affidavit and that point was not specifically answered in reply to counter-affidavit by the applicant. The 1<sup>st</sup> defendant only purchased 3 acres from the Faluyi G Family as shown in Exhibit A in the affidavit and confirmed by the 1<sup>st</sup> Defendant’s evidence .... I am in the circumstances constrained to conclude that the subject matter in 23/CV/75 and HCT/6 /89 are not same. The acreage in HCT/6/89 being 70.487 acres as against the 3 acres claimed in 23/CV/75 .... While the plaintiffs in 23/CV/75 and HCT/6/89 are the H same I cannot say precisely that the defendants in 23/CV/75 are the same. The relationship between Osundairo, Sunday Faluyi and Lasisi Faluyi and N.A. Odutola, the defendant in this suit has to be established by*

evidence. The law is that what has to be considered in detail in an interlocutory application. This would amount to double trial..... To succeed on this plea, all the requirements must be unequivocal and certain. In 23/CV/75 neither Osundairo nor the Faluyis were adjudged the owners of the 3 acres because they did not counter-claim..... I think at this stage, it would appeal improper to shut out the plaintiffs on the plea of res judicata since I find that the subject matter is not the same the claim is not the same, and the issues are more fundamental than mere issues of trespass... I have no hesitation in dismissing this application”.

The Court of Appeal in its lead judgment on page 282 of the record also had this to say-

“Applying the above principles to the present case based on what has been made available at the trial court by the appellant, it can be clearly seen that the land in dispute in the earlier suit No. 23/CV/75 (which was on trespass) was smaller in size (i.e. 3 acres) than that in the present action (which is on the whole of IJAKO Community land). In Olukoga v. Fatunde (1996) 7 NWLR (Pt. 462) 516 at 533, the Supreme Court drew a distinction between a previous suit in which the land was 18.62 acres and the subsequent case where the land was 100 acres and concluded that the subject matters threat were not the same in the two cases..... The appeal is completely devoid of merit and should be dismissed. I accordingly hereby so dismiss it.”

**I have carefully read through the record myself and my irresistible conclusion is that the lower courts were right in their rejection of the plea of res judicata relied upon by the defendant in this case. The issue and subject matter in the previous suit (23/CV/75 and the present suit (HCJ/6/89) are not the same. These are sufficient for the plea to have collapsed as it did (see for example Kutse & Ors. v. Att. Gen. Of Plateau State & Ors. (1999) 2 S.C. 124).**

**I am aware that the Court of Appeal in its judgment on page 283 held, rightly in my view, that the judgment in 23/CV/75 was not a final judgment because an appeal was lodged against the said judgment in the High Court (AB/13A/84), and a further appeal also was lodged to the Court of Appeal CA/1/62/84), which finally ordered a**

retrial of the case. This point was taken suo motu by the Court of Appeal and without giving the parties or their counsel opportunity to address on it. I think Alhaja Ayoola was right to have complained here now. But I am unable to agree with her that any miscarriage of justice has occurred in the case. As I have stated above the appeal would still have failed even if the judgment in 23/CV/75 was final (and it was not) as contended by learned counsel. (See for example Onajobi & Anor. v. Olanipekun & Ors. (1985) 4 S.C. (Pt. II) 156, Atoyebi & Anor. v. Gov. of Oyo State & Ors. (1994) 4 NWLR (Pt. 344) 290.)

The appeal therefore fails. It is hereby dismissed with N10,000.00 costs to the plaintiffs/respondents.

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**MOHAMMED JSC**

I have had the advantage of a preview of the judgment just delivered by my learned brother, Kutigi, JSC., and I agree with his reasoning and conclusion. I agree that this appeal is without merit and for the reasons advanced in the lead judgment I dismiss this appeal. The judgment of the Court of Appeal is hereby affirmed. I too award N10,000.00 costs in favour of the respondents.

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**KATSINA-ALU JSC**

I have had the advantage of reading in draft the judgment of my learned brother, Kutigi JSC., in this appeal, I completely agree with it.

It is now trite law that to sustain a plea of "res judicata" the party relying on it must satisfy the following conditions, to wit, 1. The parties (or their privies as the case may be) are the same in the present case as in the previous case;

2. That the issue and subject matter are the same in the previous suit as in the present suit.

3. That the adjudication in the previous case must have finally decided the issues between the parties.

All these conditions must be satisfied.

The learned trial Judge in the course of his ruling held that the plea

of “res judicata” was not established. He held that the subject matter in both suits was not the same and that the parties were also not the same. The Court of Appeal affirmed the decision of the trial High Court.

It is not in dispute that the area of land claimed in 23/CV/75 was 3 B acres and that claimed in HCT/6/89 was 70.487 acres. It can be seen clearly that the plea of “res judicata” was not made out. Both the High Court and the Court of Appeal rightly rejected the plea. See Aro v. Fabolude (1983) 2 S.C. 75; Olukoga v. Fatunde (1994) 7 NWLR (Pt. 462) 516. In C the former case the land in dispute in the previous suit was 4.298 acres whereas the land in the subsequent suit was 267.22 acres. In the latter case the area of land in dispute in the previous suit was 18.62 acres whereas the land in question in the subsequent suit was 267.22 acres. In both cases this court held that the subject matter in the two cases was D not the same and the plea of res judicata was rightly rejected.

In the light of the foregoing reasons and the fuller reasons contained in the leading judgment of my learned brother, Kutigi, JSC., I dismiss this appeal and affirm the decisions of the High Court and abide by E the order for costs.

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#### KALGO JSC

I have read in draft the judgment of my learned brother, Kutigi, F JSC., just delivered in this appeal and I entirely agree with him that there is no merit in the appeal and it ought to be dismissed. I agree that the appeal was competent and filed within the time required by law and so I overrule the preliminary objection raised by the appellant in his brief. I G also find that on the evidence on the record of appeal, there is no foundation upon which the principle of “res judicata” or the plea therefore can be raised in this action. I therefore agree with the reasoning and conclusions reached by Kutigi, JSC., in dismissing the appeal and I adopt them as mine. Accordingly, I dismiss the appeal and award N10,000.00 costs H to the respondents.

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#### UWAIFO JSC

I had the privilege of reading in draft the judgment of my learned

brother, Kutigi, JSC. I agree with him that the plea of estoppel per rem judicatam cannot avail the appellant in this case as a defence he can raise to dispose of this suit in limine.

The plaintiffs, suing on behalf of Ijako community, Otta, claimed among other reliefs,

*“A declaration that the plaintiffs as head and accredited representatives of Ijako Community Otta, Ogun State of Nigeria are the persons entitled to the statutory right of occupancy in respect of the vast piece of land or parcel of land situate, lying and being at Ijako village near Otta, Ogun State of Nigeria.”*

The other reliefs are damages against the 1<sup>st</sup> defendant (now appellant) for his alleged various acts of trespass and willful and malicious destruction of farm crops, economic trees, buildings etc., in Ijako village; injunction against the 1<sup>st</sup> defendant; and injunction against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants to restrain them from granting the 1<sup>st</sup> defendant a Certificate of Occupancy in respect of any parcel of land in the said Ijako village.

The basis of the suit is a claim to communal ownership of Ijako village land. The traditional history of the founding of the village was copiously pleaded in the statement of claim. The first settler on the land is stated to be one Ijako. According to the history, Ijako begat Ewu, Ewu begat Amosu who begat Ajeniya who begat Ebisa; Ebisa begat Agboodu (among others) who begat Fagbayi and Oderinde (among others). Oderinde was the father of the 1<sup>st</sup> plaintiff said to be the present Bale of Ijako. The descendants of other branches were traced including Fayemi (a woman) who begat Faluyi for Oso-Ologundudu.

The 1<sup>st</sup> defendant who claims to have bought a large parcel of land from Faluyi denied in his Statement of Defence the history pleaded by the plaintiffs. He proceeded to state the traditional history of the founding of Ijako. He averred in para. 3 that it was founded by Ebisa and in para. 13 that *“the descendants of Ebisa continued to exercise in common the vast hectares of land which they inherited under Yoruba Native Law and Custom from their original ancestor as Faluyi family land. As to how he got the land in dispute he said in para. 14:*

“Under and by virtue of a Purchase Receipt dated 25<sup>th</sup> day of January 1978 executed by Messrs. Gabriel Sunday Faluyi, Lamidi Faluyi, Sule Faluyi and Sindiku Salako as the accredited representatives of Faluyi of Ijako, Otta, the Faluyi family sold 70.487 acres forming portion of B Faluyi Family land at Ijako of the 1<sup>st</sup> defendant for the sum of N60,000.00 and put the 1<sup>st</sup> defendant in physical possession of same.”

There is the issue in the present case as to whose traditional history will eventually prevail. But the 1<sup>st</sup> defendant has in paras. 16, 17, 18 and 19 of his Statement of Defence pleaded estoppel per rem judicatam C with a view to abort the proceedings and prevent evidence being led on traditional history. The said paragraphs read:

“16. With regard to the traditional history of the Plaintiff’s root of title, as pleaded in paragraphs 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, D 20, 21, 22, 28, 31, 32, 38, 43 and 44 of the Amended Statement of Claim, the 1<sup>st</sup> defendant specifically pleads that the same traditional history was put forward by the 1<sup>st</sup> plaintiff (suing for himself and on behalf of entire community of Ijako) for-

- E a. Declaration of title to all that piece or parcel of land situate, lying and being at Ijako Village, Otta;
- b. Damages for trespass;
- c. Injunction.

F Against the predecessors in-title of the 1<sup>st</sup> defendant i.e., the Faluyi family before the Grade 1 Customary Court, Abeokuta in suit No. 23/CV/75 and which suit was dismissed in toto in favour of Faluyi family. The 1<sup>st</sup> plaintiff unsuccessfully appealed to the High Court Abeokuta against the said judgment, which appeal was dismissed in AB/13A/84 and further attempt at the Federal Court of Appeal, Ibadan resulted in the appeal being struck out as the Court of Appeal in FCA/1/78/85 refused to grant leave to appeal. G

17. The 1<sup>st</sup> defendant specifically pleads estoppel per rem judicatam H to the whole cause of action in this suit and issue estoppel in so far as the plaintiffs’ traditional history pleaded in this suit is concerned. The 1<sup>st</sup> defendant shall show at the trial of this suit that the subject matter of this suit as shown in Plan No. OGE/373A/77 pleaded in paragraph 6A of the

*Amended Statement of Claim falls within Plan No. OG/790/76, the Survey Plan in suit No. 23/CV/75. The 1<sup>st</sup> defendant shall tender a composite Plan No. APAT/OG/127/1990 dated 26<sup>th</sup> July, 1990, to show that the land, the subject matter of this suit falls within the land contained in Plan No. OG/790/76.*

18. *The 1<sup>st</sup> defendant shall contend at the trial that in so far as that traditional history of the plaintiffs' root of title had been put forward before a court of competent jurisdiction and rejected, the plaintiffs are estopped from raising the same issues in another litigation against the privy of the Faluyi family.*

19. *With particular reference to paragraph 54 of the Amended Statement of Claim, the 1<sup>st</sup> defendant maintains that in so far as suit No. AB/13A/84, which is an appeal against the judgment of Customary Court in the said Suit No. 23/CV/75, did not reverse the findings of fact in Suit No. 23/CV/75 or set aside the judgment, the plaintiffs are estopped from re litigating the subject matter of the said suit by these proceedings."*

The plea of res judicata and issue estoppel were separately specifically contested. On 10<sup>th</sup> August, 1993, Bakre, J., sitting at the High Court of Ogun State, Otta, ruled against res judicata. The Court of Appeal, Ibadan Division, heard the appeal from that ruling and on 24 June, 1999, upheld the decision of Bakre, J. The 1<sup>st</sup> defendant as appellant has further appealed to this court. The main thrust of the appeal is whether the Court of Appeal was right in holding that the plea of estoppel per rem judicatam and/or issue estoppel had not been made out.

The appellant filed his appeal within three months. The respondents thought the decision of the court below appealed against was interlocutory which should be appealed within 14 days. The respondents have for that reason raised a preliminary objection to the competency of the appeal. Their counsel argued before us that the judgment of the Court of Appeal was not a final judgment and must be appealed within 14 days unless leave of this court was obtain extending time. The appellant, however, contended that the judgment of the court below was a final judgment appealable within 3 months.

My understanding of this court's decisions in Igunbor v. Afolabi

(2001) 5 S.C. (Pt.1) 105, (2001) 11 NWLR (Pt. 723) 148 and Akinsanya v. U.B.A Ltd. (1986) 2 NSCC (Vol. 17) 968 which were cited to us leads me to the conclusion that the judgment of the court below in this case is a final judgment. It does not matter that the substantive suit is still pending in the High Court. I must concede that to determine what is final and what is interlocutory could present much difficulty. This can be seen from the decisions in Omonuwa v. Oshodin (1985) 2 NWLR (Pt. 10) 924; Akinsanya v. U.B.A.; (supra); Western Steel Works Ltd v. Iron and Steel Workers Union of Nigeria (1986) 3 NWLR (Pt. 30) 617; Igunbor v. Afolabi (Supra). In Igunbor v. Afolabi at page 65, Karibi-Whyte, JSC., observed thus:

*“[W]here the order made finally determines the rights of the parties, as to the particular issues disputed, it is a final order even if arising from an interlocutory application... The instant case as rightly submitted by appellant’s counsel, is an interlocutory motion by the appellant to be joined as co-administrators with the respondents. The order of the learned trial Judge granting the application determined the rights of the parties in the application. It is an order which did not require something else to be done in answer, and without any further reference to itself or any other court of co-ordinate jurisdiction. The order of the learned trial Judge is therefore a final order.”*

Even this observation cannot provide a clear solution to the difficulty. But it seems to have anticipated the current approach adopted in the English jurisdiction. The position is that where a hearing of any action is taken in parts under a rule of court permitting such procedure, e.g. under proceedings in lieu of demurrer, a decision reached in such hearing is regarded as final if the decision is in respect of an issue which would have formed a substantive part of the final trial. A decision reached on a plea of res judicata, whatever the result, is one on an issue which would have formed a substantive part of the final trial in the sense whether or not a plaintiff may in law be allowed to maintain his action. It is a final decision. In the present case, Order 23, r. 2 of the High Court (civil Procedure) rules, 1958 Cap. 44, Vol. III, Laws of Ogun State 1978, is relevant. It reads:



*“Any party shall be entitled to raise by his pleading any point of law, and any points so raised shall be disposed of by the Judge who tries the cause at or after the trial:*

*Provided that by consent of the parties, or by order of the court or a Judge on the application of either party, the same may be set down for hearing and deposed of at any time before the trial.”* B

This rule is now provided under Order 24, r.2 of the Ogun State High Court (Civil Procedure) Rules Edict 1987. It is under it that the question of res judicata was set down for hearing and determination in the present case. It is similar to Order 33, r.3 of the rules of the Supreme Court of England which provides thus: C

*“The court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.”* D

In Holmes v. Bangladesh Biman Corporation (1988) 2 Lloyd’s rep. 120, a passenger, a British citizen domiciled in the United Kingdom, had been killed on a domestic flight in a Bangladeshi aircraft which crashed in Bangladesh. His widow brought an action in the British court for compensation under the Law Reform (Miscellaneous Provisions) Act, 1934 and the Fatal Accidents Acts, 1976. The question was whether the claim was governed by schedule 1 to the Carriage by Air Acts (Application of Provisions) Order, 1967 or by the Bangladeshi provisions incorporated in the contract between the passenger and the airline. That question was tried as a preliminary issue. In the course of deciding the appeal from the ruling given by the trial Judge, Bingham, LJ., in his leading judgment made reference to Order 33, r.3 which I reproduced above. He said at page 24: E

*“Order 33, r3 gives the court a wide discretion to order the separate trial of different issues in appropriate cases and a decision is not to be regarded as interlocutory simply because it will not be finally determinative of the action whichever way it goes. Instead, a broad common sense test should be applied, asking whether (if not tried separately) the* F  
G  
H

*issue would have formed a substantive part of the final trial. Judged by that test this judgment was plainly final even though it did not give the plaintiff a money judgment and would not, even if in the airline's favour, have ended the action."*

B See also White v. Brunton (1984) QB 570 at 573 per Sir John Donaldson MR.

In the present case, what took place was a separate trial of the issue of res judicata. That is an issue which would have formed a substantive part of the final trial. Whatever the decision was, going by the above authorities which I endorse, it was a final decision of that issue. The period within which to appeal against the decision to the court under Section 31(2) of the Supreme Court Act, is three months. That was what was done in this case by the appellant. The respondents' counsel had thought that the decision of the Court of Appeal was interlocutory and that the appeal against it must be filed within 14 days subject to court order granting extension time. I think he was wrong. I accordingly overrule the preliminary objection to the competence of this appeal.

E As to the substance of the appeal, the real issue is whether the Court of Appeal was right in not upholding the plea of estoppel per rem judicatam. The judgment relied on was the Customary Court Grade 1 of Ogun State in Suit No. 23/CV/75 decided on 7 June, 1984. The plaintiffs in that case are the same as the respondents in the present case. They F relied on some traditional history in the action they brought against certain Olusegun Osundairo, Sunday Faluyi and Lamidi Faluyi. The customary court observed thus:

G *"As aforestate (sic), plaintiff on his own in his court evidence claimed Faluyi as the son of Fayemi the daughter of Ifaolu in the Ifaolu strips (sic) of Ebisa – married to a man called Ologundudu at Iga Olusi at Ota town and that Faluyi was taken by his mother (on divorcement) to Ijako where he was brought up to manhood and he got married. Granted H that his history is correct even though opposed by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants as well as D.W. 2 and 3 (Disu Faluyi and Alhaji Sindiku Salako) the claim is conclusive proof that Faluyi is a direct descendant to Ebisa maternally and Faluyi descendants are as such entitled to share of Ebisa*

property including Ijako land.

**RULING:**

*Summarily, the Plaintiff's claim for declaration of title to the land verged green in his Survey Plan No. OG/790/76 tendered by him and marked Exhibit "A" to the exclusion of the defendants, his prayer for injunction to restrain the defendants, their agents etc. from entering the land claiming N300.00 as damage for trespass allegedly committed by defendants should in the circumstances be dismissed."*

As will be observed, there was no definite finding on the traditional history. The judgment was reached on the basis that granted that the history was correct, a certain conclusion would follow. On appeal to the High Court, it was not discovered that there was indeed no finding upon which the judgment could be affirmed. The learned Judge of Appeal (Abiola Oyefeso, J.), concluded thus:

*"On the whole, it is my considered view that the lower court has done substantial justice in the case. Having found that the plaintiff and the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were descendants of Ebisa who was the original owner of the property in dispute and are therefore joint owners of the property in dispute and are therefore joint owners of the property by inheritance, which finding I agree with, it would be wrong in law to declare one party the owner to the exclusion of the other party. Similarly, in the circumstances, the claim for damages for trespasses must fail and so must the prayer for injunction."*

In the present case, the learned trial Judge, (Bakre, J.), relying on the judgment of Oyefeso, J., reached the following conclusion:

*"It would appear that the defendant's defence based on "res judicata" cannot be sustained, whatever the plaintiffs in this case might have said 23/CV/75 could amount to "issue estoppel" where the contents are the same, for example, both parties in that case and as found by Oyefeso, J., in the appeal case cannot now be heard that they are both descendants of Ebisa. If any of them had sold to the present defendant without the other side, the present defendant cannot be heard to raise the issue of "res judicata".*

The Court of Appeal, Ibadan Division, was under the erroneous

impression that the judgment on appeal in the decision in suit No. 23/CV/75 was set aside by the Court of Appeal and a retrial ordered (an error which both counsel before us acknowledged, and said that the case never went to the court of Appeal). Upon that error, the court below, per Dalhatu B Adamu, JCA., with which Onalaja and Adekeye, JJCA., concurred, observed thus:

*“Under the above circumstances, in my humble view, it cannot be said that the judgment in 23/CV/75 is a final judgment for the purpose of res judicata. An appeal was lodged against the said judgment in the High Court and the decision of the said High Court on the appeal was nullified by the Court of Appeal with an order of retrial de novo which has not been carried out up till now. Thus since the judgment in 23/CV/75 is not final or subsisting in the circumstances, the subsequent action taken D by the respondent was in order and cannot be affected by the plea or doctrine of estoppel per rem judicatam. In fact the action taken by the respondents in the present case (i.e. AB/13A/34) was in compliance with the order of retrial made by this court since on 17/6/85 which the appellant (or his grantors) abandoned (or attempted to frustrate) by their withdrawal of the case at the re-hearing. In the circumstances therefore the plea of estoppel per rem judicatam made by or on behalf of the appellants at the trial court was deliberate attempt to continue with their aim E at frustrating the order of retrial by this court or causing a delay (sic) F tactic in the proceedings.*

*In view of my above considerations of all the issues formulated and argued by the parties in this appeal, the said issues and their corresponding grounds of appeal must be resolved against the appellant and G in favour of the respondents.”*

It appears to me that as there was no finding on the traditional history relied on before the customary court, the present respondents who were the plaintiffs in that court cannot be estopped from relying on H their traditional history in this subsequent proceeding. That means that issue estoppel regarding that traditional history is not available to the defendant/appellant. However, it will be noted that the customary court in effect said that if the traditional history was correct, then one “*Faluyi is*

*a direct descendant of Ebisa maternally and Faluyi descendants are as such entitled to share of Ebisa property including Ijako land.* "Ebisa was one of the earliest ancestors claimed by the present respondents both in the customary court case and in this case before us. The appellate High Court got it all wrong by holding that the customary court made a B definitive finding that the present respondents and the Faluyis were descendants of Ebisa and that they were joint owners of the entire Ijako land whose boundaries were given thus:

"On the first side by Arinke land;  
On the second side by Isaka land;  
On the third side by Tetiku land;  
On the fourth side by Isorosi land"

C

Having so held, the action of the plaintiffs in that case (present respondents) was dismissed. It is on this basis that the appellant has D argued that the plaintiffs in this case (same as the plaintiffs in the customary court case) are estopped per rem judicatam from claiming in this action, among other reliefs.

*"A declaration that the plaintiffs as head and accredited representatives of Ijako Community, Otta, Ogun State of Nigeria are the persons entitled to the statutory right of occupancy in respect of the vast piece or parcel of land situate, lying and being at Ijako village near Otta, Ogun state of Nigeria.*

F

Can the appellant really rely on the plea of res judicata in the circumstances? The appellant claims that he bought a large portion of land from the Faluyi family. It is on that basis he has raised the plea of res judicata against the respondents. There are obvious problems with that plea in the circumstances of this case. First, the Faluyi family are not made a party to this action so that one of the conditions for the plea, namely the same parties, is not easily seen as having been met. Second, as has been shown, there is much confusion as to what indeed the customary court decided. What it purported to decide was misunderstood H by the appellate High Court. Third, in the appellant's brief of argument, it would appear to me that judgment in the Customary Court case has been substantially misrepresented when it was submitted thus;

G

*“We submit that the earlier suit No. 23/CV/75 certainly involved the fundamental issue of whether the respondents have any right or cause of action to complain about anybody claiming through Faluyi family into the area verged red on the plan No. OG/790/76. The earlier suit 23/B CV/75 decided the respondents had no such cause of action, since they are not descendants of the original owner, Ijako (through Ebisa).*

*Suit No. 23/CV/75 has told the respondents that they had no interest in the land of Ebisa not being his descendants. We submit that they are estopped from setting up the same claim in the present suit on appeal”.*

Neither the customary court nor the appellate High Court decided that the present respondents were not descendents of Ebisa nor that they had no interest in the land of Ebisa, namely Ijako village land.

D Estoppel per rem judicatam operates when there is a final judgment already decided between the same parties or their privies on the same subject matter by a competent court and on the same issue as are involved in a subsequent suit; and the earlier judgment is pleaded. In E other words, it is a fundamental requirement of the law that before the plea of estoppel per rem judicatam can succeed, it must be clearly shown that the parties, issues and subject matter were the same in the previous case as those in the action in which the plea is raised. See Nwaneri v. Oriuwa (1959) SCNLR 316 at 318; Ikpang v. Edoho (1978) 6-7 S.C. 21 F at 236-237; Iyayi v. Eyigebe (1987) 2 NSCC (Vol. 18) 1035 at 1043.

As already said, the Faluyi family is not a party to this action, so that, even if the Customary Court judgment were to provide a basis for res judicata, it is not possible at this stage to decide whether the appellant G is a privy of that family or not until evidence is led in which this could be confirmed or denied by the Faluyis. However, I am satisfied that it is right that the plea of res judicata to decide this action in limine was rejected by the two courts below as there is no proper foundation for it, H though they reached that conclusion on various misapprehensions. It is for the reasons given in this judgment and those contained in the judgment of my learned brother, Kutigi, JSC., that I find no merit in this appeal. I too dismiss it with N10,000.00 costs to the respondents.