

**SUPREME COURT OF NIGERIA**  
15TH JULY, 2005. SC. 161/2001  
**CORAM:- M. L. UWAIS CJN, A. I. KATSINA-ALU, U. A.**  
**KALGO, D. MUSDAPHER, D. O. EDOZIE, JJSC**

THE HONDA PLACE LTD. .... APPELLANT  
AND  
GLOBE MOTOR HOLDINGS NIG. LTD. .... RESPONDENT

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AFFIDAVITS - Facts - Where they remain unchallenged - Court is bound to accept those facts as established - And they are deemed to have been admitted (H1)

ESTOPPEL - Res judicata - To succeed - Must follow certain conditions - And a party must not be allowed to re-litigate a matter - That has been settled - By a court of competent jurisdiction (H2)

COURTS - Judgments - Res judicata - Decision - Is final - Where it finally disposes of the rights of the parties - So that consent judgment - Pursuant to parties' terms of settlement - Is a final decision (H3)

CONTRACTS - Agreements - Sub-dealership agreement - Abrogation of it in the parties' terms of settlement - When not made subject to anything - It is not subsisting and is dead for all purposes (H4)

APPEALS - Disposal of - Issues - Where a resolved single issue disposes an appeal - Academic consideration of the other issues is not necessary (H5)

**FACTS**

Before the High Court of Lagos, the plaintiff/appellant filed a motion whereby it sought an order dismissing the defendant's/respondent's suit on the ground of res judicata and abuse of court process. The court dismissed the appellant's motion. The appellant, a dealer appointed by the

Japanese manufactures of Honda cars, to import and market Honda cars in Nigeria, entered into a sub-dealership agreement with the respondent as a sub-dealer. A dispute later arose between the parties in the operating of the agreement. This led to the filing of a suit which was later settled out of court. The terms of settlement became the judgment of the Court.

The respondent later brought an action before the trial Court to compel the appellant to comply with the orders of the Court. While the suit was pending, the respondent filed a fresh suit against the appellant at the Ikeja Division of the High Court. The appellant entered a conditional appearance and filed a defence wherein it raised the issue of *res judicata*, and thereafter filed an application to dismiss the suit. The trial Court dismissed the application. This made the appellant appeal to the Court of Appeal which also dismissed the appeal. Still aggrieved, appellant has further appealed to the Supreme Court.

**ISSUES FOR DETERMINATION**

*“1. Whether there was sufficient materials before the High Court to enable it consider and decide the plea of *res judicata*.*

*2. Whether if, as decided by the court below, it is necessary for a court to examine the writ of summons and pleadings filed in an earlier suit before deciding whether a plea of *res judicata* avails the defendant, the court below was right in dismissing the appellant’s application instead of striking it out.*

*3. Whether the suit is not an abuse of court process bearing in mind the consent judgment in Suit No. LD/1643/96.”*

**HELD** (Unanimously allowing the appeal per **KATSINA-ALU JSC**)

***AFFIDAVITS - Facts - Where they remain unchallenged***

1. The Court of Appeal was plainly in grave error. The law is that where the facts in an affidavit remain unchallenged and uncontroverted, the court is bound to accept those facts as established as those facts were deemed to have been admitted. See *Nwabuoku v. Ottih* (1961) 2 SCENLR 233.

No counter-affidavit was filed by the respondent with result that the facts deposed to in support of the application were neither challenged nor disputed by the respondent. What this means is this. Those facts remain

unchallenged and uncontroverted. The inevitable consequence is that those facts deposed to in the affidavit filed by the applicant must be deemed to have admitted by the respondent and must also be taken as true by the court unless they are obviously false to the knowledge of the court. See *Alagbe v. Abimbola* (1978) 2 S.C. (Reprint) 28; (1978) 2 S.C. 39 at 40. The said facts show that the issues and the reliefs in the present suit are the same and arose out of the same transaction already decided in Suit No. LD/1643/96 between the parties. It is the decision in Suit LD/1643/96 that the respondent is seeking to enforce in Suit No. M/471/97 which is still pending at the Lagos High Court.

The courts below cannot claim that the facts deposed to in the affidavit are false to their knowledge. However, if the facts deposed to were to the effect that, for instance, Kaduna is the Capital of Nigeria or that Nigeria has a population of 50 million, then the courts which should take judicial notice of such facts would not accept the deposition as true, the failure to file a counter-affidavit notwithstanding. (p. 2257 C)

***Res judicata - To succeed - Must follow certain conditions***

2. The doctrine of res judicata rests on the principle that there must be an end to litigation. A party should not and must not be allowed to relitigate a matter that has been settled in a final decision of a court of competent jurisdiction. The law is that for a plea of res judicata to succeed, the following conditions must be met:

1. There must be an adjudication of the issues joined by the parties.
2. The parties or their privies as the case may be must be the same in the present case as in the previous case.
3. The issues and subject matter must be the same in the previous case as in the present case.
4. The adjudication in the previous case must have been by a court of competent jurisdiction; and
5. The previous decision must have finally decided the issue between the parties; i.e., the rights of the parties must have been finally determined. (p. 2260 B)

***COURTS - Judgments - Res judicata***

3. It has been submitted for the appellant that this case is a case where the doctrine of res judicata applies squarely. I couldn't agree more. All the conditions for a successful plea of res judicata have been met. The consent judgment in Suit No. LD/1643/96 given on 15th July, 1996, is a final decision. A decision of a court is final when it finally disposes of the rights of the parties. In other words, if the decision or order given by a court is such that the matter in respect of which it is given would not be brought back to the court for further adjudication, such decision or order is final. See *Odutola v. Oderinde* (2004) 5 S.C. (Pt. II) 90; (2004) 12 NWLR (Pt.88) 574. The dispute in relation to the Sub-dealership Agreement of 2nd December 1993, was determined between the parties under the terms of settlement and was embodied in the order of the court in Suit No. LD/1643/96. By clause 5 thereof, it was stated clearly that the sub-dealership Agreement was no longer operative. Upon reading the consent judgment, it will be clearly seen that the issue of the Sub-dealership Agreement was finally determined by its abrogation. There was nothing, in this respect, that would be brought back to the court for further adjudication. The respondent therefore cannot now be permitted to bring fresh action founded on the sub-dealership agreement which is no longer operative. (p. 2260 F)

***Agreements - Sub-dealership agreement***

4. These submissions seem quite attractive and convincing. But with respect I think they are misplaced. The main question is the Sub-dealership Agreement of 2nd December, 1993. That agreement was abrogated. It was rescinded by the parties. Clause 5 of the terms of agreement embodied in and as the judgment of the court spells that out clearly. Again, I read clause 5. It reads:-

“5. *The plaintiffs and the 1st and 2nd defendants hereby agree that the Sub-dealership Agreement of 2nd December, 1993, is no longer operative.*”

The abrogation of the Sub-dealership Agreement is not made subject to anything. It is not subsisting. It was not made subject to a date

in the future. It is dead for all purposes. It died on the 5th day of July, 1996. It is this dead agreement that the respondent seeks to bring back to life. The agreement should have been the focus of the arguments and submissions of respondent's counsel. The submissions, as powerful as they were, did not touch on the core issue; the abrogation of the Sub-dealership Agreement of 2nd December, 1993, by the parties themselves. (p. 2262 C)

### ***APPEALS - Disposal of***

5. In my judgment, therefore, for the reasons I have given above, the doctrine of res judicata applies to the present case. The respondent cannot be allowed to re-litigate the matter. The first issue therefore succeeds. I think the resolution of this issue has disposed of the appeal. I do not consider it necessary to deal with the remaining issues whose consideration will be merely academic. (p. 2262 H)

### **NOTABLE POINTS OF INTEREST**

#### **EDOZIE JSC**

##### ***1. Effect of failure to file counter affidavit***

It was specifically deposed in paragraph 5 of that affidavit that "the issues and reliefs in this suit are the same and arise out of the same transactions already decided in Suit No. LD/1643/96 between the parties .....". The respondent did not file a counter-affidavit to controvert the above averment. The position of the law is that when in a situation in which facts are provable by affidavit, one of the parties deposes to certain facts, his adversary has a duty to swear to an affidavit to the contrary if he disputes the facts. Where such a party fails to swear to an affidavit to controvert such facts, they may be regarded as duly established.

Since the respondent did not file a counter-affidavit to controvert the appellant's averment referred to above, that averment was deemed admitted and it was a material fact before the trial court upon which to reach a decision on the issue. (p. 2269 H)

2. *Consent judgment can sustain res judicata plea*

Adverting to the second issue, in respect of the finality or otherwise of the consent judgment, it is necessary to emphasize that a consent judgment can in an appropriate case sustain a plea of res judicata. The fact that a judgment was obtained upon a consent of both parties will not bar it from operating as an estoppel: See J. S. Talabi v. Abiola Adeseye (1973) 8-9 S.C (Reprint) 15; (1973) 1 NMLR 8. A judgment is not the less final because it is a judgment entered by consent of the parties. Such a judgment is as much a final judgment as one resulting from a contested hearing, per Finlay, J, in Cohen v. Jomesco (1926) 1 KB 119 at p. 125. Speaking on the meaning and attributes of ‘finality’ of a judgment, the learned authors of Spencer-Bower and Turner on the Doctrine of Res judicata, 2nd Edition (1969) at p. 132 para. 164, had this to say:-

“164. *A judicial decision is deemed final, when it leaves nothing to be judicially determined or ascertained thereafter, in order to render it effective and capable of execution, and is absolute, complete, and certain, and when it is not lawfully subject to subsequent rescission, review, or modification by the tribunal which pronounced it.....*” (p. 2270 G)

**REPRESENTATION**

Alhaji Abdullahi Ibrahim, SAN., (with him Prof. G. A. Olawoyin, SAN., Adetunji Oyeyipo, SAN., J. A. Badejo, Rotimi Oguneso, Soji Olawolafe and Femi Fadare), for the Appellant.

Prof. B. O. Nwabueze, SAN, (with him. Chief E. Etudo), for the Respondent.

**CASES REFERRED TO**

Odutola v. Oderitide (2004) 5 S.C. (Pt. II) 90; (2004) 12NWLR (Pt.88) 574

Udo v. Obot (1989) 1 S.C. (Pt. I) 64; (1989) 1 NWLR (Pt.95) 59

Cardoso v. Daniel (1986) 2 NWLR (Pt.20) 1

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

Ezenwa v. Kareem (1990) 3 NWLR (Pt. 138)258

Nwabuoku v. (1961) 2 SCENLR 233

Huddersfield Banking Co. Ltd, v. Henry Lister & Son Ltd (1895) 2 Ch. 273

Odunsi v. Boulos (1954) F.S.C. 234

**STATUTE REFERRED TO**

B

Evidence Act s. 54

**LEAD JUDGMENT BY KATSINA-ALU JSC**

This appeal is from the decision of the Court of Appeal, Lagos Division, in Appeal No. CA/L/164/99 given on 12th December, 2000. The appellant had filed a motion before the Lagos High Court whereby it sought an order dismissing the respondent's suit on ground of res judicata and abuse of court process. The High Court dismissed the appellant's motion. The appellant's appeal to the Court of Appeal, Lagos Division was dismissed. The decision of the High Court was affirmed. The appellant has further appealed to this court.

In order to appreciate the submissions and arguments on behalf of the parties, I think it is desirable to state the facts of this case in detail. The facts of the case are these. The appellant was a dealer appointed by the Japanese manufacturers of Honda cars, to import and market Honda cars in Nigeria. On 2nd December, 1993, the appellant entered into a Sub-dealership Agreement with the respondent as a sub-dealer of Honda cars with the right to import and market 45% of cars allotted to the appellant by the Japanese manufacturer.

Afterwards, a dispute arose between the parties in the operations of the Sub-dealership Agreement. This led to a spate of litigations, the principal one being Suit No. LD/1643/96 between the appellant as 1st plaintiff and the respondent as 1st defendant. The suit was eventually settled out of court with the 'Terms of Settlement' duly signed by all the parties. The terms of settlement were embodied in and became the judgment of the court. The judgment of the court reads as follows:

*"Judgment is hereby entered as per the terms of settlement Filed by both parties as follows:*

1. The 1<sup>st</sup> and 2<sup>nd</sup> defendants, their servants, agents and/or privies

*shall cease from any publication or advertisements or presentation of themselves to the public as otherwise sole or exclusive distributors or sole dealers of Honda cars in Nigeria.*

B 2. *The plaintiffs and the 1st and 2nd defendants have agreed that all advertisements will include all other authorized Honda dealers under one umbrella, each dealer to be identified by the words “Honda” + their respective locations. The words “T.H.P. Limited” shall appear in one corner in small letters in all adverts.*

C 3. *The 1st and 2nd defendants shall cease forthwith after the arrival of 106 units of Honda cars already committed to and arriving before the end of November 1996, the importation of HONDA CARS into Nigeria from United States of America, the Middle East or any other source and shall deal only in and participate in the sale of Honda cars*  
D *imported or sold in Nigeria by HONDA MOTOR COMPANY LIMITED OF JAPAN in Nigeria.*

4. *The 1st Defendant shall purchase a backlog of 45 units of Honda cars from the plaintiffs at a price to be mutually agreed upon before*  
E *ordering/importing any new Honda cars through the plaintiff and the plaintiff shall subsequently supply information, prices, policies and guidelines. On completion of the backlog, the plaintiff shall provide proforma invoices through T.H.P. Limited on request by the 1st and 2nd*  
F *Defendants. Payments for the said backlog shall be done as agreed by the plaintiffs and the 1st and 2nd defendants.*

5 *The plaintiffs and the 1st and 2nd defendants hereby agree that the Sub-dealership Agreement of 2nd December, 1993, is no longer operative.*

G 6. *The Plaintiffs hereby re-appoint the 1st defendant as a dealer for Honda cars subject to the above conditions and in line with Honda rules, policies and guideline and both parties shall enter into a new Dealership Agreement subject to the approval of HONDA MOTOR COMPANY OF*  
H *JAPAN.*

7 *The plaintiffs hereby discontinue this action against 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants.*

8. *Parties to bear their costs.”*



(Underlining supplied for emphasis)

On 23rd September, 1997, the respondent brought an action in Suit No. M/471/97 at the Lagos High Court seeking an order of the court “*compelling the appellant to comply with the orders of the Honourable Court delivered on the 15th day of July, 1996, in Suit No. LD/1643/96.*” B  
The respondent also asked for N900,000,000.00 damages.

While Suit No. M/471/97 was still pending at the Lagos High Court, the respondent filed a fresh action against the appellant in Suit No. ID/915/98 at the Ikeja Division of the Lagos State High Court. In that suit the respondent pleaded the Sub-dealership Agreement of 2nd December, 1993, and sought the following reliefs: C

“i. *A declaration that the Memorandum of Agreement dated the 3rd (sic) day of December, 1993, signed by both parties to this action remains binding and effective.* D

ii. *A declaration that the defendant has failed to carry out or perform the obligations imposed upon it under clauses 3(a) and (b) of the said agreement.*

iii. *A declaration that the aforementioned agreement dated the 3rd (sic) day of December, 1993, does not absolutely and completely prohibit the plaintiff from importing Honda Motor Cars from any willing supplier for resale and distribution in Nigeria.* E

iv. *A declaration that the defendant has no right to prevent the plaintiff from importing Honda Motor Cars for resale and distribution in Nigeria after he (the said defendant) had repudiated or deliberately failed to implement the aforementioned agreement dated 3rd (sic) day December, 1993.* F

v. *An order of perpetual injunction restraining the defendant, its servants and agents from preventing or doing any act or taking any action or step to prevent the plaintiff from importing into Nigeria Honda Motor Cars for resale and distribution in Nigeria on the alleged ground that no one in Nigeria (apart from the defendant) can lawfully import such cars into the country for resale and distribution.* G H

vi. *N4 billion damages for breach of agreement.”*

Upon the receipt of the said processes, the appellant entered a

conditional appearance and filed a defence wherein it raised the issue of res judicata based on the consent judgment, and abuse of court process based on the pending Suit No. M/471/97.

Thereafter the appellant filed an application to dismiss or strike out the suit on the grounds that the suit is res judicata, an abuse of court process and the court lacked jurisdiction.

As I stated earlier on, the High Court dismissed the application. Appellant's appeal to the Court of Appeal was also dismissed. The present appeal is against the judgment of the Court of Appeal.

Based on the grounds of appeal filed, the appellant has submitted three issues for determination in this appeal. The issues are as follows:

*"1. Whether there was sufficient materials before the High Court to enable it consider and decide the plea of res judicata.*

*2. Whether if, as decided by the court below, it is necessary for a court to examine the writ of summons and pleadings filed in an earlier suit before deciding whether a plea of res judicata avails the defendant, the court below was right in dismissing the appellant's application instead of striking it out.*

*3. Whether the suit is not an abuse of court process bearing in mind the consent judgment in Suit No. LD/1643/96."*

The issues raised by the respondent are similar to the appellant's issues. I do not think it is necessary to set them out.

Issue No.1

The issue here, in the main, is whether there was sufficient material before the High Court upon which to found a plea of res judicata. In his ruling the learned trial Judge said:

"The main pivot of the counsel for the defendant's argument is on res judicata. The Supreme Court in *Adedayo v. Babalola* (1995) 7 NWLR (Pt.408) 383 set out the conditions for sustaining a plea of res judicata as follows:

*"(a) That there was an adjudication of the issue joined by parties.*  
*(b) That the parties or their privies as the case may be are the same in the present case as in the previous case.*

*(c) That the issue and subject matter are the same in the previous*

case as in the present case.

*(d) That the adjudication in the previous case was given by a court of competent jurisdiction, and*

*(e) That the previous decision finally decided the issues between the parties, that is, the rights of the parties were finally determined.”*

The defendant has attached a number of exhibits to its application and Exhibits A, A1, and B are all photocopies of some court processes between the parties and some others in other suits. Unfortunately, the defendant did not exhibit any considered judgment in respect of either of these suits neither did he exhibit the Statement of Claim or Statement of Defence filed in these suits or the Writ of Summons. If these processes were exhibited I would have the privilege of examining the claim and would then be in the best position to judge whether the claims and the issuer involved in this case are one and the same with the one that is pending before the Lagos Judicial Division. Apart from this fact, the exhibits are consent judgment and terms of settlement arrived at by the parties before the matter went to trial, so Suit No. LD/1643/96 was never tried on its merit neither was suit No. M/47/97. These cases therefore were never adjudicated upon and determined it were as required by the law for the plea of res judicata to avail the defendant.”

The Court of Appeal was of the same view. In its judgment, per Oguntade, JCA., (as he then was), the court reasoned thus:

*“For the purpose of responding to the issues in contest between the parties, it is necessary to examine Section 54 of the Evidence Act. It provides:*

*54. Every judgment is conclusive proof as against parties and privies, of facts directly in issue in the case, actually decided by the court and appearing from the judgment itself to be ground on which it was based; unless evidence was admitted in the action in which the judgment was delivered which is excluded in the action in which that judgment is intended to be proved.”*

There is nothing in Section 54 above which can be construed as excluding a judgment by consent from giving rise to an estoppel by record. I think this draws support from Huddersfield Banking Co. Ltd. v. Henry

Lister & Son Ltd. (1895) 2 Ch. 273. See also Odunsi v. Boulos (1954) F.S.C. 234. Whether or not a particular consent judgment can be relied upon in a future case as creating estoppel by record will depend on the facts available to the court in the latter case in determining the questions of law or fact decided in the earlier case. There is always a difficulty to be encountered in relying on a consent judgment to sustain a plea of res judicata. The difficulty arises in relation to the ascertainment of the issues of law or fact decided in the earlier case. It is to be borne in mind that Section 54 above makes a judgment conclusive proof “of facts directly in issue in the case, actually decided by the court and appearing from the judgment itself .....”

I have deliberately quoted in extenso the judgments of the High Court and the Court of Appeal in order to bring out the flaws therein having regard to the facts of this case.

The starting point is the affidavit in support of the motion for an order dismissing or striking out the suit on the ground that the suit is res judicata. As has been pointed out in the appellant’s brief of argument, the respondent did not controvert any of the depositions contained in the affidavit in support of the application before the trial court. Of particular importance are paragraph 4 and 7 of the affidavit. These state thus:

“4. *That in Suit No. LD/1643/96, the parties to this suit had settled the issues upon which the present suit is based and judgment had been entered based on the terms of settlement filed. Copies of the Terms of Settlements and the judgment entered by the court are attached herewith and marked Exhibits ‘A’ and ‘A1.’*”

7. *That the issues and reliefs in this suit are the same and arose out of the same transactions already decided in Suit No. LD/1643/96 between the parties and which decision the plaintiff is seeking to enforce in Suit No. M/ 147/98 which is still pending.*”

It is not in dispute that the respondent did not counter these averments. The respondent did not file a counter-affidavit. Both the High Court and the Court of Appeal noted the failure by the respondent to file a counter-affidavit. The High Court in its judgment said:

“*Learned counsel for the plaintiff opposed this application but did*

not file any counter-affidavit. His objection was centered on points of law only.”

For its part, the Court of Appeal said:

“Plaintiff did not file a counter-affidavit before the lower court. The result was that the depositions as to issue of fact on the affidavit in support of the motion were unchallenged.” B

The Court of Appeal nevertheless proceeded to hold that:

“The deposition in paragraph 7 of the affidavit was therefore a conclusion of law or a statement of fact which still needed to be proved.” C  
(Underlining mine)

**The Court of Appeal was plainly in grave error. The law is that where the facts in an affidavit remain unchallenged and uncontroverted, the court is bound to accept those facts as established as those facts were deemed to have been admitted. See Nwabuoku v. Otth (1961) 2 SCENLR 233.** D

No counter-affidavit was filed by the respondent with result that the facts deposed to in support of the application were neither challenged nor disputed by the respondent. What this means is this. Those facts remain unchallenged and uncontroverted. The inevitable consequence is that those facts deposed to in the affidavit filed by the applicant must be deemed to have admitted by the respondent and must also be taken as true by the court unless they are obviously false to the knowledge of the court. See Alagbe v. Abimbola (1978) 2 S.C. (Reprint) 28; (1978) 2 S.C. 39 at 40. The said facts show that the issues and the reliefs in the present suit are the same and arose out of the same transaction already decided in Suit No. LD/1643/96 between the parties. It is the decision in Suit LD/1643/96 that the respondent is seeking to enforce in Suit No. M/471/97 which is still pending at the Lagos High Court. E F G

The courts below cannot claim that the facts deposed to in the affidavit are false to their knowledge. However, if the facts deposed to were to the effect that, for instance, Kaduna is the Capital of Nigeria or that Nigeria has a population of 50 million, then the courts which should take judicial notice of such facts would not accept the H

**deposition as true, the failure to file a counter-affidavit notwithstanding.**

I think the case of the appellant that the issues in the present suit and the previous action are the same has been made out.

B But that is not all. I think that there is enough material in the present suit (ID/915/98) brought by the respondent to indicate on a careful reading that the issues in both actions are the same. In this regard, I will read Part (ii) paragraphs 4 to 10 of the Statement of Claim. They read as follows:

“(ii) *The Agreement of 1993.*

C 4. *In or around 1993 there was a backlog of Honda motor cars ordered by the Nigerian customers who were distributors or retailers of such vehicles in Nigeria.*

D 5. *In order to promote the sale of Honda Motors cars in Nigeria, the Japanese manufacturers appointed the defendant their sole agents in Nigeria on condition that the said defendant will-la) clear the entire backlog of motor vehicles ordered from the Japanese manufacturers and mentioned in paragraph 4 hereof;*

E (b) *build a service station with adequate facilities for catering for purchasers or users of Honda vehicles in Nigeria and;*

(c) *continue to import Honda motors cars from Japan for use in the Nigerian market.*

F 6. *In order to enable him fulfil the requirement of the Japanese manufacturers of Honda, the new respondent entered into an agreement dated December, 1993. The plaintiff hereby pleads the agreement and will rely on the full text thereof.*

G 7. *By the said agreement and subject to the terms and conditions therein stipulated, the plaintiff (inter alia) covenanted to import (i.e., be responsible for payment for the importation) of 45% of the Honda car allocated for importation to Nigeria by the Japanese manufacturers.*

H 8. *The plaintiff fulfilled its obligations under the agreement mentioned in paragraph 7 hereof and in particular it-*

(a) *established irrevocable and confirmed Letters of Credit in favour of the manufacturers for clearing the back-log of Honda motor cars referred to in paragraph 2(a) of the said agreement in conjunction*

with the defendant; and;

(b) was at all material times ready and willing to take up 45% of all Honda cars imported into Nigeria by the defendant.

9. The defendant, apparently finding that the business of selling Honda cars in Nigeria was highly profitable, defaulted in giving the plaintiff his (i.e. plaintiff's) contractual rights to take up 45% of vehicles allocated for importation into Nigeria, as pleaded in paragraph 7 thereof. The plaintiff states that this conduct on the part of the defendant constitutes a breach of the agreement mentioned in paragraphs 6 and 7 hereof.

10. The defendant has made efforts, including abuse of judicial process, to frustrate the operation of the aforementioned agreement. The plaintiff will contend at the trial of this action that the said 1993 Agreement is valid and is still in force. (Underlining mine).

It seems plain to me that the action was founded on the 1993 Agreement between the parties which was incorporated in the consent judgment in Suit No. LD/1643/96. Paragraphs 4 to 10 of the Statement of Claim read together with the reliefs claimed in paragraph 16 thereof, which I have earlier on reproduced, should leave one in no doubt that the present suit is predicated on the 1993 agreement.

Clause 5 of the terms of agreement embodied in the judgment reads:

"The plaintiffs and the 1st and 2nd defendants hereby agree that the sub-dealership agreement of 2nd December, 1993, is no longer operative" (Underlining for emphasis)

It is this agreement which the plaintiff/respondent claims that it remains binding and effective. Relief No. 1 reads:

"(i) A declaration that the memorandum of agreement dated the 3rd (sic) day of December, 1993, signed by both parties to this action remains binding and effective." (Underlining mine)

By Clause 5 of the terms of settlement which was entered as consent judgment by the court, the parties had agreed to rescind the Sub-dealership Agreement of 2nd December, 1993. The said agreement is no more binding on the parties. It therefore means that the issue whether the Sub-dealership Agreement is still in operation or is still binding on the

parties has been settled in Suit No. LD/1643/96. In my judgment, aside from the uncontroverted paragraphs 4 and 7 of the affidavit in support of the application, I hold that there was sufficient material before the trial court to enable it to consider and decide the plea of res judicata raised by the appellant.

**The doctrine of res judicata rests on the principle that there must be an end to litigation. A party should not and must not be allowed to relitigate a matter that has been settled in a final decision of a court of competent jurisdiction. The law is that for a plea of res judicata to succeed, the following conditions must be met:**

- 1. There must be an adjudication of the issues joined by the parties.**
- 2. The parties or their privies as the case may be must be the same in the present case as in the previous case.**
- 3. The issues and subject matter must be the same in the previous case as in the present case.**
- 4. The adjudication in the previous case must have been by a court of competent jurisdiction; and**
- 5. The previous decision must have finally decided the issue between the parties; i.e., the rights of the parties must have been finally determined.**

See Udo v. Obot (1989) 1 S.C. (Pt. I) 64; (1989) 1 NWLR (Pt.95) 59; Cardoso v. Daniel (1986) 2 NWLR (Pt.20) 1; Dzungwe v. Gbishe (1985) 2 NWLR (Pt.8) 528; Ezenwa v. Kareem (1990) 3 NWLR (Pt. 138)258.’

**It has been submitted for the appellant that this case is a case where the doctrine of res judicata applies squarely. I couldn’t agree more. All the conditions for a successful plea of res judicata have been met. The consent judgment in Suit No. LD/1643/96 given on 15th July, 1996, is a final decision. A decision of a court is final when it finally disposes of the rights of the parties. In other words, if the decision or order given by a court is such that the matter in respect of which it is given would not be brought back to the court for further adjudication, such decision or order is final. See Odutola v. Oderinde**



(2004) 5 S.C. (Pt. II) 90; (2004) 12 NWLR (Pt.88) 574. The dispute in relation to the Sub-dealership Agreement of 2nd December 1993, was determined between the parties under the terms of settlement and was embodied in the order of the court in Suit No. LD/1643/96. By clause 5 thereof, it was stated clearly that the sub-dealership Agreement was no longer operative. Upon reading the consent judgment, it will be clearly seen that the issue of the Sub-dealership Agreement was finally determined by its abrogation. There was nothing, in this respect, that would be brought back to the court for further adjudication. The respondent therefore cannot now be permitted to bring fresh action founded on the sub-dealership agreement which is no longer operative. In *Houstead v. Commissioner of Taxation* (1926) AC 155 at 165 the Judicial Committee of the Privy Council held thus:

*“Parties are not permitted to begin fresh litigations because of the views they may entertain of the law of the case, or new versions which they present as to what should be proper apprehension by the court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted, litigation would have no end, except when legal ingenuity is exhausted.”*

This leads me to the arguments and submission of the learned counsel for the respondent. Learned counsel submitted that no legal binding and enforceable rights and obligations between persons are created where an agreement stipulates that it is “*subject to contract*”. He placed reliance on the English case of *Winn v. Bull* (1877) 7 Ch D 29. It was also said that an agreement made subject to the approval of a third party was held “*not an agreement at all*” in the case of *Pym v. Campbell* (1846) 6 E & B 370. It was his further contention that an agreement made “*subject to the approval of the court*” was held not binding and enforceable unless and until the approval was given. For this contention, counsel relied on *Smallman v. Small man* (1972) Fam 25. Similarly, a lease at “*a rent to be agreed*” and an option to sell land “*at a price to be agreed*” were held not to create a binding and enforceable contract. The cases of *King Motors (Oxford) Ltd. v. Lax* (1970) 1 WLR 426 and *Brown v. Gould* (1972) Ch.

25 were cited in support of these contentions.

Relying on the above cases, it was contended for the respondent that the stipulation in the consent judgment in the present case that “a backlog of 45 units of Honda cars” was to be purchased by the 1st defendant from the plaintiffs “at a price to be mutually agreed upon” and that “payments for the said backlog shall be done as agreed by the plaintiffs and the 1st and 2nd defendants” create no legally binding and enforceable rights and obligations. The same, it was urged, goes for the stipulation that the re-appointment of the 1st defendant as a dealer for Honda cars was “subject to the above conditions” including the stipulation that both parties shall enter into a new dealership agreement subject to the approval of HONDA MOTOR COMPANY OF JAPAN.”

**These submissions seem quite attractive and convincing. But with respect I think they are misplaced. The main question is the Sub-dealership Agreement of 2nd December, 1993. That agreement was abrogated. It was rescinded by the parties. Clause 5 of the terms of agreement embodied in and as the judgment of the court spells that out clearly. Again, I read clause 5. It reads:-**

***“5. The plaintiffs and the 1st and 2nd defendants hereby agree that the Sub-dealership Agreement of 2nd December, 1993, is no longer operative.”***

**The abrogation of the Sub-dealership Agreement is not made subject to anything. It is not subsisting. It was not made subject to a date in the future. It is dead for all purposes. It died on the 5th day of July, 1996.**

**It is this dead agreement that the respondent seeks to bring back to life. The agreement should have been the focus of the arguments and submissions of respondent’s counsel. The submissions, as powerful as they were, did not touch on the core issue; the abrogation of the Sub-dealership Agreement of 2nd December, 1993, by the parties themselves.**

**In my judgment, therefore, for the reasons I have given above, the doctrine of res judicata applies to the present case. The respondent cannot be allowed to re-litigate the matter. The first**

issue therefore succeeds.

**I think the resolution of this issue has disposed of the appeal. I do not consider it necessary to deal with the remaining issues whose consideration will be merely academic.**

In the result I allow the appeal and set aside the judgment of the court below which affirmed the judgment of the High Court. I enter an order of dismissal of the plaintiff/respondent's claim before the High Court. I make no order as to costs.

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C

**UWAIS CJN**

I have had the opportunity of reading in draft the judgment read by my learned brother, Katsina-Alu, JSC. I entirely agree with him. It is quite clear that the agreement between the parties on the sub-dealership was terminated by the terms of the settlement in Suit No. LD/1643/1996. Clause 5 of the terms of settlement, which constituted part of the judgment entered by the trial Judge, specifically provides:-

*“5. The plaintiffs and the 1st and 2nd defendants hereby agree that the Sub-dealership Agreement of 2nd December, 1993, is no longer operative.”*

Consequently, the respondent, who was the 1st defendant in the suit cannot, by the doctrine of res judicata relitigate the issues in the case (LD/1643/1996). Therefore, the claims in the present suit (LD/915/1998) which read as follows (as per the Statement of Claim):-

*“(i) A declaration that the memorandum of agreement dated the 3rd day of December, 1993, signed by both parties to this action remains binding and effective.”*

*“(ii) A declaration that the defendant has failed to carry out or perform the obligations imposed upon it under Clauses 3(a) and (b) of the said agreement.”*

*“(iii) A declaration that the aforementioned agreement dated the 3rd day of December, 1993, does not absolutely and completely prohibit the plaintiff from importing Honda motorcars from any willing supplier for resale and distribution in Nigeria.”*

(iv) *A declaration that the defendant has no right to prevent the plaintiff from importing Honda motor cars for resale and distribution in Nigeria after he (the said defendant) had repudiated or deliberately failed to implement the aforementioned agreement dated 3.12.93.*

B        (v) *An order of perpetual injunction restraining the defendant, its servants and agents from preventing or doing any act or taking any action or step to prevent the plaintiff from importing into Nigeria Honda Motor cars for resale and distribution in Nigeria on the alleged ground that no one in Nigeria (apart from the defendant) can lawfully import such cars into the country for resale and distribution.*

C        (vi) *N4 billion damages for breach of the said agreement.*

(vii) *N900 million damages for unlawful interference by the defendant with the operation of the plaintiff's business."*

D        are caught by the doctrine and cannot be enforced for as long as the judgment in Suit No. LD/1643/1996 subsists.

I too, therefore, see merit in this appeal. Both the High Court, (Phillips, J. K and the Court of Appeal, (Oguntade, JCA.. as he then was, E Chukwuma-Eneh and Sanusi. JJCA), were in grave error to have dismissed the motion brought by the appellant, as defendant, on the plea of res judicata. The plea should have been upheld and the suit dismissed as prayed by the appellant.

F        In full agreement with the leading judgment of my learned brother, Katsina-Alu, JSC., the appeal succeeds. The judgment of the Court of Appeal as well as the ruling by the High Court are hereby set aside. In their place. I too hereby enter an order of dismissal of the claims in Suit No. ID/ 915/ 1998 before the High Court of Lagos State. I abide by the order as G to costs as contained in the leading judgment.

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### KALGO JSC

H        I have had a preview of the judgment just delivered by my learned brother, Katsina-Alu, JSC., in this appeal. I agree with him that there is merit in the appeal and it ought to be allowed. The crucial issue is whether there were sufficient materials before the trial High Court to enable it

consider and decide the plea of res judicata raised by the appellant. It is well established that a plea of res judicata or issue estoppel shall apply on condition that:-

“(a) The question for decision in the current suit must have been decided in the earlier proceedings. B

(b) The decision relied upon to support the plea of issue estoppel must be final and given by a competent court

(c) The parties involved in both proceedings must be the same person or by their privies.

See *Ibero v. Ume-Ohana* (1993) 2 NWLR (Pt.277) 510 at 520; *Osunrinde v. Ajamagun* (1992) 6 NWLR 156 at 184; *Oloriegbe v. Omotoso* (1993) 1 NWLR (Pt.270) 386 at 396. C

It is also well settled that once the above conditions are shown to co-exist, the subject matter of litigation is caught by estoppel per rem D  
judicatam and neither the party nor his or her privy may re-litigate that issue again by bringing fresh action on it. The matter is said to be res judicata and conclusive. See *Ogbobu v. Ndiribe* (1974) 10 S.C. (Reprint) 145; (1992) 6 NWLR (Pt.245) 40; *Yoye v. Olubode* (1974) 10 S.C (Reprint) E  
145; (1974) 10 S.C. 209 at 220.

The disagreement between the parties arose in the operation of a sub-dealership agreement entered into between them on 2nd December, 1993, in which the respondent was granted the right to import and market F  
45% of the Honda Cars allotted to the appellant by the Japanese manufacturers of Honda Cars. As a result the appellant sued the respondent vide suit No LD/1643/96 in the Lagos State High Court. The dispute was eventually settled out of court and the Terms of Settlement were made the judgment of the High Court. The Terms of Settlement, which was duly G  
signed by all the parties to the above mentioned suit on 5th July, 1996, was attached to the affidavit in support of the appellant's motion before the trial High Court. Paragraphs 1, 5 and 6 of the Terms of Settlement read:-

“ 1. The 1st and 2nd defendants, their servants, agents and/ or H  
privies shall cease from any publication or advertisements or presentation of themselves to the public as otherwise sale or exclusive distributor or sole dealer or sole dealers of Honda Cars in Nigeria.

5. *The plaintiffs and the 1st and 2nd defendants hereby agree that the sub-dealership agreement of 2nd December, 1993, is no longer operative.*

B 6. *The plaintiffs hereby re-appoint the 1st defendant as a dealer for Honda Cars subject to the above conditions and in line with Honda rules, policies and guide lines and both parties shall enter into a new Dealership Agreement subject to the approval of HONDA MOTOR COMPANY OF JAPAN.” (Underlining mine)*

C These paragraphs among others contained in the Terms of Settlement were agreed to by both parties and filed at the High Court Registry, Lagos, on the 8th of July. 1996, and made the judgment of the High Court on the 15th of July. 1996. The parties are therefore fully bound by that judgment unless set aside by a higher court, and this did not happen here.

D And by paragraph 5, the Dealership Agreement which is the subject matter of dispute between the parties was killed and buried when it provided that “*the sub-dealership agreement of 2nd December, 1993, is no longer operative*”. Also the fact that any of the terms of agreement proved  
E difficult to implement or he complied with is no reason for reverting to status quo ante to bring back me provisions of the 2nd December, 1993, sub-dealership agreement into operation.

The appellant, in his application in the trial court, filed an affidavit  
F in support in which he averred in paragraphs 4 and 7 as follows:-

“4. That in Suit No. LD/1643/96. the parties to this suit had settled, the issues upon which the present suit is based and judgment had been entered based on the terms of settlement filed. Copies of the Terms of Settlement and judgment entered by the court are attached herewith and  
G marked Exhibits “A” and “A1”.

7. That the issue and reliefs in this suit are the same and arose out of the same transactions already decided in Suit No. LD/1643/96 between the parties and which decision the plaintiff is seeking to enforce in Suit No.  
H M/ 147/98 which is still pending.” (Underlining mine)

The respondent did not file any counter-affidavit to challenge these averments, and in law, these facts must be deemed to be admitted by the respondent. Egbuna v. Egbuna (1989) 2 NWLR (Pt. 106) 773 at 777;

Alagbe v. Abimbola (1978) 2 S.C. (Reprint) 28; (1978) 2 S.C. 39. These averments are very clear and they specifically state that the issues in Suit No. LD/ 1643/96 and in the pending Suit No. M/147/98 are one and the same and that they have been settled between the parties as contained in the Terms of Settlement signed by both parties and made the judgment of the court. This made it unnecessary, in my view, to examine the Writ of Summons or pleadings in order to discern the issues which to me are very clear and known by the parties themselves. I find that these are sufficient materials before the trial High Court to decide the issue of res judicata in this case. C

From the above, it is very clear to me that the sub-dealership agreement entered into between the parties on 2nd December, 1993, and which was the subject of controversy in Suit No. LD/1643/96 and later Suit No. M/147/98, now pending, has ceased to be operative latest on the 15th of July, 1996, when the terms of settlement were made the judgment of the court. I am more than satisfied that in the circumstances, the said judgment constituted estoppel by record in this matter and so the principle of res judicata properly applied in favour of the appellant as all the necessary conditions for its application are present. D E

Therefore, from what I said above and the more elaborate reasons given in the leading judgment of my learned brother, Katsina-Alu, JSC., I also find merit in this appeal and I allow it. I set aside the decision of the two lower courts with costs as assessed in the leading judgment. F

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### MUSDAPHER JSC

I have had the honour to have read the judgment of my Lord, Katsina-Alu, JSC. Just delivered, with which I entirely agree. I only wish to comment on a few points merely for the sake of emphasis. G

Issue one in the main deals with the question whether there was sufficient material supplied by the appellant before the High Court to enable it decide whether the plea of res judicata can avail the appellant. The appellant in its motion has attached a number of exhibits including the terms of settlement which were incorporated in the judgment in Suit No. H

LD/1643/96, The respondent failed to controvert the facts deposed to in support of the application to strike out or dismiss the suit on the grounds of *res judicata*. The trial High Court and the Court of Appeal acted in grave error when they both failed to consider the unchallenged and uncontradicted facts deposed by the appellant which were deemed under the circumstances, to have been admitted by the respondent. See *Buhari v. Obasanjo* (2003) 11 S.C. 74; (2003) 17 NWLR (Pt.850) 587. It is very clear that there are sufficient uncontradicted and unchallenged materials for the High Court to decide that the reliefs in the present suit are virtually the same and arose out of the same transaction already decided in Suit No. LD/1643/96, to wit, that agreement of sub-dealership of 2nd December, 1993, between the parties on which this case is based upon and which was judicially declared “non-operative” and no longer binding. The present case was clearly premised on the existence of the efficacy of the agreement aforesaid which was clearly determined by a judgment of court of competent jurisdiction as non-existent.

The present suit is also an abuse of the process of the court having regard to the claims by the respondent in Suit No. MA/471/97. In view of finding issue No.1 in favour of the appellant, that there were sufficient materials for the trial Judge to find a valid defence of *res judicata*, there is no need to discuss the second issue. It is for the above and the fuller reasons in the aforesaid judgment of my learned brother, Katsina-Alu, JSC., that I too, find this appeal meritorious and I accordingly allow it. I abide by the order for costs contained in the lead judgment.

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**G** **EDOZIE JSC**

I had the benefit of reading in draft the leading judgment of my learned brother, Katsina-Alu, JSC. I agree with the reasoning and conclusion in allowing the appeal, which turns on, essentially, the conditions for sustaining a plea of estoppel. The facts that gave rise to the appeal have been admirably narrated in the leading judgment and, therefore, a recapitulation of those facts serves no useful purpose except as may be necessary to consider particular issues in controversy.



As noted above, the bone of contention related to the doctrine of estoppel per rem judicatam; it is whether the appellant's Suit No. ID 13/915/98 filed at the Ikeja High Court was barred, per rem judicatam by the consent judgment delivered by the Lagos High Court on 15th July, 1996, in Suit No. LD/1643/96. It is judicially recognized by a long line of cases B that for a plea of estoppel per rem judicatam to succeed, the party relying on it must establish the following requirements or preconditions, namely:-

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

(2) That the claim or issue in dispute in both actions is the same. C

(3) That the res or the subject-matter of the litigation in the two cases is the same.

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

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

It needs to be emphasized that unless all the above constituent elements or requirements of the doctrine are fully established, the plea of estoppel per rem judicatam cannot be sustained: see Oke v. Atoloye (1985) 2 NWLR (Pt.9) 578; Yoye v. Olubode & Ors. (1974) 10 S.C. (Reprint) 145; (1974) 1 All NLR (Pt.2) 118 at 122, (1974) 10 SC 209; Samuel Fadiora & Anor. v. Festus Gbadebo & Anor (1978) 3 S.C. (Reprint) 149; F (1978) 3 S.C. 219; Adone v. Ikebudu (2001) 7 S.C. (Pt. III) 22; (2001) 14 NWLR (Pt.733) 385 at 417. In the instant case, controversy relates only to conditions 2 and 4.

The respondent's contentions are firstly and as held by the two lower courts, that as the Writ of Summons and the pleadings in the previous case were not available, there was not enough material before the trial court to enable it decide whether the issues and reliefs in the previous case and the present one are the same. Secondly, it was contended that the consent judgment did not attain a finality to sustain the plea of res judicata. H

With respect to the first point, I think that the averments in the respondent's case belie the assertion of insufficient material before the trial court. It was specifically deposed in paragraph 5 of that affidavit that "the

issues and reliefs in this suit are the same and arise out of the same transactions already decided in Suit No. LD/1643/96 between the parties .....” The respondent did not file a counter-affidavit to controvert the above averment. The position of the law is that when in a situation in which B facts are provable by affidavit, one of the parties deposes to certain facts, his adversary has a duty to swear to an affidavit to the contrary if he disputes the facts. Where such a party fails to swear to an affidavit to controvert such facts, they may be regarded as duly established, see C Agbaje v. Ibru Sea Foods (1972) 5 S.C (Reprint) 32; (1972) 5 SC. 50 at 55; Alade v. Abimbola (1978) 2 S.C (Reprint) 28; (1978) 2 S.C 39 at 40; Ajomale v. Yaduat (1991) 5 NWLR (Pt.191) 266.

Since the respondent did not file a counter-affidavit to controvert the appellant’s averment referred to above, that averment was deemed D admitted and it was a material fact before the trial court upon which to reach a decision on the issue. That

apart., the consent judgment was before the trial court and by Section 54 of the Evidence Act, 1990:

E “Every judgment is conclusive proof, as against parties and privies, of facts directly in issue in the case and actually decided by the court...”

A careful perusal of the consent judgment leaves no one in doubt that the cause of action in that case had to do with the sub-dealership F agreement entered into between the parties in December, 1993, and based on the terms of settlement of the parties, the court decided that the agreement had ceased to be binding on the parties. It is that same December, 1993 agreement which the present suit is seeking to revive. I G am of opinion that there was abundant material before the trial court to decide the question whether the issues and reliefs in the previous case are the same as those in the present suit.

Adverting to the second issue, in respect of the finality or otherwise of the consent judgment, it is necessary to emphasize that a consent H judgment can in an appropriate case sustain a plea of res judicata. The fact that a judgment was obtained upon a consent of both parties will not bar it from operating as an estoppel: See J. S. Talabi v. Abiola Adeseye (1973) 8-9 S.C (Reprint) 15; (1973) 1 NMLR 8. A judgment is not the less final

because it is a judgment entered by consent of the parties. Such a judgment is as much a final judgment as one resulting from a contested hearing, per Finlay, J, in *Cohen v. Jomesco* (1926) 1 KB 119 at p. 125. Speaking on the meaning and attributes of ‘finality’ of a judgment, the learned authors of *Spencer-Bower and Turner on the Doctrine of Res judicata*, 2nd Edition B (1969) at p. 132 para. 164, had this to say:-

*“164. A judicial decision is deemed final, when it leaves nothing to be judicially determined or ascertained thereafter, in order to render it effective and capable of execution, and is absolute, complete, and certain, C and when it is not lawfully subject to subsequent rescission, review, or modification by the tribunal which pronounced it.....”*

At p. 137 paragraph 171, the learned authors continued:-

*“Finality cannot be attributed to a judicial decision, the terms of D which, whether declaratory or directory, are so uncertain and ambiguous as to leave the parties in doubt as to the exact extent of their respective rights and liabilities, or as to the manner in which the decision is to be complied with or enforced.”*

Furthermore, the mere fact that a judgment was wrongly decided E will not prevent it from operating as an estoppel in so far as it has not been upset by a higher court: *Fabunmi Sule Farinde v. Salami Ajiko and Anor* (1940) 6 WACA 108; *Okoli Ojiako & Ors. v. Onwumaogoeze & Ors.* (1962) All NLR 58 provided it is not a nullity: *Off on Udofe & Ors. v. Akpan F Aguisisua & Ors.* (1973) 1 NMLR 286, nor will the fact that both parties are dissatisfied with the judgment: *Olomu of Okwoduku v. Ivbighre of Ughwagba* (1960) WNLR 28. But a judgment which has been procured by fraud or collusion or which is void for any reason whatsoever will not G sustain a plea of estoppel. See *The Law and Practice Relating To Evidence In Nigeria* by T. Akintola Aguda (1980) pp.279-290.

I have read the consent judgment under consideration over and over again, but I am unable to see anything that deprives it of the attribute of H finality. The respondent presumably now realizes that the terms of settlement on which it is based are disadvantageous to it, hence it is trying to wriggle out of them. Since the terms of settlement have transformed and crystallized into a judicial decision, the respondent is precluded by the

doctrine of estoppel on record from so doing.

It is for the above reasons and those elaborately set out in the leading judgment of my learned brother, Katsina-Alu, JSC., that I also allow the appeal with costs as assessed in the leading judgment.

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