

SUPREME COURT OF NIGERIA

23RD JUNE, 2006. SC. 385/2001

**CORAM:- S. U. ONU, D. MUSDAPHER, I. C. PATS-ACHOLONU,
W. S. N. ONNOGHEN, I. F. OGBUAGU, JJSC**

MEMUDU AJIBOYE

..... APPELLANT

(For himself and on behalf of
Abidoye family)

AND

ALHAJI OLOYEDE ISHOLA

..... RESPONDENT

(Substituted by Mustapha Oyedokun)

ESTOPPEL - Res judicata - Effect - It precludes a party - From disputing against the other party - In a subsequent suit - The same issues previously decided between them (H1)

ESTOPPEL - Res judicata - Ingredients - The parties, the issues and the subject matter - In the previous action - Must be same as in the present action (H2)

ESTOPPEL - Issue estoppel - Applicability - Where res judicata fails - Issue estoppel - May still apply - If failure is - By reason of difference in cause of action - So long as - Question for determination - Are same in both actions (H3)

ESTOPPEL - Res judicata - Basis of - A cross appeal - Arising from a judgement - Declared void ab initio - Cannot be basis for res judicata - Being baseless itself (H4)

LAND LAW - Title - Mode of acquisition - Duty of plaintiff - It is duty of plaintiff - To establish mode of acquisition of his title - In the course of proving that title (H5)

FACTS

The plaintiff/Appellant sued the Defendant/Respondent at the Area Court Grade I, Ajase-Ipo, Kwara State, claiming ownership of a parcel of land at Oke Maro, for himself and as representing Abidoye family of Oke Maro. That suit resulted in an appeal to upper Area Court 1, Ilorin and then to the State High Court, holden at Ilorin which ordered a retrial before the upper Area court 2, Ilorin. But the re-trial order was later varied upon application by one of the parties, for it to be heard by the Upper Area court, Omu-Aran instead. Both parties relied on traditional history. After trial, the court dismissed the Appellant's claim. Appellant appealed to the State High Court, holden at Omu-Aran, on an omnibus ground of appeal, which court reversed the judgment of the Upper Area court and awarded title to the Appellant. Respondent appealed to the Court of Appeal, whereupon Appellant raised a preliminary objection to the competence of the appeal, having been filed without prior leave as required. That Court dismissed the objection but eventually entered a non-suit. Respondent further appealed to the Supreme Court against the order of non-suit and Appellant cross-appealed against the dismissal of the preliminary objection and the order of non-suit. Supreme Court dismissed the main appeal as incompetent for lack of leave but allowed the cross-appeal.

Subsequently, Respondent applied to the Court of Appeal for extension of time within which to appeal and for leave to appeal against that judgment of the High Court, Omu-Aran. The application was granted despite objection by Appellant that the matter was already decided on merit by the Supreme Court. Court of Appeal heard the matter de novo in spite of a plea of res judicata by the Appellant. The court held that there was no valid judgment of the Court of Appeal on the matter between the parties. It eventually allowed the appeal and set aside the judgment of the High Court. Appellant has now appealed to the Supreme Court against that Judgment of Court of Appeal. It is the contention of the Appellant that a cross appeal, being an independent appeal is not affected by dismissal of the main appeal. And that by allowing the cross-appeal, the Supreme Court affirmed the judgment of the High Court. Consequently,

that that judgment of the Supreme Court constituted res judicata.

ISSUES FOR DETERMINATIONS

“(i) Whether on the evidence on record, the Court of Appeal was right in setting aside the decision of the appellate High Court and affirming the decision of the trial Upper Area Court which dismissed the plaintiff/appellant’s suit,

(ii) Whether the Court of Appeal had jurisdiction to try the case having regard to the fact that the Supreme Court had already decided the same case in suit No. SC. 271/1990 of 1st July. 1994 reported in (1994) 7-8 SCNJ (Pt. 1)1; (1994) 6 NWLR (Pt. 352) 506.”

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

Res judicata - Effect

1. Estoppel per rem judicatam or estoppel of record arises where an issue of fact has been judicially determined in a final manner between the parties or their privies by a court or tribunal having jurisdiction in the matter and the same issue comes directly in question in subsequent proceedings between the parties or their privies. The principle of res judicata effectively precludes a party to an action or his privies from disputing against the other party, in any subsequent suit, matters which had been adjudicated upon previously by a court of competent jurisdiction between him and his adversary involving the same issues. (p.2264 D)

Res judicata - Ingredients

2. It is normal to find within a single cause of action, several issues which call for determination and are necessary for the determination of the whole case. As a general rule, once one or more of any such issues have been distinctly raised in a cause of action and determined between the same parties in a court of competent jurisdiction, neither party, his privies, agents or servants is allowed to reopen or relitigate any of such issues all over again in another action between the parties, agents or privies. This is based on the principle of law that a party is precluded from contending the contrary of any specific point which, having been

once distinctly put in issue, has with certainty and solemnity been determined.

It is settled law that the ingredients of the doctrine of estoppel per rem judicata are as follows:

- B (a) the parties;
- (b) the issues; and
- (c) the subject matter in the previous action were the same as those in the action in which the plea is raised.
- C Once these ingredients are established, the previous judgment estops the plaintiff from making any claim contrary to the decision in the previous case. (p. 2264 G)

Issue estoppel - Applicability

- D 3. The conditions for the application of issue estoppel are that:
 - (a) the same question was decided in both proceedings;
 - (b) the judicial decision said to create the estoppel is final; and
 - (c) the parties to the judicial decision or their privies were the
- E same as the parties or their privies to the proceedings in which the estoppel is raised.

That being the case, it is obvious that an issue estoppel may arise where a plea of res judicata could not be established because the causes of action are not the same.

- F It is however very clear that the issue as decided in that appeal is not the same as the issues that call for determination in the present appeal and therefore it is my considered view that the principles of issue estoppel are inapplicable to this case and do not avail the appellant.
- G (pp. 2266 B / 2270 G)

Res judicata - Basis of

- H 4. The interesting question however, is whether the cross-appeal which was allowed by the court conferred any right on the present appellant or resolved the issues in contention in the present appeal so as to constitute that decision res judicata. I had earlier in this judgment observed that appellant had no cross-appeal before the Court of Appeal. It follows there-

fore that his cross-appeal to the Supreme Court arose from the very judgment the Supreme Court declared null and void. The question is, even though the said cross-appeal was allowed, was it on the merit? I do not think so. It was allowed solely on the ground that the appeal giving rise to the judgment on further appeal to the Supreme Court was incompetent which in effect also means that there was no judgment on which the cross-appeal though allowed, could be based. It therefore does not matter whether the cross-appeal is independent of the main appeal and has a separate existence - the reality being that it was based on a judgment that has been declared by this court not to have existed ab initio. It was an empty victory in relation to the principles of res judicata. I therefore resolve the issue against the appellant. (p. 2270 H)

Title - Mode of acquisition

5. It must be noted that the above five methods deal with the means by which title to land can be proved in the court of law. The said methods have nothing to do with the mode of acquisition of title to land which may be by:

- (a) first settlement on the land and deforestation of the virgin land;
- (b) conquest during tribal wars;
- (c) gift
- (d) grant-customary;
- (e) Sale;
- (f) inheritance, etc, etc.

It is however the duty of the plaintiff in an action for declaration of title to land to adduce sufficient and credible evidence to establish the mode of acquisition of his title and the law is that the said plaintiff must succeed on the strength of his own case and not on the weakness of the defence, although the plaintiff may take advantage of the defendant's evidence where it supports his case.

In the instant case, appellant as plaintiff based his claim to title on first settlement thereon by his ancestor.

It is very clear that that court did not believe the version of the

traditional history as to first settlement as given by the plaintiff in support of his claim. Rather, the court specifically found that it was the progenitor of the defendant who first settled on the land and that “his descendants ruled over Amoyo in succession since that village was founded.” I hold the view that the above specific finding by the trial court completely destroyed the foundation of the claim of title to the land in dispute by the plaintiff who is appellant before this court and the Court of Appeal confirmed the findings of facts made by the trial Judge. The same thing applies to possession and acts of ownership of the land in dispute which were also resolved in favour of the respondent and affirmed by the Court of Appeal.

In conclusion, I resolve the issue against the appellant and since both issues have failed, it is obvious that the appeal is without merit and it is accordingly dismissed by me. (pp. 2273 H / 2276 B)

NOTABLE POINTS OF INTEREST

ONNOGHEN JSC

1. *A null judgment has no legal effect*

However, what is very important and needs to be emphasized here is the fact that this court declared the judgment of the Court of Appeal resulting in that appeal to the Supreme Court a nullity. It is settled law that a judgment that is a nullity has no legal validity and can confer no right nor impose any obligation on anybody. (p. 2270 E)

OGBUAGU JSC

2. *Appraisal of evidence is duty of trial Court*

It is now firmly settled in a string of decided authorities, that an appellate court should not reverse a finding or findings of a trial court, unless that finding or findings, runs or run contrary to the trend of accepted evidence.

In other words, the duty of appraising evidence given at a trial, is pre-eminently, that of the trial court who saw and heard witnesses. It is the right of that court to ascribe value. (p. 2279 A)

REPRESENTATION

A.F. Afolayan, Esq., (with him, R.S. John and N. Tijani), for the Appellant.

Akin Adewale, Esq., (with him, T.S. Olaosebikan), for the Respondent.

B

CASES REFERRED TO

Onwugbufor v. Okoye (1996) 1 NWLR (Pt. 424) 252

Chief Frank Ebba v. Chief Wari Ogoto & Anor. (1984) 4 S.C 84 @ 92-91, 99; (1989) 1 SCNLR 372 @ 378

C

Odejewedje v. Echanokpe (1987) 1 NWLR (Pt. 52) 633

Ezeanya v. Okeke (1995) NWLR (Pt. 388) 142

Dokubo v. Omoni (1999) 6 S.C. (Pt. I) 94; (1999) 8 NWLR (Pt. 616) 647

Dawodu (1972) 8-9 S.C. (Reprint) 55; (1972) 1 All NLR (Pt. 2) 270

D

Fadiora v. Gbadebo (1978) 3 S.C (Reprint) 149; (1978) 3 S.C 219

Igwego v. Ezeugo (1992) 6 NWLR (Pt. 249) 561

Ogunrinde v. Ajamogun (1992) 6 NWLR (Pt. 346) 156

Udeze v. Chidebe (1990) 1 S.C. 148; (1990) 1 NWLR (Pt. 125) 141

E

Okukuje v. Akwido (2001) 1 S.C. (Pt. II) 80; (2001) 3 NWLR (Pt. 700) 261

Omonuwa v. Oshodin (1995) 2 S.C. I at 31

U.T.C. (Nig) Ltd v. Pamotei (1989) 3 S.C. (Pt. I) 79; (1989) 3 SCNJ 79 at 929-93

F

Achiakpa v. Nduka (2001) 7 S.C. (Pt. III) 125; (2001) WRN Vol. 39, 1

Balogun v. Adejobi (1995) 2 NWLR (Pt. 376) 131

G

STATUTES REFERRED TO

Constitution of the Federal Republic of Nigeria, 1979; ss. 221 and 238.

Evidence Act, L.F.N. 1990; ss. 135 and 136

LEAD JUDGMENT BY ONNOGHEN JSC

H

This is an appeal against the judgment of the Court of Appeal holden at Kaduna in appeal No. CA/K/140/94 delivered on 20th March, 1997.

The facts of the case include the following;

The appellant as plaintiff at the Upper Area Court, Omu-Aran, Kwara State claimed ownership of a piece or parcel of land measuring about eight square kilometers, situate at Oke Maro, Amoyo for himself and as
B representing Abidoye family of Oke Maro. Both parties relied on history and gave traditional evidence of ownership and acts of possession.

The action was initially instituted at the Area Court Grade 1, Ajase-Ipo, Kwara State which resulted in an appeal to the Upper Area
C Court No.1, Ilorin and subsequently to the High Court of Kwara State holden at Ilorin. The said High Court ordered a retrial of the matter before the Upper Area Court No.2, Ilorin which order was later varied upon an application by one of the parties for the retrial to be heard by the
D Upper Area Court, Omu-Aran.

The Upper Area Court, Omu-Aran conducted a visit to the locus-
in-quo and after reviewing the evidence adduced by the parties and their
E witnesses, dismissed the appellant's claim which decision resulted in an appeal to the High Court, holden at Omu-Aran in its appellate jurisdiction. The appeal was on an omnibus ground. The High Court, in its decision reversed the judgment of the Upper Area Court thereby awarding title to
F the disputed piece of land to the present appellant. The present respondent was not satisfied with that judgment and appealed to the Court of Appeal, Kaduna. The present appellant then raised a preliminary objection as to the competence of the appeal in that no leave was sought and obtained prior to the filing of the appeal which objection was dismissed and
G the Court of Appeal eventually entered a non-suit. The present respondent who was the defendant appealed to the Supreme Court on the order of non-suit while the present appellant cross-appealed against the dismissal of their preliminary objection and the order of non-suit and prayed
H the Supreme Court to affirm the judgment of the High Court,

The Supreme Court in its judgment in appeal No. SC. 271/1990 delivered on 1st July, 1994 and reported in (1994) 6 NWLR (Pt. 352) 506 held that the main appeal was incompetent for lack of leave but allowed

the cross appeal.

However, on the 13th day of July, 1994, the present respondent filed an application at the Court of Appeal, Kaduna for extension of time within which to appeal and leave to appeal against the judgment of the High Court, Omu-Aran, which application was granted despite objection B by the present appellant that the matter had been decided on the merit by the Supreme Court and can therefore not be reopened. The appeal was subsequently heard de novo. The appellant again filed preliminary objection to the jurisdiction of the Court of Appeal to hear the appeal on the C merit which objection was overruled on the ground that there was no valid judgment of the Court of Appeal on the subject matter between the parties. On the merit of the appeal, the Court of Appeal allowed the appeal and set aside the judgment of the High Court thereby restoring the judgment of the trial Upper Area Court, Omu-Aran. This appeal is therefore D against that judgment.

Learned counsel for the appellant, A.F. AFOLAYAN Esq., submitted two issues for the determination of the appeal in the appellant's brief of argument filed on 5/12/2001 and adopted in argument of the E appeal. The issues are as follows:-

“(i) Whether on the evidence on record, the Court of Appeal was right in setting aside the decision of the appellate High Court and affirming the decision of the trial Upper Area Court which dismissed the F plaintiff/appellant’s suit,

(ii) Whether the Court of Appeal had jurisdiction to try the case having regard to the fact that the Supreme Court had already G decided the same case in suit No. SC. 271/1990 of 1st July. 1994 reported in (1994) 7-8 SCNJ (Pt. 1)1; (1994) 6 NWLR (Pt. 352) 506.”

It must be observed that since issue No. 2 attacks the jurisdiction of the Court of Appeal and a negative resolution of same would dispose of the appeal, it ought to have been listed as the first issue for determination, not the other way round. The present order in which the issues are listed puts the cart before the horse. In this judgment therefore, I will consider issue No. 2 first since jurisdiction is the foundation of all adjudi- H

cation and a proceeding without jurisdiction is null and void.

Learned counsel for the respondent, SHITTU A. BELLO Esq, in the respondent's brief filed on 6/2/02 submitted three issues for determination. These are as follows:-

B “1. *Whether the judgment of the Supreme Court in suit No. 271/1990 of 1st July, 1994 was on merit and final so as to support the appellant's plea of estoppel per res judicatam.*

C 2. *Whether, if the Supreme Court judgment in suit No. SC. 271/1990 was not on merit or final, the Court of Appeal, Kaduna was not right in assuming jurisdiction to hear and determine respondent's fresh appeal No. CA/K/140/94.*

D 3. *Whether the Court of Appeal was not right in setting aside the decision of the appellate High Court on the ground that the appellate High Court was wrong to have re-evaluated the evidence already evaluated unquestionably by the trial court.”*

E Looking closely at the issues formulated by learned counsel for the respondent, it is clear that there is no difference between his issues No I & 2 both of which constitute one issue and are subsumed in appellant's issue No. 2. In deciding this appeal therefore. I intend to use the issues as formulated by learned counsel for the appellant.

F On the issue on jurisdiction of the lower court to hear and determine the appeal on ground of res judicata, learned counsel for the appellant referred to the judgment of this court in appeal No. SC 271/1 990 which was an appeal and a cross appeal involving the parties to this appeal on the very subject matter in the present appeal and stated that the defendant therein appealed against the order of non-suit made by the G Court of Appeal in Appeal No. CA/K/156/87 maintaining that the proper order to make was one of dismissal of the respondent's claim while the plaintiff cross-appealed against the dismissal of the preliminary objection to the competence of the appeal because the leave to appeal was granted H by a single judge, and the order of non suit of the plaintiff's claim maintaining that the judgment of the High Court granting the plaintiff's claim ought to have been affirmed; that the Supreme Court did dismiss the main appeal while the cross appeal of the present appellant was allowed.

Learned counsel then submitted that across appeal is independent of the main appeal and that the fact that the main appeal was dismissed will not affect the merit of the cross appeal relying on *Akanke Olowu v. Amudatu Abolore* (1993) 6 SCNJ (Pt. 1) 15; *Registered Trustees of Amorc v. Henry Awoniyi* (1994) 7/8 SCNJ (Pt. 2) 390 at 422. Learned counsel further submitted that in view of the decision of the Supreme Court in the said appeal No. SC 271/1990, the respondent cannot relitigate the claim afresh in the Court of Appeal as has been the case in the present appeal, on the ground of *res judicata* relying on *Shitta Bey v. L.E.D.B* (1962) All NLR 372; (1962) 23 CNLR 107; *Ezenwa v. Kareem* (1990) 5 S.C. (Pt. II) 66; (1990) 21 NSCC (Pt. 2) 284; *Odejewedje v. Echanokpe* (1987) 1 NWLR (Pt. 52) 633; *Balogun v. Adejobi* (1995) 2 NWLR (Pt. 376) 131; *Dokubo v. Omoni* (1999) 6 S.C. (Pt. I) 94; (1999) 8 NWLR (Pt. 616) 647; *Okukuje v. Akwido* (2001) 1 S.C. (Pt. II) 80; (2001) 3 NWLR (Pt. 700) 261 at 316, 318-319.

Learned counsel also submitted that by allowing the cross-appeal, the Supreme Court affirmed the judgment of the appellate High Court and thereby pronounced on the claim of the plaintiff/appellant and deprived the Court of Appeal of the jurisdiction to again entertain the present appeal. Learned counsel therefore urged the court to resolve the issue in favour of the appellant.

On his part, learned counsel for the respondent, SHITTU A. BELLO Esq., in the respondent's brief of argument filed on 6/2/2001 referred the court to appeal No. SC 271/1990 delivered on 1/7/1994 and submitted that to determine whether the said decision constitutes *res judicata*, one has to look at the issues canvassed before that court and the decision of the court thereon. Learned counsel then referred to the issues submitted both in the main appeal, which was one, and the cross-appeal, which were two and the decision in the lead judgment and submitted that the Supreme Court did not consider, talk less of determining on the merit, the main issue of ownership of the disputed land which was in contention between the parties and that the only issue determined was "whether there was any valid and competent appeal and grounds of appeal before the Court of Appeal, on which the Court of Appeal's judgment could be

based” And that only a final judgment can constitute *res judicata* which the decision in SC. 271/1990 is not, relying on *Omonuwa v. Oshodin* (1995) 2 S.C. I at 31; *U.T.C. (Nig) Ltd v. Pamotei* (1989) 3 S.C. (Pt. I) 79; (1989) 3 SCNJ 79 at 929-93; *Akuweziri v. Okenwa* (2001) 12 S.C. (Pt. II) 15; (2001) FWLR (Pt. 35) 604; *Adone v. Ikebudu* (2001) 7 S.C. (Pt. III) 22; (2001) WRN Vol. 36, 24 and *Achiakpa v. Nduka* (2001) 7 S.C. (Pt. III) 125; (2001) WRN Vol. 39, 1.

Learned counsel further submitted that the decision of the Supreme Court in SC. 271/1990 being to the effect that the judgment of the Court of Appeal in CA/K/156/87 is a nullity means that the respondent had, in effect, not appealed against the appellate decision of the High Court and was therefore in order in initiating the appeal resulting in the present appeal to this court, and urged the court to resolve the issue in favour of the respondent.

Estoppel per rem judicatam or estoppel of record arises where an issue of fact has been judicially determined in a final manner between the parties or their privies by a court or tribunal having jurisdiction in the matter and the same issue comes directly in question in subsequent proceedings between the parties or their privies. The principle of *res judicata* effectively precludes a party to an action or his privies from disputing against the other party, in any subsequent suit, matters which had been adjudicated upon previously by a court of competent jurisdiction between him and his adversary involving the same issues, see *Igwego v. Ezeugo* (1992) 6 NWLR (Pt. 249) 561; *Ogunrinde v. Ajamogun* (1992) 6 NWLR (Pt. 346) 156; *Udeze v. Chidebe* (1990) 1 S.C. 148; (1990) 1 NWLR (Pt. 125) 141; *Okukuje v. Akwido* (2001) 1 S.C. (Pt. II) 80; (2001) 3 NWLR (Pt. 700) 261.

However, **it is normal to find within a single cause of action, several issues which call for determination and are necessary for the determination of the whole case. As a general rule, once one or more of any such issues have been distinctly raised in a cause of action and determined between the same parties in a court of competent jurisdiction, neither party, his privies, agents or servants is**

allowed to reopen or relitigate any of such issues all over again in another action between the parties, agents or privies. This is based on the principle of law that a party is precluded from contending the contrary of any specific point which, having been once distinctly put in issue, has with certainty and solemnity been determined, see B
 Lawal v. Dawodu (1972) 8-9 S.C. (Reprint) 55; (1972) 1 All NLR (Pt. 2) 270; Fadiora v. Gbadebo (1978) 3 S.C (Reprint) 149; (1978) 3 S.C 219.

It is settled law that the ingredients of the doctrine of estoppel per rem judicata are as follows:

- (a) the parties;
- (b) the issues; and
- (c) the subject matter in the previous action were the same as those in the action in which the plea is raised.

Once these ingredients are established, the previous judgment estops the plaintiff from making any claim contrary to the decision in the previous case - See Odejewedje v. Echanokpe (1987) 1 NWLR (Pt. 52) 633; Ezeanya v. Okeke (1995) NWLR (Pt. 388) 142; Dokubo v. Omoni (1999) 6 S.C. (Pt. I) 94; (1999) 8 NWLR (Pt. 616) E 647; Nkanu v. Onun (1977) 5 S.C (Reprint) 12; (1977) 5 S.C. 11.

There is no doubt that though the grounds of appeal and the issues distilled therefrom are different in appeal No. SC, 271/1990 and the instant appeal, the parties are the same and the subject matter is the judgment of the High Court of Kwara State sitting at Omu-Aran in its appellate jurisdiction which went on appeal to the Court of Appeal sitting in Kaduna. In fact, none of the parties has contended otherwise. The bone of contention however, is whether the decision of this court in SC. 271/1990 was on the merit of the appeal so as to constitute res judicata. While appellants submitted that it is, the respondent contends that it is not.

I agree with the submission of learned counsel for the respondent that to determine whether the decision in question constitutes res judicata, one must look at the issues that call for determination in that appeal and the decision of the court thereon. This is so because where a cause of action or an issue has been determined in a previous suit between the same parties, the said parties are, as a matter of public policy and in the

interest of the common good to the effect that there should be an end to litigation, estopped from bringing a fresh action in any court in the same cause and issue already pronounced upon by a court of competent jurisdiction in the previous action. That, in a nutshell, is the principle of res

B judicata.

The conditions for the application of issue estoppel are that:

(a) the same question was decided in both proceedings;

(b) the judicial decision said to create the estoppel is final;

and

C

(c) the parties to the judicial decision or their privies were the same as the parties or their privies to the proceedings in which the estoppel is raised.

D **That being the case, it is obvious that an issue estoppel may arise where a plea of res judicata could not be established because the causes of action are not the same.**

At pages 17 to 19 of the appellant's brief of argument, learned counsel for the appellant reproduced what he calls the grounds of appeal in the cross-appeal in SC. 171/1990 but has not told us where he got them from particularly as there is no evidence of their existence in the record of appeal before this court and this court being an appellate court has jurisdiction to deal only with the cold facts as contained within the confines of the record of appeal and cannot legally go outside it. For the above reason, this judgment does not take into consideration the grounds of appeal and the reliefs claimed in the said cross-appeal as reproduced in the said brief of argument. In any event, for the purposes of determining in appeal or cross appeal, grounds of appeal are only relevant in formulating the issues that call for determination in the appeal in question. The relevant question therefore is what are the issues that were determined in SC. 271/ 1990?

G At pages 548 and 549 of Ishola v. Ajiboye (1994) 6 NWLR (Pt. H 352) 506, OGUNDARE, JSC., stated the issues both in the main appeal by the present respondent and the cross appeal by the present appellant as follows:-

“In his brief on the main appeal, the defendant (who is the appel-

lant in the main appeal and cross-respondent in the cross appeal) sets out one issue as calling for determination, that is to say:

“Whether the Court of Appeal Kaduna was not wrong in law in making an order of non-suit instead of restoring in toto the decision of the trial court which dismissed the suit of the plaintiff/respondent when: B

(i) the suit was given a full and complete hearing;

(ii) the Court of Appeal did not uphold the complaints of the plaintiff/respondent against the judgment of the trial courts; and it (Court of Appeal) did not reverse any of the findings, and conclusions of the trial court, but rather it confirmed them; C

(iii) the Court of Appeal did not invite the parties’ counsels (sic) to address it before making an order of non-suit;

(iv) the reasons given for making the order of non-suit instead of dismissal are not suitable in law.” D

He adopts the issue set out by the plaintiff in his brief on the cross appeal.

The plaintiff - he is respondent in the main appeal and cross appellant in the cross-appeal sets out two issues in his Brief as calling for determination in the appeals before this court. The two issues are: E

“1. Whether there was any valid and competent Appeal and Grounds of Appeal before the Court of Appeal, Kaduna on which the Court of Appeal’s judgment could be based, and, F

2. Whether the Court of Appeal’s order of non-suit is reasonable, warranted and can be supported by the weight of evidence before the court if parties’ counsel had been duly invited to address the Court of Appeal on the propriety of ordering a non-suit.” G

I hold the view that the issues as presented are very clear and unambiguous, It must be noted, and this is very important, that the present appellant who was a cross appellant in that appeal had no cross appeal before the Court of Appeal against the decision of the appellate High Court. In fact, the decision was in his favour. That being the case, only H one appeal was before the Court of Appeal in CA/K/156/87 and it was the decision of the Court of Appeal in that appeal which gave rise to the cross-appeal in SC, 271/1990. The means that the cross-appeal derived

its independence or competence from the decision of the Court of Appeal just as the main appeal.

Having reproduced the issues for determination in SC. 271/1990, the next question is what is the decision of this court on the said issues?

B I must point out that it was a full court of this court that determined the appeal in SC. 271/1 990 since the appeal involved serious constitutional issues involving some provisions of the 1 979 Constitution particularly the construction of Section 238 thereof and that the decision was five to two, with the lead judgment being written by OGUNDARE, JSC. Hon. C Justice OGUNDARE, JSC., after resolving the constitutional issues stated thus at page 561:

“I have examined the five grounds of appeal in the defendant’s notice of appeal to the Court of Appeal; the grounds raised issues of D mixed law and facts and fact. Under Section 221 (1) of the Constitution, leave to appeal was required. The leave to appeal granted by the High Court of Kwara State was granted by a single Judge sitting alone. He had no jurisdiction to grant such leave under Section 63(1) of the High E Court Law. The order granting the leave was invalid and void. And as no valid leave of either the High Court or of the Court of Appeal was obtained before the defendant appealed against the decision of the Ilorin High Court given in suit No. KWS/OM/1986 of 9th July, 1987, the ap- F peal was incompetent and the decision of the Court of Appeal therein is null and void.

In view of the conclusion just reached, I do not consider it necessary to go into other issues raised in the Briefs of the parties. Sufficient to say that a long line of cases has laid down that before an order of non- G suit is made, it is necessary and important that parties’ counsel are given opportunity to address the court as to desirability or otherwise of that order The court below was in breach of this important duty as it did not call on counsel for the parties to address it on the issue before the H order of non-suit was made As the proceedings before that court are otherwise a nullity I will not go into the question raised in both the appeal and the cross-appeal, of the correctness of the order.

The main appeal of the defendant fails and it is dismissed by me.

The cross-appeal of the plaintiff succeeds and it is allowed by me. The judgment of the Court of Appeal is declared null and void."

On his part, Hon. Justice Bello, CJN., concluded at page 566 thus:

"For the foregoing reason and the fuller reasons in the judgment of my learned brother, Ogundare, JSC, the appeal and cross-appeal are hereby allowed. The judgment of the Court of Appeal is set aside and the decision of the High Court stands."

On the other hand, KUTIGI, JSC, reached the following conclusion at page 576:

"The leave given by the single judge in the case was therefore a nullity and the appeal was not properly before the Court of Appeal, Kaduna Division. The plaintiff's appeal on the preliminary objection therefore succeeds and it is hereby allowed. In the result, appeal No. CA/K/156/87 not being properly before the Court of Appeal, Kaduna Division is hereby struck out."

In view of the conclusion above, there is no need to consider the merit or demerit of the judgment delivered by the Court of Appeal since that judgment is also a nullity being delivered without jurisdiction. It is hereby set aside. The defendant's appeal therefore fails and it is accordingly dismissed."

OGWUEGBU, JSC, concluded at page 587 as follows:

"The decision of the Court of Appeal based on the incompetent appeal was null and void. See Ukekwe Erisi & Ors. v. Uzo Idika & Ors. (1987) 3 NWLR (Pt. 66) 503. The proposed grounds of appeal were all grounds of facts and mixed law and facts. Leave was required therefore under Section 221(1) of the 1979 Constitution."

Having resolved the first issue for determination identified by the plaintiff/respondent/cross-appellant in his favour, it is not necessary to consider issue and indeed any other issue in both appeal. The defendant's main appeal fails."

IGUH, JSC., concluded at page 601 as follows:

"Having resolved the main issue that has arisen for determination in favour of the respondent/cross-appellant, it will be idle and un-

necessary for me to consider issue No. 2 formulated by the respondent/cross appellant. This issue questions the propriety of the order of non-suit entered in the case by the Court of Appeal. The main appeal of the defendant being incompetent, fails and it is accordingly struck out. The cross-appeal of the plaintiff succeeds and it is hereby allowed.”

The above constitute the judgment of this court in that appeal particularly as UWAIS, JSC, (as he then was) and ADIO, JSC, dissented.

There is no doubt that this court dismissed the main appeal but allowed the cross-appeal. However, the cross appeal was allowed after resolving issue No. 1 formulated by learned counsel for the cross appellant which issue challenged the validity or competence of the appeal in view of the fact that instead of two judges, one judge of the Kwara State High Court granted the leave to appeal to the Court of Appeal, Kaduna. The court did not consider the cross appellant’s issue No. 2 which was the same as the single issue formulated by learned counsel for the appellant in the main appeal. In other words, the cross appeal was allowed only on the preliminary objection of the cross-appellant as to the competence of the appeal before the Court of Appeal.

However, what is very important and needs to be emphasized here is the fact that this court declared the judgment of the Court of Appeal resulting in that appeal to the Supreme Court a nullity. It is settled law that a judgment that is a nullity has no legal validity and can confer no right nor impose any obligation on anybody. That being the case, it follows clearly that the order of non-suit contained in the judgment of the Court of Appeal declared a nullity is of no moment that is why the court considered it a waste of time and energy to go into a consideration of the propriety of the said order. **It is however very clear that the issue as decided in that appeal is not the same as the issues that call for determination in the present appeal and therefore it is my considered view that the principles of issue estoppel are inapplicable to this case and do not avail the appellant. The interesting question however, is whether the cross-appeal which was allowed by the court conferred any right on the present appellant or resolved the issues in contention in the present appeal so as to constitute that decision**

res judicata. I had earlier in this judgment observed that appellant had no cross-appeal before the Court of Appeal. It follows therefore that his cross-appeal to the Supreme Court arose from the very judgment the Supreme Court declared null and void. The question is, even though the said cross-appeal was allowed, was it on the merit? I do not think so. It was allowed solely on the ground that the appeal giving rise to the judgment on further appeal to the Supreme Court was incompetent which in effect also means that there was no judgment on which the cross-appeal though allowed, could be based. It therefore does not matter whether the cross-appeal is independent of the main appeal and has a separate existence - the reality being that it was based on a judgment that has been declared by this court not to have existed ab initio. It was an empty victory in relation to the principles of res judicata. I therefore resolve the issue against the appellant.

On the appellant's first issue which is whether on the evidence on record, the Court of Appeal was right in setting aside the decision of the appellate High Court and affirming the decision of the trial Upper Area Court which dismissed the plaintiff/appellant's suit, learned counsel for the appellant stated that the action was for declaration of title to land and that appellant called six witnesses to prove his case while the respondent called nine witnesses; that the trial court visited the locus in quo and in a considered judgment dismissed the case of the appellant who was the plaintiff resulting in an appeal to the appellate High Court which allowed same; that a further appeal to the Court of Appeal resulted in the setting aside of the judgment of the High Court which in turn culminated in the present appeal.

Learned counsel then submitted that the appellate High Court rightly found that the conclusions reached by the trial Upper Area Court was wrong based on the proved facts since where the question to be determined is one of the inference to be drawn from admitted or found facts, an appellate court is in as good a position as the trial court to evaluate the evidence; that the trial Upper Area Court found at the locus that the appellant "showed concrete proofs of long use and effective

control and possession denoting exercise of ownership” yet came to the conclusion that the respondent was in control of the larger portion of the disputed land; that the conclusion reached was therefore perverse and the appellate High Court was right in interfering with same; learned counsel cited and relied on *Woluchem v. Gudi* (1981)5 S.C. (Reprint) 178; (1981)5 S.C. 291 at 294-295; *Fashanu v. Adekoya* (1994) 1 All NLR 35; *Nwosu Board of Customs & Excise* (1988) 12 S.C. (Pt. III) 77; (1988) 5 NWLR (Pt. 93) 225 and *Musa v. Yerima* (1997) 7 NWLR (Pt. 511) 27 at 42-45.

C Learned counsel then referred to the testimonies of PWs1, 2, 3, 4, 5 and 6 on possession and submitted that it is settled law that long possession is one of the established methods of proving title to land, relying on *Idundun v. Okumagba* (1976) 9-10 S.C. (Reprint) 140; (1976) D 9-10 SC. 227; that the Court of Appeal did not show in its decision that the High Court was in error in the view it took of the findings of the trial Upper Area Court and that the reference to installation “of seven out of the eleven Bales” has nothing to do with the evidence of long possession E which was cogent and relied upon by appellant as evidence of title. Learned counsel further submitted that the appellant proved his title by preponderance of evidence and urged the court to resolve the issue in favour of the appellant and allow the appeal.

F On his part, learned counsel for the respondent referred to the finding of the Court of Appeal at page 171 to the effect that the trial court made far reaching findings on issues of title, user and control and rightly concluded that appellant had failed to discharge the burden of proof imposed on him by law for title and submitted that the Court of Appeal is G right in so holding; that the Court of Appeal was also right in holding that the appellate High Court erred in embarking on a fresh appraisal of the same evidence already properly evaluated by the trial court relying on *Obodo v. Ogba* (1987) 3 SCNJ 82; *Bamigboye v. Olarewaju* (1991) 5 H SCNJ 95-96; *Adeleke v. Iyanda* (2001) 6 S.C. 18; (2001) WRN Vol. 28. 1 at 3 and *Woluchem v. Gudi* (1981) 5 S.C. (Reprint) 178; (1981) 5 S.C. 291. Learned counsel further submitted that the appellate High Court had no right to ascribe credibility to the testimonies of the witnesses that

testified before the trial court as evidenced at page 72 lines 15-20 relying on *Odofin v. Ayoola* (1984) 11 S.C. 72 at 115; *Oluyole v. Olofa* (1968) NMLR 462.

Turning to the merit of the case, learned counsel stated that the trial court found that the ancestors of the respondent first settled on the area in dispute and that since the trial court rejected the traditional history of the appellant, there was no need for that court to consider any act of use or possession by the appellant, relying on *Odofin v. Ayoola* (supra) at 105-106; *Anguoke v. Adi* (1986) 6 S.C. 75 at 107. Counsel then submitted that the appellant failed to prove that his family was the first settler, or has the right to exclusive possession of the land which he claimed and that the Court of Appeal was right in setting aside the decision of the appellate High Court; that the possession of a part of the land, if any, cannot enable the appellant succeed against the respondent who has proved that he is the true owner of the disputed land. Finally, learned counsel urged the court to resolve the issue against the appellant and dismiss the appeal.

It has been settled by long line of authorities from this court that ownership or title to land may be proved by any of these five methods, viz;

- (a) by traditional evidence;
- (b) by production of documents of title, which are duly authenticated;
- (c) by acts of selling, leasing, renting out all or part of the land, or farming on it, or on a portion of it;
- (d) by acts of long possession and enjoyment of the land/ and
- (e) by proof of possession of connected or adjacent land in circumstances rendering it probable that the owner of such connected or adjacent land would, in addition, be the owner of the land in dispute/ see *I Dundun v. Okumagba* (1976) 9-10 S.C (Reprint) 140; (1976) 9-10 S.C. 227; *Nkado v. Obiano* (1997) 5 NWLR (Pt. 503) 31/ Section 46 of the H Evidence Act, 1990.

It must be noted that the above five methods deal with the means by which title to land can be proved in the court of law. The

said methods have nothing to do with the mode of acquisition of title to land which may be by:

(a) first settlement on the land and deforestation of the virgin land;

B (b) conquest during tribal wars;

(c) gift

(d) grant customary;

(e) sale;

(f) inheritance, etc, etc.

C It is however the duty of the plaintiff in an action for declaration of title to land to adduce sufficient and credible evidence to

establish the mode of acquisition of his title and the law is that the said plaintiff must succeed on the strength of his own case and not

D on the weakness of the defence, although the plaintiff may take advantage of the defendant's evidence where it supports his case - see *Onwughbufor v. Okoye* (1996) 1 NWLR (Pt. 424) 252.

E In the instant case, appellant as plaintiff based his claim to title on first settlement thereon by his ancestor. At page 8 of the record, he told the trial court, inter alia.

F “My ancestral father, Sani Maro Ajao Ohe came from Igbonla village near Ajase - Ipo to found Amoyo village. He did not meet anybody on the land and Amoyo had not come into being then.....”

At page 41 of the record, the trial court set the questions for determination thus:

“The threshold questions in this case are -

G (1) who first settled at Amoyo village between Sanni Maro - the plaintiff's progenitor and Amoyo Ijao Oge - the defendant's progenitor (sic) (meaning progenitor).

(2) which of the two contending families or parties rule over Amoyo in the past or present.

H (3) who controls or who possesses the land among the two parties or who has title to the land in dispute.”

After reviewing the evidence, the trial court held that:

“Neither the plaintiff nor any of his witnesses gave evidence superior

(sic) (meaning superior) to that of the defendant in this regard, and for that reason we accept the evidence of the defendant and his witnesses as authentic and reliable and we believe at (sic) (meaning that) Amoyo Ijao Oye first settled and that his descendants ruled over Amoyo in succession, since that village was founded”

Going further in its findings, the trial court, while considering acts of possession of the land in dispute between the parties found thus:

“Both parties also laid claim to title, long possession, usage and control over the land. The D.W.1 and D.W.2 and P.W.5 have enjoyed and stayed on the land in dispute. They alleged that they met their father farming on the land and farming right was originally granted by the plaintiff’s family to them..... The defendant also claimed that his family had granted parts of the area for gbagede community for building and that the storey building which is opposite Samike Hotel which forms part of the area claimed by the plaintiff was granted by the defendant to the occupant and that since the occupant built the storey building long ago the plaintiff has not challenged him..... The D.W.3 who is Mogaji Area Akaje told us that he has common boundary with the defendant and not the plaintiff. We saw Bale’s market and all the houses granted by the defendant to other members of Amoyo Community. The plaintiff told us that he did not contest the grant since he wanted people to build house at Amoyo to increase the population. The plaintiff himself tendered a list of names of those granted land to build by his family, which we marked as Exhibit P.1. If the plaintiff’s family granted any land for building house, we are yet to see the prove (sic) (meaning proof). But at the time we visited Amoyo we did not witness such grants of course at the locus in quo we saw his witnesses who claimed to have been granted farm land by the plaintiff’s family, this side nearer to Busunla Stream.

We also observed that the defendant is in control and full usage of a larger proportion of the land in dispute.....

In our opinion, from the evidence before this court we find it difficult to say that the plaintiff has stronger claim than (sic) (meaning than) the defendant on the area in dispute.... But there is ample evidence as to the fact that the defendant’s family granted land to other members of Amoyo

Community including the plaintiff's family."

The court finally concluded thus:

B *"We have carefully considered the veracity of the evidence of both parties, the demeanour of the plaintiff before this court, and what we saw at the loquo (sic) " (meaning loqus) in quo. We feel the evidence of the defendant is more authomatic (sic) (meaning authentic). The plaintiff fails to discharge the onus on him, and hence we dismiss the claim of the plaintiff."*

C From the passages from the judgment of the trial court, **it is very clear that that court did not believe the version of the traditional history as to first settlement as given by the plaintiff in support of his claim. Rather, the court specifically found that it was the progenitor of the defendant who first settled on the land and that**
D **"his descendants ruled over Amoyo in succession since that village was founded."** I hold the view that the above specific finding by the trial court completely destroyed the foundation of the claim of title to the land in dispute by the plaintiff who is appellant before this
E court and the Court of Appeal confirmed the findings of facts made by the trial Judge. The same thing applies to possession and acts of ownership of the land in dispute which were also resolved in favour of the respondent and affirmed by the Court of Appeal.

F **In conclusion, I resolve the issue against the appellant and since both issues have failed, it is obvious that the appeal is without merit and it is accordingly dismissed by me.** I assess and fix the costs of this appeal at N10,000.00 in favour of the respondent,
G Appeal dismissed.

ONU JSC

H Having had the opportunity to read before now the judgment of my learned brother, Onnoghen, JSC., just delivered. I agree with his reasoning and conclusion that the appeal be dismissed.

The appeal is accordingly dismissed by me with costs assessed at N10,000.00 in favour of the respondent.

PATS-ACHOLONU JSC

Editorial Note: The Hon Justice Ignatius Chukwudi Pats-Acholonu, JSC., was in the panel that heard this appeal. He indicated his concurrence with the lead Judgment. B

However, he passed away on the 14th of May 2006, before the date of this Judgment. His pronouncement was read by the Hon. Justice S.U. Onu, JSC. C

MUSDAPHER JSC

I have had the opportunity to read before now the judgment of my Lord, Onnoghen, JSC., just delivered with which I entirely agree. In the aforesaid judgment, his Lordship has meticulously and comprehensively dealt with the two issues submitted for the determination of the appeal. I adopt his reasoning as mine and I find the appeal as lacking in merit and I accordingly dismiss it. The respondent is entitled to costs assessed at N10,000.00 against the appellant. D E

OGBUAGU JSC

I have had the privilege of reading before now, the lead judgment of my learned brother, Onnoghen, JSC., just delivered by him. I respectfully agree with his reasoning and conclusion that this appeal completely lacks substance and merit. However, for purposes of emphasis, I will make my own brief contribution. F G

This appeal does not pose any difficulty at all to the court. I note at pages 29 to 34 of the Records, that the Judges of the trial Upper Area Court, visited and inspected the land in dispute in the presence of the parties and their witnesses. Thereafter, the learned Judges, identified what it described as “The threshold questions” in the case at page 41 of the Records and then at page 42, they stated inter alia, as follows: H

“Neither the plaintiff (i.e. appellant) nor any of his witnesses gave

evidence superior (sic) (meaning superior) to that of the defendant in this regard, and for that reason as we accept evidence of defendant and his witnesses as authentic and reliable and we believe at (sic) (meaning that) Amoyo Ijao Oye first settled and that his descendants ruled over Amoyo in succession, since that village was founded.....” (the underlining mine)

At page 43 of the Records, they stated further inter alia, as follows:

“..... *The plaintiff told us that he did not contest the grant since he wanted people to build house (sic) at Amoyo to increase the population, The plaintiff himself tendered a list of names of those granted land to build by his family which we marked as Exhibit PI. If the plaintiffs family granted any land for building house (sic) we are yet to see the prove (sic) (meaning proof). But as of the time we visited Amoyo, we did not witness such grants of course at the locus in quo we saw his witnesses who claimed to have been granted farm land by the plaintiff’s family, this side is nearer to Busunle stream. We also observed that the defendant is in control and full usage of a larger population of the land in dispute. Those granted land to farm by the defendant planted kolanuts, oranges, guava cashew, yam, cassava, on the land... ..*” (the underlining mine)

Then at pages 44 and 45 thereof, they continued inter alia, as follows:-

“..... *In our opinion, from the evidence before this court we find it difficult to say that be plaintiff has stronger claim them (sic) (meaning than) the defendant on the area in dispute (sic) (meaning in respect of). We do not deny that the plaintiff is a native of Amoyo and must have a family land as agreed by both parties. But there is ample land to other members of Amoyo Community including the plaintiff s family.* The defendant insisted that his family has not granted that area of Oke-maró to the plaintiff.

We have carefully considered the veracity of the evidence of both parties, the demeanour of the plaintiff before this, court, and what we say at the in quo (sic) (meaning locus) in qua. We feel the evidence of the defendant is more automatic (sic) (meaning authentic). The plaintiff fails to discharge the onus on him: and hence we dismiss the claim of the

plaintiff." (The underlining mine)

It is important and this must be borne in mind, that the above are findings of fact by the trial court that saw and heard the parties and their witnesses testify before them. It is now firmly settled in a string of decided authorities, that an appellate court should not reverse a finding or findings of a trial court, unless that finding or findings, runs or run contrary to the trend of accepted evidence. See Chief Frank Ebba v. Chief Wari Ogoke & Anor. (1984) 4 S.C 84 @ 92-91, 99; (1989) 1 SCNLR 372 @ 378; Sunday Nwosu v. Board of Customs & excise (1988) 12 S.C. (Pt. III) 77; (1988) 5 NWLR (Pt. 93) 225 @ 237-8; (1988) 12 SCNJ 313; cited in Chief Ekpo & 2 Ors. v. Chief Utong & 2 Ors. (1991) 7 SCNJ (Pt. 1) 170 @ 184.

In other words, the duty of appraising evidence given at a trial, is pre-eminently, that of the trial court who saw and heard witnesses. It is the right of that court to ascribe value. See Ogundulu & Ors, v. Chief Phillips & Ors. (1973) 2 S.C (Reprint) 55; (1973) 2 S.C. 71 @ 80 and Fashanu v. Adekoya (1974) 6 S.C (Reprint) 72; (1974) 1 ANLR (Pt. 1) 35 @ 41.

At page 171 of the Records, the court below had this to say, *inter alia*:

".....The requirement of the law on landed matters is that it is the plaintiff who shall prove its (sic) case by preponderance (sic) of evidence and not to rely on the weaknesses of the defendant. See Kodilinye v. Odu (1935) 1 WACA 336 at 337-8; Dung v. Chollom (1992) 1 NWLR (Pt. 220) 738 at 743; Sections 135 and 136 Evidence Act, LFN 1990.

This burden has not been discharged to the satisfaction of the trial court and as imposed by the law. There was total failure from the plaintiff to prove his case". (the underlining mine)

Let me pause here to state at once, that *Res Judicata*, does not and cannot apply in this case. The decision of this court in S.C, 271/1990 declaring the decision of the Court of Appeal, Kaduna Division in Appeal H No. C.A./K/1 56/87 a nullity, was on the ground that the leave to appeal to that court, was granted by a single Judge of Kwara State High Court instead of the required two judges. The said decision was certainly not

on merit. That was why the respondent, went back to the court below and obtained the leave of that court and thereafter, filed a fresh appeal which that court allowed that gave rise to the instant appeal.

Now, the court below-per Tanko Mohammed, JCA, at page 172
B of the Records, stated inter alia, as follows:

“In my view, the fundamental question in the appeal has been resolved and that is the probative value of the evidence adduced by the parties..... The lower court as an appeal court, except on special situations, had no power to re-evaluate the evidence already evaluated by the trial court. Accordingly, this appeal succeeds and it is hereby allowed.....”. (the underlining mine)
C

I agree. I have also said so in this Judgment. I also dismiss the appeal. I therefore, affirm, the judgment of the court below restoring the
D decision of the trial court. I abide by the consequential order in respect of costs awarded by my learned brother, Onnoghen, JSC., in the said lead judgment.

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