

SUPREME COURT OF NIGERIA

9TH JUNE 2006 SC. 378/2001

**CORAM:- S. M. A. BELGORE, U. A. KALGO, A. M. MUKHTAR,
M. MOHAMMED, I. F. OGBUAGU, JJSC**

1. MUDA ANWOYI
2. ASANI PELU
3. WASIU ATAKAN
4. BILLIAMINU ATAKAN APPELLANTS
5. ISMAILA ATAKAN
6. KELANI ATAKAN
7. JIMOH MOJIDI PELU
8. TASIRU AKANBI IKUOLOGUN
9. WAHAB TAIWO ALAKA
10. FATAI JOSEPH (a. k. a “Araba”)
11. LANREWAJU (a. k. a “Obele”)
(For themselves and on behalf of
Osumba Family)

AND

1. JOHN BANKOLE SHODEKE
2. AKINTOLA SUNMONU IGE RESPONDENTS
3. MURITALA ALABI OLUSUNDE
(For themselves and on behalf of the
Beku-Onimaba Family of Igando)

LAND LAW - Title - Claim to - Failure of plaintiff to prove his claim to title - And consequent dismissal of his claim by court - Does not automatically confer the title to defendant (H1)

ESTOPPEL - Effect of - Once an issue is determined - In an earlier action - By a court of competent jurisdiction - Neither party can re-litigate on it - Personally or by privy (H2)

ESTOPPEL - Application - Preconditions for - Earlier decision must be final - Must be on same question - And between same parties - Instant

case does not satisfy these conditions (H3)

ACTIONS - Counterclaim - Is a substantive action - Which must be proved - To satisfaction of court - To entitle counter claimant to judgment (H4)

FACTS

The Plaintiffs/Respondents sued the Defendants/Appellants, in Suit No IK/21/67, for declaration of title, damages for trespass and injunction in respect of a parcel of land measuring 118.7 acres as delineated in the survey plan admitted as Exhibit 'A' in that proceedings. At the hearing, though the Appellants did not raise any counterclaim, they submitted in evidence two survey plans admitted as Exhibits 'F' and 'G' covering a total area of 596.7 acres which included the area covered by Exhibit 'A' of the Respondents. The learned trial judge in his judgment dismissed the Respondents' claim in its entirety. Respondents appealed to the Court of Appeal, which dismissed their appeal. They further appealed to the Supreme Court in case No SC. 18/89 which appeal was also dismissed. Consequently, the appellants proceeded to eject the respondents and their tenants from both the land in dispute, 118.7 acres as in Exhibit 'A' and the larger area of land 596.7 acres as in Exhibits 'F' and 'G'.

This led to a fresh action by the Respondents in Suit No ID/60/92 which in turn resulted in the instant appeal. In this new suit, the Respondents prayed the court for declarations that the attempts by the appellants to eject them from the land, be it 118.7 or 596.7 acres, in purported execution of the judgment in IK/21/67 are illegal, null and void. They also prayed for perpetual injunction to restrain Appellants from ejecting them. Appellants counterclaimed for forfeiture, possession and injunction in respect of the whole 596.7 acres. Trial judge granted all the claims of the Respondents (except that as to damages) and dismissed in its entirety the counterclaim of the Appellants. Appellants appealed to the Court of Appeal but that court dismissed their appeal. They have brought this final appeal to the Supreme Court.

ISSUES FOR DETERMINATION

“(1) Whether the Court of Appeal was right in holding that the decision in IK/21/67, CA/L/43/87 and SC/184/89 do not create Issue Estoppel to bar the respondents from relitigating the issues decided therein.

(2) If issue estoppel is not applicable, whether in the circumstances of the case now on appeal, the Court of Appeal was right to confirm the High Court judgment dismissing the appellants’ counter-claim”.

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

Failure of plaintiff to prove his claim to title

1. From the above, it is abundantly clear that the only issue joined by the parties at the trial before Oshodi, J., in IK/21/67 and which he determined in his judgment was whether the respondents, as plaintiffs were entitled to the declaration as owners of the land in dispute (118.7 acres), damages for trespass and injunction sought, all of which were dismissed. Oshodi, J., did not say and nowhere can it be inferred from his judgment that the appellants were the owners of 118.7 acres or any larger piece of land. And the fact that a plaintiff claiming title to the land in dispute failed in proving the title and the court dismissed his claim and there was no counterclaim by a defendant for the same, does not automatically confer title to the land on the defendant. In fact, the appellants did not file any counterclaim in IK/21/67, and are bound by the decision of Oshodi, J., which was finally affirmed by the Supreme Court in SC. 184/89. Therefore, the dismissal of the respondents’ claims in IK/21/67 did not automatically declare the appellants’ Osumba Ikotun family, the owners of the land in dispute. (p. 2291 F)

ESTOPPEL - Effect of

2. The learned counsel for the appellants has, in my view, correctly defined the effect of issue estoppel in a case when in Paragraph 3.6 of his brief, he said:-

“The law is trite that once one or more issues have been raised in a cause of action and distinctly determined or resolved between the same parties in a court of competent jurisdiction, then neither party nor his privy or agent is allowed to relitigate that or those decided issues all over

again in another action between the same parties or their privies on the same issues:

According to the decision of this court in *Fadiora & Anor. v. Gbadebo & Anor.* (1978) 3 S.C. (Reprint) 149; (1978) 3 S.C. 219 at 228-
B 229, also referred to by learned counsel in the brief, issue estoppel arises:-

“..... where an issue has earlier on been adjudicated upon by a court of competent jurisdiction and the same issue comes incidentally in question in any subsequent proceedings between the same parties (or their
C privies).....”

The court further held that -

“Issue estoppel applied whether the point involved in the earlier decision is one of fact or law or one of mixed fact and Law”.

(p. 2292 H)

D

ESTOPPEL - Application - Preconditions for

3. The pre-conditions for its application are that -

“(a) the same question must be for decision in both proceedings
E (which means that the question for decision in the current suit must have been decided in the earlier proceedings);

(b) the decision relied upon to support the plea of issue estoppel must be final;

F (c) the parties must be the same (which means that parties involved in both proceedings must be the same) per se or by their privies”.
(Underlining mine)

Although the parties in IK/21/67 are the same as in ID/60/92 i.e. in this appeal, the issues or points decided at the trial of the two cases were
G to a great extent different. One very important difference is that the land in dispute in IK/21/67 was only 118.7 acres whereas in ID/60/92, the land in dispute was 596 acres. I also agree with the Court of Appeal when it held on page 1785 of the record thus:-

H “In the current case, the defendants were asking for forfeiture, possession and injunction. A claim for forfeiture postulates that the plaintiffs were the customary tenants of the defendants.

Inferentially therefore, the defendants rested their current case on

the title as the plaintiffs' landlords, a matter which was not pronounced upon in Suit No. IK/21/67".

Also in IK/21/67, the parties did not join issue on the larger area of land. The respondents' claim was on Exhibit 'A' (118.7 acres) but in the course of trial without filing any counter-claim, the appellants testified on Exhibits F & G (596.7 acres) and on that score, the respondents also put in issue Exhibit 'B' (2120 acres). But the trial Judge, Oshodi, J., made no findings on Exhibits 'B', 'F' or 'G' in his judgment, when he dismissed the respondents' claims.

I therefore have no doubt in my mind that the conditions for the applicability of the principle or doctrine of issue estoppel are not fulfilled at all in the circumstances of this case. (pp. 2293 E / 2294 D / 2295 E)

Counterclaim - Is a substantive action

4. A counter-claim is by itself, a substantive action which must be proved to the satisfaction of the court for a counter-claimant to be entitled to judgment. The counter-claim of the appellants was for forfeiture, possession of the land in dispute and injunction restraining the respondents from further trespass on the land. The appellants called 8 witnesses to prove their counter-claim.

The learned trial Judge, who saw and heard all the witnesses who gave evidence for the parties continued to say in his judgment thus:-

"Having analyzed the evidence adduced by the defendants both oral and documentary and compared it with that of the plaintiffs, I am convinced that the defendants have not shown such sufficient evidence to establish the fact that their forefather's land extends over the 596 acres being claimed in this case".

On possession, the learned trial Judge found as follows:-

"The defendants have claimed possession of the area of land but I have found that they have not proved their title to the land and since possession is based on better title, it is impossible for me to agree with the defence counsel that the counter-claimants have successfully established their claim for possession to the 596 acres of land in Exhibit 5B1 or 5B2 or Exhibit 'G' in IK/21/67".

He concluded thus:-

“Having failed to prove their claim for possession, the other reliefs - forfeiture and injunction cannot therefore stand”.

He then dismissed the counter-claim.

- B I have also examined the evidence adduced by the parties at the trial particularly that of the appellants on their counter-claim and I am satisfied that the trial court has arrived at the correct decision.
(pp. 2295 G / 2296 D / 2297 E)

C **REPRESENTATION**

Alhaji Fola Ajijola, for the Appellants.

B. A. M. Fashanu. SAN., (with him, A. O. Igeh), for the Respondents.

D **CASES REFERRED TO**

Adebayo v. Babalola (1995) 7 NWLR (Pt. 408) 383 at 403

Adone v. Ike-budu (2001) 7 S.C. (Pt. III) 22; (2001) 14 NWLR (Pt. 733) 385, 416 (G-H)

- E Oshodi v. Eyifunmi (2000) 7 S.C (Pt. II) 145, 157

Kodilinye v. Odu 2 WACA 336

Udegbe v. Nwakofor (1963) 1 All NLR 417

Amuda v. Oshoboja (1984) 7S.C. 68 at 83

F

LEAD JUDGMENT BY KALGO JSC

In this appeal, there are only two issues for the determination of this court and agreed to by the parties. Issue 1, which is the most important and substantive deals once more with issue estoppel per rem judicatam.

- G The case giving rise to this appeal has a very long protracted antecedent which must be set out clearly for a better understanding of the issues involved.

- H In Suit No. IK/21/67, the respondents, as plaintiffs sued the appellants on behalf of the Beku-Onimaba family for declaration, N400.00 damages for trespass and injunction in respect of a parcel of land measuring 118.7 acres only, contained in a survey plan admitted as Exhibit ‘A’. The appellants did not file any counter-claim hut at the end of the

trial, the respondents' case was dismissed in its entirety by Oshodi, J. They appealed to the Court of Appeal and the appeal was dismissed. They further appealed to the Supreme Court in case No. SC. 184/89 and it was again dismissed. The judgment of the Supreme Court is on pages 962 - 1002 of the record. 'Thereafter, the appellants proceeded to eject B the respondents and their tenants from the land in dispute as in Exhibit 'A' and also from the larger area of land covering 596.7 acres contained in survey plans. Exhibits F and G, in IK/21/67. This resulted in a fresh action by the respondents against the appellants in Suit No. ID/60/92 - J. C. B. Shodeke & Ors. v. Muda Anwoyi & Ors., which gave rise to the instant appeal.

In Suit No. ID/60/92, the parties filed their respective pleadings. The appellants who were the defendants raised a counter-claim and at the end of the trial. Longe, J., granted all the claims of the respondents D (except inquiry as to damages) and dismissed in its entirety the counter-claim of the appellants.

The appellants were dissatisfied with this decision and they appealed to the Court of Appeal. In Appeal No. CA/L/460/98, the Court of E Appeal dismissed the appeal as lacking in merit. They now appealed to this court.

In this court, the parties filed and exchanged their respective briefs between them. The appellants formulated two issues for the determina- F tion of the court which read:-

“(1) Whether the Court of Appeal was right in holding that the decision in IK/21/67, CA/L/43/87 and SC/184/89 do not create Issue Estoppel to bar the respondents from relitigating the issues decided therein. G
(2) If issue estoppel is not applicable, whether in the circumstances of the case now on appeal, the Court of Appeal was right to confirm the High Court judgment dismissing the appellants' counter-claim”.

The respondents' counsel in his brief, also raised only 2 issues which are substantially the same as those of the appellants. I shall con- H sider the appellants' issues.

ISSUE (1)

This deals with the legal principle or doctrine of res judicata, issue

estoppel or estoppel per rem judicatam. They all point to the same thing and are usually used in court as a defence to an action. They are used to show that the issue or issues raised in an action in court have been determined and adjudicated in a previous action by a court of competent jurisdiction and so cannot be relitigated in any court. It is in fact a complete defence to any subsequent action. What the respondents are saying in their brief in this issue is that the reliefs claimed by the appellants in Suit No. ID/60/92 have already been litigated and determined in suits numbers IK/21/67; CA/L/43/ 87 and SC. 184/89 and cannot be relitigated again. This makes it incumbent upon me to set out in some detail, the reliefs claimed in the 2 cases before the High Courts and the decisions reached thereon and the decision of the Supreme Court in SC. 184/89, I shall use the final pleadings of the parties at the trial.

In Suit No. IK/21/67, the reliefs claimed by the respondents as plaintiffs as per their Further Amended Statement of Claim (pages 1048 - 1053) are:-

"1. A declaration that the Beku-Onimoba family are the absolute owners under Native Law and Custom of the land in dispute.

2. N400.00 special and general damages for trespass to the said land.

3. An injunction restraining the defendants, their servants and/or agents, from further trespass"

At the end of the trial, Oshodi, J., in a considered judgment delivered on 23rd August, 1986, dismissed the respondents' claims with costs. The respondents' appeal to the Court of Appeal was dismissed as being without merit.

In Suit No. ID/60/92, the reliefs sought for and claimed by the respondents against the appellants were for:-

"(1) A declaration that the purported ejection of the plaintiffs by the defendants from parcels of land situate at Nos 130, Igando Road, Igando, 13/15 Idowu Anisore Street. Igando and 9, Muri Olusande Street, Ikotun, all in Lagos State on the 10th of January, 1992 is wrongful and or null and void.

(2) A declaration that any ejection of the plaintiffs from the par-

cel of land measuring 118.7 acres situates off Igando or near Ikotun, Lagos State and more particularly shown and delineated edged in red in Plan No. 0/135 attached herewith or any part thereof must be by due process of Law by the 1st to 11th defendants suing the plaintiffs to the appropriate court and obtaining an executory judgment which may be executed upon through the due process of law. B

(3) A declaration that the defendants cannot lawfully eject the plaintiffs from land they claim to belong to the Osunba family, shown, delineated and edged in red in the Osunba family's plan attached herewith measuring 596.7 acres or any part thereof without going through the same procedure as in (2), above. C

(4) A declaration that the purported ejection of the plaintiffs vide or the purported execution of the judgment in Suit No. IK/21/67 John Bankole Sodeke & Ors. v. Mojidi Pelu & Ors. dated 22/8/86 and Appeal D No. SC. 184/1989 dated 15/11/91 on the 10th of January, 1992 is wrongful, unlawful, null and void.

(5) An order directing an enquiry as to damages due to the said wrongful acts of the defendants. E

(6) An order of injunction restraining the defendants, their servants, privies and/or agents from harassing or further harassing and/or from disturbing the de facto possession of the plaintiffs on all parcels of land aforesaid until or except a lawful judgment of a court of law in fresh proceedings apart from the said case thereof is contained against the plaintiffs to be lawfully executed by due process of law. F

(7) An order of injunction restraining the defendants, their privies, servants and/or agents from attempting to execute or from executing the said judgment in any form or through any of the modes of enforcing judgments provided by law aimed at ejecting the plaintiffs or their tenants or privies from the said parcel of land". (Underlining mine) G

In this case, the appellants as defendants, filed, in their Further Amended Statement of Defence, a counter-claim against the respondents H claiming:-

“(a) Forfeiture on the grounds of misconduct by challenging the title of their overlord of the whole area verged “RED” in Exhibits F & G

tendered in Suit No. IK/21/67.

(b) Possession of the land.

(c) Perpetual injunction restraining the plaintiffs, their agents, servants and privies from further trespassing on the land in dispute.”

B (Underlining mine)

The trial was then conducted by Longe, J., who in a considered judgment on 24th March, 1995, granted the respondents' claims except the 5th and dismissed the counter-claim of the appellants. The appellants appealed to the Court of Appeal and their appeal was again dismissed.

C They now appealed here.

The judgment of Oshodi, J., in Suit No. IK/21/67 was affirmed by the Court of Appeal in Appeal No. CA/L/43/87 and by the Supreme Court in SC. 184/1989. The respondents in IK/21/67 claimed absolute ownership of the land in dispute comprising of 118.7 acres, N400.00 damages for trespass and injunction, the parties in the case are bound by the decisions of the courts on all the claims of the respondents, and they cannot relitigate on any of the claims thereon.

E The judgment of Longe, J., in Suit No. ID/60/92 was affirmed by the Court of Appeal in Appeal No. CA/L/460/98. The respondents, who were still the plaintiffs in the trial court, asked the court for declarations to the effect that any attempt to eject them from the land in dispute (in this case 596.7 acres) in purported execution of the judgment in IK/21/67, is wrongful, null and void. They also claimed injunctions to restrain the defendants now appellants, from ejecting them from the land in dispute. The parties filed their pleadings and the appellants raised a counter-claim for:-

G “(a) *Forfeiture on the grounds of misconduct by challenging the title of their overlord of the whole area verged “RED” in Exhibits F & G* tendered in Suit No. IK/21/ 67.

(b) *Possession of the land*.

H (c) *Perpetual injunction* restraining the plaintiffs, their agents, servants and privies from further trespassing on the land in dispute”.

On the claims of the respondents as plaintiffs in ID/60/92, the trial court after receiving the evidence adduced before it held as follows (page

766 of the record):-

“(1) The attempted ejection of the plaintiffs at the addresses listed on Exhibits 21^A and 21^B was illegal, null and void.

(2) That until a final decision is made under a due process of law on the land noted as Exhibit A in IK/21/67, the defendants should not try to eject the plaintiffs from that land.

(3) Subject to what the decision in the counter-claim of the defendants in this case will be, the defendants are hereby restrained not to tamper with the plaintiffs on the land in dispute that is Exhibit A or on Exhibit G, purported to be larger area of land as claimed by the defendants in IK/21/67.

(4) Order to direct the assessment of damages done to plaintiffs' houses is hereby dismissed”.

By the decision of Longe, J., in (1), (2) and (3) above, the respondents' claims not to be ejected from the land in dispute by the appellants in purported execution of the judgment in IK/21/67 succeeded. The land in dispute here included not only the 118.7 acres claimed in IK/21/67 but also the larger area of 596.7 acres in the counter-claim of the appellants. Longe, J., also considered the counter-claim of the appellants at the trial and dismissed it in its entirety for lack of evidence in support. The appellants then appealed to the Court of Appeal.

In the appeal filed by the appellants in the Court of Appeal, (Notice of Appeal on pp. 1183 - 1186 of the record) the appellants did not raise any ground complaining against the decision of Longe, J., on the main claim of the respondents. They restricted their appeal on the dismissal of their own counter-claim and on issue estoppel.

From the above, it is abundantly clear that the only issue joined by the parties at the trial before Oshodi, J., in IK/21/67 and which he determined in his judgment was whether the respondents, as plaintiffs were entitled to the declaration as owners of the land in dispute (118.7 acres), damages for trespass and injunction sought, all of which were dismissed. Oshodi, J., did not say and nowhere can it be inferred from his judgment that the appellants were the owners of 118.7 acres or any larger piece of land. And the fact that

a plaintiff claiming title to the land in dispute failed in proving the title and the court dismissed his claim and there was no counter-claim by a defendant for the same, does not automatically confer title to the land on the defendant (See Kodilinye v. Odu 2 WACA 336; Udegbe v. Nwakofor (1963) 1 All NLR 417; Amuda v. Oshoboja (1984) 7S.C. 68 at 83. **In fact, the appellants did not file any counterclaim in IK/21/67, and are bound by the decision of Oshodi, J., which was finally affirmed by the Supreme Court in SC. 184/89. Therefore, the dismissal of the respondents' claims in IK/21/67 did not automatically declare the appellants' Osumba Ikotun family, the owners of the land in dispute.**

In Suit No. ID/60/92, there was no appeal against the granting of the claims by the respondents as plaintiffs, but there was an appeal by the appellants against the dismissal of their own counter-claim. The judgment of Longe J., on page 800 of the record, concluded thus:-

“In summary therefore, the case of the plaintiffs for damages against the defendants for wrongful execution of the judgment in IK/21/67 is hereby dismissed.

Similarly, the case of the defendants/counter-claimants for possession of the 596 acres of land, which I have found in this case to be part of Igando land, is hereby dismissed.

There is no order for forfeiture nor order of injunction against the plaintiffs. All these are not established”.

In their Notice of Appeal (pp. 1183 - 1186 of the record), the appellants filed 3 grounds of appeal; one on misdirection and 2 on error in law. They were mainly on possession and issue estoppel, and only 2 issues for determination were raised thereon. The issues are issue of estoppel and a general one on weight of evidence. The Court of Appeal decided the issue estoppel in favour of the appellants but decided the general one on weight of evidence against them.

In the appeal to this court, the appellants filed 9 grounds of appeal but formulated only 2 issues which I have earlier set out in the judgment.

Having set out the historical antecedent of this case, I now wish to deal with issue estoppel as contained in issue 1. **The learned counsel**

for the appellants has, in my view, correctly defined the effect of issue estoppel in a case when in Paragraph 3.6 of his brief, he said:-

“The law is trite that once one or more issues have been raised in a cause of action and distinctly determined or resolved between the same parties in a court of competent jurisdiction, then neither party nor his privy or agent is allowed to relitigate that or those decided issues all over again in another action between the same parties or their privies on the same issues: Adone v. Ike-budu (2001) 7 S.C. (Pt. III) 22; (2001) 14 NWLR (Pt. 733) 385, 416 (G-H); Oshodi v. Eyifunmi (2000) 7 S.C (Pt. II) 145, 157’. (Underlining mine)

See also Adebayo v. Babalola (1995) 7 NWLR (Pt. 408) 383 at 403. According to the decision of this court in **Fadiora & Anor. v. Gbadebo & Anor. (1978) 3 S.C. (Reprint) 149; (1978) 3 S.C. 219 at 228-229**, also referred to by learned counsel in the brief, issue estoppel arises:-

“..... where an issue has earlier on been adjudicated upon by a court of competent jurisdiction and the same issue comes incidentally in question in any subsequent proceedings between the same parties (or their privies).....”

The court further held that -

“Issue estoppel applied whether the point involved in the earlier decision is one of fact or law or one of mixed fact and Law”.

And the pre-conditions for its application are that -

“(a) the same question must be for decision in both proceedings (which means that the question for decision in the current suit must have been decided in the earlier proceedings);

(b) the decision relied upon to support the plea of issue estoppel must be final;

(c) the parties must be the same (which means that parties involved in both proceedings must be the same) per se or by their privies”. (Underlining mine)

From the arguments and submissions of the appellants’ counsel in their brief, issue one clearly deals with issue estoppel as defined above. Therefore, for it to be resolved, it is necessary to ascertain, whether the

conditions (a) - (c) above applied in this case.

Looking at Suits Nos IK/21/67 and ID/60/92, the parties in each case are the same. The respondents as plaintiffs in IK/21/67 claimed the title as absolute owners of the land in dispute which was for 118.7 acres in Exhibit 'A', whereas the appellants, as defendants without raising any counterclaim submitted Exhibits F & G covering 596 acres. The respondents in ID/60/92, asked the court to declare the attempts by the appellants to eject them from the land in dispute in execution of the judgment in IK/21/67 as illegal, null and void. They also claimed perpetual injunction to restrain the appellants from ejecting them therefrom. The appellants counter-claimed for forfeiture, possession and injunction. In the counter-claim, the appellants claimed larger area of land covering 596 acres. Also while the decision in IK/21/67 was based on traditional evidence by reference to acts of recent years, the decision in ID/60/92 was based on traditional evidence and determination of boundary dispute to determine the ownership of the land in dispute.

It is therefore very clear to me that, **although the parties in IK/21/67 are the same as in ID/60/92 i.e. in this appeal, the issues or points decided at the trial of the two cases were to a great extent different. One very important difference is that the land in dispute in IK/21/67 was only 118.7 acres whereas in ID/60/92, the land in dispute was 596 acres. I also agree with the Court of Appeal when it held on page 1785 of the record thus:-**

"In the current case, the defendants were asking for forfeiture, possession and injunction. A claim for forfeiture postulates that the plaintiffs were the customary tenants of the defendants.

Inferentially therefore, the defendants rested their current case on the title as the plaintiffs' landlords, a matter which was not pronounced upon in Suit No. IK/21/67".

Also in IK/21/67, the parties did not join issue on the larger area of land. The respondents' claim was on Exhibit 'A' (118.7 acres) but in the course of trial without filing any counter-claim, the appellants testified on Exhibits F & G (596.7 acres) and on that score, the respondents also put in issue Exhibit 'B' (2120 acres). But the

trial Judge, Oshodi, J., made no findings on Exhibits ‘B’, ‘F’ or ‘G’ in his judgment, when he dismissed the respondents’ claims.

The learned appellants’ counsel submitted that the Court of Appeal failed to consider and give effect to the decision of this court in Ezewani v. Onwordi (1986) 6 S.C. 402 and Ladega v. Durosinmi (1978) 3 S.C. (Reprint) 64; (1978) 3 S.C. 91, dealing with claims on small and larger area of land in a land dispute. I have carefully examined these decisions and found that they are not applicable in this case because the parties did not in this case join issues with regard to title on a large area and the claim was made on a small area. It is in fact the opposite in this case; the claim was first on a small area (118.7 acres) in IK/21/67 and the question of larger area (596.7 acres) came later in ID/60/92. And the High Court, the Court of Appeal and the Supreme Court in IK/21/67 decided on the small area only which was contested at the trial. See for example, page 974 of the record where the Supreme Court referred to the pleadings of the respondents and held that:

“The plan referred thereto subsequently admitted in evidence and marked Exhibit ‘A’ and clearly recognized by the learned trial Judge as the plan of the land in dispute”.

And finally held on page 975 that:

“Exhibit ‘A’ is not part, but the whole of the land in dispute”.

I therefore have no doubt in my mind that the conditions for the applicability of the principle or doctrine of issue estoppel are not fulfilled at all in the circumstances of this case. I have to resolve this issue against the appellants and I so do.

ISSUE (II)

This issue deals with whether the Court of Appeal was right in affirming the dismissal of the appellants’ counter-claim by the trial High Court.

A counter-claim is by itself, a substantive action which must be proved to the satisfaction of the court for a counter-claimant to be entitled to judgment. The counter-claim of the appellants was for forfeiture, possession of the land in dispute and injunction restraining the respondents from further trespass on the land. The

appellants called 8 witnesses to prove their counter-claim. The learned trial Judge, Longe J., reviewed the cases of the respondents as plaintiffs and that of the appellants as defendants and held (page 797 of the record):-

“As I have indicated in the course of this judgment, the real issue between the parties in this particular case is not only whether the plaintiffs’ land is founded by Beku Onimoba and that it is called Igando or whether the land of the defendants is founded by Osumba and it is called Mope (area of palm trees) and situated in Ikotun, the more important issue is what is the extent of such respective area of settlement of their fore fathers. The parts (sic) in IK/21/67 asserted the area is about 2120 acres and that Exhibit ‘A’ 118.7 acres is part of it. They failed in a bid to keep the defendants from that area. It is now the turn of the defendants to claim in this case that their own area of land extends and covers 596 acres of the 2120 acres which the plaintiffs are claiming”.

The learned trial Judge, who saw and heard all the witnesses who gave evidence for the parties continued to say in his judgment thus:-

“Having analyzed the evidence adduced by the defendants both oral and documentary and compared it with that of the plaintiffs, I am convinced that the defendants have not shown such sufficient evidence to establish the fact that their forefather’s land extends over the 596 acres being claimed in this case”.

On possession, the learned trial Judge found as follows:-

“The defendants have claimed possession of the area of land but I have found that they have not proved their title to the land and since possession is based on better title, it is impossible for me to agree with the defence counsel that the counter-claimants have successfully established their claim for possession to the 596 acres of land in Exhibit 5B1 or 5B2 or Exhibit ‘G’ in IK/21/67”.

He concluded thus:-

“Having failed to prove their claim for possession, the other reliefs - forfeiture and injunction cannot therefore stand”.

He then dismissed the counter-claim.

I have already stated earlier in this judgment while considering

issue 1 that the fact that the claim for title by the respondents was dismissed in IK/21/67 does not automatically confer the same title to the land in dispute on the appellants. The same situation repeats itself here unless the appellants were able to prove their counter-claim with sufficient evidence to entitle them to judgment, they cannot rely on the failure of the respondents to prove the title to the land claimed. See Adone v. Ikebudu (2001) 7 S.C. (Pt. III) 22; (2001) 14 NWLR (Pt. 733) 385 at 408; Kodilinye v. Odu (1935) 2 WACA 336.

The Court of Appeal has in my view, carefully examined the evidence and the circumstances of this case and the observations of the learned trial Judge on the issues at stake between the parties and came to the conclusion that it would not interfere with his decision. The Court of Appeal said on page 1794 of the record that the learned trial Judge has:

“..... demonstrated in the judgment appealed against, a clear understanding of the issues involved in the dispute as manifested in the pleadings and the evidence led. There was also a patent solicitude on the part of the Judge to be fair in his reasoning to both parties such that I am satisfied that he took full advantage of the opportunity he had in seeing and hearing the witnesses testify. There is therefore no reason whatsoever for this court to interfere by disturbing the solemn findings of fact made by the trial Judge”.

I have also examined the evidence adduced by the parties at the trial particularly that of the appellants on their counter-claim and I am satisfied that the trial court has arrived at the correct decision. I entirely agree with the observations of the Court of Appeal quoted above.

There is also no doubt that this appeal is on concurrent findings of the two lower courts. This court by practice does not interfere with such findings except where special reasons are shown such as substantial error on the face of the record, decision not supported by evidence or reached on application of wrong principle of law or procedure or on findings which are perverse. See Omoboriola II v. Military Governor of Ondo State (1998) 11- 12 S.C. 92; (1998) 14 NWLR (Pt. 584) 89 at 107. The appellants have not shown any of these reasons in this appeal and I

do not see any. I therefore see no reason to interfere with the decision of the Court of Appeal. Issue 2 is therefore answered in the affirmative.

In the circumstances and for all what I said above, I find no merit in this appeal. I accordingly, dismiss it with costs against the appellants in favour of the respondents which I assess at N10,000.00. I affirm the decision of the Court of Appeal.

BELGORE JSC

I read in advance the judgment of my learned brother, Kalgo, JSC., and I agree with him entirely in concluding that this appeal has no merit. For the reasons set out clearly in that judgment, I also dismiss the appeal and award N10,000.00 costs to respondents.

MUKHTAR JSC

I have read in advance the lead judgment delivered by my learned brother, Kalgo, JSC. I am in full agreement that the appeal lacks merit and should be dismissed in its entirety. This appeal is on concurrent findings of fact, which this court cannot disturb, as the findings are supported by credible evidence, with no substantial error shown, and the findings are not perverse. See *Enang v. Adu* (1981) 11-12 S.C (Reprint) 17; (1981) 11-12 S.C. page 25; *Anaeze v. Anyaso* (1993) 5 NWLR (Pt. 291) page.

I dismiss the appeal, and abide by the consequential orders in the lead judgment.

MOHAMMED JSC

The judgment of my learned brother, Kalgo, JSC., which has just been delivered was read by me before today. I am in full agreement with him that there is no merit at all in this appeal. Only two issues were identified in the appellants' and the respondents' briefs of argument for the determination of the appeal. As the issues are virtually the same in the respective briefs of the parties, those in the appellants' brief are as follows:-

"1. Whether the Court of Appeal was right in holding that the

decision in IK/21/67, CA/L/43/87 and SC/184/89 do not create issue estoppel to bar the respondents from relitigating the issues decided therein.

2. If issue estoppel is not applicable, whether in the circumstances of the case now on appeal, the Court of Appeal was right to confirm the High Court judgment dismissing the appellants' counter-claim."

On issue No. 1, when the question is whether the doctrine of issue estoppel is applicable to a case or not, the important questions to ask are whether the parties are the same; whether the issues are the same; whether the issues are material to the cause of action in the previous and in the latter case; and, whether that issue has been resolved in the previous case in favour of one of the parties that it has been proved or it has not been proved as the case may be. See the general observation of Diplock, LJ., on the subject of issue estoppel in *Mills v. Cooper* (1967) 2 All ER 100 at 104, adopted by this court in *Mackson Ekeni & 7 Ors. v. Chief William Akuma Efamo & Ors* (2001) 10 NWLR (Pt. 720) 1 at 15. In other words, the law is trite that once one or more issues have been raised in a cause of action and distinctly determined or resolved between the same parties in a court of competent jurisdiction, then neither a party nor his privy or agent is allowed to relitigate that or those decided issues all over again in another action between the same parties or their privies on the same issues. See *Lawal v. Dawodu* (1972) 8-9 S.C. (Reprint) 55; (1972) All NLR 707 at 718; *Aro v. Fabolude* (1983) 1 SCNLR 58 and *Fabunmi v. Oyewusi* (1990) 6 NWLR (Pt. 159) 728 at 737.

In the present case, the respondents who were the plaintiffs at the trial court claimed for declaration of title in respect of a parcel of land described as 118.7 acres against the appellants in suit No. IK/21/67. The claims of the respondents were dismissed by the trial court while their appeal against the judgment dismissing their case was dismissed by the Court of Appeal and subsequently by this court. The issues raised and ultimately determined in that case related to the respondents' claim for declaration of title which they lost in succession in the three courts. The appellants who misconceived the effect of the dismissal of the respondents' claim for title to the 118.7 acres of land in dispute in the case

against them as judgment in their favour, applied for the possession of the land in dispute at the trial court which granted their application even though ex-parte. The Ex-parte order of the trial court in the name of execution of the judgment of this court in Appeal No. SC/184/89 dismissing the respondents' appeal, gave the appellants' possession of not only the 118.7 acres litigated upon between the parties in this appeal but also 596.7 acres which was not the subject of claim of the respondents in their action in case No. IK/21/67. Thus, the dispute between the parties arising from the Ex-parte order of possession by the trial court, gave rise to the second case No. ID/68/92 by the respondents claiming various reliefs against the appellants mainly to stop what the respondents regarded as wrongful execution of judgment against them. The appellants not only defended this action but also filed a counter-claim against the respondents claiming declaration for forfeiture, possession and perpetual injunction restraining the respondents from trespassing on the land in dispute.

From the four volumes of the record of this appeal containing the pleadings and the evidence of the witnesses together with the documents tendered and received in evidence and the judgment which determined the respective rights of the parties in the two Suits No. IK/21/67 and ID/68/92, it is quite clear that the two courts below are right in their decisions that issue estoppel could not apply in favour of the appellants to defeat the respondents' claims in the latter Suit No. ID/68/92. This is because although the parties in the two suits are the same, the issues raised and determined between the parties are not the same. Considering the fact that 118.7 acres was in dispute between the parties in the earlier case of IK/21/67, larger parcel of land, namely, 596.7 acres was the subject of the contest between the parties in the latter case ID/68/92. Therefore, even the subject matter in the two cases are not the same to justify the application of issue estoppel being asserted by the appellants in this appeal.

With these comments on the first issue alone, I completely agree that the appeal is devoid of merit and I hereby dismiss it with N10,000.00 costs to the respondents.

OGBUAGU JSC

I have had the privilege of reading in draft the lead Judgment of my learned brother, Kalgo, JSC., just delivered by him. I agree with him that this appeal lacks merit and stands dismissed. However, for purposes of emphasis, I will make my own contribution. B

The facts in this case leading to this appeal, have been clearly stated in the said lead Judgment. The appellants have raised two issues for determination, namely:

“2.1 Whether the Court of Appeal was right in holding that the decisions in IK/21/67, CA/L/43/87 and SC/184/89 do not create Issue Estoppel to bar the respondents from relitigating the issues decided therein. C

2.2 If Issue Estoppel is not applicable, whether in the circumstances of the case now on appeal, the Court of Appeal was right to confirm the High Court judgment dismissing the Appellants’ Counter-Claim”. D

On their part, the respondents have also raised two (2) issues for determination (the both of them couched in the negative) namely: E

“1. Whether the Court of Appeal was not right in upholding the Judgment of the trial court that the appellants could not successfully rely on the doctrine of issue estoppel in this case vis-à-vis the findings in Suit No. IK/21/67 J. B. Shodeke & Ors. v. Mojidi Pelu & Ors. as confirmed by the Supreme Court in SC. 184/1989? F

2. Whether having regard to the issues joined and evidence adduced on record, the Court of Appeal was not right in affirming the decision of the trial court?”

I note that in the claims of the respondents in Suit No. IK/21/67, G there was no issue of customary tenancy claimed therein. What were claimed, were Declaration, N400.00 as special and general damages for trespass and injunction. The appellants did not counter-claim and therefore, the dismissal of the respondents’ said suit, it is now settled, does H not automatically mean, that the land in dispute, belongs to the appellants. See the cases of The Obi of Ogwashi-Ukwu v. Obi Onwordi & Ors. (1986) 4 NWLR (Pt. 33) 27; Chief Eyo Ogboni & 2 Ors. v. Chief Ojo

Ojah & 5 Ors. (1996) 6 NWLR (Pt. 454) 272 at 294; (1996) 6 SCNJ 140 at 153, citing the cases of Ntiaro v. Akpan (1918) 3 NLR 10 and Ikoku & Ors. v. Ekenkwu (1995) 7 NWLR (Pt. 410) 637 which is also reported in (1995) 7 SCNJ 190; Alhaji Salami v. Chiefs. Gbadoolu & 3 Ors. (1997) 4 B SCNJ 196 at 206 citing the cases of Kodilinye v. Odu (1935) 2 WACA 336 and Abisi & Ors. v. Ekweator & Anor. (1995) 6 NWLR (Pt. 302) 643; (1995) 7 SCNJ 193 just to mention a few, i.e., such dismissal of Judgment, decrees no title to the defendant who has not counter-claimed seeking such declaration to title. See recently, the case of Nweke Nwokedi C & 2 Ors. v. Ekwenugu Okugo & 2 Ors. (2002) 7 S.C. (Pt. II) 176 at 179; (2002) 7 SCNJ 205 - per Katsina-Alu, JSC., in which Kalgo, JSC., also concurred.

On this ground alone, this appeal collapses. But for completeness, D I will deal with Issue Estoppel and find out or determine, whether the appellants who have been losing all the time, could raise the said issue. Even if there is such a plea of Issue Estoppel, there is no evidence in the Records, showing that there is or that there has been any Judgment of E any of the courts including this court, in their favour.

It is now firmly established in a line of decided authorities, that the defence of Estoppel by Res Judicata, cannot succeed, unless it is shown that the parties, issues and the subject-matter, were the same in the previous case as those in the action in which the plea is raised. See Echebiri F v. John Alozie (1972) 3 ECSLR 665 at 668, Chinwendu v. Mbamali & Anor. (1980) 3-4 S.C. 21; (1980) 3-4 S.C. 31 at 48; Ihenacho Nwaneri & Ors. v. Nnadikwe Oriuwa & Ors. (1959) 4 FSC 132; Alhaji Olariegbe v. Omotosho (1993) 1 SCNJ 30 at 38 citing Kalu Njoju & Ors. v. Ukwu G Erne & 2 Ors. (1973) 5 S.C. (Reprint) 211; (1973) 5 S.C. 293, 304, 305; Faleye & 2 Ors. v. Alhaji Otapo & 2 Ors. (1995) 2 SCNJ 195 at 220 - 221 citing several other cases therein and Chief Balogun v. Adejobi & Anor. (1995) 1 SCNJ 242 citing Idowu Alase & Ors. v. Sanya Olori Ilu (1965) H NMLR 66, just to mention but a few. It must be borne in mind and this is also settled, that the Rule is that Estoppel, must be mutual between the parties. See Madam Daniel v. Iroeri (1985) 5 S.C. 17 at 25. It is also firmly established that it is a question of fact whether the parties, their

privies, the facts in issue and the subject-matter of the claim, are the same with those in the current suit. See Prince Yaya Adigun & 2 Ors. v. Governor of Osun State & 17 Ors. (No. 3) (1995) 3 NWLR (Pt. 385) 513 at 535; (1995) 3 SCNJ 1 at 17-19. As to the distinction between Estoppel and Res Judicata, see the case of Alhaji Ladimeji & Anor. v. B Salami & 2 Ors. (1998) 4 S.C. 1; (1998) 5 NWLR (Pt. 548) 1 at 13-14; (1998) 4 SCNJ 1 at 14 - per Ogundare, JSC, (of blessed memory) and Oyerogba & Anor. v. Olaopa (1998) 12 S.C. 115; (1998) 12 SCNJ 115 at 122 - per Belgore, JSC.

Now, in the instant case leading to this appeal, it is noted by me, that there was no appeal in respect of Suit No. ID/60/92 against the dismissal of the claims of the respondents as plaintiffs, by the appellants. It is also noted by me and as found by the lower court in its Judgment at pages 1787 to 1788 of Vol. 5 of the Records, that in the said Suit No. IK/21/67, the claim related to only 118.7 acres of land, while in the said Suit No.ID/60/92, the appellants made a claim to 596.7 acres. The court below held inter alia, as follows:

“..... When the plans of the land used in the old and current cases are compared and contracted (sic) as shown in Exhibits 5^{B1}, 5^{B2}, 8^A, 9 and 27, one sees that more area of land is in dispute in the current than was in (sic) 14/21/67. Even if the plaintiffs had lost in the previous case, that loss would not relieve the defendants (the appellants) of the duty to prove their entitlement to the land they claimed in the current issue. The reliance placed on issue estoppel is misconceived as the ingredients for the applicability of the plea were not present”. (the underlining mine)

This finding of fact cannot be faulted by me as same, is borne out from the Records. My view is supported and strengthened by the fact that it is now settled, that the four (4) conditionalities in respect of the plea, must be satisfied by the party raising and relying on the said plea. Failure to so satisfy any one of these conditions, means the failure of the plea in its entirety. See the case of Afolabi & 2 Ors. v. Governor of Osun State & 3 Ors. (2003) 7 S.C. 55; (2003) 7 SCNJ 27 at 33 – per Kutigi, JSC.

In summary, although the parties are the same in the two said

suits and the judgment in Suit No. IK/21/67 is final, the identity/size of the land in dispute, are not the same - i.e. the subject-matter of both suits, are not the same. This Court in Appeal No. SC. 184/89 stated inter alia, as follows:

B “..... *an obvious mis-statement by the court below. Exhibit A is not a part, but the whole of the land in dispute*”.

See page 975 of Vol. 3 of the Records.

C It need be stressed and this is also firmly settled, that the fact that the parcel of land in the previous litigation, bears the same name with the parcel of land in later litigation, does not necessarily mean that they are the same. See Chief Adomba & 3 Ors. v. Odiase & 3 Ors. (1990) 1 S.C. 219; (1990) 1 NWLR (Pt. 125) 165; (1990) 1 SCNJ 135 referred to in the case of Chief Olukoga & 3 Ors. v. Mrs. O. Fatunde (1996) 9-10 D SCNJ 1 at 12.

In concluding this Judgment, I find as a fact and also hold, that since the appellants failed woefully to satisfy all the conditions in respect of their said plea, the said plea accordingly fails.

E There is also the concurrent findings of fact by the two lower courts and the attitude of this court in respect thereof, is settled. See Ike v. Ugboaja (1993) 6 NWLR (Pt. 301) 539; (1993) 7 SCNJ 402 and Abidoye v. Alawode (2001) 3 S.C. 1; (2001) 6 NWLR (Pt. 709) 463; (2001) 3 F SCNJ 40 - i.e., not to interfere.

It is from the foregoing and the more detailed lead Judgment of my learned brother, Kalgo, JSC., that I too dismiss the appeal. I abide by the consequential order in respect of costs.

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