

**SUPREME COURT OF NIGERIA**

20<sup>TH</sup> APRIL 2007 SC. 15\2002

**CORAM:- A. I. KATSINA-ALU, N. TOBI, I. T. MUHAMMAD,  
P. O. ADEREMI, C. M. CHUKWUMA-ENEH, JJSC**

MUJEED SUARA YUSUF ..... APPELLANT  
AND  
1. MADAM IDIATU ADEGOKE ..... RESPONDENTS  
2. SULAIMAN ADEAGBO ODETUNDE

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PLEADINGS - Binding nature of - Evidence - That is at variance with pleadings - Goes to no issue (H1)

LAND LAW - Title - Proof - Pleadings - Prescribed five methods of proof - Claimant to title - Need not plead more than one of the methods - And burden of proof lies on plaintiff (H2)

LAND LAW - Title - Pleadings - Appeals - Where specific grant was pleaded - But was not proved by credible evidence - Plaintiff's claim should be dismissed - Without considering any other evidence (H3)

LAND LAW - Title - Root of - Possession - Where a party fails to prove his pleaded root of title - Copious evidence of possession - Cannot validate his ownership (H4)

APPEALS - Concurrent findings - Interference - Where plaintiffs failed to prove the substratum of their case - Supreme Court's refusal to interfere - Will occasion miscarriage of justice (H5)

ACTIONS - Estoppel - Res judicata - Meaning and purpose - It can be pleaded to raise objection to court's jurisdiction - It is a shield and not a sword (H6)

EVIDENCE - Relevance - Past proceedings, s. 34(1) EA - Evidence

given therein - That does not fall within the proviso - Is only relevant in present proceedings - For the purpose of discrediting the witness (H7)

### **FACTS**

Before the High Court of Justice Ibandan, Oyo State, plaintiffs/respondents filed a representative action against the defendant/appellant. They claimed declaration to right of occupancy, N10,000.00 damages for trespass and perpetual injunction in respect of the land in dispute. Both parties filed and exchanged their respective pleadings and the case proceeded to trial. At the conclusion of evidence of the parties and the addresses of counsel for both parties, in a considered judgment delivered on 30-6-1987, the trial court found for the plaintiffs/respondents.

Dissatisfied, appellant appealed to the Court of Appeal. While the appeal was pending, respondents sought to amend paragraph 3 of their pleadings to reflect a plea of original settlement and not grant. This was because whereas they pleaded grant as their root of title, they led evidence as to original settlement and no evidence of grant was presented. The Court of Appeal refused to grant the application to amend the pleadings but still found in the plaintiffs' favour thereby dismissing the appeal. Still aggrieved, defendant has further appealed to the Supreme Court. The apex court also refused plaintiffs' application to amend their statement of claim.

**HELD** (Unanimously allowing the appeal per **ADEREMI JSC**)

### ***PLEADINGS - Binding nature of***

1. It is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings; or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded by the court. (p. 2054 B)

### ***Title - Prescribed five methods of proof***

2. The case at hand is a land matter. It is now well established principle of law that a party claiming declaration of title to a statutory or customary

right of occupancy to land does not need to plead more than one of the prescribed methods of proof of title to land to succeed. The five ways, which have received judicial blessings, are: -

- (1) By Traditional evidence
- (2) By Document of title
- (3) By various acts of ownership and possession numerous and positive to warrant inference of ownership.
- (4) By acts of long possession and enjoyment of land
- (5) By proof of possession of adjacent land in dispute in such circumstances which render it probable that the owner of the adjacent land is the owner of the land in dispute.

See *Idundun v. Okumagba* (1976) 9-10 S.C. 227 and *Ogunnaike v. Oluyemi* (1987) 3 S.C. 215. Again, in all cases of declaration of title to land, generally, like other cases, the burden of proof lies on the plaintiff to prove his case by credible evidence in line with his pleadings and his case will collapse if he fails to discharge that duty. (p. 2054 D)

***Title - Pleadings - Appeals - Where specific grant was pleaded***

3. With due respect and for what I shall soon say, this concluding part of the summation of the court below has no support in law. I do realise that the court below adjudicated on the matter as an appellate court. And it has been held that an appeal court has no duty to disturb the findings of fact made by a trial court except, in exceptional circumstances, where the inferences drawn from the established facts are wrong or where those findings do not flow or follow from the evidence given. The court below was in serious error, not to have reversed the judgment of the trial court. I say so because once it is obvious from the records, as in the instant case, that a plaintiff who pleaded traditional history failed to adduce evidence, credible one, in proof of same, his case is entitled to be dismissed in toto. No other evidence should be considered. Let me repeat here, the plea of the plaintiffs/respondents, in paragraph 3 of the statement of claim is one of specific grant - GRANT OF LAND FROM ALESHINLOYE TO ODETUNDE - no scintilla of evidence was led in support. That was grave to the case presented and it knocked the bottom

out of the case which at that stage, qualified for nothing but a dismissal order. (p. 2059 A)

**Title - Root of - Possession**

B 4. This court had occasion to express in clear terms that when a party pleads a grant as the root of his title and proves that grant by credible traditional evidence, he need not go further to prove possession or acts of ownership or indeed any of the other established ways stated supra. In C Atanda v. Ajani (1989) 3 NWLR (pt.111) 511, Craig JSC delivering the judgment of this court, reasoned: -

D *"It has been held that when a party relies on a grant and proves that grant by traditional evidence, he need not go further and prove possession or acts of ownership or any of the other four ways stated above .....*

*In the case of F.M. Alade v. Lawrence Awo (1975) 4 S.C. 215 at page 225, this court held:*

E *'In other words, Webber J, quite rightly thought, and we agree with him that, where the other evidence of title i.e. tradition is inconclusive or entirely lacking if we may say so, then and it is only then, that the onus, of proving the facts constituting acts of ownership is thrown upon the plaintiff. That being the case, we think that the correct view of the F law is that the plaintiff in a claim for declaration of title could succeed only on the basis of traditional evidence. Moreover, it seems to us that the rule in Ita's case does not apply where the plaintiff relies upon and proves title by grant.'* *That pronouncement represents the state of the law G .... I am satisfied that a consideration of the issues of possession does not arise until the question of traditional history has been determined.*

(Underlining mine for emphasis)

H It should not be forgotten that, in the instant case, the plaintiffs/respondents claimed a declaration of title based on GRANT from Aleshinloye to Odetunde under Yoruba Native Law and Custom. Unless the origin of their title is valid, that it was established by credible evidence, even if there was copious evidence of possession, the length of possession does not ripen invalid title to a valid ownership title. This is so

because a claim for declaration of title is not founded on ownership by prescription under native law and custom and it will never be.

(p. 2060 C)

***Concurrent findings - Interference***

5. There are two concurrent findings of fact before us. When faced with such a situation as we do here, the general rule to be applied, which rule is longstanding is that where there are two concurrent findings of facts, as in the instant case before us, such findings will not ordinarily be disturbed by this court unless there is, ex facie, the record of proceedings substantial error which is very apparent. It is very much apparent from the record of proceedings that the plaintiffs/respondents failed to prove grant of land from ALESHINLOYE to ODETUNDE (which is the substratum of their case). To refuse to interfere here will, as was said in *Coker v. Oguntola & Ors* (1985) 6 S.C. 223, be tantamount to a substantial miscarriage of justice. It is for this crucial reason that I resolve Issue No.1 on the appellant's brief of argument in his favour. The judgments of the trial court and the court below must not be allowed to stand; they are hereby set aside while I enter an order dismissing the suit in toto.

(p. 2061 D)

***Res judicata - Meaning and purpose***

6. Let me quickly make a pronouncement on the term "*RES JUDICATA*", it has now become well entrenched in our civil jurisprudence that once a dispute or matter has been finally and judicially pronounced upon or determined by a court of competent jurisdiction, neither the parties thereto nor their privies can subsequently be allowed to relitigate such matter in court. A judicial decision properly handed down is conclusive until reversed by a superior court and its veracity is not open to a challenge nor can it be contradicted. The term derives its force from that good public policy which says that there must be an end to litigation. The maxim is *INTEREST REPUBLICAE UT SIT FINIS LITII*.

Therefore, in a bid to raise objection to the jurisdiction of a particular court on the ground that the matter has once been judicially pro-

nounced upon, the plea of estoppel per rem judicatam is there to be employed; it is there as a shield and not as a sword. I dare say that that plea is not available to a plaintiff in his statement of claim as by it, he would be impugning the jurisdiction of the court to which he has brought his action since its successful plea, would, in effect, oust the jurisdiction of the court before which it is raised. (p. 2063 C)

***EVIDENCE - Relevance - Past proceedings***

7. These are the pieces of evidence given in another proceeding, which are now being sought to support the case of the plaintiffs/respondents. It must be noted that none of Tiamiyu Layinka, Salawu Adeagbo and Ladejo Adeleke testified in the case before the trial judge. It has long been established, in law, that evidence of a witness taken in an earlier proceedings is not relevant in a later proceedings, except for the purpose of discrediting such a witness in cross-examination and for that purpose only.

There is nothing on the printed evidence that Tiamiyu Layinka, Salawu Adeagbo and Ladejo Adeleke were dead, nor could not be found, nor incapable of giving evidence nor kept out of the way by adverse party. It was not even the case of the plaintiffs/respondents, who pleaded Exhibit 6 that the presence of these persons could not be obtained without some considerable delay and expense which could be adjudged to be unreasonable. None of these three comes within any of the provisos to Section 34 supra. For all I have been saying, I do not hesitate to say that Exhibit 6 is of no evidential value in this case. (p. 2065 H/2066 F/2067 D)

**NOTABLE POINTS OF INTEREST**  
**TOBI JSC**

***1. Equity is for both parties - Technicality defined***

The principles of equity, as recourse to principles of justice to correct or supplement the rigidity of the common law, possessing the quality of mercy, with their palliative and soothing hands, are not only for one of the parties in the litigation, but for all the parties. Much as the respondents need the principles of equity to aid them, so too the appellant. Can

a party who departs from his pleadings and makes a different case at the hearing really rest on equity for salvation?

The respondents referred to the departure in their brief as merely technicality. What is technicality? In *Adedeji v. The State* (1992) 4 NWLR (Pt. 234) 248, I said at page 265:

*“I realise that courts of law seem to be using the word technicality out of tune or out of turn, vis-a-vis the larger concept of justice. In most cases, it has become a vogue that once a court is inclined to doing substantial justice by deflecting from the rules, it quickly draws a distinction between justice and technicality so much so that it has become not only a cliché but an enigma in our jurisprudence. In most cases when the courts invoke the substantial justice principle, they have at the back of their minds the desire to put to naught technicalities which the adverse party relies upon to drum down an otherwise meritorious case. We seem to be overstretching the technicality concept. We should try to narrow down the already onerous and amorphous concept in our judicial process. A technicality in a matter could arise if a party is relying on abstract or inordinate legalism to becloud or drown the merits of a case.*

Can respondents say with all seriousness and sincerity that ignoring the pleadings and making a different case at the hearing is a mere technicality? I think not. (p. 2069 H/2070 G)

## 2. *Pleadings - Amendment with overreaching effect is refused*

It is good law that parties must be consistent in presenting their cases to the court. This means that the pleadings and the oral evidence should tell the same story. They should not tell different stories. The case of a party is first made in the pleadings and because the pleadings have no mouth and not the intelligence to talk, the human being who is possessed of the two narrates the content of the pleadings to the court. It is loud law that parties are bound by their pleadings. What this means is that a party cannot move out of his pleadings and give evidence of facts not duly pleaded therein.

The law is not as rigid as that. Because the law recognises a possible lapse or failure of the human memory, it has worked out procedures

for amendment of pleadings to accommodate any possible lapse or failure. But amendment of pleadings is not open ended, in the sense that an applicant can always succeed in his application for amendment. For instance, where an application for amendment is designed to overreach the respondent, the court will not grant the application. This arises when the applicant cleverly anticipates the core of the case of the respondent and seeks the amendment to frustrate the case with the result that the respondent fails at the end of the day. An overreaching conduct is a circumventing conduct to outwit the adverse party by cunning or artifice. It is designed to defeat the object or objective of the respondent's case by going too far, in the sense of destroying the core or fulcrum of the respondent's case. (p. 2071 E)

**MUHAMMAD JSC**

*3. Pleadings - Averment at variance with evidence goes to no issue*

It is with all due respect to the court below that the elementary principle of pleadings which is still applicable in our courts is that any material, fact pleaded must be supported by evidence. Any averment in a pleading which is at variance with the evidence goes to no issue and the claim would fail and be dismissed by the court. This court has made such pronouncement of the law in several decided cases. In the case of *Okhwarobo v. Aigbe* (2002) 9 N.W.L.R. (pt. 771) 29 at p. 47 B-E my Lord, Igu, JSC, stated the law as follows:-

*"There can be no doubt that the evidence of the plaintiff with regard to his root of title is completely at variance with that averred and relied upon in his pleadings. In the first place, it is a well-established principle of law that if the evidence of a party is at variance with the averment in his pleadings on a material and relevant point, the claim would fail and stand dismissed. This is because parties are bound by their pleadings and evidence which is at variance with the averments in his pleading goes to no issue and should be disregarded by the court."* (p. 2075 B)

**REPRESENTATION**

Ubong Ewop Akpan Esq. with him Akinyemi Aremu, Esq. for Appellant.  
Akeem Agbaje Esq. with him Femi Folorunso Esq. for Respondents.

### **CASES REFERRED TO**

Okhwarobo v. Aigbe (2002) 9 N.W.L.R. (pt. 771) 29	B
Adedeji v. The State (1992) 4 NWLR (Pt. 234) 248	
Coker v. Oguntola & Ors (1985) 6 S.C. 223	
Atanda v. Ajani (1989) 3 NWLR (pt.111) 511	
F.M. Alade v. Lawrence Awo (1975) 4 S.C. 215 at page 225	C
Idundun v. Okumagba (1976) 9-10 S.C. 227	
Ogunnaike v. Oluyemi (1987) 3 S.C. 215	
Njoku & Ors. v. Eme & 4 Ors (1973) 5 S.C. 293	
Kodilinye v. Odu 2 WACA 336	
Elufisoye v. Alabetutu (1968) NMLR 298	D
Egri v. Uperi (1973) 1 ALL N.L.R. (pt.2) 198	
Obisanya v. Nwoko & Anor (1974) 1 ALL N.L.R. (pl.5) 420	
Fashanu v. Adekoya (1974) 1 ALL N.L.R. (pt.1) 35	
Fasoro v. Beyioku (1988) 2 NWLR (pt.76) 363	E
Obioha & Ors V. Duru & Ors. (1994) 8 NWLR (pt.365) 631	

### **STATUTE REFERRED TO**

Evidence Act s. 34(1)	F
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### **LEAD JUDGMENT BY ADEREMI JSC**

The appeal is against the judgment of Court of Appeal, sitting in Ibadan, in CA/I/72/89: Alhaji Suara Yusuf and Lasisi Kode delivered on Thursday 7<sup>th</sup> June 2001. The case originated from the High Court of Justice Ibadan, Oyo State where in Suit No.I/683/84 Tiamiyu Adeagbo and Alhaji Lamidi Atanda (deceased for themselves and on behalf of Odetunde Family) claimed against Alhaji Suara Yusuf as follows: -

“(1) a declaration to a statutory or customary right of occupancy to all that piece or parcel of land verged RED on Plan No. APAT/OY/06/1986 (Excluding the area verged green);

(2) the plaintiffs also claim N10,000.00 damages against the de-

*fendant for trespass committed by the defendant in respect of the said parcel of land sometimes in December 1984 which trespass is still continuing;*

(3) *the plaintiffs also claim perpetual injunction restraining the defendant, his servants, agents and privies from committing further acts of trespass on the land in dispute”.*

Both parties filed, in the trial court registry, their respective pleadings and exchanged them; the pleadings of the plaintiffs (hereinafter referred to as the respondents) being the statement of claim dated 1<sup>st</sup> February, 1986 accompanied by a dispute survey plan No. APAT/OY/06/1986 dated 9<sup>th</sup> January 1986 wherein the area in disputed was verged “RED” as pleaded in paragraph 2 thereof; while that of the defendant (hereinafter referred to as appellant) is the statement of defence dated and filed on 18<sup>th</sup> July, 1986. The case thereafter proceeded to trial and at the conclusion of the evidence of the parties and the addresses of counsel for both parties, the trial judge, in a considered judgment delivered on the 30<sup>th</sup> of June, 1987 found for the plaintiffs/respondents and accordingly granted them the three reliefs sought; for the second relief, N3,000.00 was awarded in their favour as damages for the trespass said to have been committed.

Dissatisfied with the said judgment, the appellant lodged an appeal against it to the court below. While the appeal was still pending in the court below, the respondents sought to amend paragraph 3 of their pleadings to reflect a plea of ORIGINAL SETTLEMENT and not GRANT. The prayer was refused by the court below and this court, (Supreme Court) upon an appeal to it on that issue also refused to accede to the prayer for the amendment. In the course of this interlocutory matter, Tiamiyu Adeagbo, I the first plaintiff/respondent died and the prosecution of the case was carried on by Alhaji Lamidi Atanda, the second plaintiff/respondent on behalf of 4 Odetunde family. Again, Alhaji Lamidi Atanda himself died on the 12 of December 1996 and one Lasisi Kode was by the order of court, sequel to an application dated 9<sup>th</sup> April, 1998, substituted for the deceased. The parties up to the time the judgment of the court below was given on the 7<sup>th</sup> of June 2001 were (1) Alhaji Suara

Yusuf (the appellant) and (2) Lasisi Kode (the respondent for and on behalf of Odetunde family). Upon the death of Kode, both Madam Idiatu Adegoke and Sulaiman Adeagbo Odetunde were joined by the order of court to continue the prosecution of their appeal. Alhaji Suara Yusuf (the appellant) who died on the 5<sup>th</sup> of August 2002 was by the order of this court pursuant to an application dated 9<sup>th</sup> September 2002 substituted by his son, one Mojeed Suara Yusuf, as the appellant. The above account of the various deaths that occurred while the appeal was still pending gave rise to the present composition of the parties that are now prosecuting this appeal to finality.

As I have said supra, the appellant who was the plaintiff in the trial court, being dissatisfied with the decision of the court, appealed to the court below on seven grounds from which five issues were distilled for determination by the court below. The respondents, for their part, raised four issues for determination of the court below. For a clear understanding of this case, it is important to observe that both parties filed their respective briefs of argument after the respondents had failed in their bid to amend their pleadings by deleting the word “GRANT” in paragraph 3 of their statement of claim. Counsel representing the parties after adopting their briefs, urged, for the appellants, that the appeal be allowed and for the respondents, that the appeal be dismissed. The very crucial issue laid before the court below was whether on the state of the pleadings and the evidence adduced, the plaintiffs/respondents could be said to have proved by credible evidence, the traditional history relied upon in their pleadings. As I have said, the court below, in a considered judgment delivered on the 7<sup>th</sup> of June, 2001, dismissed the appeal before it.

Being dissatisfied with the judgment, the appellants have appealed to this court upon an Amended Notice of Appeal, dated 25<sup>th</sup> November 2002 but deemed properly filed with the leave of court, on 3<sup>rd</sup> May 2006, which said Notice incorporating seven grounds of appeal. Distilled there from and set out in the appellant’s brief of argument dated 15<sup>th</sup> July 2004 are two issues, which are in the following terms:-

“(1) *Whether the court below could legitimately affirm the High Court judgment for the respondents on grounds expressly rejected by the*

*respondents themselves, unsupported by any oral evidence led (which evidence conflicted with the pleadings), and never made out by the respondents.*

(2) *Whether the Court of Appeal's use of Exhibit 6 in this case was appropriate?"*

The respondents who disagreed with issue No.1 distilled by the appellant raised only one issue for determination which as contained in their brief of argument dated 8<sup>th</sup> September 2006 but deemed properly filed on the 22<sup>nd</sup> of January 2007 is as follows: -

*"Whether the appellant has made out any case for interference with the decision of the learned justices of the Court of Appeal which affirmed the judgment of the learned trial judge, having regard to all the circumstances of the case including Exhibit 6?"*

When this appeal came before us on the 22<sup>nd</sup> of January 2007 for argument, Mr. Ubong Akpan, learned counsel for the appellant referred to, adopted and relied on the appellant's brief filed on the 10<sup>th</sup> of August 2004 and while urging that the appeal be allowed, he submitted that the entire appeal turned on the interpretation of Exhibit 6 - the proceedings of judgment of the Ibadan City No. 1 Grade "A" Customary Court, Mapo Hill Ibadan. It was his further submission that the said exhibit did not advance the case of the plaintiffs/respondents pointing out that the claim before the customary court was wrongly reproduced in the respondents' brief of argument. Mr. Akeem Agbaje, learned counsel for the respondents for his part also referred to, adopted and relied on his clients' brief of argument deemed properly filed on the 22<sup>nd</sup> of January 2007 and while urging that the appeal be dismissed, he conceded the point raised by Mr. Akpan that the claim before the customary court was wrongly reproduced in the brief of his clients, adding that the words

*"and joint owners of Odetunde family lands including the land at Oke-Ode" 1* were erroneously represented by the respondents to be part of the claim before the customary court.

In their brief of argument, the respondents expressed their disagreement with issue No.1 identified in the appellant's brief, they nevertheless went on in their said brief to reply to the said issue; I have

considered the said issue and it is my respectful view that it is very germane to this appeal. I shall therefore consider it.

On Issue No.1, the appellant in his brief, submitted that the trial court wrongly gave judgment in favour of the respondents (who were plaintiffs before that court) on the basis that their root of title to the land was predicated on a grant from Aleshinloye, a root, according to the appellant, which the respondents had rejected on the record as being their case. More importantly, he further argued, no oral evidence was adduced by the plaintiffs/respondents in proof of the grant by Aleshinloye. Reviewing the proceedings before the court below (Court of Appeal) the appellant further submitted that once it became obvious that plaintiffs/respondents' pleading was based on GRANT, but evidence led before the trial court was on original settlement and judgment of the trial court was also founded on original settlement, the plaintiffs/respondents made a desperate effort to amend the relevant paragraph of the pleadings before the trial to delete the part relating to GRANT and confine their case to ORIGINAL SETTLEMENT. Both the lower court (Court of Appeal) and this court, on appeal to it, refused to grant the prayer. And so the entire case remained • predicated on the original pleadings before the trial court. In furtherance of his argument, the appellant opined that the evidence of original settlement proffered by the plaintiffs/respondents at the trial was at variance with the pleadings and that being so and touching as it did, to the radical title to the said land, the court below ought to have allowed the appeal and ordered a dismissal of the entire suit. In support of this argument, the following cases were relied upon; *Adisa v. Oyinwola* (2000) 10 NWLR (pt.674) 116; *Emegokwue v. Okadigbo* (1973) 4 S.C. 113, *Mogaji & Ors v. Cadbury (Nigeria) Ltd. & Ors.* (1985) 2 NWLR (pt.7) 393. The court below, it was finally argued, erred in law for deciding the case on an issue none of the parties ever contested and on a piece of evidence, which was in conflict with the pleadings. It was urged that the appeal be allowed on this ground.

In reply to this crucial ground, the respondents, in their brief of argument took the two issues raised by the appellant together. They argued that the oral evidence of the plaintiffs/respondents together with the

documentary evidence which finds expression in Exhibit 6 tendered at the trial were sufficient proof of the case of the plaintiffs/respondents; contending further that the pleadings were not ambiguous but conceded that the evidence led by Tiamiyu Adeagbo, the 1<sup>st</sup> plaintiff was ambiguous. It was their further submission that the court below in holding that the ambiguity created by the evidence of 1<sup>st</sup> plaintiff was overridden by the legal effect of the admissions in Exhibit 6.

I start by saying that **it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings; or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded by the court;** if I must cite an authority in support of this statement, I call in aid the decision of the Supreme Court in *Njoku & Ors. v. Eme & 4 Ors* (1973) 5 S.C. 293. **The case at hand is a land matter. It is now well established principle of law that a party claiming declaration of title to a statutory or customary right of occupancy to land does not need to plead more than one of the prescribed methods of proof of title to land to succeed. The five ways, which have received judicial blessings, are: -**

- (1) By Traditional evidence
- (2) By Document of title
- (3) By various acts of ownership and possession numerous and positive to warrant inference of ownership.
- (4) By acts of long possession and enjoyment of land
- (5) By proof of possession of adjacent land in dispute in such circumstances which render it probable that the owner of the adjacent land is the owner of the land in dispute.

See *Idundun v. Okumagba* (1976) 9-10 S.C. 227 and *Ogunnaike v. Oluyemi* (1987) 3 S.C. 215. Again, in all cases of declaration of title to land, generally, like other cases, the burden of proof lies on the plaintiff to prove his case by credible evidence in line with his pleadings and his case will collapse if he fails to discharge that duty. See *Kodilinye v. Odu* 2 WACA 336 and *Elufisoye v. Alabetutu* (1968)

NMLR 298. In the case at hand, both parties in their pleadings rely on traditional history. I pause to remind myself that the defendant, now the appellant never counter-claimed. In paragraph 3 of the statement of claim dated 1<sup>st</sup> of February 1986 and filed on the 3<sup>rd</sup> of February 1986, the plaintiffs/respondents averred thus:-

PART 3

*“The land in dispute formed part of a large tract of land SETTLED upon by one Odetunde the ancestors of the plaintiffs many years ago after GRANT by Aleshinloye during the reign of Maye, after the Egbas and Ijebus have been driven away from the area.”*

(Underlining mine for emphasis)

A careful reading of paragraph 3 of the statement of claim quoted supra leaves me in no doubt that they (plaintiffs) were relying on GRANT from ALESHINLOYE. On the face of that paragraph, it admits of no argument that their case was that it was after the GRANT by ALESHINLOYE to Odetunde (their ancestor) that he (their ancestor) settled on the land. The condition precedent to a legally valid settlement on the said land by Odetunde was a GRANT by Aleshinloye. So therefore, the plaintiffs/respondents owe a duty in law, to establish, by credible evidence, grant of the land by Aleshinloye to Odetunde. For his part, the defendant (now appellants) averred in paragraph 3 of his statement of defence dated 18<sup>th</sup> July 1986 and filed the same day thus: -

Para 3

*“The defendant avers that the land in dispute forms part of a large area of land which originally belonged to Oderinde by SETTLEMENT under the native law and custom.”*

(Underlining mine for emphasis)

Again, a careful study of paragraph 3 of the statement of defence reproduced supra creates no doubt in my mind that SETTLEMENT by Oderinde on the said large tract of land is the root of their title. The crucial matter to now examine is the evidence led in proof of the traditional histories put up by the parties. The 1<sup>st</sup> plaintiff, Tiamiyu Adeagbo, the only witness who testified in proof of the plaintiffs’ traditional history

said in examination-in-chief and I quote:

*“My family got on the land during the Ibadan/Ijebu War.*

*Odetunde was a warrior and he was our ancestor who first SETTLED on the land .....*

B *When the war was over, Odetunde SETTLED there with his family and he established a village there”.*

(Again, the underlining is mine for emphasis)

C For the umpteenth time, I remind myself that there was no counter-claim. In civil cases, the like of this, the rule is that the burden of proof rests on the party, whether plaintiff or defendant, who asserts the affirmative of the issue -here the ownership of the land. I still say that the defendant did not counter-claim. So it is only when the plaintiffs have satisfactorily discharged their duty by proving GRANT from Aleshinloye D that the onus of proof will shift to the defendant (now appellant); called the ONUS PROBANDI, it rests on the party who would fail if no evidence at all, or no more evidence, as the case may be, were given on either side. See Ajide v. Kelani (1985) 11 S.C. 124.

E The evidence of Tiamiyu Adeagbo which I reproduced supra is what the plaintiffs/respondents put forward in proof of that all important averment in their paragraph 3, which is a plea of traditional history. When a party gives evidence in proof of the traditional history pleaded, it is F incumbent and necessary if not imperative that a clear and positive statement be made by the trial court on it. And if the other party also adduces traditional evidence, as in the instant case, then the trial court must make a pronouncement as to which of the two stories he believes.

G The learned trial judge in his evaluation of the traditional evidence led by both parties said: -

*“The plaintiffs claim that their ancestor, one Odetunde first settled on the land in dispute after he had successfully helped, on the instructions of Balogun Aleshinloye in the war to drive Ijebus away from the H area .....*

*The traditional history of the defendant’s vendors on the other hand, is that one Oderinde, their ancestor came from Oyo-Ile, first settled on the land in dispute as virgin land and he farmed on*

it.....

*Looking at the traditional evidence alone, there seems to be little to help chose (sic) between them. Either is probable. There are, however one of two pieces of evidence which appear to give plaintiffs story an edge over that of the defendant's vendors."*

B

In concluding his evaluation of the traditional evidence adduced by both parties, the learned trial judge reasoned:-

*"It is clear from the foregoing that the preponderance of credible evidence is heavily in favour of the plaintiffs and I am satisfied that the plaintiffs' ancestor, Odetunde originally settled on the land in dispute and that his descendants right up to the present plaintiffs are the owners of the land in dispute."*

C

Suffice it to say that what the learned trial judge considered as giving an edge to the story of the plaintiffs/respondents are acts of ownership/possession purportedly exercised by the plaintiffs' family. I need not reproduce the evaluation of the pieces of evidence relating to ownership and possession for the reason I shall give ANON. As earlier said, the defendant/appellant was dissatisfied and he appealed to the court below challenging the judgment of the trial court given in favour of the plaintiffs/respondents. The court below, after taking addresses of the respective counsel based on the respective briefs on the legal owner of the land, reasoned on this crucial issues, thus: -

D

*"Thus, the evidence from the parties therein supported by a member of the Aleshinloye family, Ladejo Adeleke is that Odetunde settled on the large parcel of land including the land in dispute after same had been granted him by Aleshinloye. It follows therefore that the pleading in paragraph 3 of the statement of claim about Odetunde's settlement on the land in dispute after grant by Aleshinloye is to my understanding consistent with the root of title uncontested and established in Exhibit 6....."*

F

G

At a particular point in the course of reviewing the exercise of evaluation of this crucial evidence by the trial court, the court below expressed some doubt as to whether Odetunde whom the plaintiffs/respondents put forward was the owner of the land based on the traditional

H

evidence, the court below said: -

*“At the trial the relevant oral evidence came from the 1<sup>st</sup> respondent, Tiamiyu Adeagbo. At page 69, lines 20-30 of the record, he said:*

*I know the land in dispute. It is Odetunde family land. The land is  
B at Oke-Ode, Agbanmu Road near Sango in Ibadan. The land is 150  
acres. The family got on the land during the Ibadan/Ijebu War Odetunde  
was a warrior and he was our ancestor who first settled on the land. Iba  
Oluyole was the reigning Olubadan at the time. It was Bankole Aleshinloye  
C who was the Balogun at Ibadan at the time told Odetunde to go and  
defend land against the Ijebus. When the war was over, Odetunde settled  
there with his family and he established a village there.*

*The evidence itself is somewhat ambiguous. On the orders of  
Bankole Aleshinloye, Odetunde went into the land to defend it against  
D the Ijebus. After the war, Odetunde settled there with his family and he  
was the first to do so. Can this be construed to mean that Odetunde  
founded the land? The fact that Bankole Aleshinloye ordered him to go  
into the land and defend it implied that title in the land was vested in  
E Bankole Aleshinloye and that Odetunde settled there with his family at  
the end of the war after same had been granted j him by Aleshinloye. I do  
not think the statement can be construed to mean that Odetunde founded  
the land. As I said, the statement is ambiguous. However, the respondent  
F had a duty to tender clear, unequivocal evidence in support of his plead-  
ings in paragraph 3 of the statement of claim. Because of the ambiguity,  
I can only subscribe to the view that the evidence standing on its own,  
was not sufficient proof of the averments in paragraph 3 of the statement  
of claim”.*

*G I pause here to say that based on the evidence of Tiamiyu Adeagbo  
which is reproduced supra, the court below was right in the concluding  
part of the summation which I reproduced from the judgment of the  
court below. But the court below still went ahead to evaluate the printed  
H evidence in favour of the plaintiffs/respondents when that court at page  
184 said and I quote: -*

*“I am therefore not persuaded by the contention of the learned  
counsel for the appellant that the case of the respondent was liable to be*

*dismissed on the aforesaid evidence alone. That piece of evidence as to the respondent's root of title has to be considered together with all other legally admissible and relevant evidence presented at the court of trial."*

**With due respect and for what I shall soon say, this concluding part of the summation of the court below has no support in law. I do realise that the court below adjudicated on the matter as an appellate court. And it has been held that an appeal court has no duty to disturb the findings of fact made by a trial court except, in exceptional circumstances, where the inferences drawn from the established facts are wrong or where those findings do not flow or follow from the evidence given see Egri v. Uperi (1973) 1 ALL N.L.R. (pt.2) 198; Obisanya v. Nwoko & Anor (1974) 1 ALL N.L.R. (pl.5) 420 and Fashanu v. Adekoya (1974) 1 ALL N.L.R. (pt.1) 35. The court below was in serious error, not to have reversed the judgment of the trial court. I say so because once it is obvious from the records, as in the instant case, that a plaintiff who pleaded traditional history failed to adduce evidence, credible one, in proof of same, his case is entitled to be dismissed in toto. No other evidence should be considered. Let me repeat here, the plea of the plaintiffs/respondents, in paragraph 3 of the statement of claim is one of specific grant - GRANT OF LAND FROM ALESHINLOYE TO ODETUNDE - no scintilla of evidence was led in support. That was grave to the case presented and it knocked the bottom out of the case which at that stage, qualified for nothing but a dismissal order.** This statement derives legal force from a number of judicial decisions, which I shall examine hereunder. The first of such decisions is Emegokwue v. Okadigbo (1973) 8 N.S.C.C. 220 where the Supreme Court, per the judgment of Fatayi Williams JSC (as he then was) said at page 222 and I quote him:

*"It is trite law, and have repeated it on many occasions, that parties are bound by their pleadings and that any evidence which is at variance with the averments in the pleadings goes to no issue and should be disregarded by court."*

Again in Odofin v. Ayoola (1984) 15 N.S.C.C. 711, this court per the judgment of Karibi-Whyte JSC at page 720 said and I quote: -

“It is well settled that where a plaintiff relies on grant or original settlement as title to claim the land in dispute, the burden is on him to establish such grant or original settlement - this he can do by cogent and acceptable evidence of tradition, whether or not, accompanied by exercise of dominion which alone may be sufficient to establish title

.....  
It follows therefore that where traditional evidence of that alleged from which title is derived, is lacking or rejected, as was in this case, such evidence is not only merely inconclusive but also cannot be relied upon whether any other acts positive or numerous can support evidence of ownership.”

**This court** had occasion to express in clear terms that when a party pleads a grant as the root of his title and proves that grant by credible traditional evidence, he need not go further to prove possession or acts of ownership or indeed any of the other established ways stated supra. In *Atanda v. Ajani* (1989) 3 NWLR (pt.111) 511, Craig JSC delivering the judgment of this court, reasoned: -

“It has been held that when a party relies on a grant and proves that grant by traditional evidence, he need not go further and prove possession or acts of ownership or any of the other four ways stated above .....

In the case of *F.M. Alade v. Lawrence Awo* (1975) 4 S.C. 215 at page 225, this court held:

“In other words, Webber J, quite rightly thought, and we agree with him that, where the other evidence of title i.e. tradition is inconclusive or entirely lacking if we may say so, then and it is only then, that the onus, of proving the facts constituting acts of ownership is thrown upon the plaintiff. That being the case, we think that the correct view of the law is that the plaintiff in a claim for declaration of title could succeed only on the basis of traditional evidence. Moreover, it seems to us that the rule in *Ita’s* case does not apply where the plaintiff relies upon and proves title by grant.’ That pronouncement represents the state of the law .... I am satisfied that a consideration of the issues of possession does not arise until the question of traditional his-

**tory has been determined.”**

**(Underlining mine for emphasis)**

**It should not be forgotten that, in the instant case, the plaintiffs/respondents claimed a declaration of title based on GRANT from Aleshinloye to Odetunde under Yoruba Native Law and Custom. Unless the origin of their title is valid, that it was established by credible evidence, even if there was copious evidence of possession, the length of possession does not ripen invalid title to a valid ownership title. This is so because a claim for declaration of title is not founded on ownership by prescription under native law and custom and it will never be; see Mogaji & Ors v. Cadbury Nigeria Ltd & Ors (1985) 7 S.C. 59. Other cases in which similar views as stated above have been expressed by this court are: Fasoro v. Beyioku (1988) 2 NWLR (pt.76) 363 and Obioha & Ors V. Duru & Ors. (1994) 8 NWLR (pt.365) 631. Before I conclude the discussion on this point, let me say that I do realise that, in substance, the findings of the court below tally with the findings of the trial court. In other words, **there are two concurrent findings of fact before us. When faced with such a situation as we do here, the general rule to be applied, which rule is longstanding is that where there are two concurrent findings of facts, as in the instant case before us, such findings will not ordinarily be disturbed by this court unless there is, ex facie, the record of proceedings substantial error which is very apparent. See Kofi v. Kofi 1 WACA 284; Chinwendu v. Mbamali & Anor (1980) 3-4 “S.C. 252. It is very much apparent from the record of proceedings that the plaintiffs/respondents failed to prove grant of land from ALESHINLOYE to ODETUNDE (which is the substratum of their case). To refuse to interfere here will, as was said in Coker v. Oguntola & Ors (1985) 6 S.C. 223, be tantamount to a substantial miscarriage of justice. It is for this crucial reason that I resolve Issue No.1 on the appellant’s brief of argument in his favour.****

**The judgments of the trial court and the court below must not be allowed to stand; they are hereby set aside while I enter an order dismissing the suit in toto.**

In view of the principles of law that I have enunciated above, I would have ended the discourse on this appeal at this point, but certain fundamental principles of law subsumed in Issue No.2 on the appellant's brief and the only issue raised by the respondents in their brief are propelling me to examine them if only for the re-statement of the area of the law concerned which does not often offer itself for consideration. More important is the principle of law stated by this court that all courts, including this court, must never leave any issue or issues raised by the party or parties to suit without hearing and determining same before concluding the case. See (1) Katto v. C.B.N. (1991) 9 NWLR (pt.214) 126 and (2) Osasona v. Ajayi & Ors (2004) 14 NWLR (PT.894) 527. For the foregoing, I shall proceed to consider the second issue raised by the appellant.

Issue No. 2 in the appellant's brief of argument raises the question as to whether the use by the court below of Exhibit 6 tendered at the trial and the conclusions reached on it were appropriate. Indeed, the only issue identified for determination by this court is whether having regard to all the circumstances of the case and in particular, Exhibit 6, this court would be justified in interfering with the decision of the court below. Exhibit 6 is the proceedings and judgment in Suit No. CV/5/80 ALLI OGUNSIJI & 8 ORS V. SALAWU ADEAGBO & 3 ORS. The claim in the said suit brought by the plaintiffs therein against the defendants jointly and severally is for a declaration under native law and custom that the plaintiffs as well as the defendants are members and/or descendants of Odetunde Family of Isale- Ijebu, Ibadan. Exhibit 6 was pleaded by the plaintiffs/respondents in paragraphs 27, 28, 29, 31, 33, 34 and 39. The purpose for which Exhibit 6 was sought to be used by the plaintiffs/respondents in the proceedings is contained in paragraph 39 which reads:-

Para 39 of the statement of Claim:

*"The plaintiffs will rely on all the proceedings and judgment pleaded and admissions contained therein as acts of ownership and possession and as estopping the defendant's vendor from disputing Odetunde's title to the land in dispute."*

The defendant/appellant disputed the afore-mentioned paragraphs off the statement of claim relating to Exhibit 6 when, in paragraph 37 of

the statement of defence, it was pleaded thus: -

*“As regards the suit quoted in paragraphs 21,22,24, 26,27 and 28 of the statement of claim, the defendant will contend at the hearing of this action that they are “res inter alios,” and are not binding and cannot bind the defendant.”*

I have gone through the briefs of both parties, none of them pointedly said Exhibit 6 was put in as res judicata although the appellant, through his brief, seemed to ascribe plea of Exhibit 6 as res judicata to the respondents. I do not think that view is correct. In paragraph 37 of the statement of defence, the appellant was very emphatic that if Exhibit 6 was of any evidential value it was not more than res inter alios..... and not binding on the defendant/appellant. **Let me quickly make a pronouncement on the term “RES JUDICATA”, it has now become well entrenched in our civil jurisprudence that once a dispute or matter has been finally and judicially pronounced upon or determined by a court of competent jurisdiction, neither the parties thereto nor their privies can subsequently be allowed to relitigate such matter in court. A judicial decision properly handed down is conclusive until reversed by a superior court and its veracity is not open to a challenge nor can it be contradicted. The term derives its force from that good public policy which says that there must be an end to litigation. The maxim is INTEREST REPUBLICAE UT SIT FINIS LITIIUM.**

Therefore, in a bid to raise objection to the jurisdiction of a particular court on the ground that the matter has once been judicially pronounced upon, the plea of estoppel per rem judicatam is there to be employed; it is there as a shield and not as a sword. I dare say that that plea is not available to a plaintiff in his statement of claim as by it, he would be impugning the jurisdiction of the court to which he has brought his action since its successful plea, would, in effect, oust the jurisdiction of the court before which it is raised. This court expounded the law on this point in Ukaegbu & Sons v. Ugoji & Ors (1991) 6 NWLR (pt.196) 124 when at page 46, Justice Babalakin JSC opined: -

B *“In my view when a party pleads a judgment as estoppel, what he is telling the court is that the court should take that judgment into consideration in considering the totality of the present case before the court. Whereas when he pleads res judicata, he is saying that although he already got judgment on the piece or parcel of land, he wants the court to adjudicate on the matter that has already been adjudicated ; upon in its favour. This is contradiction in terms — he is asking the court to judge what has already been judged .....*

C *In objecting to the jurisdiction of the court, it cannot be over-emphasised that the plea of estoppel, to be effective, must be specifically ; pleaded as going to be relied on per res judicatam and not merely pleaded in a casual manner.”*

D I have looked carefully at the statement of claim, RES JUDICATA was never specifically pleaded as required by law, if it could be pleaded in that process at all. But in the brief of the respondents, it was submitted that the paragraphs and the judgments contained in Exhibit 6 were tendered at trial as evidence of acts of ownership, which the learned trial  
E judge and the learned justices of the court below accepted them to be. And they were quick to further add that the court below, in its judgment, found that by the totality of the evidence, both oral and documentary, the plea of estoppel was successfully raised against the appellant’s vendors.  
F This can be founded on the admissions in the plaintiffs claim on Exhibit 6 that Odetunde owned the land and that it was granted to Ode. The pieces of testimonies in Exhibit 6 and upon which the respondents put up in support of their case are as follows: - one Tiamiyu Olayinka, the 7<sup>th</sup> plaintiff before the customary Court who held himself out as a member  
G of Peluola branch of Odetunde family, said: -

*“Aleshinloye family granted land to Ode, Aleshinloye family knows that Ode is our common ancestor. Aleshinloye family knows about Ode to whom land was granted.”*

H Also, Salawu Adeagbo, the 1<sup>st</sup> defendant in the customary court suit who held himself out as a member of Ode family, while giving evidence in that court said: -

*“I know Aleshinloye family. Aleshinloye family is our overlord.*

*Aleshinloye granted land to my ancestor. If the head of family dies, my family report to Aleshinloye family and a new head of family will be presented to Aleshinloye family."*

Finally on this issue, Ladejo Adeleke, the D/W3, testifying said: -

*"I am an important member of Aleshinloye family. My father Lawani Adeleke is dead. My father was Mogaji of Aleshinloye Compound. I know Odetunde family. The family lives at Isale-ljebu. Bankole Aleshinloye, our ancestor, gave the land to Odetunde, the founder of the family."*

The crux of the argument of the appellant as could be gathered from his brief is that the entire Exhibit 6 did not advance the case of the plaintiffs/respondents. The various pieces of evidence which I have reproduced supra are what the plaintiffs/respondents would like now to rely upon to prove and sustain their title to land after Tiamiyu Adeagbo the first plaintiff and their star witness had woefully failed to prove GRANT which is the root of their title. It seems to me that by that approach, they tried to take a cover under the Maxim; RES INTER ALIOS ACTA ALTER! MOCERE NON DEBET; which literally translated means that a man ought not to be prejudiced by what has taken place between others. The maxim operates to exclude all the acts, declarations or conduct of others as evidence to bind a party either directly or by inference. The court below, in making use of the testimonies, given by the aforementioned persons in Exhibit 6 said and I quote: -

*"Now can the seven vendors of appellant whose ancestors had in Exhibit 6 positively and unequivocally asserted, acknowledged and admitted Odetunde's title to the four parcels of land including the one now in dispute be permitted in this proceedings to deny Odetunde's title to the selfsame four parcels of land? This is where estoppel comes in to say NO. The appellant and his vendors are by reason of what their fathers and grandfathers had asserted, acknowledged and admitted in the previous suit Exhibit 6, barred and precluded from saying in this proceedings that Odetunde was no longer the owner of the four parcels of land and that it was one Oderinde who was now the founder and owner of the land."*

**These are the pieces of evidence given in another proceed-**

**ing, which are now being sought to support the case of the plaintiffs/respondents. It must be noted that none of Tihamiyu Layinka, Salawu Adeagbo and Ladejo Adeleke testified in the case before the trial judge. It has long been established, in law, that evidence of a witness taken in an earlier proceedings is not relevant in a later proceedings, except for the purpose of discrediting such a witness in cross-examination and for that purpose only. See Ogunnaike v. Olayemi (1987) 3 S.C. 313. The relevant provision of the Evidence Act is Section 34 (1) which provides: -**

**“Evidence given by a witness in a judicial proceeding, or before any person authorised by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the fact which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or when his presence cannot be obtained without an amount of delay or expence which, in the circumstances of the case, the court considers unreasonable**  
**PROVIDED -**

- (a) that the proceeding was between the same parties or their representatives in interest**
- (b) that the adverse party in the first proceeding had the right and opportunity to cross-examine, and**
- (c) that the questions in issue were substantially the same in the first as in the second proceeding.”**

**There is nothing on the printed evidence that Tihamiyu Layinka, Salawu Adeagbo and Ladejo Adeleke were dead, nor could not be found, nor incapable of giving evidence nor kept out of the way by adverse party. It was not even the case of the plaintiffs/respondents, who pleaded Exhibit 6 that the presence of these persons could not be obtained without some considerable delay and expense which could be adjudged to be unreasonable. None of these three comes within any of the provisos to Section 34 supra. In Ayinde & Anor v. Salawu (1989) 3 NWLR (pt.109) 297, this court per the judg-**

ment of Agbaje JSC dealing with a similar issue, reasoned:-

“In so far as Exh. A was used for the purpose of contradicting the evidence now given by the 2<sup>nd</sup> defendant in this case, Exh. A is not proof of facts contained in it, its purpose being only to impugn the testimony of 2<sup>nd</sup> defendant. At all times material to this case, the deponent in Ex. A, 2<sup>nd</sup> defendant was not dead, nor could not be found, nor incapable of giving evidence nor kept out of the way by adverse party nor could it be said that his presence could not be obtained without an amount of delay or expense which was unreasonable. In short, the conditions for the admissibility of Exhibit A as truth of the facts it states, under Section 34(1) of the Evidence Act in a later stage of the same judicial proceeding are absent here. So I agree with counsel for the defendants that Exh. A is not proof of what it says. In my judgment, therefore the Court of Appeal was wrong in using the contents of Exh. A as evidence before it.”

Other cases in which this court has made similar pronouncements are : Alade v. Aborisade (1960) 5 FSC 167; Owoniyin v. Omotosho (1961) 1 ALL N.L.R. 304. **For all I have been saying, I do not hesitate to say that Exhibit 6 is of no evidential value in this case.** Even, if I have held otherwise in respect of Exhibit 6, plaintiffs/respondents having failed woefully to establish their title by adducing credible evidence to substantiate the traditional history pleaded, an Exhibit 6 characterised by very rich evidential value would not have availed them, having regard to what I have said supra. Issue No.2 is, for the above, resolved in favour of the appellant.

In the final conclusion, it is my judgment that this appeal is meritorious. It is hereby allowed. The judgments of the trial court and the court below are hereby set aside. In their place, I make an order dismissing, in its entirety, the suit of the plaintiffs/respondents. There shall be N10,000.00 costs in favour of the appellant.

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#### KATSINA-ALU JSC

I have had the advantage of reading in draft the judgment delivered by my learned brother, Aderemi, J.S.C. I agree with it and for the reasons

he has given I too, allow the appeal. I abide by the order for costs.

### TOBI JSC

B The respondents as plaintiffs sued the appellant as defendant for declaration of title to land, damages for trespass and perpetual injunction regarding all the land at Oke-Odo Village, off Odon-Oba Area, Agbamu, Ibadan. The learned trial Judge gave judgment to the respondents. An  
C appeal to the Court of Appeal was dismissed.

The appellant has come to this court. As usual, briefs were filed and duly exchanged. The appellant formulated two issues for determination. The respondents formulated a single issue for determination.

D The crux of this appeal is whether the respondents who pleaded grant in their statement of claim, can rely on settlement as basis of title. Paragraph 3 of the Statement of Claim reads:

E *“The land in dispute formed part of a large tract of land settled upon by one Odetunde the ancestor of the plaintiffs many years ago after grant by Alesinloye during the reign of Maye after the Egbas and Ijebus have been driven away from the area.”*

As rightly pointed out by counsel for the appellant, the above paragraph is clearly a grant as the basis of title. This is because the settlement  
F came after the grant. In other words, the grant by Alesinloye of the land in dispute came first before the settlement by Odetunde.

The 1<sup>st</sup> plaintiff, Tiamiyu Adeogbo, said in his evidence in-chief on the root of title of the respondents at page 69 of the Record:

G *“My family got on the land during the Ibadan Ijebu war. Odetunde was a warrior and he was our ancestor who first settled on the land. Iba Oluyole was the reigning Olubadan at the time. It was Bankole Aleshinloye who was Balogun of Ibadan at the time told Odetunde to go and defend the land against the Ijebus. When the war was over Odetunde settled  
H their with his family and he established a village there.”*

Again, as rightly pointed out by counsel for the appellant the above  
is

“clearly evidence of acquisition of title by traditional history of

original settlement. The evidence is against paragraph 3 of the Statement of Claim, which pleaded grant. Curiously, the learned trial Judge gave judgment to the respondents based on original settlement. The Judge said at page 117 of the Record:

*“I accept the evidence of the plaintiffs that the vendors of the defendant are descendants of various guests of the plaintiffs’ ancestor, Odetunde. It is clear from the foregoing that the preponderous of credible evidence is heavily in favour of the plaintiffs and I am satisfied that the plaintiffs’ ancestor, Odetunde, originally settled on the land in dispute and the owners of the land in dispute. Plaintiffs claim therefore succeeds. The fact that the plaintiffs admit that they have sold part of the land and made grant of another portion does not prevent them from getting the declaration they want as against the defendant.”*

I say curiously because the above conclusion is not borne out from the pleadings, particularly paragraph 3 thereof. While the conclusion vindicated the evidence of the 1<sup>st</sup> plaintiff, both the evidence and the conclusion of the learned trial Judge are clearly outside the averment in paragraph 3 of the Statement of Claim.

The respondents would appear to have conceded that much in the Court of Appeal. He said in paragraph 3.01 at page 4 of the respondent’s brief in that court:

*“The respondent concedes that there is a departure from the case originally pleaded in paragraph 3 of his statement of claim wherein he pleaded settlement after grant” and led evidence of “original settlement”. The respondent will however, contend that the departure is not such as should prejudice the respondent and deprive the respondent of the judgment which he is undoubtedly entitled to on the ground that it will not be equitable, just and appropriate to deny the respondent, who undoubtedly has succeeded on the facts and on the truth, of the judgment and allow the appellant who has failed completely to prove any title or right to the land in dispute to take the land on mere technicality.”*

This is quite a new one to me. I do not think I can take it because it is not good law. The principles of equity, as recourse to principles of justice to correct or supplement the rigidity of the common law, possess-

ing the quality of mercy, with their palliative and soothing hands, are not only for one of the parties in the litigation, but for all the parties. Much as the respondents need the principles of equity to aid them, so too the appellant. Can a party who departs from his pleadings and makes a different case at the hearing really rest on equity for salvation?

The respondents referred to the departure in their brief as merely technicality. What is technicality? In *Adedeji v. The State* (1992) 4 NWLR (Pt. 234) 248, I said at page 265:

“I realise that courts of law seem to be using the word technicality out of tune or out of turn, vis-a-vis the larger concept of justice. In most cases, it has become a vogue that once a court is inclined to doing substantial justice by deflecting from the rules, it quickly draws a distinction between justice and technicality so much so that it has become not only a cliché but an enigma in our jurisprudence. In most cases when the courts invoke the substantial justice principle, they have at the back of their minds the desire to put to naught technicalities which the adverse party relies upon to drum down an otherwise meritorious case. We seem to be overstretching the technicality concept. We should try to narrow down the already onerous and amorphous concept in our judicial process. A technicality in a matter could arise if a party is relying on abstract or inordinate legalism to becloud or drown the merits of a case. A technicality arises if a party quickly takes an immediately available opportunity, however infinitesimal it may be, to work against the merits of the opponent’s case. In other words, he holds and relies tenaciously unto the rules of court with little or no regard to the justice of the matter. As far as he is concerned the rules must be followed to the last sentences, the last words and the last letters without much ado, and with little or no regard to the injustice that will be caused the opponent.”

Can respondents say with all seriousness and sincerity that ignoring the pleadings and making a different case at the hearing is a mere technicality? I think not.

This court had earlier dealt with the matter in *Kode v. Yussuf* (2001) 4 NWLR (Pt. 703) 392 where respondents applied to amend paragraph 3 of their statement of claim as follows:

*“By deleting the words “after grant by Aleshinloye during the reign of Maye” and substituting therefore the words “During the reign of Iba Oluyole” on the following grounds:*

- (i) It is to bring evidence in line with pleadings.*
- (ii) To reflect the facts established and accepted by the court,* B
- (iii) To amend all defects and errors necessary for the purpose of determining the real question in controversy between the parties.”*

The Court of Appeal refused the application on the ground that it was designed to overreach the respondent. This court agreed with the C Court of Appeal. Onu, JSC, said at page 411:

*“I cannot agree more since the ground of appeal would have overreached and been incapable of being considered again in the judgment yet to be delivered.”*

Grant and settlement mean two different things. They are not syn- D  
onyms. Onu, JSC, clearly brought out the difference in the case of Kode v. Yussuf (supra) when he said at page 409:

*“It ought to be borne in mind that this court had long before now clearly decided that there is a difference between a grant and a settle- E  
ment. For while a grant comes from a previous title holder to a subsequent one called grantee, settlement does not recognise a previous title holder. See Mogaji v. Olafa (1968) NMLR 462.”*

It is good law that parties must be consistent in presenting their F  
cases to the court. This means that the pleadings and the oral evidence should tell the same story. They should not tell different stories. The case of a party is first made in the pleadings and because the pleadings have no mouth and not the intelligence to talk, the human being who is possessed of the two narrates the content of the pleadings to the court. It is loud G  
law that parties are bound by their pleadings. What this means is that a party cannot move out of his pleadings and give evidence of facts not duly pleaded therein.

The law is not as rigid as that. Because the law recognises a pos- H  
sible lapse or failure of the human memory, it has worked out procedures for amendment of pleadings to accommodate any possible lapse or failure. But amendment of pleadings is not open ended, in the sense that an

applicant can always succeed in his application for amendment. For instance, where an application for amendment is designed to overreach the respondent, the court will not grant the application. This arises when the applicant cleverly anticipates the core of the case of the respondent and seeks the amendment to frustrate the case with the result that the respondent fails at the end of the day. An overreaching conduct is a circumventing conduct to outwit the adverse party by cunning or artifice. It is designed to defeat the object or objective of the respondent's case by going too far, in the sense of destroying the core or fulcrum of the respondent's case.

Relevantly, the respondents in paragraph 3 of the Statement of Claim pleaded and led evidence on grant as the basis of title and they could not amend that to settlement. Onu, JSC, stated this at page 409:

*"Furthermore, the appellant having led evidence following his pleading as to grant to him of the land in dispute cannot now be heard to blow hot and cold by asking to plead settlement in place of grant."*

I think I can stop here. I do not want to go to Exhibit 6. My learned brother has gone into it admirably. It is for the above reasons and the more detailed reasons given by my learned brother, Aderemi, JSC, that I too allow the appeal. Both the High Court and the Court of Appeal were wrong in their decisions. I abide by the costs awarded in the judgment of my learned brother, Aderemi, JSC.

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### MUHAMMAD JSC

I have had the advantage of reading in draft the judgment just delivered by my learned brother, Aderemi, JSC. There is no doubt that my learned brother has dealt with all the issues raised in the appeal satisfactorily. The plank of the plaintiffs claim to the land in dispute; is that it formed part of a large tract of land settled upon by one Odetunde the ancestor of the plaintiffs many years ago after GRANT by Alesinloye during the reign of Maye after the Egbas and Ijebus had been driven away from the area, (paragraph 3 of the plaintiffs' statement of claim and plan referred. Emphasis supplied by me). It is thus clear that GRANT

was the pleaded root of title for the plaintiff. On the other hand, the defendant's case on the pleadings was traditional evidence of root of the title arising from ORIGINAL SETTLEMENT by Oderinde. After taking all the evidence placed before him by the parties, the learned trial Judge evaluated the traditional evidence and arrived at the conclusion quoted B below:-

*“ It is clear from the foregoing that the preponderance of credible evidence is heavily in favour of the plaintiffs and I am satisfied that the plaintiffs ‘ancestor, Odetunde originally settled on the land in dispute C and that his descendants right up to the present plaintiffs are the owners of the land in dispute.”*

The Court of appeal, Ibadan Division, affirmed the Judgment of the trial court on the ground that it did not find any strong reason to interfere with the trial court's judgment and the appeal before it was D accordingly dismissed.

However, the 1<sup>st</sup> issue for determination before the court below as formulated by learned Counsel for the appellant both at the court below and herein, reads as follows:- E

*“1. Whether the respondents who pleaded and relied on grant by Aleshinloye as their root of title were entitled to the judgment of the court in the absence of proof of such grant.”*

In his additional ground of appeal which was numbered as ground 4, the F appellant complained to the court below that:-

*“4. The learned trial Judge erred in law by failing to dismiss the plaintiffs suit when the plaintiffs failed to prove the root of title pleaded and relied upon by them.”*

#### **PARTICULARS**

*1. The root of title pleaded and relied upon by the plaintiffs was a grant by Aleshinloye, which was not proved by evidence.*

*2. A plaintiff who pleads and on a grant as his root of title in order to H succeed is bound to prove by evidence such grant.”*

In its finding and conclusion on that issue, the court below held inter alia:-

*“At the trial the relevant oral evidence came from the 1<sup>st</sup> respon-*

dent, Tiamiyu Adeagbo. At page 69 lines 20-30 of the record he said:-

I know the land in dispute. It is Odetunde family land. The land is at Oke Ode, Agbam Road near Sango in Ibadan. The land is 150 acres. My family got on the land during the Ibadan Ijebu war. Odetunde was a warrior and he was our ancestor who first settled on the land. Iba Oluyole was the reigning Olubadan at the time. It was Bankole Aleshinloye who was the Balogun at Ibadan at the time told Odetunde to go and defend the land against the Ijebus. When the war was over, Odetunde settled there with his family and he established a village there.”

The Court below went on to observe as follows:

“Apparently because the issue was raised by Counsel for the appellant at the court below the learned trial Judge did not address it. The evidence itself is some how ambiguous. On the orders of Bankole Aleshinloye, Odetunde went into the land to defend it against the Ijebus. After the war Odetunde settled there with his family and he was the first so to do. Can this be construed to mean that Odetunde founded the land? The fact that Bankole Aleshinloye ordered him to go unto the land and defend it implies that title in the land was vested in Bankole Aleshinloye and that Odetunde settled there with his family at the end of the war after same had been granted him by Aleshinloye. I do not think the statement can be construed to mean that Odelunde founded the land. As I said the statement itself is ambiguous. However the respondent had the duty to tender clearly unequivocal evidence in support of his pleadings in paragraph 3 of the statement of claim. Because of the ambiguity I can only subscribe to the view that the evidence standing on its own was not sufficient proof of the averments in paragraph 3 of the statement of claim. Now whether that piece of evidence which failed to establish the respondent’s source of title strictly as pleaded renders his case liable to dismissal depends by and large on the entire case being tested on the imaginary scale of justice to determine the party in whose favour the evidence preponderates.”

(underlining supplied by me for emphasis)

In furtherance of the above view, the court below went on again to hold as follows:-

“There is doubt that the respondent’s oral evidence of his root of title was not strictly as pleaded in paragraph 3 of the statement of claim. That insufficiency of oral proof does not, in my consideration, reduce the full effect of the matters affirmed, admitted and established in Exhibit 6.”

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(underlining supplied for emphasis)

It is with all due respect to the court below that the elementary principle of pleadings which is still applicable in our courts is that any material, fact pleaded must be supported by evidence. Any averment in a pleading which is at variance with the evidence goes to no issue and the claim would fail and be dismissed by the court. This court has made such pronouncement of the law in several decided cases. In the case of Okhwarobo v. Aigbe (2002) 9 N.W.L.R. (pt. 771) 29 at p. 47 B-E my Lord, Igu, JSC, stated the law as follows:-

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*“There can be no doubt that the evidence of the plaintiff with regard to his root of title is completely at variance with that averred and relied upon in his pleadings. In the first place, it is a well-established principle of law that if the evidence of a party is at variance with the averment in his pleadings on a material and relevant point, the claim would fail and stand dismissed. This is because parties are bound by their pleadings and evidence which is at variance with the averments in his pleading goes to no issue and should be disregarded by the court.”*

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See further: Emegokwue vs. Okadigbo (1973) 4 SC 113, Odumosu v. ACB (1976) 11 SC 55, Njoku & Ors. v. Eme & Ors. (1973) 5 SC. 293, Mogaji and Ors. v. Cadbury (Nig.) Ltd & Ors. (1985) 2 N.W.L.R. (pt. 7) 393, Amakor v. Obiefuna (1974) 3 SC 67, Nwosu v. Otunola (1974) 4 SC. 21; Oluwi v. Eniola (1967) N.W.L.R. 339; Adebayo v. Shogo (2005) 7 N.W.L.R. (pt. 925) 467. As the main root of title pleaded by the respondents was grant, it certainly dawned on them to prove grant to their ancestor Odetunde by Aleshinloye. That is in line with the decision of this court in Odofoin v. Bello (1984) N.S.C.C 711 at 731 which has been followed in a number of decisions of this court. Just of recent, my learned brother, Ayoola, JSC had cause to quote that dictum in Odofoin’s case as follows:-

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“If a party relies oil and pleads a grant as his root of title, he is under a duty to prove such grant to the satisfaction of the trial court. Other evidence of acts of possession after the grant will merely go to strengthen the grant. But where, as in this case, the proof of the grant is inconclusive, the bottom is knocked out of the plaintiff/appellant’s claim. When his root ceases to stand, the stem and branches will fall with the root. In other words, where the radical title pleaded is not proved, it is not permissible to support a non-existent root with acts of possession, it is not permissible to substitute a root of title that has failed with acts of possession which should have derived from that root.”

Ours is an adversarial system of justice as once put by Obaseki, JSC, in *Egonu v. Egonu* (1978) 11-12 SC 111 at 130, that:-

“over the years, it is one of the repeated Catch phrases but a well settled principle of law that in a claim for declaration of title, the plaintiff must succeed on the strength of his own case (evidence) although any evidence by the defence which is favourable to the plaintiff’s case will go to strengthen the case for the plaintiff.”

It was therefore wrong of the court below to have affirmed the decision of the trial court after it was fully convinced that the pleadings on grant was at variance with the evidence given, in spite of the views expressed by the court below on Exhibit 6 (called in aid by the plaintiffs/respondents to ground a plea of *Res judicata*) when no pleading or oral evidence existed in the record to support any plea of *Res judicata*. The court below was bound to have found in favour of the appellant by allowing the appeal before it on the ground of inconsistency between the pleadings and the evidence adduced in respect of title to the land in dispute by grant. After all, the respondents before them, as is clear from the record, rejected grant as their root of title and never made out any such case of grant.

For the fuller reasons given by my learned brother Aderemi, JSC, I too dismiss this appeal. I accordingly set aside the judgments of both the trial court and the court below. I hereby dismiss the plaintiffs/respondents claim. I abide by order as to costs.

**CHUKWUMA -ENEH JSC**

I have read before now the judgment just delivered by my learned brother Aderemi JSC and I agree with his reasoning and conclusions. However, I think, I should add one or two comments of mine in support of the lead judgment. B

In the High Court, Ibadan, Oyo State, the Plaintiffs (i.e. respondents in this Court) have sued the Defendant (i.e. appellant in this Court) for a declaration to a Statutory or Customary Right of occupancy to all that piece or parcel of land edged Red on plan No.APAT/OY/06/1986 (excluding the area edged green), N10,000 damages for trespass and a perpetual injunction. Pleadings have been filed and exchanged as ordered by the trial Court; according to the record both parties have testified and called their witnesses. Having found the case in favour of the plaintiffs, the trial Court in its judgment has declared that, C D

*“the plaintiffs are entitled to Statutory Right of Occupancy to the land edged Red in Exhibit 8 excluding area edged green, subject to the Provisions of the Land Use Act 1978”* E

Accordingly, the plaintiffs have been granted N3000 as damages for trespass and a perpetual injunction, to be precise, in regard to all the land at Oke Odo village of Odo-Oba Area Agbamu Ibadan. The Defendant being aggrieved by the decision have appealed to the Court of Appeal and on his appeal to the lower Court (i.e.. Court of Appeal) being dismissed he has finally appealed to this Court by an amended notice of appeal dated 25/11/2002 and therein has raised 7 (seven) grounds of appeal from which two issues have been distilled as articulated in his brief of argument also filed in this case, to wit. F G

*“1. Whether the Court below could legitimately affirm the High Court Judgment for the Respondent on grounds expressly rejected by the Respondents themselves unsupported by any oral evidence led (which evidence conflicted with the pleadings), and never made out by the Respondents.* H

*2. Whether the Court of Appeal’s use of Exhibit 6 in this case was appropriate”*

The respondents on their part have raised in their brief of argument filed in this case one issue to wit:

*“Whether the appellant has made out any case for interference with the decision of the learned Justices of the Court of Appeal which affirmed the judgment of the learned trial judge, having regard to all the circumstances of the case including Exhibit 6?”*

The Plaintiffs (Respondents) have adopted issue 2 as framed by the Defendant (Appellant). I agree with the lead judgment that Issue 1 as formulated by the defendant and Issue 2 as formulated by the defendant and adopted by the plaintiffs will resolve this appeal.

The Defendant’s (appellant) case throughout in the lower courts and here has consistently been that the respondents (as plaintiffs) having unambiguously pleaded as in paragraph 3 of the statement of claim and having averred that they rely in regard to their root of title on traditional history as per the grant by Aleshinloye to their ancestor Odetunde, cannot now contend in the plaintiffs’ oral testimony at the trial that their ancestor Odetunde acquired title to the land in dispute by original settlement. This is the gist of the question in issue in this matter. In other words the appellants are reiterating by their case the settled principle that once pleadings have been settled and issues have been joined that the duty of the Court is to proceed to the trial of the issues; See: *The Gold Coast of Ashanti Power Development Corporation Ltd. v. The Attorney-General of Gold Coast* 3 WACA 215 and *Imana v. Robinson* (1979) 3-4 SC 1 at 8: This proposition of the law ultimately transcends another settled principle that pleadings are binding on parties and that evidence not supported by pleadings goes to no issue. In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation. See: *N.I. P.C. Ltd. v. Thompson Organization Limited* 1969 NMLR 99; *Ogiamien v. Ogiamien* 1967 NMLR 245 & *Ukaegbu v. Ugoji* (1991) 6 NWLR (Pt. 196) 127 at 156. I must state the point that the decision of the trial Court which has been affirmed by the Court below is predicated on the fact that the acquisition of the land in dispute by the

plaintiffs is by original settlement. In contrast to the foregoing plaintiffs' traditional history the defendant at the trial has testified by DW2 and I quote as at P. 86 LL 22 et seq,

*"I, know the defendant.*

*We sold out land at Oke-Ode near Sango to him.*

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*I am from Oderinde family. The name of our ancestor is Oderinde.*

*He came from Oyo Ile and settled at Isale Ijebu, Idi Areere, Ibadan.....*

*My ancestor settled on the land Oke Ode as virgin land.*

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*When he settled there he started farming ....."*

The important question in this case, therefore, is whether the lower Courts having regard to the foregoing settled principles vis-a-vis the oral testimony of the plaintiffs at the trial clearly at variance with their averment in paragraph 3 of the statement of claim, the plaintiffs' case should not have been rejected; as clearly the plaintiffs' case has apparently given way centrally. From my overview of the entire case, this case has therefore to be won and lost on the pleadings. In this regard, therefore a party's pleading ought to contain material facts upon which the party relies to support his case. The averments in the instant statement of claim contain material facts upon which the plaintiffs rely to prove their case and on paragraph 3, to the extent that the plaintiffs rely on the acquisition of the land in dispute by grant from Aleshinloye has sufficiently put the ownership of the land in dispute as a material fact in issue. This is even moreso when the defendant has denied the averments as pleaded in paragraph 3 of the Statement of Claim and has put the plaintiffs to the strict proof thereof.

To put this matter in a relative perspective let me for completeness set out verbatim paragraph 3 of the statement of claim and the plaintiffs' evidence in support thereof, which has been in the eye of the storm in this case. Paragraph 3 as per page 33 of the record is as follows:

*"3. The land in dispute formed part of a large tract of land settled upon by one Odetunde the ancestor of the plaintiffs many years ago after grant by Aleshinloye during the reign of Moye after the Egbas and Ijebus have been driven away from the land"*

The plaintiffs' testimony by P.W. 1 in regard to the above averment that is at p. 69 LL 24 -31 of the record reads as follows:

“My family got on the land during the Ibadan Ijebu war. Odetunde was a warrior and he was our ancestor who first settled on the land. Iba  
B Oluyole was the reigning Olubadan at the time. It was Bankole Aleshinloye who was the Balogun of Ibadan at the time told Odetunde to go and defend the land against the Ijebus. When the war was over, Odetunde settled there with his family and he established a village there.”

The appellant (the defendant) reaction as averred in the Statement  
C of Defence, again, if I may reiterate, has been one of denial of the foregoing paragraph 3 of the statement of claim. He has put the plaintiffs to strict proof of the averment. He also has gone along to set out in paragraph 3 of the Statement of Defence the traditional history of how his  
D ancestors acquired title to the said land in dispute by way of original settlement through one Oderinde. Thus issues have been joined between the parties. Based on the instant claim, as the plaintiffs are seeking a discretionary relief of declaration of title to the land in dispute, the burden  
E in such cases rests squarely on them as plaintiffs and is a heavy one as they must establish by evidence called by them to the satisfaction of the Court that they are otherwise entitled to such a declaration; more importantly, they must rely on the strength of their case as plaintiffs to succeed  
F and not on the weakness of the defence case that is merely to serve as a defence. And as has been decided in Alhaji Adebola Olakunle Elias v. Chief Timothy Omo-Bare (1982) 5 SC 13 and Kodilinye v. Mbanefo Odu 3 WACA 336 at 337 to the effect that where the onus of proof in such cases as here is not discharged, the weakness of defence case will not  
G help the plaintiffs' case and the proper judgment is for the defence. Meaning that in the event of the instant plaintiffs failing to discharge the onus on them in this regard their claim is bound to be dismissed outrightly.

It is clearly deducible from the foregoing extract of the oral testi-  
H mony by PW 1 that the plaintiffs have testified unequivocally as to their ancestor's acquisition of title to the land in dispute by traditional history of original settlement which is in contrast with the facts as pleaded in paragraph 3 of the Statement of Claim as per above. One thing, which is

certain in law and in fact is that the lower Courts have, all the same, found for the plaintiffs, as having acquired the land in dispute by original settlement. This cannot be right, as the parties on having filed and exchanged their pleadings in this case they are bound by their pleadings and cannot depart from them without damaging their case. Furthermore, by adducing evidence on the unpleaded fact of their acquisition of the land in dispute by original settlement, the plaintiffs have thrown to the winds tin whole essence of pleadings to avoid embarrassing and surprising of the defendant. This, no doubt has done great damage to their case as pleaded. With respect, therefore, the conclusions reached in this case by the lower Courts have no basis on the pleadings as filed and exchanged by the parties here as the plaintiffs' case as pleaded, is founded on settlement by grant and not by original settlement. In other words, the plaintiffs having put in issue the question of their ancestor's acquisition of the land in dispute by grant from one Aleshinloye and at the trial have adduced evidence of acquisition by original settlement totally at variance with their averment, their case in the circumstances is liable to be dismissed. If I must rely on legal authorities for this proposition in this regard. See: the cases of Imana v. Robinson (*supra*) and Okhwarobo v. Aigbe (2002) 9 NWLR (Pt. 771) 29 at 47 paragraphs B - E per Iguh JSC. Strangely, the lower Courts have not seen the plaintiffs' case from this perspective in spite of their findings that it has not been proved as pleaded. I shall advert to this aspect of the case anon. And even then a more fundamental defect in the plaintiffs' case as per their pleading and evidence in this case and which has damaged their case even more rendering it as baseless is their apparent failure to plead facts and lead evidence as to how Aleshinloye, their grantor acquired title to the land in dispute. This break in the chain of devolution is damaging to the plaintiffs' case. Where therefore, the line of succession is not satisfactorily traced and has gaps or nexus, which are not established as I have shown here, then such line of succession, would be rejected. See: Mogaji v. Cadbury (Nig.) Ltd. (1985) 2 NWLR (Pt. 7) 393. In other words; the origin of their grantor's title to the land in dispute has to be averred on the pleading and proved by evidence. This is so as the defendant has joined issues with the plaintiffs on their settle-

ment by grant. There is no way the plaintiffs could have secured the declarations they are seeking here without proving of their grantor's title to the land in dispute. See: *Mogaji v. Cadbury Nig. Ltd.* (1985) 2 NWLR (Pt. 7) 293 at 431; *Alhaji Adebola Olakunle Elias v. Chief Timothy Omo-Bare* (1982) 5 SC 13. There can be no doubt that the plaintiffs have failed in this respect to prove their case. They have not appreciated the heavy burden on them in matters of this nature in which they are seeking for a declaration of title to the land in dispute, the claim therefore, must fail.

B Besides, where ownership of land in dispute is in issue as here, the law has equally laid it down that the plaintiff is bound to prove ownership/entitlement thereof to the title he has put in issue in one of five ways namely:

- D (1) by traditional history;  
 (2) by production of documents of title;  
 (3) by acts of ownership over a sufficient length of time numerous and positive enough as to warrant the inference that the person is the true owner;  
 E (4) by acts of long possession  
 (5) by proof of possession of connected or adjacent land in circumstance rendering it probable that the owner of such connected adjacent land would be the true owner of the land in dispute. (See *Idundun v. Okumagba* (1976) 10 SC 227.

F The parties in this case have principally pleaded and relied on their version of traditional evidence to establish their respective titles to the land in dispute and as regards the plaintiffs it must be proved up to the hilt as they are seeking a declaratory relief in a land' matter in order to succeed. The onus of proof in this regard is as well settled in *Idundun v. Okumagba* (1976) 10 SC 227 and of which I have set out the standard of proof above and it has also settled the point that one or any combination of the five ways above would suffice to prove title to a disputed land as here.

G However, the above-cited case does not permit of a situation as where the pleaded root of title is not proved to support it as it were, with

evidence of the plaintiffs' acts of recent possession. What the lower Courts have attempted to do here is to prop up support of a non-existent root of title, by evidence of the plaintiffs' acts of possession. This they are not allowed to do. In other words, once the root of title in this case of settlement by grant is established by evidence resorting to other ways of proving ownership to land in dispute as per the five ways listed above, is simply to strengthen the said root of title. In a converse situation as I have shown above in this case a party as the plaintiffs here is not allowed to rely on evidence of any of the five ways listed above to prove title to land in dispute and use it to support an inconclusive proof of root of title. Therefore, there cannot be any doubt that the pleading of acquisition by grant and evidence of acquisition by original settlement not being coterminous are truly at variance both in meaning and legal effect. The plaintiffs in the circumstances cannot be allowed to depart from their stance on pleading acquisition by grant as their root of title for acquisition by original settlement in their evidence at the trial howbeit without amending their pleading. The rules of pleadings are as strict and fundamental as that. This proposition is further strengthened by the decision in *Kode v. Yusuf* (2001) 4 NWLR (pt. 703) 392 which case has doubly underlined the binding effect of pleadings and that one would not be allowed to depart from his pleaded facts, and in this case, if I may add, without firstly going about it by due process of amendment.

In further expatiation, I must observe that the lower Courts have not been unaware of the fatal deficiency, if I may so put it, in the plaintiffs' case here yet both lower Courts have erroneously gone ahead to support the case of the plaintiffs (respondents) firstly at the trial by relying on acts of possession being exercised on the land in dispute by the plaintiffs in recent times, that is, by supporting a non-existent root of title by grant which the plaintiffs have not proved and in the lower Court, additionally by specifically relying on a spurious issue of estoppel per rem judicatam by Exhibit 6 not otherwise even then properly pleaded to achieve the effect of ousting the jurisdiction of the Court in this case. I shall come anon to this exhibit 6.

In this regard in my respectful view I highlight the point that once

the lower Court has reached the following conclusions as at P. 183 LL 9 - 11 of the record and I quote as follows:

“Because of the ambiguity, I can only subscribe to the view that the evidence standing on its own was not sufficient proof of the averments in paragraph 3 of the I Statement of Claim”, and further at P. 191 LL 2-7 of the record to the effect that,

“There is doubt that the respondent’s oral evidence of his root of title was not strictly as pleaded in paragraph 3 of the Statement of Claim. That insufficiency of oral proof however does not, in my consideration, reduce the full effect of the matters affirmed, admitted and established in Exhibit 6”; then, the only reasonable inference to be drawn from these extracts is that the plaintiffs have failed to prove by evidence the crucial averments of their acquisition of the land in dispute by grant as averred in paragraph 3 of the Statement of Claim. The plaintiffs’ claim, therefore, stands to be dismissed and judgment entered for the defendant for their having failed to discharge the heavy onus on them in this respect as pronounced in *Kodilinye v. Mbanefo Odu* 3 WACA 336 at 337 and other numerous like cases. The trial Court also fell into the same error as the lower Court in this regard. My stance on the foregoing findings of the lower Courts is again strengthened by the decision in *Odofin v. Ayoola* (1984) NSC C (Vol. 15) 711 at 731 where the Supreme Court reasoned thus:

“If a party relies on, and pleads a grant as his root of title; he is under a duty to prove such grant to the satisfaction of the trial court. Other evidence of acts of possession after the grant will merely go strengthen the grant. But where, as in this case, the proof of the grant is inconclusive, the bottom is knocked out of the plaintiff/appellant’s claim. When his root ceases to stand, the stem and branches will fail with the root. In other words, where the radical title pleaded is not proved, it is not permissible to support a non-existent root with acts of possession, it is not permissible to substitute a root of title that has failed with acts of possession which should have derived from that root.” Per Oputa JSC.

One other implication of the plaintiffs’ evidence being totally at variance with their pleading is that it has to be disregarded by the Court.

In other words, evidence as to acquisition of the land in dispute by original settlement as given by the plaintiffs not having been pleaded goes to no issue. Again, in this respect I rely on the Supreme Court decision in the case of Okhuarobo v. Aigbe (2002) 9 NWLR (Pt. 771) 29 at 47 where it reasoned thus: ‘

“There can be no doubt that the evidence of the plaintiff with regard to his root of title is completely at variance with that averred and relied upon in his pleadings. In the first place, it is a well-established principle of law that if the evidence of a party is at variance with the averment in his pleadings on a material and relevant point, the claim would fail and stand dismissed. This is because parties are bound by their pleadings and evidence, which is at variance with the averments in his pleadings, goes to no issue and should be disregarded by the Court. And see: Emegokwue v. Okadigbo (1973) 4 SC. 113, Odumosu v. A.C.B. (1997) 6 11 S.C. 55, Kalu Njoku & Ors. v. Nkwu Eme and Ors. (1973) 5 S.C. 293, Mogaji and Others v. Cadbury (Nigeria) Ltd. And Others (1985) 2 NWLR. (Pt. 7) 393, .....and see also: Commissioner for Works Benue State and Another v. Devcom Development Consultants Ltd. & Anor. E (1988) 3 NWLR (Pt. 84) 407; Rihawi v. Aromashodun (1952) 14 WACA 204.

I am in complete agreement with the above pronouncement and I adopt it in deciding this case.

I now come to Exhibit 6. In so far as Exhibit 6 in this case comprising a compendium of record of proceedings in Suit No. CV/5/68 between Alli Ogunsiji & Ors. v. Salawu Adeagbo & Ors, is relevant to Issues one, it is my respectful view and in this respect I agree with appellant that at the trial by the High Court Exhibit 6 has not been pitched any higher than constituting evidence supporting of acts of ownership exercised by the plaintiffs on the land in dispute. The question of whether Exhibit 6 in that regard can constitute acts of ownership vis-a-vis the defence case that the proceedings comprised therein are all res inter alios and therefore not binding on the defendant has been fully considered in my discussion here in that in so far as the grant by Aleshinloye has not been proved as the plaintiffs’ root of title it is not permissible to substitute

that root of title which has not been proved with acts of ownership that should have derived from that root of title. See: *Odojin v. Ayoola* (supra).

At the Court below, the lower Court has raised Exhibit 6 to another height as constituting a plea of estoppel per rem judicatam. This is in spite of the settled principle that the plea of estoppel per rem judicatam being a shield, is never a sword and cannot be pleaded by the plaintiff. See: *Salawu Yoye the Ololu of Igboburo, Ibefun v. Lawani Olubode & Ors.* (1974) 10 SC 209 at 220 - 222. It is a fundamental error on the part of the lower Court to over look this crucial factor of res judicata. See: *Atolagbe v. Shorun* (1985) 1 NWLR (Pt. ) 560 at 7374. *Adimorrah v. Ajifo* (1983) 3 NWLR (pt. 80) 1 at 16 B - C *Aladegbemi v. Fasanmade* (1988) 3 NWLR (Pt. 81) 129 at 148D -F4 *Oshodi v. Eyiwumi* (2000) 13 NWLR (Pt. 684) 298 at 325 In the instant case, the lower Court with respect in regard to Exhibit 6 has not only failed to note the distinction but also the application of previous judgment as constituting estoppel per rem judicatam as against the use to be made of previous evidence of witnesses in the proceeding as in Exhibit 6. This is clear from the record at p. 189 LL 22-32 where the lower Court held thus:

*“No appellant and his vendors are by reason of what their fathers and grand (sic) fathers had asserted acknowledged and admitted in the previous suit Exhibit 6 barred and precluded from saying in this proceeding that Odetunde who was now the founder and owner of the land”*

To bring out this misapprehension more clearly the lower Court at the same page 189 LL8 to 14 (of the record) held that:

*“Evidence of these came from the plaintiffs themselves, who were the 4<sup>th</sup>, 6<sup>th</sup>, and 7<sup>th</sup> plaintiffs respectively. They are positive and equivocal about Odetunde’s title to the four parcels of lands.”*

It is important to note that none of the witnesses referred to in the immediate extract (above) testified in this case. Thus raising a big question mark on the evidential value of their testimonies. What I have tried to do here is to elucidate by the foregoing extracts of evidence as per Exhibit 6 upon which the lower Court has predicated its decision that they cannot ipso facto constitute estoppel per rem judicatam nor is it open in the circumstances to use those pieces of evidence as per the proceedings

in Exhibit 6 save as provided in section 34(1) of the Evidence Act 1990. This area of this case has been dealt with much fuller in the lead judgment of my learned brother, Aderemi, “JSC. Again, respectfully, therefore, Exhibit 6 a copy of the proceedings in suit No.CV/5/69 - between Alli Ogunsiji & Ors. V. Salawu Adeagbo & Ors. has unwarrantedly been B accorded the centre stage in this matter by the lower Court that it does not deserve. Respectfully, the lower Courts have wrongly applied Exhibit 6 in deciding this case.

Clearly, it cannot be said that upon the foregoing reasoning and C conclusions that the plaintiffs have established satisfactorily on their pleading and evidence their entitlement to the reliefs they are seeking here. I find no merit in their claim and I also dismiss it I abide by the order contain in the judgment of my learned brother Aderemi, JSC.

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