

SUPREME COURT OF NIGERIA
25TH JANUARY, 2008. S.C.234/2003
CORAM:- A. I. KATSINA-ALU, D. MUSDAPHER, S. A.
AKINTAN, W. S. N. ONNOGHEN, I. T. MUHAMMAD, JJSC

MADAM ABUSATU AGBOGUNLERI APPELLANT
AND

1. MR J. DEPO

2. MUSA POLYCARP

3. REV. . FR. J. KILBEY RESPONDENTS

4. MOST REV. DR. ANTHONY

OLUBUNMI OKOGIE

ESTOPPEL - Definition - Creation of can be in several ways - Three kinds recognised by common law include estoppel by record (H1)

ESTOPPEL - Res judicata - Presupposes that a final decision - On same subject matter - Cannot be contradicted by any of the parties - It arises under about three given situations (H2)

ESTOPPEL - Res judicata - Estoppel by record - Judgments in personam - Meaning - For plea of estoppel by judgment to succeed - Defendant will show inter alia - Sameness of subject matter (H3)

ACTIONS - Privy - Definition - It is a person whose title is derived from a party - Or identity of successive persons having interest in property - There are three kinds of privies (H4)

ESTOPPEL - Title - Privity - Parties - Any person who derives title or claims under the actual representor - Is bound by consequent estoppel - Parties are the same in both suits in this matter (H5)

ESTOPPEL - Res judicata - Sameness of subject matter - Correct findings of trial court confirmed by the Court of Appeal - That the land in dispute is same - Will not be disturbed (H6)

COURTS - Judgments - Jurisdiction - When a court is said to be

competent - Includes when it is properly constituted - Previous decision binds present appellant - Who is deemed to be a privy (H7)

ESTOPPEL - Res judicata - Conclusive nature of the judgment - Applies in this case - In justification of plea of estoppel - As rightly held by lower courts (H8)

FACTS

Before the Lagos State High Court, plaintiff/appellant instituted an action against the defendants/respondents. She claimed entitlement to Statutory Right of Occupancy, perpetual injunction and N1,416,000.00 special and general damages in respect of the land in dispute. Respondents denied the claim while 4th respondent filed a counter claim for the total sum of N4 million as special and general damages. Appellant called 3 witnesses and respondents called 6 in support of their respective claims.

The trial court dismissed the appellant's claim, found in respondents' favour and awarded to 4th respondent the sum of N1,510,000.00 as special damages. It upheld respondents' plea of estoppel by virtue of a previous judgment. Appellant appealed to the Court of Appeal which allowed her appeal partially. It affirmed dismissal of the claim but awarded only N10,000.00 as damages. Still dissatisfied, appellant has further appealed to the Supreme Court.

ISSUE FOR DETERMINATION

"Whether the Court of Appeal was right in upholding the finding that the appellants are estopped by judgment in ID/199/81, (Exhibit DIB at the trial)."

HELD (Unanimously dismissing the appeal per **MUHAMMAD JSC**)
ESTOPPEL - Definition

1. Estoppel, generally, is that doctrine where a party is not allowed to say that a certain statement of fact is untrue, whether in reality it is true or not. It is therefore a disability whereby a party is precluded from alleging or proving in legal proceedings that a fact is otherwise than it has been made to appear by the matter giving rise to that disability.

Estoppel can be created in several ways. The Common law

recognizes three kinds:

- (1) Estoppel by record or quasi by record
- (2) Estoppel by deed and
- (3) Estoppel in pais. (p. 132 A)

Res judicata arises under about three given situations

2. The one that concerns us in this appeal is estoppel by record or quasi by record. It is more popularly known as Estoppel per rem judicatam. It presupposes that a final decision of a court of competent jurisdiction once pronounced between the parties cannot be contradicted by any of such parties in any subsequent litigation between them respecting the same subject matter.

It arises in the following situations:

(1) where an issue of fact has been judicially determined in a final manner between the parties by a court/tribunal having Jurisdiction, concurrent or exclusive, in the matter and the same issue comes directly in question in subsequent proceedings between the same parties. (cause of action estoppel).

(2) where the first determination was by a court having exclusive jurisdiction, and the same issue comes incidentally in question in subsequent proceedings between same parties (issue estoppel)

(3) in some cases where an issue of fact affecting the status of a person or thing has been necessarily determined in a final manner as a substantive part of a judgment in rem of a court/tribunal having jurisdiction to determine that status and the same issue comes directly in question in subsequent proceedings between any parties whatever. (see paragraphs 952 and 953 of Halsbury's Laws of England Vol. 16, Fourth edition). (p. 132 C)

Judgments in personam - Meaning

3. Where the earlier decision being relied upon by a party to disable the other party from alleging or proving in legal proceedings that a fact is otherwise than it has been made to appear by the matter giving rise to that disability, such as in the present appeal, the judgment delivered earlier by Desalu, J, (of blessed memory) then that decision can create estoppel by record. Such judgments are known as "judgments in personam or inter parties or res judicata. They are

those which determine the rights of parties as between one another to or in the subject matter in dispute, whether it be corporeal property of any kind whatever or a liquidated or unliquidated demand, but which do not affect the status of either persons, or things, or make any disposition of property or declare or determine any interest in it except as between the parties in litigation. They include all judgments which are not judgments in rem.

In order to succeed on the plea of estoppel by judgment, it is necessary for the defendant to show:-

(1) the subject matter in dispute is the same namely that everything that is in controversy in the second suit as the foundation of the claim for relief was also in controversy or open to controversy in the first suit.

(2) it came in question before a court of competent jurisdiction. See *Cardoso v. Daniel* (1986) 3 NWLR (Pt.20) 1, and

(3) the result was conclusive so as to bind every other court. (p. 133 E)

ACTIONS - Privy - Definition

4. But, who is a privy? In *Arabio v. Kanga* (1932) 1 WACA 253 at p. 254, a privy was defined as that person whose title is derived from and who claims through a party. It may also imply identity of successive interest or persons having interest in property. There are said to be three kinds of privies:

- (a) privies in blood, such as testator and heir
- (b) privies in law such as testator and executor or in the case of intestate succession, a successor and administrator.
- (c) privies in estate, such as vendor and purchasers; lessor and lessee etc. (p. 135 G)

ESTOPPEL - Title - Privity - Parties

5. The learned trial judge in the second suit (now under appeal) based her decision on the privity established between the appellant and his predecessors in the title to hold that she was bound by the decision of Desalu, J., (late) so, the case of the appellant here is privity by successive interest as Mr. Obe, who was the plaintiff in the first suit claimed that he derived his title from the Agbogunleri family,

whose claim against the church which acquired its interest from the same family for over 20 years before he came on the scene, failed. Therefore, judgment against a testator operates downstream as the first suit ID/199/81, to operate against any fresh claim in respect of the same land or property by the same parties. This has been the position of the law for quite sometime. Thus, the general principle of the law relating to privity in title is that in transactions relating to land, any person who derives title from or takes an assignment from, or is let into possession by, or otherwise claims or "comes in" under the actual representator, is bound by the same representation, and consequent estoppel, as that which binds such actual representator. B
C

There is no way I can brush aside the submission of learned counsel for the respondents and the conclusion reached by the learned trial judge, affirmed by the lower court on the issue of parties, that the parties, on the principle of privity of transactions are from all intents and purposes, the same in both suits. Each of the parties from both sides must bear the consequence of his/its predecessor in title and be bound by it. (p. 137 E) D

Res judicata - Sameness of subject matter E

6. The second requirement in sustaining a plea of estoppel by judgment is that the subject matter in dispute must be the same in the previous suit and the suit in litigation at the time the plea was raised. In the appeal on hand, learned trial judge found from the pleadings of the parties that there was no dispute that the land in dispute was the one situate at 17, Old Abeokuta Motor Road, Isale Oja, Agege (page 192 of the record). She also found and held as follows: F

"I am satisfied that the subject matter in both suits are (sic) the same that is the land situate lying and being at No 17, Old Abeokuta Motor Road, isale Oja, Agege." G

The lower court agreed with that finding. I have no reason to tamper with the concurrent findings of the two lower courts. I affirm same that the said land is the same land in litigation in both suits, i.e. the land situate, lying and being at No 17, Old Abeokuta Motor Road, Isale Oja, Agege. It was this land that was in real controversy. It has same identity in both suits. (p. 138 D) H

COURTS - Judgments - Jurisdiction

7. A court or tribunal is said to be of competent jurisdiction if it is established by law as against a Kangaroo's court. It is presided by a person competent in all respect and has the authority to adjudicate disputes in that court. It has for long been settled that a court is said to be competent when:

(1) it is properly constituted with respect to the number and qualifications of its members and none of the members is disqualified for any reason,

(2) the subject matter of the dispute is within its competence and jurisdiction,

(3) the action is initiated by due process of law and not in abuse of the court's process and,

(4) any condition precedent to the exercise of its jurisdiction has been fulfilled. The first High Court, i.e. the one presided by Desalu, J., came about by constitutional provisions. So also the appointment of Desalu, as it's Judge. Thus, whatever decision is handed by that court is a decision given by a court of competent jurisdiction and remains binding on parties to it. The decision in suit ID/199/81 of 3rd June, 1988, must remain binding, on parties to it until set aside by a higher court. I therefore, affirm that the decision in suit ID/199/81 binds the present appellant as he was privy or deemed to be privy to it. I say no more on this condition. (p. 139 A)

Res judicata - Conclusive nature of the judgment

8. The last condition for the application of estoppel by judgment is the conclusive nature of the judgment. I readily find answer to that from the trial court's judgment. The learned trial judge held:

"I therefore hold that the plaintiff herein is bound by the judgment of Desalu, judge, in suit ID/199/81, and is estopped from litigating the same issue which was conclusively determined in that suit." (underlining for emphasis)

The court below affirmed this decision. I too affirm the decision and would not venture to enter into academic rigmarole.

Finally, I find no merit in this appeal and I hereby dismiss same. I affirm the lower court's decision. (p. 139 G)

NOTABLE POINTS OF INTEREST
ONNOGHEN JSC

1. Res judicata - Finality of a judgment - Is not altered by pending appeal

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

A decision of a court is said to be final when it finally disposes of the rights of the parties. For instance, if the judgment/decision/order given by the court is such that the matter in controversy between the parties would not be brought back to the court for further adjudication, in such a case, such a decision or order is said to be final. In the instant case it is my considered view that the decision in ID/81/1991, was a final decision because it determined the issue in controversy between the parties. It does not matter whether one of the parties decided to appeal against that decision as such an appeal, for the purpose of res judicata does not derogate from the finality of the decision by the trial court with competent jurisdiction. The submission of learned counsel for the appellant as to the finality of the earlier decision purportedly on appeal is erroneous. A final judgment is therefore one which puts an end to an action by declaring that the plaintiff is or is not entitled to judgment on the reliefs claimed in the action so that nothing else is left to be done except to execute the judgment. The finality of a judgment for the purposes of res judicata is therefore viewed in contradistinction with an interlocutory judgment. A final judgment for that purpose is also known as an appealable judgment; definitive judgment or final decree. (p. 146 D) D
E
F
G

2. Res judicata if upheld - Merit of case need not be considered

I however, have to observe that it would not have been necessary to go into the merits of the appeal before the lower court if that court had preceded the determination of that appeal with the resolution of the issue of res judicata since a positive resolution of same would H

have made it unnecessary for the court to go on to consider the issue as to whether there was a valid sale of the land in dispute to the respondents by the ancestor of the appellant - a matter dealing with the merits of the appeal. An issue of *res judicata* is like a question of jurisdiction, which ought to be considered first before proceeding, where need be, to determine the merit of the case. They are both, peripheral matters. If that approach had been adopted in the instant case the error would not have been committed. In any event, once it is held that *res judicata* applied, the earlier finding on sale becomes superfluous and of no moment in my considered view. (p. 148 D)

REPRESENTATION

Chief Bisi Adegunle, Appellant

Chief Mary M. Bassey, for the Respondents

D

CASES REFERRED TO

Arabic v Doku Kanga (1932) 1 WACA 253 at 254

Akande v Alaga (1988) 4 NWLR (Pt.86) 1 SC

Ebuaku v Amala (1988) 2 NWLR (Pt.75) 128 at 130

E Oye v Olubode & Ors (1974) NSCC (Vol.9) 409 at 413

Adebayo v Babalola (1995) 7 NWLR (Pt.408) 383 at 390

Kparsanaqi v Shabako (1993) 5 NWLR (Pt.291) 67 at 70

Chiakpa & Anor v. Nduka & ors' (2001) 11SCM, 16 at 18

F Rossek v ACB & 4 ors (1993) 8 NWLR (pt 312) 382

Nwosu v Udeaja (1990) 1 NWLR (Pt.125) 188

Tylor v Needham (1810) 2 Taunt 279

Shonekan v Smith (1964) 1 NLR; 168

Mohafe v Esekhome (1993) 8 NWLR (Pt.309) 58.

G Mohafe v Esekhome (1993) 8 NWLR (pt. 309) 58 at 67 - 68

STATUTE REFERRED TO

Evidence Act s. 54

H BOOK REFERRED TO

Halsbury's Laws of England vol. 16 4th Ed. para. 952 & 953

LEAD JUDGEMENT BY MUHAMMAD JSC

From the pleaded facts of her statement of claim, the plaintiff, one Madam Abusatu Agbogunleri was the head of Agbogunleri family of Agege. She instituted the suit giving rise to this appeal before the Lagos High Court of Justice, on her own behalf and on behalf of the Agbogunleri family making the following claim against the defendants: B

(1) A declaration that Agbogunleri family is the person entitled to statutory right of occupancy in respect of the land situate, lying and being at No 17, Old Abeokuta Road, Isale Oja, Agege.

(2) Perpetual injunction restraining the defendants jointly and severally from committing further act of trespass on the plaintiff land. C

(3) Special and general damages as follows:-

i. Seven thousand 6x6x18 vibrated cement blocks at N25
N175,000.00

ii. Six thousand 9x9 x18 vibrated cement blocks at N35
N210,000.00 D

iii. Three hundred of cement at N450 per bag
N135,000.00

iv. Three tones of iron rod at N15.000 by tones N
135,000.00 E

v. Forty lorry loads of graves at N3, 000 per load N 1 2 0 ,
000.00

vi. Thirty lorry of loads of sharp sand at N1.500 N 4 5 ,
000.00 F

vii. Filling sand, twenty lorries load at N800 per load
N16, 000.00

viii. One hundred boundless roofing sheets N200,000.00

ix. Wiring and other electrical materials N80, 000.00

Total N916,000.00 G

Grand damages N500,000.00

Grand Total N1,416,000.00

Save and except where the defendants specifically admitted, they denied in their statement of defence each and every allegation of facts made in the plaintiff's statement of claim. The 4th defendant indorsed a counterclaim against the plaintiff as follows: H

1. General damages for trespass on the 4th defendant's land in January 1996, N500, 000.00

2 Special damages for vandalizing and demolishing St. John's Church (Mud) in June, 1996, N200, 000.00

3. For the sum paid to Stevak Enterprises for construction work in advance per receipt N1, 500,000.00

4. The 4th defendant claims the sum of N3,500,000.00 as
B special above and N500,000.00 as general damages.
Total N4, 000,000.00 (Four Million Naira).

The plaintiff sought for and was granted extension of time by the trial court to file his reply to the defendant's statement of defence and the counter - claim set out in it. In that reply plaintiff set out her
C defence to the counter-claim.

At the trial the plaintiff called three witnesses in support of the plaintiff's claim. The defendants called six witnesses. In her judgment the learned trial judge Kekere - Ekun, J. dismissed the claims of the
D plaintiff. The counter-claim of the 4th defendant succeeded and the 4th defendant was awarded the sum of N1,510,000.00 as special damages. Dissatisfied with that decision, the plaintiff appealed to the Court of Appeal, Lagos Division (court below).

In the court below, the appeal was partially allowed. Judgment
E of the trial court dismissing the plaintiffs claim was affirmed. The award of N1, 510,000.00 as special damages was set aside. N10,000.00 was awarded as damages.

Dissatisfied further, the plaintiff appealed to this court on two
F grounds of appeal set out in the Notice of Appeal.

Briefs of arguments were settled by the parties.

In her brief of argument which was adopted by her learned counsel, the plaintiff, now appellant herein, formulated a sole issue for the determination of this court. It reads as follows:

G *"Whether the Court of Appeal was right in upholding the finding that the appellants are estopped by judgment in ID/199/81, (Exhibit DIB at the trial)."*

Learned counsel for the defendants but now respondents, initially formulated four issues for determination. On the hearing date
H however, he sought for and was granted leave to abandon three of the issues which, together with arguments preferred in respect thereof, were struck out accordingly. The subsisting issue for the respondents reads as follows:

"Whether the Court of Appeal was right in upholding the findings of the Court of 1st instance in respect of an earlier Suit No ID/199/81 (Exhibited as D1 at the trial) having regard to the fact that the matter had been adjudicated upon and determined by a Court of competent jurisdiction and as such the Appellant is estopped by the principle of estoppel per-rem judicatem from re-litigating on same." ^B

Some of the points raised by learned counsel for the respondents in respect of which a reply brief was filed by learned counsel for the appellant were conceded by the respondents. The respondents accordingly had such points struck out e.g. issues 1, 3 and 4 of their ^C brief of argument.

In his submission on the sole issue, learned counsel for the appellant devoted some time in defining and expatiating on the doctrine of estoppel per res-judicata. He submitted that both the Court of Appeal as well as the trial court was wrong in holding that the ^D parties were the same on the footing that the parties in the present suit are privies of the parties in the earlier suit. He argued further that as a general rule, no person is to be adversely affected by a Judgment in an action in which he was not a party because of the injustice in deciding a matter against him in his absence unless he is a privy to ^E a party in which he is equally bound as the parties and is estopped by res judicata or he has so acted to preclude himself from challenging the Judgment in which case he is estopped by conduct. Learned counsel contended that case of the respondent is not that the appellant ^F has conducted herself in any manner that would warrant the coming into play of the doctrine of estoppel by conduct. There is no allegation that appellant was aware of the prosecution of suit ID/199/81 or that she stood by. The respondents' case is that the appellant here is the privy of the plaintiff in ID/199/81. ^G

Learned counsel for the appellant stated the classification of privies in general. He submitted that an admission by a predecessor in title binds his successors provided it affects the title and is made during the predecessors interest. The reverse, he argued, cannot be the position. He put his arguments in other words, that an admission ^H by a successor in respect of the title cannot bind his predecessor for the simple reason that the interest of the predecessor must have become spent at the time of such admission by the successor. There, is

no longer any identity of interest. In the same manner the binding effect of the doctrine of estoppel in relation to privies operates down stream. Judgment against an ancestor in relation to the title will operate to bind his heir, not the other way round.

Learned counsel for the appellant stated further that a privy is
 B a person whose title is derived from and who claims through a party. He cited and relied on the case of *Arabic v Doku Kanga* (1932) 1 WACA 253 at 254. Learned counsel went on to explain further what he means. He stated that a judgment against a testator will bind his
 C heir. A judgment against an heir cannot bind a testator. The simple reason being that the testator would have passed out of the scene. Similarly, a judgment against a vendor affecting the property will bind the purchaser. It cannot be the other way round because the vendor
 D would have ceased to have any interest and there would be no identity between the purchaser and the vendor. Cases of *Akande v Alaga* (1988) 4 NWLR (Pt.86) 1 SC; *Ebuaku v Amala* (1988) 2 NWLR (Pt.75) 128 at 130; were cited in support of that submission.

It was contended for the appellant that the appellant did not derive her title from the party in suit ID/199/81 as the title of
 E Agbogunleri family has long been vested before the institution of suit ID/199/81 and judgment on it cannot operate as an estoppel against the Agbogunleri family. Another reason why that judgment cannot operate as estoppel is that although the land in dispute in the
 F earlier case is the same land in dispute, the issue was completely different. The matter which came directly for decision in the earlier case was as to the ownership between Mr. Moris Obe and the Catholic Church. That issue is quite different from the issue of ownership
 G between Agbogunleri family and the Catholic Church. Mr. Moris Obe could not have been fighting the cause of the plaintiff in this case when he was making a claim for himself. Consequently, the plaintiff could not be accused of allowing someone to fight their battle for them. The direct issue decided in suit ID/199/81 was the ownership
 H between Moris Obe and the Catholic Church mission. Thus the 2nd condition for sustaining estoppel per-res judicata could not be fulfilled.

Another condition not fulfilled by the respondents according to respondent's counsel was that the judgment relied upon must be a

final judgment of a competent court. The onus of establishing that rests on the party seeking to rely on the judgment as estoppel. - Learned counsel cited the case of *Oye v Olubode & Ors* (1974) NSCC (Vol.9) 409 at 413. Learned counsel argued that as the judgment sought to be relied upon to found estoppel per rem -judicata was appealed against there was no credible evidence as to the outcome of the appeal and evidence shows the appeal is still pending. The Judgment, he submitted, could not be said to have decided the issue to finality and the judgment is incapable of being used to estop the plaintiff. This court is finally urged to allow this appeal and give judgment in favour of the plaintiff.

In his submissions, learned counsel for the respondents stated that the appellant has correctly stated the position that the plaintiff in suit No. ID/199/81 are the same as the present plaintiff i.e. appellant before this court and by virtue of the principle of estoppel per-rem judicata cannot relitigate the issues afresh. Appellant also correctly identified the situation of the appellant as one of privity by successive interest. The findings of the court in suit No ID/199/81 bind any successive claim in respect of the same subject matter. Obe the plaintiff in the said suit No ID/199/81 claimed that he derived his title from the Agbogunleri family, whose claim failed against that of the church who had acquired their interest from the same family for over 20 years before he (appellant) came on the scene. Thus, judgment against a testator operates downstream as in the-earlier judgment in suit No ID/199/81 operating as against the fresh case in respect of the same land by the same parties. Contended further for the respondents is that the parties in the suits are the same, the land is the same and the judgment relied upon i.e. suit No ID/199/81 was a final judgment of a competent court i.e. the High Court of Ikeja, Lagos State. Learned counsel cited and relied on several authorities including: *Adebayo v Babalola* (1995) 7 NWLR (Pt.408) 383 at 390; *Kparsanaqi v Shabako* (1993) 5 NWLR (Pt.291) 67 at 70; *Chiakpa & Anor v. Nduka & ors'* (2001) 11SCM, 16 at 18. *Rossek v ACB & 4 ors* (1993) 8 NWLR (pt 312) 382.

Learned counsel for the respondents submitted that a privity is a person whose title is derived from and who claims through a party. He went on to categorize privies. He finally urges this court to dismiss the

appeal and affirm the concurrent decisions of the two courts below.

Permit me my Lords, to set out the background facts of this appeal, for the sake of clarity, before I embark on any meaningful discussion of the issues raised and argued above by the parties to this appeal.

B In her statement of claim, the plaintiff averred that she is the head of Agbogunleri family and institutes this suit and prosecutes it for and on behalf of the Agbogunleri family of Isale Oja, Agege, Lagos state. It was also averred that the land which is the subject matter of the suit is situate, lying and being at 17 old Abeokuta motor Road C Isale Oja Agege and formed part of a vast parcel of land owned by Agbogunleri family. It was further averred by the appellant that the land originally belonged to the Ewu family which-exercised various rights of ownership thereon including the cultivation of cash crops, D gathering of fruits and the cultivation of cocoa and kolanut trees. The Ewu family was said to have sold the piece or parcel of land in dispute to Fadunsi Agbogunleri (The founder of Agbogunleri family and plaintiffs grand father). He had been in possession of the said parcel of land from 1906 until his death in 1939. Upon the death of Fadunsi E Agbogunleri, the land devolved upon his children by native law and custom. Paragraphs 14, 15 and 17 traced the succession to the land by subsequent generations of the Agbogunleri family up to the present plaintiff/appellant.

F It was averred by the appellant that one Mr. Obe rented the land in dispute and he used to pay rent regularly to Agbogunieri family and that he was issued with receipts. Averred further is that Mr Obe erected a mud house on the land which he later converted to a church. He continued to pay his rent until the church vacated the G land. After the church vacated, Mr Obe began to default in payment of rent that led to the Agbogunleri family to recover part of the land.

The appellant averred as per paragraphs 26 and 27 of the statement of claim that the Agbogunleri family erected a three bedroom structure on the land as family house. Early in 1996, the defendants/respondents began trespassing on the land and destroyed H structures which had been put there by the Agbogunleri family.

The defendants joined issues with the plaintiff on most of the averments in the statement of defence. In paragraphs 4 and 5 of the

statement of defence, the defendants admitted that the land in dispute originally belonged to Agbogunleri family. It was averred by the defendants that an area measuring 200ft x 200ft was sold to the authority of the Roman Catholic Church in 1936 vide receipt dated 4th of August, 1936 which land became vested by succession (to ecclesiastical) in the 4th defendant since 1934. The 4th defendants predecessor in title had caused the area of the land purchased to be occupied by his church with a mud church built thereon in 1936 and surveyed in 1935. The defendants averred that they were not aware of suit AB/224/56 pleaded by the plaintiffs and that until these proceedings the Agbogunleri family had never challenged nor instituted any legal proceedings against the defendants. The defendants pleaded long possession, acquiescence, standing by and laches. They pleaded also that the land was not let to Mr. Obe by the plaintiff's predecessor in title but that she purported to sell it to him as per the evidence of Mr. Obe in suit ID/199/81 against the 4th defendant and others. That judgment in the suit was entered in favour of the 4th defendant against Mr. Obe and contended that Agbogunleri and Mr. Obe's vendor are estopped from denying the judgment in that suit. Any land recovered from Mr. Obe by Agbogunleri family cannot be the land in dispute. Defendants/respondents averred that some vandals had demolished the mud church and further that after the foundation stone of the plot had been laid, the church discovered that the plaintiff and her thugs had disturbed the workers on the site. That was why the defendants in their counter claim claimed special damages for the vandalisation and demolition of St. John's Church in 1997 and for the amount paid to contractor for construction work in advance. The defendants averred further that the plaintiff had no claim or interest on the land in dispute having been divested of all claims and interest since 1936 when the 4th defendant and his predecessors in office and title became the owners thereof by purchase from the plaintiff's family or in the alternative, by long possession, laches, standing by and acquiescence.

The plaintiff replied to some of the issues raised in the statement of defence and the counter-claim.

In consideration of the sole issue formulated for the determination of this appeal which is on estoppel by Judgment, it is pertinent

for me to state that ***estoppel, generally, is that doctrine where a party is not allowed to say that a certain statement of fact is untrue, whether in reality it is true or not. It is therefore a disability whereby a party is precluded from alleging or proving in legal proceedings that a fact is otherwise than it has been made to appear by the matter giving rise to that disability.***

Estoppel can be created in several ways. The Common law recognizes three kinds:

- (1) Estoppel by record or quasi by record***
- (2) Estoppel by deed and .***
- (3) Estoppel in pais***

The one that concerns us in this appeal is estoppel by record or quasi by record. It is more popularly known as Estoppel per rem judicatam. It presupposes that a final decision of a court of competent jurisdiction once pronounced between the parties cannot be contradicted by any of such parties in any subsequent litigation between them respecting the same subject matter.

It arises in the following situations:

(1) where an issue of fact has been judicially determined in a final manner between the parties by a court/tribunal having Jurisdiction, concurrent or exclusive, in the matter and the same issue comes directly in question in subsequent proceedings between the same parties. (cause of action estoppel).

(2) where the first determination was by a court having exclusive jurisdiction, and the same issue comes incidentally in question in subsequent proceedings between same parties (issue estoppel)

(3) in some cases where an issue of fact affecting the status of a person or thing has been necessarily determined in a final manner as a substantive part of a judgment in rem of a court/tribunal having jurisdiction to determine that status and the same issue comes directly in question in subsequent proceedings between any parties whatever. (see paragraphs 952 and 953 of Halsbury's Laws of England Vol. 16, Fourth edi-

tion).

There is a finding by the learned trial judge that the parties joined issue on whether the Agbogunleri family is bound by the judgment of Desalu, J. in suit No ID/199/81 as privies therein, i.e. whether the doctrine of estoppel per rem judicatam applies. At page 223 of the record, the learned trial judge held as follows: B

"I therefore hold that the plaintiff herein is bound by the judgment of Desalu Judge in suit ID/199/81 and is estopped from re-litigating the same issue which was conclusively determined in that suit." C

After quoting extensively the holding of the learned trial judge on the reliance placed by the defendants on the judgment in suit No ID/199/81. as estoppel per res judicata in their favour against the plaintiff, the lower court was of the view that the learned trial judge was right in her conclusion and the plaintiffs case ought to have failed as it did. D

Is the lower court justified in affirming the decision of the trial court especially when both courts below found the plea of res judicata raised by the defendants/respondents valid?

To answer this question, there is need for me to go through the full scope of estoppel by record. ***Where the earlier decision being relied upon by a party to disable the other party from alleging or proving in legal proceedings that a fact is otherwise than it has been made to appear by the matter giving rise to that disability, such as in the present appeal, the judgment delivered earlier by Desalu, J, then that decision can create estoppel by record. Such judgments are known as "judgments in personam or inter parties or res judicata. They are those which determine the rights of parties as between one another to or in the subject matter in dispute, whether it be corporeal property of any kind whatever or a liquidated or unliquidated demand, but which do not affect the status of either persons, or things, or make any disposition of property or declare or determine any interest in it except as between the parties in litigation. They include all judgments which are not judgments in rem.*** E F G H

In order to succeed on the plea of estoppel by judg-

ment, it is necessary for the defendant to show:-

(1) the subject matter in dispute is the same namely that everything that is in controversy in the second suit as the foundation of the claim for relief was also in controversy or open to controversy in the first suit.

B (2) it came in question before a court of competent jurisdiction. See Cardoso v Daniel (1986) 3 NWLR (Pt.20) 1; and

(3) the result was conclusive so as to bind every other court. See; Cardoso v Daniel (supra)

C The judgment which was pleaded by the respondents as res judicata against the claim of the appellant is the judgment delivered-by-Desalu, J. (late) it came about as a result of Suit No ID/199/81. The parties therein were:

D Morris Akinola Obe
Plaintiff

AND

Parish Council St. John's
Catholic Church, Agege

E Archbishop Anthony Olubunmi Okogie
Rev, L. R. J. Hannon S. M. A
Defendants

This was in suit No ID/199/81 which was pleaded and tendered in Evidence.

F In the suit giving rise to this appeal the parties are:

Madam Abusatu Agbogunleri Plaintiff
AND

Mr. John Depo

G Mr. Musa Polycarp
Rev. Fr. John Kilbey

Most Rev. Dr. Anthony Olubunmi Okogie (joined as a defendant by trial court's order of 20/6/1997)

H The various positions or status of the parties mentioned in suit No ID/199/81 are that the plaintiff, Mr. Obe, instituted the action against the defendants therein seeking declaration that he was the person entitled to the statutory right of occupancy in respect of the land in dispute which was situate, lying and being at Gbogunleri quarters of

Agege township along Agege motor road, sworn on plan No L&L/C2669 as Church (mud) edged red, also known-as-17 Abeokuta motor road, Agege, by virtue of Deed of Conveyance dated 9/9/65 between himself and Madam Adenrele Gbogunleri, the grandmother of the plaintiff in the second suit. It was in evidence before the first trial court that the land in dispute was purchased by Fadunsi Gbogunleri, (ancestor to plaintiff in the second suit) and that the Gbogunleri family had remained in undisturbed possession from 1906 till 1996 when the defendants allegedly trespassed on the land. It was also in evidence that succeeding generation of the Agbogunleri family inherited the land and the plaintiff in the second suit is presently the head of the family.

The plaintiff in the first suit claimed title through Aderenle Gbogunleri, the grandmother of the plaintiff in the second suit. The learned trial judge in the second suit found the plaintiff in that suit to be a privy of the plaintiff in the first suit (page 222 of the record). Thus, the learned trial judge concluded in the following words:

"I therefore hold that the parties in the two suit (sic) are the same." In both suits Most Rev. Dr. Anthony Olubunmi Okogie was sued, according to the finding of the trial court, in his capacity as the Archbishop of the Roman Catholic Archdiocese of Lagos and as the sole trustee in whom all the lands of the Archdiocese are vested by succession and acquisition. He was joined as a defendant in the second suit by order of court, the other defendants in the first and the second suits were sued as members of St. John's Catholic Church, Agege. It is because of the contractual relationship that was existing between the plaintiffs predecessors in title and the defendants that is why the learned trial judge found the appellant to be in privity of the transaction and bound by the judgment in the first suit.

But, who is a privy? In Arabio v Kanga (1932) 1 WACA 253 at p. 254, a privy was defined as that person whose title is derived from and who claims through a party. It may also imply identity of successive interest or persons having interest in property. There are said to be three kinds of privies:

- (a) privies in blood, such as testator and heir***
- (b) privies in law such as testator and executor or in the case of intestate succession, a successor and adminis-***

trator.

(c) privies in estate, such as vendor and purchasers; lessor and lessee etc. see *Nwosu v Udeaja* (1990) 1 NWLR (Pt.125) 188

B In Exh. DIB, i.e. the judgment of Desalu J; which was pleaded and tendered in evidence before the trial court, the learned trial judge in evaluating the evidence before him, made the following findings:-

C *"The plaintiff admits the land in dispute originally belonged to Gbogunleri, the fore bear of the vendor of the plaintiff Madam Gbogunleri Adenrele.*

The case of the defendant on the other hand is that the Roman Catholic Mission bought the land in dispute as per the purchase-receipt, Exhibit "K" bearing date the 4th day of August, 1936.

D *The 2nd defendant contended that the Roman Catholic Church was put in possession of the land purchased which includes the land in dispute.*

It was contended the land so purchased measured 200 feet by 200 feet and that the land in dispute forms a portion to the North Western portion thereof, see the compilation plan, Exhibit "L".

E *The 2nd defendant claims to have bought the land from Gbogunleri, the father of Madam Aderenle Gbogunleri the vendor of the plaintiff. In support, Exhibit "K" the purchase receipt was tendered.*

F *No evidence was adduced to invalidate the purchase receipt Exhibit "K".*

G *I prefer and believe the testimony of the witnesses for the defence P. W.1 and P. W.2 that the Roman Catholic Church bought a parcel of land from Gbogunleri the father of Madam Aderenle Gbogunleri about the year 1936.*

I believe that the Roman Catholic Church was put in possession of the land so purchased and exercised diverse acts of ownership thereon from about 1935 without let or hindrance from anyone,

H *I am satisfied that one of the cogent acts of ownership and possession exercised on the land by the Roman Catholic Church, was the erection on the land of St. John's Catholic Church, Agege about 1935. Exhibit "B", the deed of conveyance of the plaintiff is*

dated 9th September, 1965.

There was no evidence that the plaintiff was ever put into possession of the land in dispute by his vendor in 1965 or at any time thereafter.

I am satisfied upon the evidence in this case that Gbogunleri the father of Madam Aderenle Gbogunleri, had sold a parcel of land measuring about 200 feet by 200 feet to the Roman Catholic Church, and that the land in dispute on which the mud Church of St. John's Catholic Church, Agege was erected forms a small part.

I am satisfied that Gbogunleri had therefore in 1936 divested himself and the entire Gbogunleri family, of any further proprietary or other interest in the said land.

It follows therefore and I hold that the interests of the GBOGUNLERI family in the land in dispute having been divested in the land in dispute after 1936.

It follows also, that some 30 years thereafter, Madam Aderenle Gbogunleri would have no interest in the land in dispute to convey to the plaintiff herein

That being so, I hold that no interest in the land in dispute passed to the plaintiff by virtue of the deed of conveyance, Exhibit "B" as *Nemo dat quod non habet.* (underlining supplied for emphasis)

The learned trial judge in the second suit (now under appeal) based her decision on the privity established between the appellant and his predecessors in the title to hold that she was bound by the decision of Desalu, J., (late) so, the case of the appellant here is privity by successive interest as Mr. Obe, who was the plaintiff in the first suit claimed that he derived his title from the Agbogunleri family, whose claim against the church which acquired its interest from the same family for over 20 years before he came on the scene, failed. Therefore, judgment against a testator operates downstream as the first suit ID/199/81, to operate against any fresh claim in respect of the same land or property by the same parties. This has been the position of the law for quite sometime. Thus, the general principle of the law relating to privity in title is that in transactions relating to land, any person who derives title from or

takes an assignment from, or is let into possession by, or otherwise claims or "comes in" under the actual representator, is bound by the same representation, and consequent estoppel, as that which binds such actual representator. See: Tylor v Needham (1810) 2 Taunt. 279; Spenser, Bower and Turner in their
 B book: Estoppel by representation, third edition, Butterworth, London, 1977, pages 123-124.

There is no way I can brush aside the submission of learned counsel for the respondents and the conclusion reached by the learned trial judge, affirmed by the lower court on the issue of parties, that the parties, on the principle of privity of transactions are from all intents and purposes, the same in both suits. Each of the parties from both sides must bear the consequence of his/its predecessor in title and be
 C
 D ***bound by it.*** See. Odua v Nweze (1934) 2 WACA; 93; Shonekan v Smith (1964) 1 NLR; 168; Mohafe v Esekhome (1993) 8 NWLR (Pt.309) 58.

The second requirement in sustaining a plea of estoppel by judgment is that the subject matter in dispute must be the same in the previous suit and the suit in litigation at the time the plea was raised. In the appeal on hand, learned trial judge found from the pleadings of the parties that there was no dispute that the land in dispute was the one situate at 17, Old Abeokuta Motor Road, Isale Oja, Agege (page 192 of the record).
 E
 F ***She also found and held as follows:***

"I am satisfied that the subject matter in both suits are (sic) the same that is the land situate lying and being at No 17, Old Abeokuta Motor Road, isale Oja, Agege."
 G ***The lower court agreed with that finding. I have no reason to tamper with the concurrent findings of the two lower courts. I affirm same that the said land is the same land in litigation in both suits, i.e. the land situate, lying and being at No 17, Old Abeokuta Motor Road, Isale Oja, Agege. It was this land that***
 H ***was in real controversy. It has same identity in both suits.*** See: Chikwe v Obiora (1960) SC NLR 566; Ekpoke v Usilo (1978) 6-7 SC 187.

The third requirement for the plea of estoppel by judgment to

be sustained is that same issue must have been adjudicated by a court of competent jurisdiction.

A court or tribunal is said to be of competent jurisdiction if it is established by law as against a Kangaroo's court. It is presided by a person competent in all respect and has the authority to adjudicate disputes in that court. It has for long been settled that a court is said to be competent when:

(1) it is properly constituted with respect to the number and qualifications of its members and none of the members is disqualified for any reason,

(2) the subject matter of the dispute is within its competence and jurisdiction,

(3) the action is initiated by due process of law and not in abuse of the court's process and,

(4) any condition precedent to the exercise of its jurisdiction has been fulfilled. See: Madukolu v Nkemdilim (1962) All NLR (Pt.2) 581; Nalsa and Team Ass. v NNPC (1996) 3 NWLR (Pt.439) 621.

The first High Court, i.e. the one presided by Desalu, J., came about by constitutional provisions. So also the appointment of Desalu, as it's Judge. Thus, whatever decision is handed by that court is a decision given by a court of competent jurisdiction and remains binding on parties to it. The decision in suit ID/ 199/81 of 3rd June, 1988, must remain binding, on parties to it until set aside by a higher court. I therefore, affirm that the decision in suit ID/199/81 binds the present appellant as he was privy or deemed to be privy to it. I say no more on this condition.

The last condition for the application of estoppel by judgment is the conclusive nature of the judgment. I readily find answer to that from the trial court's judgment. The learned trial judge held:

"I therefore hold that the plaintiff herein is bound by the judgment of Desalu, judge in suit ID/199/81, and is estopped from litigating the same issue which was conclusively determined in that suit."

(underlining for emphasis)

The court below affirmed this decision. I too affirm the decision and would not venture to enter into academic rigmarole.

Finally, I find no merit in this appeal and I hereby dismiss same. I affirm the lower court's decision. The respondents are entitled to N10, 000.00 costs from the appellant.

B

KATSINA-ALU JSC

C I have had the advantage of reading in draft the judgment delivered by my learned brother I. T. Muhammad J.S.C in this appeal. I entirely agree with his reasoning and conclusion. There is nothing I can usefully add.

D

MUSDAPHER JSC

E I have had the honour to read in advance the judgment of my Lord, Muhammad, J.S.C just delivered in this matter and I respectfully agree. In the aforesaid judgment his lordship has meticulously and exhaustively discussed all the issues submitted for the determination of the appeal. I have nothing further to add but suffice for me to adopt his reasonings as mine. Accordingly, I too, find no merit in this appeal, I dismiss it and affirm the decision of the court below. I abide by the order for costs proposed in the aforesaid judgment.

F

AKINTAN JSC

G The dispute between the parties in this case arose over a plot of land at No 17 Old Abeokuta Road, Isale Ojo, Agege in Lagos State. The appellant was the plaintiff in the suit she commenced at the Lagos State High Court. Her claim was, inter alia, for declaration of statutory right of occupancy over the said plot of land; injunction restraining the defendants jointly and severally from committing further acts of trespass on the disputed land; and various sums of special H and general damages.

The respondents denied the claim and the 4th defendant/respondent counter-claimed for general and special damages suffered as a result of acts of damages committed by the plaintiff/appellant on

the 4th respondent's property on the land.

At the conclusion of the trial, the plaintiffs claim was dismissed while the 4th defendant/appellant's counter claim was granted. An appeal filed by the plaintiff/appellant to the court below was dismissed. The present appeal is against the judgment of the court below.

The main issue in controversy is whether the doctrine of estoppel raised was applicable. The answer to that question and other questions raised in the appeal have been adequately discussed and resolved in the lead judgment prepared by my learned brother, I. T. Muhammed, J.S.C, the draft of which I had the privilege of a preview. I entirely agree with his reasoning and conclusions as expressed in the lead judgment which I hereby adopt. For the reasons given in the lead judgment, I also dismiss the appeal with costs as assessed in the lead judgment.

D

ONNOGHEN JSC

This is an appeal against the judgment of the Court of Appeal, holden at Lagos in appeal No CA/L/515/2001 -delivered on the 22nd day of January, 2003 in which it dismissed the appeal of the appellant against the judgment of the Lagos State High Court, holden at Ikeja in suit No ID/211/96 delivered on the 16th day of June 2000, dismissing the suit of the appellant as plaintiff on the ground of estoppel per rem judicatam. In short the appellant lost in the lower courts.

The facts of this case are simple and straight forward. The appellant is the head of Agbogunleri family of Agege, Lagos State and instituted the action for and on behalf of that family against the respondents who are the trustees of the Roman Catholic Church over the ownership of a piece of land situate and lying at No 17 old Abeokuta Motor Road, Isale Oja, Agege. It is the case of the appellant that the land in dispute was let to one Mr. Obe a member of the Catholic Church by the Agbogunleri family at an annual rent of Ihe equivalent of N3.15K; that Mr. Obe erected a mud house on the land which was later used as a church and paid the rent until his death after which his son, Morris Obe continued with the tenancy performing his part of the agreement unfit some time before the church vacated the premises and the land became vacant resulting in

H

the family resuming possession of same by surveying and putting up a three bedroom boys quarters thereon which building was later demolished by the Catholic Church; that the land was never sold to Obe or the Catholic Church.

On the other hand, the case of the respondents as pleaded
 B and testified to is that the land in dispute originally belonged to the
 Agbogunleri family until 1934 when a price of same meaning 200ft
 by 200ft was sold vide receipt dated 4th August, "1936 to the Ro-
 man Catholic Church by D.F. Gbogunleri, the father of Adenrole
 C Gbogunleri which receipt was tendered and admitted in suit No ID/
 199/81 as exhibit IK; that the church had been in occupation of the
 land by building a mud church thereon in 1936 which was surveyed
 in 1938 with beacon stones planted therein; that it is not true that
 Mad. Adenrole Gbogunleri leased the land in dispute to one Mr. Obe
 D with the mud church thereon, but that in 1965 the lady purported to
 sell the land to Mr. Obe which resulted in suit No ID/199/81 in favour
 of the respondents against the Gbogunleri family through Mad.
 Gbogunieri who was the vendor of Mr. Obe and that the Gbogunieri
 family is thereby estopped from denying the title of the respondents
 E following the judgment by Desalu J., delivered in suit No ID/199/81
 on the 3rd day of June, 1988.

The plaintiff therefore claimed the following reliefs:-

"1. A declaration that the plaintiff is the person entitled to the
 F statutory right of occupancy in respect of the /and situate, lying and
 being of No 17 Old Abeokufa Motor Road, Isale Oja, Agege.

2. N500.000.00 damages against the defendant jointly and
 severally for trespass committed by the defendants, their servants,
 workers, privies on the plaintiff land at No 17 old Abeokuta Motor
 G Road, Isale Oja, Agege Lagos State.

3. Permanent injunction restraining the defendants jointly and
 severally their agents, servants, workers and privies against further
 acts of trespass on the said land of the plaintiff."

The trial court did find as a fact at page 216 of the record as follows:-

H "I prefer and believe the evidence of the defendants witnesses
 that indeed the parcel of land in dispute was purchased by the defen-
 dants vide exhibit D3A from one D.F. Gbogunleri ancestor of PW. I."

The issue identified for determination in this appeal by learned

counsel for the appellant, Chief Bisi Adegunle in the appellant's brief filed on 20/10/06 is as follows:-

"Whether the Court of Appeal was right in upholding the finding that the appellants are estoppel by judgment in ID/199/81 (Exhibit DIB at the trial). This is the issue called in question in the two grounds of appeal in this matter." B

In arguing the sole issue, learned Counsel for the appellant submitted that before the principle of estoppel can be applied, the following conditions must exist:-

(a) the same question as is currently in issue must have been decided in an earlier judgment; C

(b) that judgment must have been final, and

(c) the parties in the earlier case or their privies must be the same relying on the case of Mohafe v Esekhome (1993) 8 NWLR (pt. 309) 58 at 67 - 68; Odua v Nwenze (1934) 2 WACA 98; Shonekan v Smith (1964) 1 All NLR 168; Chiekwe v Obiora (1960) SCNLR 506, Ekpoke v Usilo (1978) 6 - 7 S.C 187; Modukolu v Nkemdilim (1962) 1 All NLR 587; D

that the lower courts were in error when they held that the parties are the same on the ground that the parties in the present action are privies of the parties in the earlier suit, because no person is to be adversely affected by a judgment in an action in which he was not a party unless he is a privy to a party or has acted in such a way as to preclude himself from challenging the judgment, which was not the case in the present case; that there is no evidence that appellant was aware of the prosecution of suit No ID/199/81 or that he stood by but that the appellant is the privy of the plaintiff in suit No ID/199/81; that judgment against an ancestor in relation to title will operate to bind his heir, not the other way round; the same way as a judgment against a vendor affecting the property will bind the purchaser as the vendor would have ceased to have any interest in the property following the sale and in such a case, there can be no identity of interest between the purchaser and the vendor, learned counsel further submitted; that the appellant did not derive her title from the party in suit ID/199/81 and that the title of Agbogunleri family had long been vested before the institution of suit ID/199/81. E F G H

Learned Counsel also submitted that although the land in dis-

pute in the earlier case is the same in the instant case, the issue for determination was completely different; that in the 1981 case, the issue was ownership of the land between Mr. Obe and the Catholic Church which is different from the ownership between Agbogunleri family and the Catholic Church; that Mr. Obe could not have been fighting the case of the Agbogunleri family when he was making a claim for himself and therefore the appellant cannot be accused of allowing someone else to fight their battle for them; that there is evidence that the judgment in ID/199/81 was appealed against though there is no credible evidence as to the outcome of that appeal though it appears that the appeal still pends; that the judgment, in the circumstance cannot be said to be final and cannot therefore be used as *res judicata*, 'learned Counsel finally submitted and urged the court to resolve the issue in favour of the appellant and allow the appeal.

On her part, learned Counsel for the respondents, Chief Mary M. Bassey submitted that the lower courts were right in their conclusion that the present case is caught by the principles of *res judicata* particularly as the appellant is the privy of the plaintiff in suit No ID/199/81 and is therefore bound by the decision in that case. She urged the court to resolve the issue against the appellant and dismiss the appeal. It should be noted right away that in suit No ID/199/81 both the plaintiff and the defendant claimed to have purchased the land in dispute from the heads of Agbogunleri family at the relevant times - the defendant from D.F. Agborunleri and the plaintiff from Mad. Agbogunleri who was said to be the daughter of D.F. Agbogunleri and therefore his successor in title. It must also be noted that the plaintiff in ID/199/81 admitted that the defendant therein had been on the land, built a mud church thereon in which he the plaintiff and other members worshipped until 1960 when he allegedly purchased the property following the inability of the defendant to pay rents to the original owners, it is therefore very clear that whether the family sold to the plaintiff or defendant in suit No ID/199/81, it has, by that act divested itself of any interest in the said property and cannot subsequently turn round to claim title or right of occupancy over the said property.

The court in ID/199/81 made some specific and powerful findings of facts based on the issues as joined in the pleadings and testi-

fied to in evidence at pages 243 - 244 of the record as follows:-

"I prefer and believe the testimony of the witnesses for the defence PW1 and PW2 that the Roman Catholic Church bought a parcel of land from Gbogunleri the father of madam Adenrele Gbogunleri about the year 1936.

I believe that the Roman Catholic Church was put in possession of the land so purchased and exercised divers acts of ownership thereon from about 1935 without let of (sic) hindrance from anyone.

I am satisfied that one of the cogent acts of ownership and possession exercised on the land by the Roman Catholic Church, was the erection on the land of St. John's Catholic Church, Agege about 1935.

Exhibit "B", the deed of conveyance of the plaintiff Is dated 9(h September, 1965.

There was no evidence that the plaintiff was ever put info pos- session of the land in dispute by his vendor in 1965 or at anytime thereafter.

I am satisfied upon the evidence fn this case that Gbogunleri the father of madam Adenrele Gbogunleri had sold a parcel of land measuring about 200 feet by 200 feet to the Roman Catholic Church and that the land in dispute on which the mud church of St. John's Catholic Church, Agege was erected forms a small part.

I am satisfied that Gbogunleri had therefore in 1936 divested himself and the entire Gbogunleri family, of any further proprietary or other interest in the said land.

It follows therefore and I hold that the interests of the Gbogunleri family in the land in dispute having been divested in the land in dispute after 1936(sic)

It follows also, that some 30 years thereafter Madam Aderenle G Gbogunleri would have no interest in the land in dispute to convey to the plaintiff herein:

That being so, I hold that no interest in the land in dispute passed to the plaintiff by virtue of the deed of conveyance, Exhibit "B" as Nemo dat quad non habet."

Even though learned Counsel for the appellant has argued that an appeal against that decision still pends it does not change the finality status of the judgment for the purpose of the principles of

estoppel per rem judicata, the judgment having been given by a competent court of record in the exercise of its original jurisdiction. It remains binding on all concerned and can and does command obedience until set aside. In any event, is it the law that where an appeal
 B pends against a judgment it cannot operate as estoppel per rem judicata? I do not think so, otherwise all a party needs do to avoid the operation of the doctrine of res judicata would be to appeal or keep on appealing even when he knows that nothing useful would come out of it.

C Where a court of competent jurisdiction has settled, by a final decision, the matters in dispute between the parties, neither party, or his privy may re-litigate that issue again by instituting a fresh action on the same matters - see *Osunrinde v Ajamogun* (1992) 6 NWLR (pt. 246) 156; *Ogbogu v Ndiribe* (1992) 6 NWLR (pt 245) 40; *Akpan*
 D *v Win* (1996) 7 NWLR (pt. 463) 634.

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

A decision of a court is said to be final when it finally disposes
 F of the rights of the parties. For instance, if the judgment/decision/order given by the court is such that the matter in controversy between the parties would not be brought back to the court for further adjudication, in such a case, such a decision or order is said to be final. In the instant case it is my considered view that the decision in
 G ID/81/1991, was a final decision because it determined the issue in controversy between the parties. It does not matter whether one of the parties decided to appeal against that decision as such an appeal, for the purpose of res judicata does not derogate from the finality of the decision by the trial court with competent jurisdiction. The sub-
 H mission of learned counsel for the appellant as to the finality of the earlier decision purportedly on appeal is erroneous. A final judgment is therefore one which puts an end to an action by declaring that the plaintiff is or is not entitled to judgment on the reliefs claimed in the

action so that nothing else is left to be done except to execute the judgment. The finality of a judgment for the purposes of res judicata is therefore viewed in contradistinction with an interlocutory judgment. A final judgment for that purpose is also known as an appealable judgment; definitive judgment or final decree.

Turning, however, to the judgment of the lower court at page 292 of the record, the court stated thus, inter alia:

"The plaintiff (that is in the instant case) coded evidence that the land was rented to Obe who later built a church on the land. The evidence of the plaintiff was not accepted by the trial court. As it turned out, Obe had litigated against the defendants over the same parcel of land.

This brings me to a consideration of the reliance placed by the defendants on the judgment in suit No ID/199/81 [tendered as exhibit as creating estoppel per res judicata in their favour against the plaintiff. The trial judge painstakingly and exhaustively considered the issue of estoppel at pages 222 to 223 of the record I hold that the trial judge was right in her conclusion as the plaintiff's case ought to have failed as it did."

I find no fault at all with the above finding which is accordingly endorsed by me as sound and flowing from the facts of the case. It should be noted that the above finding constitutes concurrent findings by the lower courts on the issue of estoppel per res judicata and it is the policy of this court not to disturb such findings without the appellant showing that there are special or exceptional circumstances necessitating such interference such as that the findings were perverse etc; which exceptions have not been shown to have existed in this case. I am not unmindful of the feeble attempt by the appellant to argue that the appellant in this case cannot in law be said to be the privy of the plaintiff in suit No ID/199/81 which attempt failed to address the real issue which is whether the plaintiff in suit No ID/199/81 did not claim title to the land in dispute through the Gbogunleri family against the respondents in this appeal and lost out. If he did, where is the title of the appellant in respect of the same land, which he now claims in this action?

It has also been argued by the appellant in the reply brief that the alleged sale by the ancestor of Madam Gbogunleri to the respon-

dents was set aside by the Court of Appeal and as such the principle of estoppel per res judicata does not apply. I think the submission is in error. In the first place the respondents did not counter claim so their title to the land was not in issue. It is the plaintiff/appellant who claimed title or right of occupancy even though evidence in ID/199/81 shows that she had sold the land to the plaintiff therein, and the trial court and the lower court, in the instant case both found against the appellant. That being the case, it is my considered view that whether the lower court set aside the finding by the trial court as to the sale to the respondents is of no moment particularly as what was being decided was not an appeal against the judgment in suit No ID/199/81 which in any event was not before the court.

While still on the setting aside of the finding of the lower court as to the existence of sale to the respondents, it is important to note that the lower court found that despite the error, the trial court came to the right conclusion on the totality of the evidence hence it dismissed the appeal.

I however, have to observe that it would not have been necessary to go into the merits of the appeal before the lower court if that court had preceded the determination of that appeal with the resolution of the issue of res judicata since a positive resolution of same would have made it unnecessary for the court to go on to consider the issue as to whether there was a valid sale of the land in dispute to the respondents by the ancestor of the appellant - a matter dealing with the merits of the appeal. An issue of res judicata is like a question of jurisdiction, which ought to be considered first before proceeding, where need be, to determine the merit of the case. They are both, peripheral matters. If that approach had been adopted in the instant case the error would not have been committed. In any event, once it held that res judicata applied, the earlier finding on sale becomes superfluous and of no moment in my considered view.

It is for the above and the more detailed judgment of my learned brother Muhammad J.S.C that I agree with the conclusion that the appeal is without merit and ought to be dismissed. I hereby dismiss same and abide by the consequential orders contained in the lead judgment including the order as to costs.
Appeal dismissed.