

SUPREME COURT OF NIGERIA
30TH JANUARY, 2009. SC. 303/2002
CORAM:- A. I. KATSINA-ALU, G. A. OGUNTADE,
M. MOHAMMED, F. F. TABAI,
C. M. CHUKWUMA-ENEH, JJSC

1. DAMULAK DASHI
 2. NOKDANG DAWANG
 3. SAMUEL DAMULAK
 4. DATAU DALONG
- AND
1. STEPHEN SATLONG
 2. SALONG DALIP
-

ESTOPPEL - Res judicata - Ingredients - Sameness of subject matter - Land which is the subject matter of dispute in Exhibit 'A' - Is same as the one herein - Notwithstanding the unproved assertion by appellants that the former is smaller (H1)

ESTOPPEL - Res judicata - Ingredients - Sameness of issues - Though the issue of radical title over the land was not settled in Exhibit 'A' - There are legally binding pronouncements as to the parties' rights over the land therein - Which rights are again questioned in this suit (H2)

ESTOPPEL - Res judicata - Ingredients - Sameness of parties - Trial court found that respondents and Irimaya Topsin - Are privies bound by the decision in Exhibit 'A' - The finding was endorsed by the two courts below - Appellants have not shown reason to hold otherwise (H3)

CUSTOMARY LAW - Customary tenancy - Payment of tribute - It is not an incident of customary tenancy - That tributes can be paid by customary tenant to the landlord through a third party - As alleged by appellants herein (H4)

EVIDENCE - Proof - Title to land - In view of appellants' assertion that respondents are in possession by customary tenancy - Appellants can only prove their title by proving customary tenancy of respondents -

Which they have failed to do (H5)

FACTS

The Plaintiffs/Appellants sued the defendants/respondents at the Upper Area Court, Pankshin, Plateau State. Appellants' claim was for declaration of title to land and forfeiture of customary tenancy. Their case was that the respondents were their customary tenants but have denied the appellants' title as overlords thereby rendering the tenancy liable to forfeiture. Respondents denied appellants claim that they were customary tenants and set up a claim of title to the land in dispute.

Respondents further claimed that the land had been the subject of an earlier suit between the predecessors-in-title of the parties and that the judgment therein, Exhibit 'A', was in their favour. So they raised a plea of res judicata. At the end of trial, the trial court held that the plea of res judicata was successful. Accordingly, the claim of the appellants was struck out. Appellants appealed to the Plateau State Customary Court of Appeal, which dismissed the appeal. They further appealed to the Court of Appeal which also dismissed the appeal. They have come on a final appeal to the Supreme Court.

ISSUES FOR DETERMINATION

ONE

"Whether the Plaintiffs now Appellants are estopped from instituting Suit No. PUACP/CV.68/93; or differently put, is their suit caught by the doctrine of res judicata?"

TWO

Whether the Appellants proved that the Respondents are their customary tenants in respect of the land in dispute and are therefore entitled to an order of forfeiture.

THREE

Whether the Appellants proved their title to the land in dispute as per the evidence before the court."

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

Res judicata - Sameness of subject matter

1. In the first place it is a common ground that the land which is the subject matter of the dispute in Exhibit "A" is one and the same as the one in this suit. Although learned counsel for the Appellants argued,

rather feebly, that the land in this suit is by far larger than that in Exhibit “A” there is no evidence in support of that assertion. I hold and affirm the decision in the three courts below that the land involved in Exhibit “A” is the same as that in this suit. The Customary Court of Appeal also said so at page 66 of the record. This thus meets one of the necessary constituents of estoppel per judicatum. (p. 29B)

Res judicata - Sameness of issues

2. It is true that the issue of the radical title over the land was not settled in Exhibit “A”. Be that as it may, there are nevertheless legally binding pronouncements in it. The Respondents were held to be in possession for a long time and to be entitled to continue in such possession only determinable by and at the instance of the real owners of the land. And that although the Respondents acquired their possessory rights to the land through the late District Head of Chip and the late village Head of Minting, they (or their successors in title as District Head or Village Head) have no title to the land; that neither they nor their successors in title including the Defendant therein (who is PW6 herein) nor the L.B.R.B.D.A. can acquire the land without the consent and payment of compensation to the Respondents. And that the acquisition of the land either by the Defendant (PW6 herein) or the L.B.R.B.D.A. without the consent and payment of compensation to the Respondents in possession was illegal. I have no doubt in my mind therefore that Exhibit “A” contains pronouncements on issues upon which a plea of estoppel per rem judicatum can be founded. Same questions as to the parties’ rights over the land on Exhibit “A” are also raised in this suit. (p. 30 C)

Res judicata - Sameness of parties

3. The only other constituent for the invocation of the doctrine of res judicata is sameness of the parties in the previous suit Exhibit “A” and this suit. The PW7 said all the Plaintiffs and Irimiya Tepsin are relations of the same Ruling House having a common grand father. The trial court believed this evidence and found as a fact that the Respondents and Irimiya Tepsin are privies bound by the decision in Exhibit “A”. This finding was again endorsed by the Customary Court of Appeal and the Court below. I do not have any strong reasons to disturb this concurrent finding of the three courts below.

In the light of the foregoing considerations I resolve the first issue in favour of the Respondents and hold that Exhibit “A” operates to estop the Appellants from instituting this suit. (pp. 30 H / 31 B)

Customary tenancy - Payment of tribute

B 4. As I pointed out, the evidence of the Plaintiffs/Appellants was reasonably consistent. One aspect of their evidence is that the Defendants/Respondents paid their tributes to the Plaintiffs through the Ward Head. This was categorically denied by the Respondents who C maintained that under the customary land tenure of that area, a customary tenant pays his tributes direct to the customary landlord and that the tributes paid to the District Head through the Ward Head were so paid because they were custodians of all land within their area of jurisdiction. This evidence sounds to me more credible. On D this issue of the payment of tributes the Court below examined the evidence carefully. The court then held that the alleged customary tenancy and the payment of customary tributes was not proved with credible evidence.

E I do not see any feasible reason to disagree with the conclusion reached by the court below. It is not an incident of customary tenancy that tributes can be paid by customary tenant to the landlord through a third party. (p. 34 B / G)

F ***EVIDENCE - Proof - Title to land***

5. The third and last issue is whether the Appellants proved their title to the land in dispute as per the evidence before the court. In my view my deliberations on the second issue resolves this issue. Having regard to the undisputed facts about the Respondents being in possession of the land in dispute and the assertion by the Appellants that G the Respondents’ said possession is by reason a customary tenancy they (Appellants) can only establish their title to the land by proof of the customary tenancy. In view of the finding by the lower court that the alleged customary tenancy was not proved and which finding I H have endorsed the Appellants have, *a fortiori* failed to prove their title to the land in dispute. The third issue is accordingly also resolved against the Appellants. (p. 35 C)

REPRESENTATION

Appellants absent and not represented but served
Solomon Umoh with Chatang Wash-Pam (Miss) and Simon Peter
Esien for the Respondents.

CASES REFERRED TO

Enang v. Adu (1981) 11 - 12 S.C. 25 B
Lokoyi v. Olojo (1983) 8 S.C. 61
Ojomu v. Ajao (1983) 9 S.C. 22
Are v. Ipaye (1990) 2 N.W.L.R. (Pt. 132) 298 at 308.
DOKUBO v OMONI (1999) 6 SCNJ 168 at 179 C
BIARIKO v EDEH OGWUILE (2001) 12 NWLR (Part 726) 235 at
255
DACOSTA v IKOMI (1968) 1 ANLR 394
AROMIRE v ANOYEMI (1972) 1 ANLR (Part 1) 101 at 112-113
MITINI NYAVWARO & ORS v BABIYA OGEDEGE (1971) N.S.C.C. D
206 at 211

STATUTE REFERRED TO

Evidence Act, LFN, 1990, s. 146
Supreme Court Act, Cap. S. 15, LFN, 2004, s. 22 E

LEAD JUDGMENT BY TABAI JSC

This appeal is against the judgment of the Jos Judicial Division
of the Court of Appeal on the 23rd of May 2002. The original action F
itself was commenced at the Upper Area Court, Pankshin in Plateau
State sometime in 1994. The Plaintiffs therein are the Appellants in
this Court. And the Defendants therein are the Respondents before
us. The claim is expressed in the opening statement of learned coun-
sel for the Plaintiffs Chris Ekeakhogbe at page 8 of the record. He G
said:-

*“The Plaintiffs’ claim is for a declaration of title to a piece of
farm land situated at Minting in Chip District of Pankshin Local Gov-
ernment Council The Defendant is a customary tenant to the Plain-
tiff and is now denying the Plaintiffs’ title. Hence he does no longer H
comply with the traditional requirements of customary tenancy. The
Plaintiffs therefore wish to retake possession and seeks a declaration
of title in their favour.”*

This is reproduced by the trial Upper Area Court in its judg-

ment at pages 34-35 of the record.
 The Defendants denied the claim and their denial is recorded at page 8 of the record as follows:

“*I deny the claim, this is because the piece of land is mine. This is so because my father cleared the land 26 years ago. The land was formerly a bush which served as hunting ground for the District Head of Chip. In 1986, I sued one Irimiya Topsin who is a brother of the Plaintiff in respect of this farmland in this Court. The judgment was in my favour. Since then I have been farming the land until 1993 when Irimiya handed out the land to the Plaintiff.*”

The above is also reproduced by the trial Upper Area Court in its judgment at page 35 of the record. The above clearly capture the claim and the defence. The Defendants/Respondents raised the plea of Res Judicata as part of their defence to the action.

The matter then went to trial wherein seven witnesses testified for the Plaintiffs case and four for the defence. And in the presence of the parties and their witnesses, except the 2nd Defendant, the court visited the land in dispute. Two sets of documents were tendered by the Defendants and were admitted as Exhibits “A” and “B”. By its judgment on the 13/8/96 the plea of Res Judicata was held to be successful and the claim was struck out.

The Plaintiffs were not satisfied and went on appeal to the Plateau State Customary Court of Appeal. The court expressed the view that it was unable to fault the judgment of the trial court and so dismissed the appeal. This was in its judgment on the 11th of June 1998. Still dissatisfied, the Plaintiff went on further appeal to the Court of Appeal. In its judgment on the 23rd of May 2002 the appeal was dismissed. The Plaintiffs are still aggrieved and have come on further appeal to this Court. The Notice of Appeal was dated and filed on the 17/7/2002. It contained eight grounds of appeal.

In this Court the parties have filed and exchanged their Briefs of Argument. The Appellants’ Brief was prepared by C.O. Ekeakhogbe and same was dated the 9th of November 2002 and filed on the 18/11/2002. The Respondents’ Brief was prepared by Daniel Gopep. It was dated and filed on the 31/1/2003.

In the Appellants’ Brief five issues for determination were formulated in the following terms.

ONE

Whether the Appellants were estopped from relitigating on this land by the principle of estoppel per rem judicatam and/or guilty of the doctrine of standing by.

TWO

Whether the Appellants proved their title to the land in dispute and if they did, were they not entitled to the declaration sought. B

THREE

Whether the Appellants proved that the Respondents were their customary tenants and if the answer is in the affirmative, does the long possession of the disputed land by the Respondents a presumption of their ownership. C

FOUR:

Whether from the circumstances of this case the means by which the Appellants receive their customary tributes is a relevant factor for determining their ownership of the land in dispute. D

FIVE

Whether the Respondents were not entitled to forfeit the land in dispute to the Appellants.

In the Respondents' Brief of Argument three issues for determination were identified. They are: E

ONE

Whether the Plaintiffs now Appellants are estopped from instituting Suit No. PUACP/CV.68/93; or differently put, is their suit caught by the doctrine of res judicata? F

TWO

Whether the Appellants proved that the Respondents are their customary tenants in respect of the land in dispute and are therefore entitled to an order of forfeiture.

THREE G

Whether the Appellants proved their title to the land in dispute as per the evidence before the court.

The substance of the arguments of learned counsel for the Plaintiffs/Appellants runs as follows: He stated firstly the principles of estoppel per rem judicatam. On whether it can apply to estop the Appellants from relitigating over title to the land in dispute, counsel contended firstly that the parties in Exhibit "A" STEPHEN SATLONG v IRIMIYA TEPSIN are not the same as the parties in this case. He submitted further that the Plaintiffs/Appellants are also not privies to H

the PW6 who was DW1 in Exhibit “A” because he did not claim the land in dispute in Exhibit “A” to be his own. Rather, he argued, the PW6 who was DW1 in Exhibit “A” testified to the effect that the land belonged to the 1st Appellant and the fathers of the 2nd and 3rd Appellant and 1st Appellant. Learned counsel referred to Exhibit “A” and submitted that the Defendant/Respondent have failed to establish his title in Exhibit “A” and cannot be held to establish his title in the present case. Counsel referred to the evidence of all the Appellants denying their relationship with the PW6 which evidence, he submitted the lower courts failed to consider. According to counsel, the Topsin mentioned by the PW1 as his grand father was different from the father of the PW6.

With respect to the question of the sameness of the subject matter learned counsel contended that the land in this case is by far larger than that in Exhibit “A”. He relied on the opinion of the Plateau State Customary Court of Appeal at page 66 lines 1-4 of the record, and submitted that where the land in a latter case is larger than that in a previous case the plea of *res judicata* is weakened. He relied on *DOKUBO v OMONI* (1999) 6 SCNJ 168 at 179; *BIARIKO v EDEH OGWUILE* (2001) 12 NWLR (Part 726) 235 at 255. Still on the issue of whether Exhibit “A” operates as *res judicata* counsel argued that although it is a valid and subsisting judgment of a court of competent jurisdiction, it did not establish a title over the land on any of the parties therein and cannot therefore operate to estop any of them from relitigating on the land. It was further submitted that for the same reason that Exhibit “A” did not confirm title over the land on any of the parties therein, the Plaintiffs/Appellants cannot be guilty of standing by.

On the Appellants issue two learned counsel referred to the 1st Respondent’s assertion in this suit to the effect that his father cleared the land 26 years ago and his claim in Exhibit “A” that the land was given to his father by the District Head of Chip about 70 years ago and submitted that his claim in the two suits were inconsistent. It was further contended that since the 1st Respondent had failed to secure title over the land in Exhibit “A” it is he that should be estopped from again claiming title over the land. It was further argued that even if there is evidence of the Respondent’s long possession, such long possession cannot defeat title over the land. He cited *DACOSTA v IKOMI*

(1968) 1 ANLR 394; AROMIRE v ANOYEMI (1972) 1 ANLR (Part 1) 101 at 112-113. It was the submission of learned counsel therefore that the long possession by the Respondents notwithstanding the Appellants proved their title to the land in dispute and are therefore entitled to the reliefs sought.

With respect to the Appellants' third issue, it was the contention of learned counsel that in view of the evidence of the PW5 and PW6 the customary tenancy of the Respondents was established. According to learned counsel, their evidence was even supported by that of the Respondents who admitted paying tributes to the PW6 and his father.

Arguments on the Appellants' issues four and five are still on the main issue of proof of the alleged customary tenancy.

In the Respondents' brief of argument, Mr. Daniel Gopep, learned counsel for the Respondents argued as follows; On the Respondents' first issue of whether this suit is caught by the doctrine of res judicata, it was the submission of learned counsel that although the Appellants are not named as parties in the previous suit Exhibit "A" they are nevertheless privies by virtue of their relationship with the Defendant therein who is PW6 in this suit. All the Plaintiffs/Appellants and Irimiya Topsin the Defendant in Exhibit "A" have a common grandfather, learned counsel argued. He urged therefore that the concurrent findings of the three courts below about the Appellants being privies to the Defendants in Exhibit "A" be not disturbed.

It was further contented that even if the Appellants are held not to be privies to the Defendants in Exhibit "A" they are still caught by the principle of estoppel by standing by when they were aware of the proceedings. Learned counsel also contended that the land in Exhibit "A" is the same as the land now in dispute and asserted that the PW6 also admitted that fact under cross-examination. Exhibit "A" is a valid and subsisting judgment which finally determined the rights of the parties therein, counsel argued.

With respect to the Respondents' second issue learned counsel for the Respondents argued that the Appellants' failed to prove the alleged loan of the land in dispute. Nor did they prove the customary tenancy alleged, he submitted.

The Respondents' third issue relates to whether the Appellants proved their title to the land in dispute. It was the submission of learned

counsel for the Respondents that the Appellants' story about the loan of the land and customary tenancy failed and thus the entire case of the Appellant collapsed. Learned counsel further argued that once the story of loan and/or customary tenancy collapsed, the Appellants have no answer for the Respondents' long possession. See 146 of the Evidence Act Laws of the Federation of Nigeria 1990 which he argued operates in favour of the Respondents' title over the land in dispute. In conclusion it was urged that the appeal be dismissed.

I have considered the case of the parties which I have earlier reproduced above, the evidence in support thereof, the judgments of the three courts below and the address of counsel for the parties. For the purpose of my deliberations in this case I would respectfully adopt the three issues formulated by the Respondents which determination, in my view, also effectively determines the five issues formulated by the Appellants.

The Respondents' first issue is the same as that of the Appellants. It is whether by reason of the proceedings and judgment in the previous suit Exhibit "A" the Appellants are estopped from instituting this action. This was the only issue considered by the trial Upper Area Court. In like manner, it was the only issue upon which the Plateau State Customary Court of Appeal founded its decision on the 11th of June 1998. And it is one of the two main grounds upon which the Court below based its decision of the 23rd May 2002, against which this appeal is lodged. The relevant part of Exhibit "A" is reproduced in the judgment of the Court below at page 116 of the record. It states:

"It is also clear from both sides that the late District Head of Minting the area where the farm is situate also consulted some of his subjects, who agreed to give their farms for the father of the Plaintiff to live and cultivate on. In other words, the actual owners of the farms are neither the Plaintiff's father or the late District Head of Chip or the late Village Head of Minting. The actual owners of the place are there, none was called to say he wanted back his farm. It is only the actual owners of the farm that can request for their farm even then with such a long stay as one of the Plaintiff's family has put on courtesy demands that they be given notice. Though the Defendant said it was the L.B.R.B.D.A. that acquired the farm, there is no evidence that the Plaintiff's family who were in possession were con-

sulted, there is also no evidence of compensation. Though the Defendant is the Village Head of the area, and the Plaintiffs family acquired the farm through him, the farm in the actual sense does not belong to the Defendant, In conclusion, I hold that the acquisition either by the Defendant or the L.B.R.B.D.A., without the consent and payment of compensation to the person in possession is illegal. The Plaintiff's family should therefore be allowed to stay and cultivate the area until the real owners wanted it back."

In the first place it is a common ground that the land which is the subject matter of the dispute in Exhibit "A" is one and the same as the one in this suit. Although learned counsel for the Appellants argued, rather feebly, that the land in this suit is by far larger than that in Exhibit "A" there is no evidence in support of that assertion. I hold and affirm the decision in the three courts below that the land involved in Exhibit "A" is the same as that in this suit. The Customary Court of Appeal also said so at page 66 of the record. This thus meets one of the necessary constituents of estoppel per judicatum.

With respect to some of the other necessary constituents of the plea of estoppel per judicatum, the trial Upper Area Court reproduced a substantial part of the text in the Exhibit "A" at page 51 of the record and reasoned that in view of the pronouncements of the Court as to the right and/or other entitlements of the parties over the land in dispute, they (the parties in Exhibit "A") are estoppel from re-contesting same in this suit. Specially on the question of whether Exhibit "A" sustains the plea of estoppel res judicatum in this suit, the trial Upper Area Court at page 51 said:-

"The effect is that the Plaintiff who sued in that case was refused title. The Defendant who was sued was also refused title. It follows that as between the Plaintiff in that case (now 1st defendant) and the defendant in that case (now PW6) the issue of title can never be re-contested in a fresh suit, This also applies to their privies and those who knew of the case but took no action to defend their own interests. At best any of them not satisfied could seek remedy through an appeal, not definitely not through the institution of a fresh suit seeking a declaration of title to the same land which is the plaintiffs' claim in the present action. The 1st Defendant also having not challenged the decision in Exhibit "A" which declined to declare him the

owner of the land through an appeal is also estopped from suing the Plaintiffs or their privy Irimiya Topsis with whom he had the case in Exhibit "A" over the same land for title."

The above decision of the trial Upper Area Court and the principles; embodied therein were adopted by the Plateau State Customary Court of Appeal. In its brief remark the Customary Court of Appeal spoke of Exhibit "A" in the following terms.

"Being valid and subsisting it is therefore capable of sustaining a plea of res judicata. The fact that there was no appeal does not render that judgment less forceful. Mr. Ekeakhogbe's submission that the decision in Exhibit "A" is not valid cannot be true it not having been set aside by a superior court."

I also endorse the reasoning and conclusion of the trial Upper Area Court. ***It is true that the issue of the radical title over the land was not settled in Exhibit "A". Be that as it may, there are nevertheless legally binding pronouncements in it. The Respondents were held to be in possession for a long time and to be entitled to continue in such possession only determinable by and at the instance of the real owners of the land. And that although the Respondents acquired their possessory rights to the land through the late District Head of Chip and the late village Head of Minting, they (or their successors in title as District Head or Village Head) have no title to the land; that neither they nor their successors in title including the Defendant therein (who is PW6 herein) nor the L.B.R.B.D.A. can acquire the land without the consent and payment of compensation to the Respondents. And that the acquisition of the land either by the Defendant (PW6 herein) or the L.B.R.B.D.A. without the consent and payment of compensation to the Respondents in possession was illegal. I have no doubt in my mind therefore that Exhibit "A" contains pronouncements on issues upon which a plea of estoppel per rem judicatam can be founded. Same questions as to the parties' rights over the land on Exhibit "A" are also raised in this suit.***

The only other constituent for the invocation of the doctrine of res judicata is sameness of the parties in the previous suit Exhibit "A" and this suit. This issue was examined in details by the trial Upper Area Court at pages 48-49 of the record. The court

examined the relationship of the Plaintiffs /Appellants on the one hand and their relationships with PW6 (Defendant in Exhibit A). The 1st and 2nd Plaintiffs each testified as PW1 and PW2 respectively. Each of them testified to the effect that the he is related to the Plaintiffs and to Irimiya Topsin. Although the 3rd and 4th Plaintiffs denied any relationship with the other Plaintiffs and Irimiya Topsin, the trial Upper Area Court did not believe their denial. **The PW7 said all the Plaintiffs and Irimiya Topsin are relations of the same Ruling House having a common grand father. The trial court believed this evidence and found as a fact that the Respondents and Irimiya Topsin are privies bound by the decision in Exhibit “A”. This finding was again endorsed by the Customary Court of Appeal and the Court below. I do not have any strong reasons to disturb this concurrent finding of the three courts below.**

In the light of the foregoing considerations I resolve the first issue in favour of the Respondents and hold that Exhibit “A” operates to estop the Appellants from instituting this suit.

The Respondents’ second issue is whether the Appellants established that the Respondents are their customary tenants, Regrettably, this issue was not considered by the trial Upper Area Court and the Customary Court of Appeal. It was however considered by the Court of Appeal. And by the authority of the general powers under Section 22 of the Supreme Court Act Cap S.15 Laws of the Federation of Nigeria 2004, I shall examine the evidence on record and make appropriate findings as if the proceedings had been initiated here.

Before embarking on this exercise, it is pertinent to state the fundamental features of a customary tenancy. A customary tenancy involves the transfer of an interest in land from the customary landlord or overlord to the customary tenant and which interest entitles the customary tenant to exclusive possession of the land and which interest, subject to good behaviour, he holds in perpetuity. Unless it is otherwise excluded, the main feature of a customary tenancy is the payment of tributes by the customary tenant to the overlord. And the status of his exclusive possession is such that it is enforceable against the world at large including even the customary landlord or those claiming through him. See the case of *MITINI NYAVWARO & ORS v*

BABIYA OGEGEDE (1971) N.S.C.C. 206 at 211 where this Court per Fatayi-Williams JSC (as he then was) said:

“..... a customary tenant can be in possession and is usually In possession of the land which he occupies as such tenant Furthermore, he can institute proceedings against any person (including all or any of the members of the family or community who are his overlords) who commits any act of trespass on his land.”

As I said earlier above the most significant insignia of a customary tenancy is the payment of tributes by the customary tenant to the overlord. In this case, it is a common ground that the Defendants/ Respondents are in exclusive possession. With respect to the controversy however, the Appellants have insisted that the Respondents are their customary tenants on the land in dispute and that their possession of the land is by reason of such customary tenancy; that by reason of such customary tenancy, the Respondents in acknowledgment of their overlordship regularly paid customary tributes to them until about 1985/86 when they refused to pay the tributes. The Respondents have maintained on the other hand that, although they obtained their interest over the land through the late District Head of Chip and the late Village Head of Minting, the said interest is not by reason of any customary tenancy between them and the Appellants; that they never paid any customary tributes to the Appellants. It was further their case that they paid tributes to the District Head of Chip and Village Head of Minting and NOT to the Appellants whom they have never ever recognised as their overlords.

Now what was the evidence of the alleged customary tenancy? The 1st Plaintiff, Damulak Dashi testified as the PW1. The substance of his evidence is that 2nd Defendant/Appellant (who is the father of the 1st Defendant/Appellant) approached the then District Head of Chip known as Dashar to request for land. The District Head invited the then Village Head of Minting also called Topsin and mentioned the 2nd Respondent desire for land. The Village Head then took the 2nd Respondent to Minting and met his father and the father of the other Plaintiffs/Appellants. The Village Head, the 2nd Respondent, his father, the father of the other Plaintiffs, Madaki, Shinkai and Katong went to the land and they, in accordance with the Custom laid the foundation of a house for the 2nd Defendant. He was given the surrounding lands to farm. According to this witness, the condition

for the 2nd Defendant's use of the land was that he was to pay tributes in the form of millets and guinea corn. The 2nd Defendant continued to pay these tributes to his father until his death and after his death, to him until 1985 when he stopped.

According to this witness although he was born then, he did not personally witness the transaction and that it was his father who told him the story. B

The other Plaintiffs testified as PW2, PW3 and PW4 respectively. Their evidence was in substance to the same effect as that of the PW1. The PW5 was Wesley L. Mulak, the District Head of Chip. According to him his father was the District Head of Chip at the time the 2nd Defendant was put on the land. He did not know the land in dispute and he did not know the actual owners of the land. He gave evidence as to the custom of the payment and sharing of tributes. According to him the Village Head of Minting otherwise called Dangrap usually collected tributes in the form of millets and guinea corn from every one who was under Minting and gave to him one half while he retained the other half. C D

The PW6 Irimiya Topsin is the Ward Head of Minting. His evidence was also reasonably consistent with that of the Plaintiffs/Appellants. According to him the 2nd Defendant/Respondent used to give tributes in the form of millets and guinea corn to his father who was then the Ward Head who would give the land owner their share, a share to the District Head and retained some for himself as Ward Head. After the death of his father and his installation, the 2nd Respondent refused to pay any more tribute. He said the Respondents refused to pay tributes since after the death of his father. The evidence of the PW7 was to the same effect as that of the PW1,2,3 and 4. E F G

The 1st Defendant/Respondent testified as DW1. According to him his father went to the then District Head of Chip and asked for the land which was a hunting ground, with nobody farming thereon. The District Head then referred him to the then Ward Head of Minting who went with his father to the land and laid the foundation of a house for him. He denied that the fathers of the four Plaintiffs/Appellants were present. According to this witness at the time the foundation was laid the place was a bush reserved for hunting and it had not been cultivated. He said his father used to pay tributes to the Ward H

Head who on collection would take same to the District Head of Chip. According to this witness, the tributes were paid through the Village Head to the District Head because he the District was the custodian of all the lands within the district. According to him the custom is that a customary tenant pays his tribute direct to the customary landlord, emphasizing that had the land been that of the Appellants they would have paid the customary tributes direct to them. Each of the other witnesses gave evidence substantially in line with that of the DW1.

As I pointed out, the evidence of the Plaintiffs/Appellants was reasonably consistent. One aspect of their evidence is that the Defendants/Respondents paid their tributes to the Plaintiffs through the Ward Head. This was categorically denied by the Respondents who maintained that under the customary land tenure of that area, a customary tenant pays his tributes direct to the customary landlord and that the tributes paid to the District Head through the Ward Head were so paid because they were custodians of all land within their area of jurisdiction. This evidence sounds to me more credible. On this issue of the payment of tributes the Court below examined the evidence carefully and at page 118 had this to say:-

“As for the tributes alleged to be given to the PW6 one may wonder why they were not being given to the Appellants directly since they are the purported owners. Surely the relationship between a customary landlord and tenant goes far beyond that of having a middle man to collect and deliver tributes to the landlord. I am saying this, bearing in mind the evidence of the PW6 himself that the owner of the land are the Appellants, not him. Funny enough none of the Appellants testified that tributes were given to them through PW6, rather their evidence was that the Defendant and his father used to give them tributes. In fact, their evidence on tributes is contrary to the evidence of the PW6..”

The court then held that the alleged customary tenancy and the payment of customary tributes was not proved with credible evidence.

I do not see any feasible reason to disagree with the conclusion reached by the court below. It is not an incident of customary tenancy that tributes can be paid by customary ten-

ant to the landlord through a third party. It is on record that before this dispute arose the Respondents had been on the land for many years. The DW1 testified on 22/11/95 at which time he was about 53 years old. And he said he was born on the land in dispute. None of the witnesses apart from the 2nd Defendant/Respondent was an eye witness to the transaction. I have no reason to disturb the finding of the Court below that the tributes paid by the Respondents to Ward Head of Minting and the District Head of Chip were so paid in recognition of the fact that they are custodians of the land. The result is that I also resolve this issue or issues against the Appellants. B C

The third and last issue is whether the Appellants proved their title to the land in dispute as per the evidence before the court. In my view my deliberations on the second issue resolves this issue. Having regard to the undisputed facts about the Respondents being in possession of the land in dispute and the assertion by the Appellants that the Respondents' said possession is by reason a customary tenancy they (Appellants) can only establish their title to the land by proof of the customary tenancy. In view of the finding by the lower court that the alleged customary tenancy was not proved and which finding I have endorsed the Appellants have, a fortiori failed to prove their title to the land in dispute. The third issue is accordingly also resolved against the Appellants. D E

In conclusion I do not fancy any strong reason to disturb the concurrent findings and conclusions of the three courts below. The result is that this appeal fails and is accordingly dismissed. I assess the costs of this appeal at N50,000.00 in favour of the Respondents. F

KATSINA-ALU JSC

My Lords, I have had the advantage of reading in draft the judgment of my learned brother Tabai JSC. I agree with it and, for the reasons which he gives, I, too, would dismiss this appeal with N50,000.00 costs in favour of the Respondents. G H

OGUNTADE JSC

I have read in draft a copy of the lead judgment by my learned

brother Tabai. JSC., agreed with his reasoning and conclusion, I would also dismiss the appeal with N50.000.00 costs in favour of the respondents.

B

MOHAMMED JSC

This is a case of farmland dispute between the parties which began at the Upper Area Court Pankshin in Pankshin Local Government Area of Plateau State. The Appellants who were the Plaintiffs at the trial Court sued the Respondents and claimed declaration of title to a piece of farmland at Miler-Minting in Chip District, an order of forfeiture and order of perpetual injunction restraining the Respondents from further interfering with the farmland in dispute. The Respondents as Defendants denied the Appellants claims against them. The matter went on trial in the course of which the parties called their witnesses to prove their respective cases. The Appellants lost at the trial Upper Area Court and their appeal to the Customary Court of Appeal of Plateau State was also dismissed. Dissatisfied with the judgment of the Customary Court of Appeal, the Appellants' further appeal to the Court of Appeal Jos against it, was also dismissed. Still not satisfied with the outcome of their appeal, the Appellants are now on a further and final appeal to this Court raising as many as five issues for the determination of the appeal all of which were clearly hinged on the question of proof of title to the farmland in dispute between the parties.

Having regard to the evidence on record, the concurrent findings of fact by the three Courts below in favour of the Respondents are quite clear and I find no reason whatsoever to disturb such findings see Enang v. Adu (1981) 11 - 12 S.C. 25. Lokoyi v. Olojo (1983) 8 S.C. 61; Ojomu v. Ajao (1983) 9 S.C. 22; and Are v. Ipaye (1990) 2 N.W.L.R. (Pt. 132) 298 at 308.

I therefore find no merit at all in this appeal which is hereby dismissed.

H

CHUKWUMA-ENEH JSC

I have had the advantage of reading before now the lead judgment of my learned brother Tabai, JSC in this matter.

This is a case where the plaintiffs, the appellants in this Court have consistently and, of course, rightly in my opinion lost in the Pankshin Upper Area Court, the Plateau Customary Court of Appeal and the Court of Appeal (Court below) before coming to this Court on appeal in this matter. The two lower Courts in particular have upheld the plea of *res judicata* in their respective decisions in this matter, thus agreeing with the Upper Area Court on the findings of facts that the parties, the subject matter and issues in this case have been decided upon as between the parties in a previous suit as per exhibit A. These findings of facts have not been displaced by the appellants in their appeal to this Court.

It is a clearly postulated principle long ago laid down by the Privy Council in the case of OMETA V NUMA (1932-34) 11 NLR 18 AND KOFI V KOFI (1933) 1 WACA 284 followed and applied in KODILINYE V ODU (1935) 2 WAG A 336 and in this Court in as recently as in the case of OKULATE V AWOSANYA (2000) 1 SC 107 that this Court will not disturb concurrent findings of facts of two lower Courts unless special circumstances exist to necessitate such intervention.

Special circumstances in this regard have been held to include where the decision of the lower Courts are perverse or there is no sufficient evidence before the Court to support the decisions or that the decisions have occasioned a miscarriage of justice. The instant case has been fought and lost on the plea of *Res ludicata* as raised by the respondents.

In the lead judgment of my learned brother, it has been found and I entirely agree with him that the plea of *res judicata* has been rightly sustained before the two lower Courts. The appellants have woefully failed in this appeal to dislodge the solid findings of facts by both lower courts that the parties, the land in dispute and issues in the instant case at the same as in exhibit A and that the land in dispute has been conclusively decided as between the parties here in a previous suit as per Exhibit A it this matter. In other words, the appellants have not made out a case of exceptional circumstance to justify this Court interfering with the findings of facts of the two lower Courts.

The Upper Area Court in the course of dealing with this matter before it has made a significant finding with regard to exhibit A vis-a-vis the plea of *res Judicata* by the respondents and I quote:

“The effect is that the plaintiff who sued in that case was refused title. The Defendant who was sued was also refused title. It follows that as between the plaintiff in this case (now 1st Defendant) and the defendant in that case (now PW6) the issue of title can never be re-contested in afresh suit. This applies to their privies and those who knew of the case but took no action to defend their own interests”

These solid findings of facts have been confirmed by the two lower Courts in this case and so long as they have not been set aside on appeal they bind the parties thereto. See AKIBU V OPALEYE AND OTHERS (1974) 11 SC (reprint) 141. And so, exhibit A is binding on the parties herein notwithstanding the contrary position being urged by the appellants here; not even if exhibit A were to be a nullity, it is still the judgment of a Court of competent jurisdiction. See the decisions of this Court in JIMOH AKINFOLARIN AND OTHERS V SOLOMON OLUWOLE AKINOLA (1994) 4 SCNJ 30 at 46 and AGWAM OBIHA AND OTHERS V CHIEF NWAFOR DURU AND OTHERS (1994) 8 NWLR 9 PT 365) 631 in support of this proposition.

And so, both on the evidence before the Court and the justice of this matter, the appeal lacks merit. And I agree with the lead judgment that this appeal should be dismissed. I dismiss it on this ground alone and I make no comments on the other issues. And this judgment is to abide by the orders as contained in the lead judgment.

G

H