

SUPREME COURT OF NIGERIA
3RD APRIL, 2009. SC. 281/2002
CORAM:- A. I. KATSINA-ALU, A. M. MUKHTAR,
W. S. N. ONNOGHEN, P. O. ADEREMI,
C. M. CHUKWUMA-ENEH, JJSC

EPHRAIM OKOLI DIM APPELLANT
AND
ISAAC ENEMUO
(Substituted by Bedford Enemu) RESPONDENT

LANDLAW - Declaration of title - Onus of proof - How discharged - Plaintiff has to discharge the onus on the strength of his own case - Not on the weakness of the defendant's case (H1)

LANDLAW - Pleadings - Title - Root of - It is incumbent on the plaintiff to plead & prove how he has come to acquire title to the land - This he has failed to do (H2)

LANDLAW - Title - Means of proof - Long possession - Plaintiff has not pleaded specifically his acts of user in possession - By various, positive & numerous acts - Over a long period as to prove ownership (H3)

PLEADINGS - Landlaw - Averments - Sufficiency of - Plaintiff has not pleaded specifically his acts of user in possession - By various, positive & numerous acts - Over a long period as to prove ownership

ACTIONS - Declaration of rights - Proof - Effect of admissions - The right will not be conferred simply upon the state of pleadings or admissions therein - Plaintiff must satisfy the court by evidence (H4)

LANDLAW - Title - Proof - Basis of - Title must be considered & decided upon on the basis of the plaintiff's case - So that where plaintiff initially fails to prove title - His case must be dismissed without recourse to defendant's case (H5)

CUSTOMARY LAW - Customary tenancy - Abandonment - How proved - Being a matter of intention it can be shown - By proving facts from which such intention may be inferred - Or by direct evidence of the party concerned (H6)

CUSTOMARY LAW - Allottee & Customary tenant - Difference - Though both exercise occupational rights over land - The allottee's interest in family land cannot be forfeited - Unlike that of the customary tenant (H7)

EVIDENCE - Issue estoppel - Applicability of - There is evidence that the status of the defendant has been finally decided - As per Exhibit E - The instant parties being privies to those on Exhibit E can not reopen the issue (H8)

FACTS

The plaintiff / respondent sued the defendant / appellant for declaration of title, damages for trespass and injunction. Respondent called four witnesses to prove his case. Appellant's only witness was an Assistant Chief Registrar of the High Court, called to tender Exhibit E, the judgment in an earlier Suit between the instant parties' predecessors - in - title. After hearing, the trial court held that, in view of Exhibit E, respondent had failed to prove the basis of his claim, i.e., that appellant was a stranger in Akpu, and accordingly dismissed the respondent's claim in toto.

Aggrieved, the respondent appealed to the Court of Appeal which allowed the appeal and set aside the decision of the trial court on the basis that appellant, on the state of pleadings, is deemed to have admitted that respondents were owners in exclusive possession of the land in dispute. The court rejected Exhibit E as constituting estoppel between the parties. Dissatisfied, the appellant has brought this appeal against the judgment of the Court of Appeal.

ISSUES FOR DETERMINATION

“(a) Whether the Court of Appeal was right in reversing the judgment of the learned trial Chief judge in view of the peculiar facts and circumstances of the case?”

“(b) Whether the Court of Appeal was right in the treatment and conclusions on Exhibit E?”

(c) Whether the Court of Appeal was correct in holding that Defence had the duty to prove that he belonged to Umuike family of Okpu town and that he is the undisputed owner exercising maximum and numerous acts of ownership therein and, that the Defence conceded to the Plaintiff's ownership of the disputed land?

(d) Whether the Court of Appeal was right in raising some weighty issues suo motu and deciding some without hearing the parties thereon?

(e) Whether the Court of Appeal rightly rejected Exhibit E as constituting estoppel per Rem judicata or even issue estoppel?"

HELD (Unanimously allowing the appeal per **CHUKWUMA- ENEH JSC**)

Declaration of title - Onus of proof - How discharged

1. It is settled that the onus is on a plaintiff seeking a declaration of title to a land in dispute to establish his title on the strength of his own case and not on the weakness of the Defendant's case although the weakness of the defence case may in some cases assist the plaintiff's case. That is to say, that the Plaintiff going by his averments in his pleadings has to aver and prove by his case how he and his progenitors have acquired title to the land in dispute under native law and custom of Akpu and not merely to show that he has a better title than the Defendant. (p. 1131 E)

Title - Root of - Need to plead with particularity

2. It is incumbent on the plaintiff once he traces the root of his title to Ezeilo or Ezeilo family to plead and prove how he or the family has come to acquire title to the land in dispute. This he has failed to do. How the plaintiff has acquired the root of his title to the land in dispute has not been pleaded with the particularity as to show the intervening owners through whom the land in dispute has devolved to him, that is to say, the origin of the Plaintiffs title to land in dispute to the exclusion of the Defendant. (p. 1132 C)

Title - Means of proof - Long possession

3. The plaintiff has not pleaded specifically his acts of user in possession of the land in dispute, that is to say, by various, positive and numerous acts of possession over a long period of time to prove his

ownership of the land in dispute. He has told how the family has put Okoli Mgbafor on the land as customary tenant with his domestics i.e. the Defendants and his kinsmen to whom they have allotted farm-lands. This solitary act of ownership has not been satisfactorily established both on the pleading and on the evidence adduced to establish the same. (p. 1132 H/1133 B)

Declaration of rights - Proof - Effect of admissions

4. I agree that a party's case is as a set out in his pleadings and proved by evidence. But respectfully the plaintiff has totally misconceived the burden on him in this case. In respect of the burden of proof of declaratory rights Obaseki JSC has eloquently restated the guiding principle in the case of VINCENT BELLO V. MAGNUS EWEKA (1981) 1 S.C. 101 thus:

"It is true as was contended by the Appellant's Counsel that Rules of Court and Evidence relieve a party of the need to prove what is admitted but where the court is called upon to make a declaration of right it is incumbent on the party claiming to be entitled to the declaration to satisfy the court by evidence not by admission in the pleading of the Defendant that he is entitled to the declaration. The law is thus established that to obtain a declaratory relief as to right, there has to be evidence which supports an argument as to the entitlement to such a right. The right will not be conferred simply upon the state of the pleadings or the admissions therein. (p. 1134 D)"

LANDLAW - Title - Proof - Basis of

5. It is settled law that the plaintiffs title to a land in dispute must first be considered and decided upon before a consideration of the case of the defendant; so that where the plaintiff initially has failed to prove his title, his case must be dismissed without a recourse to the Defendant's case. (p. 1135 E)

Customary tenancy - Abandonment - How proved

6. Abandonment is a matter of intention and can be showed either by proving facts from which to draw such intention by inference which is not the case here or by direct and explicit evidence of the party concerned, there is again, no direct nor explicit act of abandoning the land in dispute here by the Defendant and his kinsmen them-

selves. In the instant case there are no proved facts to enable one to draw such inference. The plaintiff's pleadings and evidence here have showed that the defendant and his kinsmen have continued to farm and reap economic trees on the land in dispute without leave of the plaintiff; these are clearly acts inconsistent with the plaintiffs claim of defendants and his kinsmen having abandoned the land in dispute. B (p. 1139 B/D)

Allottee & Customary tenant - Difference

7. I think the plaintiff has in this regard misconceived the customary incidences on an allottee of family land vis-a-vis a customary tenant of family land. Even though both exercise occupational rights over land, the allottee's interest in family land cannot be forfeited while customary tenant's interest cannot be terminated save for forfeiture for his misbehaviour. (p. 1139 G) D

EVIDENCE - Issue estoppel - Applicability of

8. There is cogent and abundant evidence before the instant trial court as per exhibit E that the status of the Defendant and his kinsmen has been finally decided and settled in AA/19/74. The principle underlying, issue estoppel contemplates that there must be an end to litigation, and so neither party to a suit is allowed to challenge in the court a finding of fact binding on them in that decision. The parties in the instant suit and in AA/19/74 are privies in blood. They are all members of the same family of Umuezeilo family of Akpu and are bound by the decision. The Plaintiff in the instant suit is therefore rightly estopped from re-opening that issue again. (p. 1143 D) F

REPRESENTATION

B. S. NWANKWO FOR THE APPELLANT.

R.C. MADU WITH BILLY IRABOR FOR THE RESPONDENT.

CASES REFERRED TO

OLUGBADE V. SANGODEY (1996) 4 SCNJ 1 H
 NTEOGWUILE V. OTUO (2001) 6 NWLR (Pt.738) 58 at 64
 BASHAYA V. THE STATE (1998) 4 SCNJ 202 at 204
 ADENIRAN V. ALAO & ANOR (2002) 1 SCM 1 AT 126
 ANIEMEKA EMEGOKWUE V. JAMES OKADIGBO (1973) 4 S.C.

113 AT 117

I.B.W.A. V. IMANO (NIG.) LTD. (2001) FWLR (pt.44) 421

AKINTOLA V. SOLANO (1986) 2 NWLR 598 at 620

DURUMINIYA V. COMMISSIONER OF POLICE (1961) ANLR (Pt.)
70 at 74

B QUEEN V. WILCOX (1961) ANLR 631 at 634

BORNU HOLDING CO. LTD. V. BOGOLO (1972) 1 ANLR 324 at
329 - 332

ADESOMEYE V. GARDNER (1977) NMLR 136

C ONIBUDO V. AKIBU (1982) 13 NSCC 199 at 207

BOOK REFERRED TO

Halbury's Laws of England, 4th Edn, Vol. 16; Paragraph 1530

D

LEAD JUDGMENT BY CHUKWUMA-ENEH JSC

From the instant record of appeal the Plaintiff claims in this suit in the High Court of Anambra State against the Defendant, a declaration of title, damages for trespass and injunction. Pleadings have been filed and exchanged between the parties. At trial court, the Plaintiff called 4 witnesses to prove his case. The Defendant's only witness called in the case is an Assistant Chief Registrar of the High Court to tender the judgment in Suit No.AA/19/74 which among other exhibits has been admitted in evidence and marked Exhibit "E." At the conclusion of the oral hearing the parties have addressed the court.

In a considered judgment the trial court in dismissing the plaintiffs claim in toto has found for the Defendant. Aggrieved by the decision the Plaintiff has appealed to the Court of Appeal, Enugu Division (lower court). The Lower Court having allowed the appeal, it set aside the decision of the High Court. Dissatisfied with the decision, the Defendant has now appealed against the decision of the lower court by a Notice of Appeal filed on 6/3/2002 containing 12 grounds of appeal.

In this court the Plaintiff and Defendant are respectively designated as appellant and respondent. In compliance with the Rules of this Court the Appellant and the Respondent have filed and exchanged their respective briefs of argument in the appeal. In the Appellant's

brief of argument have been distilled five issues for determination and they are as follows:

“(a) Whether the Court of Appeal was right in reversing the judgment of the learned trial Chief judge in view of the peculiar facts and circumstances of the case?”

“(b) Whether the Court of Appeal was right in the treatment and conclusions on Exhibit E?”

“(c) Whether the Court of Appeal was correct in holding that Defence had the duty to prove that he belonged to Umuike family of Okpu town and that he is the undisputed owner exercising maximum and numerous acts of ownership therein and, that the Defence conceded to the Plaintiff’s ownership of the disputed land?”

“(d) Whether the Court of Appeal was right in raising some weighty issues suo motu and deciding some without hearing the parties thereon?”

“(e) Whether the Court of Appeal rightly rejected Exhibit E as constituting estoppel per Rem judicata or even issue estoppel?”

The Respondent has filed a brief of argument; even though the issues for determination raised therein are substantially identical to the Appellant’s, all the same, for completeness they are set out as follows;

“1. Whether the judgment of the Court of Appeal was right when no evidence is lead by the Defendant in support of his pleadings.

2. Whether Exhibit “E” qualifies to operate as estoppel per Rem judicatem (sic) in this case.

3. Whether pronouncing on all issues placed before the court amount to raising issues suo motu by the court.

4. Whether the Court of Appeal was right in reversing the High Court judgment when the same is perverse.”

The core facts of the case in a resume are as culled out from the judgment of the Lower Court at page 197 of the Record, they read as follows:

“The plaintiff who is the Okpala of Umonyeché family of Akpu in Orumba, Aguata Local Government Area of Anambra State, claimed that he is the owner of a parcel of land called ‘Ani Ofe Mili Onyeche’ which the land in dispute forms a part and that the defendant and his family who are natives of Umudim in Aro Ogwe, Orumba,

are his customary tenants. The defendant denied that he is a native of Umudim in Aro Ogwe, Orumba, and insisted that his family is called 'Eze Ihedukwa' and that from time immemorial 'they belong to the extended family of Umuezili, Umuike, of Akpu Town like the plaintiff. To lend judicial affirmation to the assertion that he is not a stranger but an indigene of Akpu Town with the right to hold land. The Defendant pleaded in paragraph 34 of his amended statement of Defence an earlier judgment of the Anambra State High Court in Suit No.AA/19/74 instituted against him by one John Okoli which was dismissed on the ground that he, the defendant, is a native of Akpu and not a stranger.'

The record also shows that the Plaintiff has testified as PW1 as well as his 3 witnesses i.e. PW2, PW3 and PW4. The main plank of their testimony bears to the effect that Okoli Mgbafor, a grandson of the Plaintiffs family lived on the land in dispute as a customary tenant of Umuonyeche family and brought in the Defendant and his kinsmen unto the land in dispute as his domestics. Later on he, Okoli Mgbafor vacated the land in dispute with his domestic servants i.e. the Defendant and his kinsmen. The said land in dispute has to revert to the Plaintiffs family of Umuonyeche. It is the plaintiff's case that without the consent of Umuonyeche family, the Defendant and his kinsmen later went back to the land in dispute (which has reverted to the plaintiffs family) and have harvested economic trees thereat. And when confronted by the Plaintiff, they have laid claim to the land in dispute as owners in possession.

This is the genesis of the institution of this action. I must with respect, repeat that the Defendant, apart from DW1 i.e. the Assistant Chief Registrar, who has tendered Exhibit "E". has called no other further evidence at the trial.

I think I should stop so far as I perceive that the foregoing facts have captured the real essence behind the cause of action in the case and on which the core issues for determination of the appeal have otherwise to be predicated upon. The Plaintiff at the trial court has testified and so also his 3 witnesses. The Defendant's only one witness has been the Assistant Chief Registrar of the High Court of Anambra State who has tendered from his custody a certified copy of the judgment in Suit No.AA/19/74 between John Okoli and Okoli Dim & Another marked as Exhibit "E" in this case. More facts are as

contained in the body of the judgment.

In the course of the proceedings some critical documents as Exhibits A and B, the respective survey plans of the Plaintiff and the Defendant as well as Exhibits C and D - the respective testimonies of Stephen Okoli and Nwafor Obodo before another judge and lastly Exhibit "E" - the judgment in AA/19/74, have been received in evidence. B

The Appellant in his brief of argument, if I may treat with advantage issues one and three together, has relied on the case OLUGBADE V. SANGODEY (1996) 4 SCNJ 1 to contend that the trial court is well placed in the circumstances of the case of having seen, heard and watched the demeanours of the witnesses in the case to evaluate and ascribe probative value to the evidence of the witnesses; the function being one entirely within its province; and that the lower court has wrongly intervened to upset the findings of facts of the trial court when there is no credible evidence adduced by the Plaintiff and his witnesses to justify the Lower Court's intervention in this matter and even at that to show that the Defendant is a stranger in Ezeilo family a crucial issue in the case. See: NTEOGWULE V. OTUO (2001) 6 NWLR (Pt. 738) 58 at 64 and BASHAYA V. THE STATE (1998) 4 SCNJ 202 at 204. He also has reminded the court that the Plaintiff seeking a declaration of title must succeed on the strength of his case not on the weakness of the defence although the weakness of defence may in some cases assist the Plaintiffs case. See: ADENIRAN V. ALAO & ANOR (2002) 1 SCM 1 AT 126. C
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On issue two that is, on whether the court below is right in its treatment and conclusions on Exhibit "E"; the Appellant states that in Paragraph 34 of the Statement of Defence of the suit No.AA/19/74 of the Awka High Court has been pleaded to debunk the Respondent's case that the Defendant is a stranger in Akpu Town. The trial Court in the cited case has found that the Defendant is a native of Akpu Town. This point has not been challenged on appeal. He reminds the Court that the attentions of both the Plaintiff as PW1 and his witness PW2 have been drawn to their respective testimonies in Suit No.AA/19/74 as witnesses for the Plaintiff (i.e. John Okoli) therein, particularly with respect to their assertions that the Defendant and his kinsmen are strangers in Akpu and have paid homage to one Ezeilo. The Appellant has stated that the court below has to- G
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tally misconceived the evidential value of Exhibit “E” as no witness has been cross-examined on the material parts of it. He distinguishes the cases of DURUMINIYA V. COMMISSIONER OF POLICE (1961) ANLR. 70 (and the QUEEN V. WILCOX (1961) 1 ANLR -) where a whole book has been tendered with no particular reference to any
 B page of the book from the instant case the judgment of a competent court. He relies on Section 132(1) and Section 54 of the Evidence Act to submit that the conclusions of the court below on Exhibit “E” are unsupportable.

C He has queried the propriety of the findings of the lower court that on the Defendant lies the duty of proving that he belongs to Umejili Umuike family of Akpu as the onus rests on him; furthermore, to show that he as the owner in possession has exercised numerous and positive acts of user on the land in dispute. The Appel-
 D lant has relied on Sections 136 and 137 of the Evidence Act and the case of ADENIRAN V. ALAO & ANOR. (supra) to opine that as the Appellant (Defendant at the trial court) who has not counter-claimed that the burden of proof rests squarely on the Plaintiff as regards facts alleged by the plaintiff in his pleadings; the onus will not shift until
 E that burden is successfully discharged. However, the court is reminded that the trial court has found that Plaintiff’s case in sum, has lacked probative value and that the conclusion of the trial court should not have been interfered with.

F On issue four, that is, on the question of new weighty issues suo motu raised and resolved by the lower court without hearing the parties; the Appellant has submitted that the lower court has raised a number of new issues, one of such issues is the contention that DW1 is not a witness within the meaning of section 193 of the Evidence
 G Act as the sole purpose of calling him is to tender Exhibit E and so he has not been crossed examined, the appellant submits that it is wrong to have gone ahead to resolve it without giving any hearing to the parties and thus has occasioned a miscarriage of justice.

H The Lower Court has also raised the question whether Exhibit “E” could constitute estoppel per Rem judicatam or issue estoppel in the absence of sameness of parties, the issues and subject matter in both suits i.e. AA/19/74 and the instant suit; again, a pronouncement castigated by the appellant as having been reached without having given to the parties the chance to contest the issue.

The Appellant has relied on Exhibit E as pleaded in paragraph 34 of the Amended Statement of Defence to submit that in Suit No.AA/19/74 between one John Okoli - the son of Mgbafor Okoli and 1st Defendant and another that the issue of whether the Defendant is a stranger in Akpu Town has been conclusively settled and that PW1 (i.e. Plaintiff) and PW2 (both witnesses in Suit No.AA/19/74) respective attentions have been drawn to that case. The Appellant submits that paragraph 34 of the Statement of Defence has sufficiently pleaded estoppel per rem judicata or issue estoppel and relies on ALADE V. OLUKADE (1976) 2 FNR Ratio 7 for so submitting.

The court is urged to allow the Appeal set aside the judgment of the Court of Appeal and restore the judgment of the trial court.

The Respondent's case on issue one is as borne out from his brief of argument i.e. on whether the judgment of the lower court is right when the Defendant led no evidence in support of his pleadings. He restates his assertion as per the traditional history of his family and how the land in dispute known as "Ana Ofe Mili Onyeche" has come down to the Plaintiff and the numerous acts of user as farming and harvesting of economic trees being exercised on the said land. It is told how the Defendant and his kinsmen have lived with one John Okoli on the said land as his domestics and how the Plaintiff have allotted farmlands to Defendant and his kinsmen as customary tenants until the quarrel between John Okoli and the Defendants leading to John Okoli dispossessing the Defendant and his kinsmen of their lands which action has precipitated the Suit in AA/19/74. i.e. JOHN OKOLI V. OKOLI DIM & ANOR. and the judgment to Exhibit "E". The Defendant, he submits, has led no evidence in support of his pleadings apart from his having tendered Exhibit "E". The Respondent has asserted that Eze Ihedukwa sub-family of the Appellant i.e. the Defendant is not known to him and that it is not one of the five sub-families of Umuezeilo extended family as follows: Umuezeilo, Umuonyeche, Umuezeohu, Umumbanko and Umuokoronkwo Aku.

Still on issue one the Respondent contends that having led evidence as per his pleadings as against the failure of the Defendant (appellant) to do the same with regard to his pleadings that the Defendant has not set up any case which will have to be weighed in the imaginary scale against the Plaintiffs case. See: IYOSE V. UBTHMB (2000) 2 NWLR (pt.643) 45 and AKINFOSILE V. IJOSE (1960)

SCNLR 477. He submits that Defendant has attempted to discredit the Plaintiffs case by cross-examination but observes that any evidence so elicited which is contrary to the pleadings even when extracted through cross-examination goes to no issue. See: ANIEMEKA EMEGOKWUE V. JAMES OKADIGBO (1973) 4 S.C. 113 AT 117, B and I.B.W.A. V. IMANO (NIG.) LTD. (2001) FWLR (pt.44) 421 and AKINTOLA V. SOLANO (1986) 2 NWLR 598 at 620.

On issue two i.e. on whether the lower court is right in its treatment of and conclusions on Exhibit “E” - (a certified true copy of the judgment of the same Awka High Court in AA/19/74) which has C been treated as grounding a plea of Res judicata or issue estoppel in this action, the Respondent has posited that since the subject matter i.e. the two lands in dispute are differently owned by John Okoli and Isaac Enemuo and as the parties, and issues are not the same in both D suits that the requirements for a valid plea of Res judicata or issue estoppel are not present here thus making the principle inapplicable in this case. See: OJEMEN V. MOMODU (2001) FWLR (Pt.37) 1138 at 1143. The Respondent has reminded the court that the averments in the statement of defence to the effect that the Appellant is not a E stranger in Akpu still remains as a mere averment as there is no evidence from the defendant to give life to the said averment. See: IBENYE V. AGWU (1998) 11 NWLR (Pt.574) 372 at 380.

It is also contended that Exhibit “E” has practically been dumped on the trial court as DW1 has not been cross-examined on Exhibit F “E” thus making it so worthless evidentially and that DW1 is not a witness in this suit as per Section 193 of the Evidence Act. See: DURUMINIYA V. COMMISSIONER OF POLICE (1961) ANLR (Pt.) 70 at 74, QUEEN V. WILCOX (1961) ANLR 631 at 634, BORNU G HOLDING CO. LTD. V. BOGOLO (1972) 1 ANLR 324 at 329 - 332, ADESOYE V. GARDNER (1977) NMLR 136, and ONIBUDO V. AKIBU (1982) 13 NSCC 199 at 207. In support for rejecting exhibit E by the lower court the Respondent has referred to AGBAJE V. ADIGUN (1993) 1 NWLR (pt.269) 261. It is submitted that the Appellant has placed nothing before the court yet expects to succeed on H nothing; and even more so that the evidence of PW1 and his witnesses not having been damaged in cross-examination, the lower court rightly has found for the Respondent in this case.

On issue three, the Respondent has denounced the conten-

tion that the lower court has raised issues suo motu and resolved them without hearing from the parties and has described it as a mere speculation. He however has asserted that the lower court has the power to resolve issues properly raised by the parties in their respective briefs of argument when they are on material issues and this has to depend on the facts and circumstances of each case. See: STATE V. AJIE (2000) FWLR (Pt.16) 2833, OLOWOLAGBA V. BAKARE (1998) 3 NWLR (Pt.543) 528 at 529. He submit that all the issues considered by the lower court under issue three have been raised in the parties' briefs of argument making it a duty on the court to pronounce on them. The Appellant should not therefore complain.

Issue four i.e. on whether the lower court is right in reversing the judgment of the trial court; it is submitted that this is perfectly so when the judgment is perverse. The Respondent has relied on NWADIOGBU V. NWADOZIE (2001) PWLR (pt.61) 1625 at 1628 to justify the lower court's interfering with the findings of facts of the trial court particularly as the findings have not been supported by the pleadings and/or evidence. He has deprecated as unwarranted, the reliance placed on Exhibit E which the Appellant i.e. Defendant has dumped on the court through DW1 without his being cross-examined on it. See: ONIBUDE V. AKIBU (supra) and contends it has no evidential quality.

In conclusion the court is urged to dismiss the appeal and uphold the judgment of the Court of Appeal.

I have reviewed as well as given considerable thought to the cases of the parties to this appeal. The Plaintiffs case is as pleaded in his further Amended Statement of Claim. In it he has pleaded the traditional history of his family of Umuonyeche and how the family has come to own the land in dispute known as "Ana Ofemili Onyeche". The Plaintiff has depicted the Defendant/Appellant and his kinsmen as no more than as "domestics" and customary tenants, and as migrants from Umudim Aro-Ogwe. The Plaintiff in expatiation of the pleaded facts has said that one Okoli Mgbafor Ezeobu, a grandson of the Plaintiffs family has lived on the land in dispute with the Defendants as "domestics" and after him John Okoli (his son), who has inherited them (the Defendant and his kinsmen) from his father. And it is the Plaintiffs case that at each farming season the Plaintiffs family allots farmlands to the Defendants, servants of Okoli Mgbafor. Con-

tinuing the plaintiff has pleaded of how Okoli Mgbafor has left the land in dispute along with his domestics i.e. the Defendant and his kinsmen and moved to a new location outside the land in dispute i.e. completely outside Umuonyeche family land which otherwise tantamounts to an act of abandonment of the land in dispute under native law and custom of Akpu. It is further pleaded that as a result of a dispute (i.e. misbehaviour of the Defendant and his kinsmen) between the Defendant and his kinsmen as domestics and their master John Okoli the Defendants have to be dispossessed of their lands hence they have reverted to the Plaintiffs land in dispute the land they have long abandoned; they have since laid claims to the same.

The Plaintiff has pleaded an arbitration conducted by members of Umuezeilo extended family of both parties; in the result, the elders of Umuezeilo family have looked into the matter and handed down a warning to the Defendant and his kinsmen not to enter the land in dispute without leave of the Plaintiff; they have also reduced their decision to writing and given a copy to each side. This is a synopsis of the plaintiffs averments in his pleadings and it is in the main as to the status of the Defendant and his kinsmen vis-a-vis the plaintiff and his people.

On the other hand, the Defendant has filed his Defence and in it has pleaded exhibit B the survey plan of the land in dispute and a judgment in suit No. AA/19/74 as Exhibit E between JOHN OKOLI V. OKOLI DIM & ANOTHER upon which has been founded the plea of Res judicata or issue estoppel as the reliefs sought in the two land cases by the Plaintiff in both cases are the same albeit against the same Defendants. The Defendants has repudiated the Plaintiffs case as pleaded. The Plaintiff as PW1 and his witnesses as PW2, PW3 and PW4 have testified and have been cross-examined on Exhibit E. The Defendant has called no further evidence apart from tendering Exhibit E through DW1.

The Plaintiff, it seems to me, has premised his claim in this case on the twin bases of relying on traditional history and acts of user in possession to prove his title to the land in dispute. All I can make out of the plaintiff's case is that the Defendant and his kinsmen are not part of the land owing family in Ezeilo extended family in Akpu. There can be no doubt that this is a land case with a little twist of difference from the ordinary run-of-the mill type of land disputes. This will be-

come more manifest in a while from here.

From the plaintiffs pleadings and oral testimony in support in his case it goes without any doubt that for the plaintiff to succeed in this case he has also the burden of showing that the Defendant and his kinsmen are not full blooded members of Umuonyeche family i.e. Umuezeilo extended family of Akpu; in other words that it is an accepted fact that the Defendant and his kinsmen are strangers in Akpu and are domestics and customary tenants. And that even although they as domestics have occupational rights of the land allotted to them, even then that under Akpu native law and custom they suffer from major disabilities as to land ownership in Akpu Town being strangers; in other words the Defendants are subject to what is otherwise akin to House Rule System and its incidences.

In this matter the plaintiff has the further burden to prove up to the hilt the alleged abandonment of the land in dispute by the Defendants and his kinsmen and their unwarranted re-entry.

I intend to examine the plaintiff's case here from two perspectives, firstly, from the angle of how it is pleaded and secondly the evidence adduced in support of the pleadings. This case is about title to the land in dispute otherwise known by both sides as Ana Ofemili Umuonyeche verged pink in both Plaintiff and Defendant plans Exhibits A and B. ***It is settled that the onus is on a plaintiff seeking a declaration of title to a land in dispute to establish his title on the strength of his own case and not on the weakness of the Defendant's case although the weakness of the defence case may in some cases assist the plaintiff's case. That is to say, that the Plaintiff going by his averments in his pleadings has to aver and prove by his case how he and his progenitors have acquired title to the land in dispute under native law and custom of Akpu and not merely to show that he has a better title than the Defendant.*** There are decisions of this court showing that the onus in such until the Plaintiff has completely and successfully discharged the onus on him in this regard. See: KODILINYE V. ODU (1935) 2 WACA 336 at 337, KOFI V. KOFI (1933) 1 WACA 284 and OKULATE V. AWOSANYA (2000) 1 S.C. 107.

There are quite a number of holes, big ones for that matter to pick in the plaintiff's pleadings of his case as per his further Amended Statement of Claim and the oral testimonies to prove his case; in

paragraph 3 at page 70 of the Record he has averred thus:

“From time out of memory, plaintiff’s family had been in exclusive owners in possession of the parcel of land in dispute called Ani-Ofe-Mili Onyeche situate at Akpu Orumba”.

The PW1 testifying at page 65 of the record at LL. 3-4 said:

B *“Ezeilo 1 was our great ancestor. Ezeilo 1 was the founder of the 5 sub-families of Umuezeilo”.*

C That is the furthestest he could go in tracing his genealogy vis-a-vis the devolution of the land in dispute through the generations to his generation. On the principle decided in MOGAJI V. CADBURY (NIG) LTD. (1985) 2 NWLR (Pt.7) 393, ***it is incumbent on the plaintiff once he traces the root of his title to Ezeilo or Ezeilo family to plead and prove how he or the family has come to acquire title to the land in dispute. This he has failed to do.***
D ***How the plaintiff has acquired the root of his title to the land in dispute has not been pleaded with the particularity as to show the intervening owners through whom the land in dispute has devolved to him, that is to say, the origin of the Plaintiffs title to land in dispute to the exclusion of the Defendant.***

E Nothing could be clearer from the foregoing abstracts than the fact that the plaintiff has not pleaded nor has he led preponderance of evidence of who his ancestors are, how they have acquired the land in dispute and that the land in dispute belongs to his family and is family communal property. See: ATUANYA V. MBAJEKWE (1975)
F 3 S.C. 616 at 617. The pleadings are clearly deficient in these respects. Even then, having asserted that Ezeilo is his great ancestor; the plaintiff has the onus of showing how the land in dispute has devolved on Ezeilo and how he has acquired it, by grant or first
G founder of the settlement as the case may be and then from him (Ezeilo) to the plaintiff. See: MOGAJI V. CADBURY (NIG.) LTD. (1985) 2 NWLR (Pt.7) 393; OHIERI V. UDO ETUK (1993) 3 NWLR (Pt.279) 94 at 96. His traditional history is anything but satisfactory. It is a non-starter.

H ***The plaintiff has not pleaded specifically his acts of user in possession of the land in dispute, that is to say, by various, positive and numerous acts of possession over a long period of time to prove his ownership of the land in dispute. He has told how the family has put Okoli Mgbafor on the land as cus-***

tomary tenant with his domestics i.e. the Defendants and his kinsmen to whom they have allotted farmlands and furthermore how the Defendant and his kinsmen have abandoned the land to another land, along with Okoli Mgbafor their overlord, and how the Defendant and his kinsmen have reverted to the land in dispute without leave and therein have exploited all the economic trees and cash crops on the land and farmed the land without any leave from the plaintiff's family. It must be noted that the incidences of customary tenancy in this regard have not been pleaded by the plaintiff. **This solitary act of ownership has not been satisfactorily established both on the pleading and on the evidence adduced to establish the same.** The trial court at page 116 of the record has in these respects found thus,

"With regard to (a) pleadings of the plaintiff in relation to the reliefs he claims, plaintiff's averment on how the 1st Defendant 'was brought into the family of late Okoli Mgbafor, father of the plaintiff in suit No.AA/19/74 is far from clear. 1st Defendant was emphatic that he is a member of Ezeilo family of Akpu whose sub-family is Umulhedukwa within Ezeilo extended family.

Both Plaintiff and 1st Defendant are agreed that all members of the sub-families of Umu-Ezeilo left or vacated or abandoned their respective family lands on the Ofemili side of Aghoumili stream. The preponderance of evidence was that 1st Defendant and his people were 'attachees' to the family of Okoli Mgbafor whose son was the Plaintiff who sued the 1st Defendant in suit No.AA/19/74 which was dismissed for a reason or reasons in the said suit now referred to. If the Plaintiff's case was that 1st Defendant vacated the Ofemmili land of Okoli Mgbafor along with the latter what tangible reason would their (sic) be for 1st Defendant to jump into the land of the Plaintiff. Further, if every sub-family of Ezeilo family still retained its land in Ofemmili why would not the 1st Defendant? The 1st Defendant would be subject to disability to return to Ana Ofe Ofemmili only if he is not a member of one of the sub families of Ezeilo. Neither by his pleading nor by his oral evidence was the plaintiff able to show that the 1st Defendant is not a member of Ezeilo family either 1 or 11. The Plaintiffs traditional history as pleaded regarding ownership of the land in dispute is unconvincing."

(Underlining mine for emphasis).

I have set out the foregoing findings of facts to show that the trial court has appreciated on whom lies the onus in this case, and that the burden of proof lies on the Plaintiff throughout in this matter. He has failed to discharge the burden in the opinion of the trial court as I have adumbrated above and on the backdrop of my reasoning above I confirm the above findings as sound and as having derived from the facts found by the trial court; having failed to discharge the burden of proof on him in this regard successfully the onus does not shift to the Defendant; until this is done the court is not obliged to look at the Defendant's case — this being an action as to declaratory rights. These findings are well grounded having been based on the evidence before the trial court. Much heavy weather has been made by the Respondent that the Appellant as Defendant having led no evidence in support of his pleadings has admitted the Plaintiff's case in toto and has more or less abandoned of the averments contained in the amended statement of defence and that any evidence elicited in cross-examination by the Defendant which is not pleaded goes to no issue.

I agree that a party's case is as a set out in his pleadings and proved by evidence. See: ANIEMEKA EMEGOKWUE V. JAMES OKADIGBO (supra) but respectfully the plaintiff has totally misconceived the burden on him in this case. In respect of the burden of proof of declaratory rights Obaseki JSC has eloquently restated the guiding principle in the case of VINCENT BELLO V. MAGNUS EWEKA (1981) 1 S.C. 101 thus:

"It is true as was contended by the Appellant's Counsel that Rules of Court and Evidence relieve a party of the need to prove what is admitted but where the court is called upon to make a declaration of right it is incumbent on the party claiming to be entitled to the declaration to satisfy the court by evidence not by admission in the pleading of the Defendant that he is entitled to the declaration. The law is thus established that to obtain a declaratory relief as to right, there has to be evidence which supports an argument as to the entitlement to such a right. The right will not be conferred simply upon the state of the pleadings or the admissions therein. See: NELSGER V. DEPARTMENT OF HEALTH & SOCIAL WELFARE

(1973) 3 AER 444 at 457 where Megary V.C. observed, 'The court does not make declarations just because the parties to litigation have chosen to admit something. The court declares what it has found to be the law after proper argument not merely after admission by the parties. There are no declarations without argument. That is quite plain'. See also SORUGBE V. OMOTAWUSE (1988) 3 NSCC (Vol,19) B 252 at 262."

(underlining for emphasis).

The implication of the foregoing cited case to this case is, firstly, it is wrong for the lower court to say that because the Plaintiff has not led evidence as to his paragraphs 3 and 4 of the Defence he has conceded to paragraphs 2 and 3 of the Statement of Claim and is thereby entitled to judgment by operation of law. With all due respect, this is a major gaffe by the lower court. C

The lower court, again, with respect has committed a grave error in disturbing the findings of facts of the trial court in this case as per the abstract above. The trial court I must emphasis, has not rested his decision solely on the judgment in Suit No.AA/19/74 as pleading Res judicata or issue estoppel to defeat this suit; the lower court has wrongly so thought and secondly, ***it is settled law that the plaintiffs title to a land in dispute must first be considered and decided upon before a consideration of the case of the defendant; so that where the plaintiff initially has failed to prove his title, his case must be dismissed without a recourse to the Defendant's case.*** E F

That the lower court completely has misconceived the shifting of onus of proof in a claim for declaration is evident from a number of passages of its judgment at page 210 from the 2nd paragraph of the record as follows: G

"With this clarification the issue of whether the Respondent is a member of Ezeilo family is the crucial question necessary for the Respondent to answer to negate the Appellant's claim in paragraphs 2 and 3 of the further Amended Statement of Claim that the Respondent is the customary tenant of the Appellant and his family on the land in dispute that had been in exclusive possession of the appellant's family upon which the Respondent joined issue in paragraphs 3 and 5 of his statement of defence. On that state of pleading, the respondent has a duty to prove as he averred in those paragraphs of his H

statement of defence that from time immemorial he belongs to the extended family of Umejili Umuike of Akpu Town and that he is the owner in possession from time immemorial of the land in dispute; furthermore, that he has been exercising maximum and numerous acts of ownership therein from time immemorial without any act or
 B *hinderance from the plaintiff until the cause of the present action arose in 1967.”*

It must be noted here that the Defendant has not counter-claimed against the Plaintiff in this suit. The foregoing abstract has
 C compounded the principle of shifting of burden of proof in a matter of declaration of title. The Lower Court has not adverted to it at all. Therefore, the only conclusion open to this court on having found that the Plaintiff has totally failed to discharge the burden the law has placed on him in this suit is an outright dismissal of his claims; as the
 D burden does not shift until the plaintiff has successfully discharged his onus, which he has not done.

I have found that the Plaintiff has misconceived the burden on him to show that the Defendants are strangers in Akpu and are domestics and customary tenants to the Plaintiff (Respondent).
 E Another instance of misconceiving the principle in BELLO V. EWEKA by the lower court is as at page 208 last paragraph of the record where the lower court said:

“..... the legal conclusions as outlined in various submissions
 F of the learned Senior Advocate follow, namely, (a) that averments in pleadings do not constitute evidence and, therefore, failure to lead evidence on facts pleaded means an abandonment of these averments.
 (b) it also amounts to an admission of the appellant’s claims by the
 G Respondent who pleaded but did not establish by evidence any evidence to the Appellant’s claims.”

He has cited AKINTOLA V. SOLANO (1986) 2 NWLR (Pt.24) 598. I have demonstrated herein that before the conclusions in the above abstract could be reached, the lower court ought to have
 H paused to ask itself whether the plaintiff has successfully discharged the burden of proof on him as outlined in the above cited case as then and only then would the burden shift to the Defendant. This is a glaring error in this appeal. It is noticeable that nowhere in its judgment has the lower court drawn attention to this principle or found

that the plaintiff has so discharged his burden in this regard as in the cited case. Meaning that the lower court should not have interfered with the findings of facts unless the trial court has been clearly wrong. It is only then that it has to apply its mind afresh to the evidence and form its own conclusions and embody the same and its reasons on which they are founded in its decision. The defendant has clearly and rightly faulted the decision of the lower court in these respects. ^B

The case of AKINTOLA V. SOLANO (1986) 2 NWLR (Pt.24) 598 relied and followed by the lower court has no bearing with the instant case as it has nothing to say on the crucial question of shifting of burden of proof to the Defendant after the plaintiff must have discharged the initial burden on him as per BELLO V. EWEKA (supra). ^C

Respectfully, the obvious confusion as to shifting of burden of proof in this case has arisen from a misconception of the principles of pleading vis-a-vis the burden of proof on a plaintiff especially in actions for declaratory rights as here and this is further obviously so as in the next paragraph to the above quoted passage where the lower court has continued thus:

“The Respondent who led no evidence to prove those averments must on the principle of law herein before stated be deemed to have abandoned those averments and in effect concede the Appellant’s averments in paragraph 2 and 3 of his further Amended Statement of Claim that the Respondent is the customary tenant of the Appellant whose family ‘had’ from time out of memory ‘been in (sic) exclusive owners in possession of the parcel of land in dispute called ‘Ani-Ofe-Mili Onyeche’ situate at Akpu Orumba. ^E ^F

With that concession by the Respondent that the family of the Appellant had been the owners in exclusive possession of the land in dispute the appellant is by operation of law entitled to judgment, a conclusion which is not affected by the issue of contradiction in the evidence of the Appellant about the status of the Respondent as a stranger in Akpu Town which is predicated erroneously on the earlier judgment Exhibit E that has been shown to have no probative value for anything including making comparison. Nor is this conclusion affected by the discrepancy in the Appellant’s evidence about his age which is minor and, therefore, immaterial within the test in ONYEMA V. THE STATE (1974) 1 ANLR (Pt.1) 522 at 530; ISHOLA V. THE ^G ^H

STATE (1977) 2 FCA 153, 206 affirmed on appeal in (1978) 9-10 SC. 81, 110-113 and THEOPHILUS V. THE STATE (1996) 1 SCNJ 79, at 91."

I have to note that the above cited cases in the foregoing abstract are all criminal cases and of no significant support to the contention for which they are supposed to expound here - this being a civil matter. Not only has the plaintiff failed to plead and prove by evidence of how he has derived title to the land in dispute by traditional history or acts of ownership; he has woefully failed to prove the decisive point that the Defendant and his kinsmen are customary tenants of the plaintiff and strangers in Akpu on which he has pitched his entire case. Having failed on this singular issue, the Plaintiff's case is bound to fail.

The lower court in its judgment has seen the Defendant's case from the perspective of his having conceded to all averments of facts in the plaintiff's further Statement of Claim as the cornerstone of its decision in this case particularly as the Defendant has even more so led no further evidence in support of his pleadings. I have, however, endeavoured here by references to high authorities with regard to claims of declaratory rights to show that even admission by a Defendant does not relieve the Plaintiff in such actions of the onus of proving his entitlement to the declaration he seeks as the court in such cases has to base its declaration on law.

And even more so, and as I have found herein, the plaintiff on whom lies the onus of proof in this case has not established any bases from which to find that the Defendant and his kinsmen in this case are strangers in Akpu and have lived with one Okoli Mgbafor and after him his son John Okoli on the land in dispute as domestics under a customary tenure - non has been called to testify to this effect in this case. This is the basis on which the plaintiff has founded his entire claim against the Defendant in respect of his claim of Ana Ofe Mili Onyeche, the land in dispute as verged pink in exhibits A and B and he fails or succeeds on it in this case; and the basis having collapsed as I have found herein, the plaintiffs claim that the said land in dispute is his exclusive property must fail. It, indeed, fails. And I so find.

One other strong point that has weakened the plaintiffs case here relates to his contention that at one time, Okoli Mgbafor with

the Defendant and his kinsmen as his domestics, abandoned the land in dispute for another land. The trial court rightly has rejected this contention as can be gathered from the passages of its decision I have quoted above. Again, the plaintiff has not therefore satisfactorily established the fact of abandonment. See: EKPENYONG V. EYIBIO (1965) NSCC (Vol.4) 288 and ELUMARE AND ANOR. V. EMHONYOU (1985) NSCC (Vol.16) (Pt.01) 163 on the issue of abandonment. B

In this context, ***abandonment is a matter of intention and can be showed either by proving facts from which to draw such intention by inference which is not the case here or by direct and explicit evidence of the party concerned, there is again, no direct nor explicit act of abandoning the land in dispute here by the Defendant and his kinsmen themselves. In the instant case there are no proved facts to enable one to draw such inference.*** In fact, on the contrary, the cause of action in this case as per the plaintiffs claim is borne out of the presence of the defendant and his kinsmen on the land in dispute in spite of the alleged abandonment and moving out of the said land; ***the plaintiffs pleadings and evidence here have showed that the defendant and his kinsmen have continued to farm and reap economic trees on the land in dispute without leave of the plaintiff; these are clearly acts inconsistent with the plaintiffs claim of defendants and his kinsmen having abandoned the land in dispute.*** C
D
E
F
The defendant and his kinsmen as can be seen have not done so. See: BENJAMIN EZEILO & ORS. V. SAM OBI & ANOR. (1960) IV ENLR 19. In this regard, therefore, the trial court has rightly rejected the plaintiff's submission that the defendant and his kinsmen have abandoned the land in dispute. G

The plaintiff has also pressed his submissions that he allots land to the Defendant and his kinsmen too far. ***I think the plaintiff has in this regard misconceived the customary incidences on an allottee of family land vis-a-vis a customary tenant of family land. Even though both exercise occupational rights over land, the allottee's interest in family land cannot be forfeited while customary tenant's interest cannot be terminated save for forfeiture for his misbehaviour.*** The plaintiff is totally misconceived as to which of the two customary tenures has applied here and it is not H

the place of this court to pick either for him.

In conclusion I have to draw attention to a parallel situation as between the case of ARCHIBONG V. ITA (1953) 14 WACA 520 at 522, vis-a-vis as in this case on the issue of shifting of onus of proof in an action of declaratory rights. I think I should conclude this aspect of my decision as observed by the court in that case as thus:

"It is submitted for the plaintiff that he would have succeeded in establishing his title by cross-examination of the Defendant's witnesses if they had testified. This submission overlooks the principle that the onus is on the Plaintiff throughout to prove the title which he seeks to have confirmed. That onus never shifts. It is not sufficient for the Plaintiff in such an action to show possession and argue that the Defendant has proved no better title."

(Underlining mine for emphasis).

I adopt this dictum in resolving this appeal. On the foregoing ground alone, this appeal should succeed.

However, I now come to the propriety of relying by the 1st Defendant on Exhibit E that is, the judgment in suit AA/19/74 between JOHN OKOLI V. OKOLI DIM & ANOTHER on the issue of Res judicata or issue estoppel by judgment in this matter. It is now settled law that to raise a plea of Res judicata in defence of a matter the party so raising it has to show that the parties, the issues and the subject matter in both cases are the same otherwise it is a non-starter.

It is my view that Exhibit E having been duly proved, the trial court rightly has averted to it in this case so as to determine the applicability to this matter of Res judicata/issue estoppel.

However, I think that to properly position this question of Res judicata/issue estoppel in this matter it is crucial to identify in this regard the findings of facts of the trial court in suit No. AA/19/74 that have given rise to the plea of Res judicata/issue estoppel as raised by the Defendant in the instant matter. The plea of Res judicata/issue estoppel has been raised here to show particularly that the issue of the Defendant's status in Umuezeilo family has been pleaded and specifically determined by the trial court in Suit No. AA/19/74. In Exhibit E of Suit No. AA/19/74 at p.17 the trial court held:

"After a careful consideration of the evidence led by the parties on this issue it is my view that the Plaintiff has not led evidence to my satisfaction that the Defendants are strangers in Akpu."

And at p.20 the trial court further rightly said:

“With two members of the Umuezeilo family supporting the Defendants that they are not strangers in Akpu and the evidence of the Plaintiff and his witnesses on this issue not very convincing, I am unable to hold that the Defendants are strangers in Akpu and were once the domestics of the Plaintiff and his father. The foundation on which the plaintiff bases his claim against the Defendants in respect of the area in dispute verged in Exhibits A and B having collapsed, the Plaintiff’s claim that this area of the land is his exclusive property therefore fails.”

Before the above finding of fact, the trial court in AA/19/74 at p.18 of Exhibit E also held:

“On this issue again I cannot lightly disregard the evidence of DW1 Okeke Ezeilo and DW2 Otuonye Ofor, all of them members of Umuezeilo family, that the Defendants are not strangers in Akpu but are members of Umuezeilo family. DW2 is closely related with Plaintiff. It is his evidence which I accept that the mother of the Plaintiff’s father Okoli Ezeobu was his father’s sister. This witness may not be regarded as a completely truthful witness when the whole evidence which he gave before me is considered. But unless he has any axe to grind against the Plaintiff and this has not been suggested he will not very lightly come to court to say that the Defendants are full blooded members of Umuezeilo family if it is true that they are strangers in Akpu and the domestics of the Plaintiff and his father.”

The Plaintiff’s case as to the status of the Defendants in Akpu is as pleaded in paragraphs 6, 7, 8, and 9 of his Statement of Claim.”

The trial court has then set out in its judgment the said paragraphs of the Statement of claim. I make the detour in regard to this aspect of the case to show that the issue of the Defendants’ status is clearly joined as per the parties’ pleadings in suit No.AA/19/74.

The Defendant in the instant suit has in his pleadings pleaded Exhibit E as of Res judicata/issue estoppel to meet the Plaintiffs averments as to his status as a stranger and a domestic. The findings of facts in regard to the instant issue which the Plaintiff/Respondent has taken serious exception to are as per p. 117 of the Record:

“In regard to issue 2 - propriety of reliance on the judgment in Suit No.AA/19/74, all prerequisites for a valid plea of Res Judicata are intact in favour of the Defendant. Both Plaintiff and 1st Defen-

dant are agreed that the Defendants in both suits - Suit No.AA/19/74 and the present suit are the same or privies. For precisely the same reason that the Defendants in Suit No. AA/19/74 are not strangers to Ezeilo family and the Plaintiffs case in that suit was dismissed - the same should hold in the present case. If every sub-family of Umu-
B Ezeilo should have their holdings in Ofemmili why not the 1st Defendant? The Plaintiff in this case testified as the PW2 in Suit No.AA/19/74 against the 1st Defendant and was not believed - his claim in the present suit is nebulous also."

C At p.118 the trial court has forthrightly held:
"And first as the court in the judgment in AA/19/74 did not believe his testimony that the first Defendant was a stranger to the Ezeilo family, I too do not believe his evidence on this point."

D One cardinal point hotly contested in this matter is as to the status of the Defendant and his kinsmen, that is, as to whether they are strangers in Akpu and the domestics of the plaintiff's people. A cursory perusal of the above abstracts from the judgments in AA/19/74 and the instant trial court will show conclusively that it is a critical issue that has been raised and distinctly determined between the parties. At the trial court of the instant suit the Defendant has pleaded exhibit E - the judgment in AA/19/74 to contend that the plaintiff in the instant suit cannot be allowed to contest the issue as to the status of the Defendant and his kinsmen again; the same having been finally determined in AA/19/74 and binding on them. In the suit No.AA/19/74 it has been decided that the Defendants are not strangers in Akpu nor are they domestics to the Plaintiff and his father. The Plaintiff and his father are of Umuezeilo family. As can be seen from the abstracts above, the trial court in AA/19/74 has referred to the aver-
E G ments in the Statement of Claim and Defence of the parties on the joinder of issues on the Defendant's status and so for the Plaintiff, to succeed in this regard he has to prove by evidence that the Defendants are strangers; at p. 17 of exhibit E it said;-

H "Therefore for the Plaintiff to succeed he has to give a very satisfactory explanation as to how the Defendants came to be living and working on the land in dispute with his father. This therefore brings me to the consideration of the Plaintiff's Case that the Defendants are strangers in Akpu."

The trial court in AA/19/74 has finally decided the issue of the

Defendant's status; it is a final decision binding on the parties and their privies. The conditions for issue estoppel to operate in any given case have been set out in the case of CARL ZEISS SUFTUNG V. RAYUER AND KEELER LTD. (NO.2) 1967 AC. 853 at 953; (1966) AER 536 at 565 per Lord Guest, HALSBURY'S LAWS OF ENGLAND, 4th Edition paragraph 1530 Vol. 16 as follows: B

"(1) that the same questions was decided in earlier proceedings;

(2) that judicial decision said to create the estoppel was final; and

(3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies." C

The above case has been cited with approval in ADEBAYO V. BABALOLA (1995) NWLR (Pt.408) 383. ***There is cogent and abundant evidence before the instant trial court as per exhibit E that the status of the Defendant and his kinsmen has been finally decided and settled in AA/19/74. The principle underlying, issue estoppel contemplates that there must be an end to litigation, and so neither party to a suit is allowed to challenge in the court a finding of fact binding on them in that decision.*** See: ADEBAYO V. BABALOLA (supra). ***The parties in the instant suit and in AA/19/74 are privies in blood. They are all members of the same family of Umuezeilo family of Akpu and are bound by the decision. The Plaintiff in the instant suit is therefore rightly estopped from re-opening that issue again.*** D E F

By Section 54 of the Evidence Act previous judgments are conclusive proof of facts actually decided by the court as against parties and their privies. Therefore, the finding that the Defendant and his kinsmen in this matter are no strangers in Akpu Town is conclusive against John Okoli and his privies of Umuezeilo family. See FADIORA V. GBADEBE (1978) 3 S.C. 219 per Idigbe JSC, where he said: G

"this is based on the principle of law that a party is not allowed to (i.e. he is precluded from) contending the contrary or opposite of any specific point which having been determined against him..... Issue estoppel applies whether the point involved in the earlier decision is one of fact or law or one of mixed law and fact." H

It has been shown that exhibit E is a final judgment. There can

be no doubt that the Respondent and his people of Umuezeilo family are caught by the issue estoppel as per Exhibit E in this matter.

In the light of these conclusions I agree with the trial court's finding of fact that the Defendants and his kinsmen are not strangers in Akpu nor are they domestics to the John Okoli and his father and their privies of Umuezeilo family in Akpu Town a finding binding on the Plaintiff.

In the result there is merit in this appeal and it should be allowed, I allow it and set aside in its entirety the judgment of the Court of Appeal including costs and restore the decision of the trial court.

The Plaintiff /Appellant is entitled to the costs of this appeal fixed at N50,000.

D **KATSINA-ALU JSC.**

I have had the advantage of reading in draft the judgment delivered by my learned brother Chukwuma-Eneh JSC in this appeal. I entirely agree with it and, for the reasons he has given, I also allow the appeal and set aside the judgment of the Court of Appeal. I also award costs of N50,000,00 in favour of the appellant.

MUKHTAR JSC

F Six grounds of appeal were filed before this court against the judgment of the Court of Appeal, Enugu Division, and married to these grounds are the following issues for determination raised in the appellant's brief of argument:-

G *"(a) Whether the Court of Appeal was right in reversing the Judgment of the learned trial Chief Judge in view of the peculiar facts and circumstances of this case?"*

(b) Whether the Court of Appeal was right in its treatment and conclusions of Exhibit E?

H *(c) Whether the Court of Appeal was correct in holding that the Defence had the duty to prove that he belonged to Umunike family of Akpu town and that he is the undisputed owner exercising maximum and numerous acts of Ownership therein and that the Defence conceded to the plaintiffs Ownership of the disputed land?*

(d) Whether the Court of Appeal was right in raising some

weighty issues suo motu and deciding same without the parties thereon?

(e) Whether the Court of Appeal rightly rejected Exhibit E as constituting Estoppel per Rem judicata or even Issue Estoppel?"

The issues raised in the respondents brief of argument are virtually in pari materia with the above issues. I will for the purpose of this contribution highlight issue (b) supra.

It is on record that the defendant who is now the appellant pleaded the judgment which later emerged as Exhibit 'E' in his amended statement of defence thus:-

"34 Also in suit No. AA/19/74 between one John Okoli and 1st defendant and another, in which the present plaintiff testified in favour of the plaintiff in the said suit No. AA/19/74 to the effect among other things that the 1st defendant was a stranger in Akpu Town and the Honourable Court presided over by the late Hon. Justice T. C. Umezina dismissed the action and held that the 1st defendant is a native of Akpu among other things. The 1st defendant hereby pleads the said judgment dated 18/6/81 of the Awka High Court and will found on same at the trial."

Issues were joined with the above averment, and it is on record that the respondent was cross-examined on this judgment, and the evidence supported the case of the defence. The content of Exhibit 'E' and its applicability to the case at hand was carefully considered, and its effect on the defence of res judicata was established, as well as its evidential value.

The court below was wrong to have interfered with the finding of the trial court on the said Exhibit 'E'. In this respect the Court of Appeal misdirected itself, and erred in rejecting Exhibit E, when it held inter alia the following:-

"The application of the above principles to the facts of this appeal shows a total charade where the learned trial judge who sustained the plea of estoppel per rem judicatam which implies that his jurisdiction to try the case is ousted delved into the merit of the case with gusto at the end of which he made an order of dismissal. It is a comedy of errors in a riotous display. Indeed, the catalogue of errors with which the trial by the court below is infested is sufficient to resolve Issues One and Three in favour of the appellant and I do so."

Authorities abound that when such plea of res judicata is raised

it behoves the trial court to consider the case in support of the plea, and the evidence before it. See the case of *Oshodi v. Eyifunmi* (2000) 13 NWLR part 684 page 298.

In the light of the above and the fuller reasoning in the lead judgment, I agree with the lead judgment of my learned brother, ^B Chukwuma-Eneh, JSC that the appeal be allowed. I abide by the consequential orders made in the lead judgment.

ONNOGHEN JSC

^C The respondents who were plaintiffs at the trial court in suit NO. AA/34/72, claimed against the appellant as defendants in the said suit, a declaration that his family by name UMUONYECHE is the owner of the land in dispute, N100.00 damages for trespass and ^D perpetual injunction restraining the defendant from further trespass on the disputed land known as ANI OFE MILICHE.

At the trial, the plaintiff/respondent testified and called three witnesses and tendered a survey plan of the land in dispute.

^E The defendant on the other hand called one witness who was the Assistant Chief Registrar of the High Court of Anambra State, Awka Division who tendered exhibit 'E' being the certified true copy

of the judgment of the court in a sister case. At the conclusion of ^F hearing, the learned trial judge dismissed the suit resulting in an appeal to the Court of Appeal holden at Enugu in appeal NO. CA/E/79/96. On the 10th day of December, 2001 the Court of Appeal delivered judgment on the appeal in which it allowed the appeal of the plaintiff and granted the reliefs claimed at the trial court. The ^G present appeal is against the said judgment of the lower court.

The facts of the case as relevant to this appeal are that, Okoli Dim, the defendant in suit NO. AA/34/72 which gave rise to the instant appeal, while carrying out the survey of the land in dispute in the suit, allegedly trespassed on an adjoining piece or parcel of land ^H allegedly belonging to another member of UMU ONYECHE family by name JOHN OKOLI resulting in the institution of suit NO. AA/19/74 which was later dismissed - see exhibit E.

The traditional history of the land in dispute in both suit NOS. AA/34/72 and AA/19/74 is the same in that the land is said to belong

to UMONYECHE family and is called ANI-OFE-MILI land; that Okoli Mgbafor who was the father of John Okoli and plaintiff in AA/19/74 lived on a portion of the larger family land as a customary tenant; that the defendant together with his -kith and kin lived with Okoli Mgbafor and later vacated the land by moving to a new location which was outside the land in dispute thereby abandoning same which then reverted to the UMONYECHE family - the owners; that sometime in 1967, the defendants trespassed into the abandoned land claiming ownership of same resulting in the institution of suit NO. AA/34/72 culminating in the instant further appeal. The traditional history narrated above was rejected in the judgment of that court in suit NO. AA/19/74 which was delivered on the 18th day of June, 1981, which judgment has not been appealed against. From the record, it is clear that the plaintiff in suit NO. 11/34/72 and P.W.2 in suit NO. AA/34/72 both testified for the plaintiff in suit NO. AA/19/74 and the court rejected their evidence of traditional history. It is noteworthy that the same traditional evidence or history was rejected in the judgment of the trial court delivered in suit NO. AA/34/72 on the 15th day of September, 1994. It is that judgment that was set aside by the Court of Appeal resulting in the instant further appeal.

Learned Counsel for the appellant, B.S. NWANKWO Esq., in the appellant's brief filed on the 21st day of October, 2002 formulated the following issues for the determination of the appeal:-

“(a) Whether the Court of Appeal was right in reversing the judgment of the learned trial Chief Judge in view of the peculiar facts and circumstances of this case?”

“(b) Whether the Court of Appeal was right in its treatment and conclusions on Exhibit E?”

“(c) Whether the Court of Appeal was correct in holding that the Defence had the duty to prove that he belonged to UMONYECHE family of AKPU town and that he is the undisputed owner exercising maximum and numerous acts of ownership therein and that the Defence conceded to the plaintiff's ownership of the disputed land?”

“(d) Whether the Court of Appeal was right in raising some weighty issues suo motu and deciding same without hearing the parties thereon?”

“(e) Whether the Court of Appeal rightly rejected Exhibit E as constituting Estoppel per Rem judicata or even issue Estoppel?”

On the other hand, learned counsel for the respondent, R.C. MADU Esq., in the respondent's brief of argument deemed filed on 4/12/07 formulated the following issues for determination:

B *"1. Whether the judgment of the Court of Appeal was right when no evidence is lead by the Defendant in support of his pleadings.*

2. Whether exhibit E qualifies to operate as estoppel per rem judicatem in this case.

C *3. Whether pronouncing on all issues placed before the court amount to raising issues suo motu by the court.*

4. Whether the Court of Appeal was right in reversing the High Court judgment when same is perverse. "

It should be noted that the action as instituted by the respondent is for declaration of title to land, damages for trespass and injunction. Also to be noted is the fact that the appellant, who was a defendant at the trial court, did not counter claim for declaration of title to the land in dispute and, that apart from tendering exhibit E in support of the defence of issue estoppel, he did not testify. The fact that the defendant/appellant called no witnesses nor testified in support of his pleadings at the trial greatly influenced the decision of the lower court in setting aside the judgment of the trial court.

However, the law is settled that in an action for declaration of title to land or declaration of right to anything, the plaintiff must succeed on the strength of his case, not on the weakness of the defence, though where the case of the defence supports that of the plaintiff, the plaintiff can rely on same to prove his case. This principle of law places the burden of proof on the plaintiff seeking declaratory reliefs from the court, whether the defendant calls evidence or not, as it is also a settled principle of law that a declaratory relief cannot be granted by the court without the plaintiff calling evidence. In other words, the relief of declaration of title or otherwise cannot be granted where the defendant defaults in filing his pleadings or where he files one, is absent on the date fixed for hearing without the plaintiff testifying or calling evidence to establish his claim. It therefore does not matter in law in the circumstances of the relief of declaration of title, that the defendant/appellant in the instant appeal did not testify or is alleged to have abandoned his defence to the claim of the plaintiff/respondent; the respondent must prove his entitlement to the declaratory

relief claimed. The question therefore is whether the plaintiff/respondent proved the case before the court so as to entitle him to judgment as ordered/found by the lower court.

The main plank of the case of the plaintiff is that the original defendants were domestics of Okoli Mgbafor who were brought into the land in dispute which land later reverted to the UMUONYECHE family. To prove the alleged facts, the plaintiff testified and called witnesses. However, the trial court that heard and watched the witnesses testify disbelieved them and rejected their traditional evidence and consequently dismissed the claims of the plaintiff.

The trial court at pages 116 - 117 of the record held thus:

“The plaintiff’s traditional history as pleaded regarding his ownership of the land in dispute is unconvincing.”

The said court went further to state at pages 117 - 118 as follows:

“On the question of credibility of the of the plaintiff and his witnesses, issue number (C) the plaintiff as PW1 claimed that they knew when Okoli Mgbafor brought Okoli Dim, original 1st defendant into the family of EZEILO. 1st defendant was not a member of Ezeilo family according to PW1. Pressed un (sic) cross examination when he PW1 was born since he admitted that 1st defendant was older than he, the plaintiff claimed that he was up to 100 years on the date he testified and in another breath he said he was more than 60 years. Since he said he could not know his exact age he was asked how many years he thought he would be by the time of the influenza in the aftermath of the first World War, he told the court he might be 40 years before the conslaugur (sic) of that pandemic disease.

I observe this witness throughout the entire length of his evidence before me. He was determined to show by all means that first defendant was not a member of Ezeilo family and so could only have had his right to the land through Okoli Mgbafor who plaintiff claimed brought the First Defendant into the land in dispute.

There was no credible piece of evidence by him to show that First Defendant was a stranger to the family of Ezeilo. And just as the court in its judgment in AAJ19/74 did not believe his testimony that the first defendant was a stranger to the Ezeilo family, I too do not believe his evidence on this point. “

It is very clear from the above passage that the decision of the

trial court to dismiss the claims of the plaintiff/respondent before it was based on the court's findings on credibility of the evidence particularly of PW1. The evidence of PW1 was found by the trial court to be incredible and consequently rejected.

B The rejection of that evidence amounts to a rejection of the traditional history of the plaintiff relied upon to establish the claim of declaration of title. It is this finding on credibility that was set aside by the lower court and judgment entered in favour of the respondent. The question is whether the lower court is right in so doing.

C It is settled law that evaluation of evidence and ascription of probative value to the testimony of a witness is within the exclusive domain of the trial court that heard and watched the witness testify before it. To determine whether a testimony has probative value, the court takes into consideration whether the testimony is cogent, consistent and in accord with reason and in relation to other evidence before it. The court also takes into consideration the demeanour, personality, reaction to question under cross examination in the determination of the issue of credibility of a witness. A determination of the court on credibility is almost sacred. By credible evidence we mean evidence that is worthy of belief and must not only proceed from credible sense, it must be credible in itself in the sense that it should be natural, reasonable and probable in view of the entire circumstances.

F In the instant case, as found earlier in this judgment, the decision of the trial court, which was set aside by the lower court was on credibility of witnesses. The law on this point, which guides the appellate courts on the matter, is long settled. It is that where the issue before an appellate court turns on the credibility of witnesses, an appellate court which has not seen the witnesses must defer to the opinion of the trial court; that in such cases the opinion of the trial court ought normally to be preferred except it is demonstrated that the inference drawn by the trial judge was not supported by the evidence and the facts before him or was perverse - see *Fashanu vs Adekoya* (1914) 6 S.C 83; *Sagay vs Sajere* (2000) 6 NWLR (pt. 661) 360; *Abba vs Ogodo* (1984) 1 SCNLR 372; *Nnorodim vs Ezeani* (2001) 5 NWLR (pt. 706) 203 *Agbi vs Ogbeh* (2006) 11 NWLR (pt. 990) 65.

In the instant case, the finding of the trial court has not been

demonstrated to be perverse neither has it been shown to have arisen from wrong inferences drawn from the evidence. In fact the finding of the trial court on credibility is very much supported by the findings on the same evidence in exhibit “E”.

The trial judge went on to give reasons why he did not believe the evidence of traditional history given by the plaintiff and his witnesses as follows:-

“It is common ground that every sub-family of Ezeilo family retained its respective holdings on the Ofemili side after the “abandonment” and plaintiff has not shown that first defendant was a stranger to the Ezeilo family; there is no reason to support plaintiff’s claim that the land in dispute reverted to the PWI and his family because First Defendant abandoned the land as any other member of the sub-family of Ezeilo extended family. The finding of the court in suit NO. AA/19/74 on this fact was well founded and I adopt in this judgment.”

I therefore hold the considered view that the lower court was in error when it interfered with that finding.

It is for the above and the more detailed reasons contained in the lead judgment of my learned brother CHUKWUMA-ENEH, JSC that I too allow the appeal, set aside the judgment of the lower court and substitute thereto, the judgment of the trial court with costs as assessed and fixed in the said lead judgment, which I had earlier had the privilege of reading in draft.

Appeal allowed.

ADEREMI JSC

This is an appeal against the judgment of the Court of Appeal Enugu Division, (hereinafter referred to as the court below; delivered on the 10th of December 2001 wherein the court below allowed the appeal of the appellant before it i.e. the present respondent and proceeded to set aside the judgment of the trial court which had earlier dismissed the claims of the plaintiff/respondent. Briefly, the facts of this case are as follows:

The present respondents, as the plaintiff at the High Court of Justice, Anambra State sitting at Awka Judicial Division, Awka had by paragraph 11 of his further amended statement of claim, sought the

following reliefs against (a) Okoli Dim (who was later substituted by Ephraim Okoli Dim (present appellant) and (b) Okeke Okoli jointly and severally as follows:

(1) Declaration that the Umuonyeche family of Akpu in Orumba is the owner under native law and custom of the parcel of land called
B ANI OFE MILI, ONYECHE more particularly shown on plan No EC/129/72

(2) N100,00 damages for trespass to the said land

(3) Perpetual injunction restraining the defendants, their servants and /or agents from further trespass.

C The pleadings filed by both parties were at different times, with the leave of court, amended upon the applications made to the trial court. The final pleadings upon which the case was tried are (1) the further amended statement of claim dated 7th November, 1988 and
D (2) the amended statement of defence of the 1st defendant Okoli Dim) dated 29th April, 1985 but filed on the 30th of April 1985. Both parties called evidence in proof of the averments in their respective pleadings. Sequel to the final addresses by their respective counsel, in a reserved judgment delivered on the 15th of September
E 1994 by the then Chief Judge of Anambra State, Hon. Justice Uyanna, the plaintiffs, now the respondent in this court, claims were dismissed in toto. Being dissatisfied with the said judgment, the plaintiff/respondent, appealed therefrom to the court below which, after
F taking the arguments of counsel for both parties in a reserved judgment delivered on the 10th of December 2001, the court below allowed the appeal and granted the reliefs sought by the plaintiff who is the present respondent before us. Again, being dissatisfied with the judgment of the court below, the present appellant who was the defendant before the trial court and of course the respondent at the
G court below appealed therefrom, to this court via a Notice of Appeal filed on the 6th of March 2002 which Notice carried eleven grounds of appeal.

H Distilled from the said grounds of appeal and as set out in the appellant's brief of argument filed on the 21st of October 2002 are five (5) issues for determination which are in the following terms:

(1) Whether the Court of Appeal was right in reversing the judgment of the learned trial Chief Judge in view of the peculiar facts and circumstances of this case?

(2) Whether the Court of Appeal was right in its treatment and conclusion of Exhibit E.

(3) Whether the Court of Appeal was correct in holding that the defence had the duty to prove that he belonged to Umunike Family of Akpu town and that he is the undisputed owner exercising maximum and numerous acts of ownership therein and that the defence conceded to the plaintiffs ownership of the disputed land? B

(4) Whether the Court of Appeal was right in raising some weighty issues suo motu and deciding same without hearing the parties thereon? C

(5) Whether the Court of Appeal rightly rejected Exhibit E as constituting Estoppel per Rem judicatem or even Issue Estoppel?

The respondent identified four issues for determination by this court and as set out in his brief of argument deemed properly filed and served on the 4th of December 2007, they are in the following D terms:

(1) Whether the judgment of the Court of Appeal was right when no evidence is lead (sic) by the defendant in support of his pleadings?

(2) Whether Exhibit E qualifies to operate as Estoppel per Rem E judicatem in this case?

(3) Whether pronouncing on all issues placed before the court amount (sic) to raising issues suo motu by the court.

(4) Whether the Court of Appeal was right in reversing the F High Court judgment when same is perverse.

When this appeal came to us for argument on the 19th of January 2009, Mr. Nwankwo, learned counsel for the appellant adopted his client's brief filed on 21st October, 2002 and urged that the appeal be allowed. Mr. Madu, learned counsel for the respondent, also adopted his client's brief filed on 21st November, 2007 and urged that the appeal be dismissed. G

I have had a careful study of the issues raised for determination by the two parties. It is my view that issues Nos, 1, 2 and 5 in the appellant's brief can jointly be taken together with issues Nos 2 and 4 H in the respondent's brief.

On the issue No 1, the appellant, through his brief, has submitted that the court below, was in error in reversing the learned trial Chief Judge on the order of dismissal he handed over based on the

flaws in the plaintiff's traditional history as relayed, in his evidence failing to realize that the trial Chief Judge who had the singular honour of seeing the witnesses testify before him was, in law, preeminently qualified to evaluate and ascribe probative value to the oral evidence given before him and an appellate court must be wrong in setting aside those findings. On issue No 2, which relates to Exhibit E - the judgment delivered in suit No. AA/19/74, it was argued that the judgment in Exhibit E operated as a *res judicata* in favour of the 1st defendant now the appellant for the reason that the trial judge found inter alia that the 1st defendant was a native of Akpu. The court below was therefore wrong to have held otherwise.

On issue No 5 still on Exhibit E, the judgment in AA/19/74; after examining its contents it was submitted that the defendant/appellant was not a stranger in Akpu or a domestic of Okoli Mgbafor but a legitimate native of Akpu and it therefore operates as *Estoppel per Rem Judicatem* in this case and consequently the appeal should be allowed.

For his part, the respondent through his brief, in arguing his issue No 2 which relates to Exhibit E - the judgment afore-mentioned in it was argued that it has no evidential value in that the said certified copy of the judgment was tendered by the Assistant Chief Registrar of the High Court of Awka who was only called in to tender that document and no more and consequently, he was not cross-examined. The court below, it was further argued, was right in holding that Exhibit E lacked evidential value. On Issue No 4, it was submitted that the defendant who is the present appellant did not lead evidence in proof of the averments and therefore those averments must be taken as having been abandoned and the mere dumping of a document without it been subjected to cross-examined does not qualify it for ascription of evidential value. He urged that the appeal be dismissed.

I have had a careful reading of the pleadings of the parties, it is clear that both of them relied on traditional history to support their different cases. I have also read the testimonies of the plaintiff/respondent and his witnesses, I could not agree more with the trial Chief Judge when, in his judgment, he said:

"Neither by his pleadings nor by his oral evidence was plaintiff able to show that 1st defendant is not a member of Ezeilo family

either 1 or 11. The plaintiff's traditional history as pleaded regarding his ownership of the land in dispute is unconvincing."

The plaintiff had pleaded that his family had been in exclusive ownership of the land situate at Akpu over many years. In his testimony, all the said was this:

"Ezeilo 1 was our great ancestor. Ezeilo 1 was the founder of the 5 sub-families of Umuezeilo."

Even, if the above could pass for properly saying that the plaintiff/respondent has traced his title to that of the established owner, a plaintiff who relies on root of title must prove his derivative title; See (1) OJO VS. ADEJOBI & ORS (1978) 3 S.C 65 (2) ODOFIN VS. AYOOLA (1984) II S.C. 72 and (3) NNEJI & ORS VS. CHUKWU & ORS (1996) 10 NWLR (PT.478) 265. The plaintiff/respondent has woefully failed to discharge this heavy duty that lay on him. Now to Exhibit 'E' - the all important documentary evidence which the 1st defendant is holding out to support his plea of Res Judicata - it is common ground between the parties that the defendants in both suits that is suit No AA/19/74: John Okoli versus Okoli Dim and Okeke Okoli and the defendant in the present suit are the same or they are privies. In Exhibit E, the said judgment delivered on 18th June, 1981 by Umezinwa J (as he then was) the following findings at page 20 are very helpful in determining whether that document it supports a case for issue estoppels on res Judicata and they are:

"The two witnesses he called namely Isaac Enemuo and Nelson Okoli although they gave evidence to the effect that the defendants are Aro strangers settled in Akpu, they did not give full evidence as to the circumstances under which the defendants settled in Akpu as pleaded by the plaintiff in his statement of claim. Even plaintiff's own evidence on issue did not completely tally with his pleadings..... With two members of the Umuezeilo family supporting the defendants that they are not strangers in Akpu and the evidence of the plaintiff and his witnesses on this issue not very convincing, I am unable to hold that the defendants are strangers in Akpu and were once the domestics of the plaintiff and his father."

The parties in the present case and in Exhibit E are without dispute the same. The issue of whether the defendants were strangers or people with vested interest in Akpu has been laid to rest in Exhibit E the afore-said judgment delivered on 18th June, 1981.

The trial judge, said in that case, that based upon the evidence before him, he could not hold that the defendants were strangers there. Indeed, he disbelieved that assertion. By that judgment, that matter has already become the subject of a final judicial pronouncement between the two parties. Each of them is estopped from re-opening it, for it is a final judicial pronouncement as between them. See IBULUYA & ORS VS. DIKIBO & ORS (1976) 6 S.C. 97. Issues Nos (a), (b) and (C) as they are therein stated in the appellant's brief of argument are hereby answered in the negative, similarly issues No 2 and 4, in the respondent's brief of argument.

Issues No 3 in the appellant's brief of argument and issue No 1 in the respondent's brief, having regard to what I have said are of no moment here. The principle is sacrosanct that he who asserts must prove. The plaintiff/respondent has woefully failed to prove the averment contained in his pleading to the satisfaction of the trial judge. Exhibit E which the defendant/appellant tendered has totally vindicated him (the defendant/appellant). Both issues are therefore answered in the negative.

It is for the foregoing but most especially for the fuller reasons and conclusion reached in the lead judgment of my learned brother Chukwuma -Eneh JSC with which I am in full agreement that I also say that this appeal is meritorious. I allow it. I hereby set aside the judgment of the court below including the costs awarded by that court. In its place, I restore the judgment of the trial court delivered on 15th September, 1994. I abide by the consequential orders therein contained in the lead judgment including the order as to costs.

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