

SUPREME COURT OF NIGERIA
15TH MAY, 2009. SC. 7/1999
CORAM:- N. TOBI, G. A. OGUNTADE,
M. MOHAMMED, I. F. OGBUAGU, J. O. OGBE, JJSC

1. LASIS AYNRINOLA AKAYEPE APPELLANTS
2. TIYAMIYU AYANRINOLA AKAYEPE
AND
GANIYU AYANRINOLA AKAYEPE RESPONDENT

APPEALS - Issues - Resolution of - By implication - With the resolution of the central issue - Of whether the land had been partitioned - By Court of Appeal in the way it did - It is not correct to say that issue three of appellant was not determined (H1)

COURTS - Error - Effect on appeal - Notwithstanding the commitment of error by a lower court - An appeal may still be dismissed - Unless such error is substantial in that it has affected the merits of the case (H2)

JUSTICE - Miscarriage - Meaning & applicability - It simply means failure of justice - No elements of miscarriage of justice have been disclosed in the present case (H3)

LAND LAW - Family land - Injunction against family members - Effect - In spite of the order of injunction on appellants - Overall interest of Akayepe family - Including appellants - Remains intact - Their complaint is therefore baseless (H4)

LAND LAW - Family land - Partitioning of - Proof - In view of the fact that both sections of Akayepe family took part in taking the loan for the building - And in letting out the shops - The finding that the land is not partitioned is justified (H5)

ESTOPPEL - Res Judicata - Applicability - Issue of - Arguments of counsel on this issue were not addressed to the relevant judgment - They are therefore irrelevant for the determination of the appeal (H6)

ESTOPPEL - Res Judicata - Proof - Means - In the absence of certified true copies of the judgments in the previous cases relied on - There is no means of determining if all the conditions have been met by appellants - To sustain the plea (H7)

FACTS

The plaintiff/respondent sued the defendants/appellants before the High Court of Oyo State claiming a declaration and injunction meant to assert the right of the respondent to the use and possession of the shop in dispute. The case of the respondent was that the shop was among the five shops built on the vacant, not partitioned part of Akayepe family land, to which family both parties herein belonged. The family had granted him use and possession of the shop. The appellants contended that the part of the land on which the shop was built belonged, not to the entire Akayepe family, but to a branch of it to which both parties herein belonged.

Accordingly, they argued that it is that branch of the family, and not the entire family that can grant same to whom it would. After hearing, the trial court gave judgment to respondent. Aggrieved, appellants appealed to the Court of Appeal, which dismissed the appeal. Still dissatisfied, they have brought this further appeal to the Supreme Court contending, inter alia, that it was improper for the trial court to have granted injunction in respect of family land against a family member; and moreover that respondent was estopped by an earlier judgment from asserting that the land was not partitioned, on the principle of res judicata.

ISSUES FOR DETERMINATION

“1. Whether having regard to the failure of learned Justices of Court of Appeal to pronounce on propriety of Order of injunction granted by the learned trial Judge, their judgment was conclusive as to the right of the parties.

2. Can any order of injunction be granted against a family property in which he has interest and that has not been partitioned.

3. Whether from the evidence adduced at trial the land upon which the five (5) shops were built belong to Ayanrinola Akayepe family or not.

4. Whether from the evidence on records, the Respondent is

not caught by the doctrine of Res judicata or issue estoppel from re-contesting the possession of the shop in dispute with the Appellants."

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

APPEALS - Issues - Resolution of

1. The partition or otherwise of the vacant plot of land upon which the 5 shops were built is the crux of the dispute between the Appellants and their brother the Respondent who was allowed to occupy and use one of the 5 shops by the head of the Akayepe family. With the resolution of this central or common issue by the Court below in favour of the Respondent, the declaratory and injunctive reliefs granted him by the trial Court remained intact on the confirmation of the finding of the trial Court that the land on which the 5 shops were built had not been partitioned as claimed by the Appellants. It is therefore not correct to say that issue three in the Appellants' brief at the Court below was not considered and determined in their appeal against the judgment of the trial Court. (p. 1192 G)

COURTS - Error - Effect on appeal

2. In any case, it is the law that even where an Appellant is able to show that the Court below had committed an error, without showing that such error is substantial or material in that it has affected the merits of the case one way or the other or has occasioned a miscarriage of justice, the appeal may still be dismissed. (p. 1193 B)

JUSTICE - Miscarriage - Meaning & applicability

3. The phrase 'miscarriage of justice', simply means failure of justice. With the overwhelming evidence in support of the decision of the trial Court as affirmed by the Court below, no elements of miscarriage of justice have been disclosed in the present case to warrant any interference. (p. 1193 D)

Family land - Injunction against family members

4. The overall interest of the Akayepe family including the Appellants over the unpartitioned vacant plot upon which the five shops were built remains intact in spite of the order of injunction on the Appellants to prevent them from interfering with the right of the Respon-

dent conferred upon him by the same family to occupy and use one of the five shops. The complaint of the Appellants in this issue is therefore baseless. (p. 1194 F)

Family land - Partitioning of - Proof

- B 5. The learned trial Judge took a number of factors from the evidence in arriving at his decision. These factors include; the fact that the descendants of both sections of Akayepe family took part in taking the loan from Ajewole to build the five shops in question and also were parties in the lease agreement including the head of the family in letting out the shop for renting and the admission of these same factors by the Appellants in their statement of defence that the land in question had not been partitioned. The confirmation of this finding by the Court below therefore is on firm ground, in my view. (p. 1196 G)

Res Judicata - Applicability - Issue of

- E 6. Definitely the entire arguments of the Appellants on this issue were not addressed to the relevant judgment in suit No. 1/255/87, of the Ibadan High Court as pleaded by them in support of their plea of res-judicata. Instead of directing his arguments on this issue to the relevant High Court judgment clearly pleaded, learned Counsel to the Appellants devoted his time in pursuing arguments in support of paragraph 13 of the statement of defence where it was pleaded that the shop in contention between the parties was once recovered by the Akayepe family from the tenant Ajewole following a judgment in case No. CM/2/86, delivered by the Magistrate's Court Ibadan on 26th February, 1987. Thus, the arguments not having been directed to the subject of this issue, are completely irrelevant for the determination of the appeal. (p. 1198 E)

Res Judicata - Proof - Means

- H 7. I indeed agree completely with the two Courts below on the position of the law on the burden on the Defendants/Appellants to prove their defence of res judicata and standing-by.

In the absence of the certified true copies of the judgments in the previous cases being relied upon in support of res-judicata, there is nothing to compare with the present case in determining if any or

all the conditions have been met by the Appellants to sustain their plea. This issue is accordingly resolved against the Appellants.
(pp. 1199 F/1200 B)

REPRESENTATION

Olusola Idowu Esq., for the appellants
Alhaja (Mrs.) R.O. Ayoola for the respondents

B

CASES REFERRED TO

Odunayo v. The State (1972) 8-9 S.C. 290
Ifeanyi Chukwu (Osondu) Co. Ltd. v. Soleh Boleh (Nig.) Ltd. (2000)
5 N.W.L.R. (Pt. 656) 322

C

Katto v. C.B.N. (1999) 5 S.C. (Pt. II) 21

Onifade v. Olayiwola (1990) 11 S.C.N.J. 10

D

Abiegbe v. Ugbodume (1991) 11 S.C.N.J. 11

Owodunni v. Registered Trustees of Celestial Church (2000) 10
N.W.L.R. (Pt. 675) 315 at 347 - 348

Adebayo v. Adusei & An. (2004) 4 N.W.L.R. (Pt. 862) 44

Igbinovia v. University of Benin Teaching Hospital (2000) 8 N.W.L.R. E
(Pt. 667) 53

Ndayako & Ors. v. Dantoro (2004) 13 N.W.L.R. (Pt. 889) 187

Okpala v. Ibeme (1989) 2 N.W.L.R. (Pt. 102) 208

F

STATUTES REFERRED TO

Constitution of the Federal Republic of Nigeria, 1979, s. 213

Constitution of the Federal Republic of Nigeria, 1999, s. 233

LEAD JUDGMENT BY MOHAMMED JSC

G

The parties in this appeal are members of the same Ayanrinola Akayepe family. They were before the High Court of Justice of Oyo State sitting at Ibadan where the Respondent was the Plaintiff while the Appellants were the Defendants, The dispute between the parties was over the allocation to the Respondent by the head of the family of one shop out of five shops built on the family property at Akayepe Compound, Agboni Ibadan which allocation was resisted by the Appellants/Defendants resulting in the Respondent as Plaintiff filing an action against them by a writ of summons claiming in paragraph

H

28 of his further amended statement of claim, the following reliefs:

"(1) Declaration that in accordance with the authorisation Injunction of the Akayepe family acting by their head, the plaintiff is entitled to the use and possession of one of the five door shops (formerly occupied by a tenant, Mr. Ajewole) situated and lying at

B Akayepe compound, Agboni, Ibadan.

(2) Injunction to restrain Defendants their agents or servants from interfering with the Plaintiff's possession and use thereof."

At the trial Court before Oyekan J, the case was duly heard after the exchange of pleadings which were amended on the application of the parties. The case of the Plaintiff was that the shop which the Defendants refused to allow him to occupy and use, is one of the five shops built on vacant unpartitioned part of the Akayepe family land which Madam Folashade Akayepe as the head of the whole Akayepe family with the consent of the majority of the principal members of the family at a family meeting for that purpose, which the Defendants refused to attend, allocated to the Plaintiff for his possession and use. The case of the Defendants however was that the Defendants and the Plaintiff are children of Salami Ayanrinola Akayepe, a descendant of Fagbohun Akayepe who was the original owner of the part of the land upon which one of the five shops in dispute between the parties was built; that the five shops are the property of the family of Salami Ayanrinola Akayepe and not the property of the whole Akayepe family headed by Madam Folashade Akayepe and as such Madam Folashade Akayepe could not have the right to allocate one of the shops to the Plaintiff.

At the end of the hearing of the parties through their learned Counsel, the learned trial Judge made specific findings on the pleadings and evidence before him that Madam Folashade Opadoyi Akayepe was the head of the Akayepe family made up of the section of the Plaintiff and the Defendants on one side and that of Madam Folashade on the other; that the portion of the Akayepe family land upon which the five shops were built had not been partitioned; that the entire members of the Akayepe family participated in the transaction that culminated in the building of the five shops on the unpartitioned family land; that the judgments of the High Court and Magistrate Court in suits No. 1/255/87 and CM/Z/86 pleaded and relied upon by the Defendants in their defence of *res judicata*, were

not tendered in evidence and therefore not proved. With these findings, the learned trial Judge therefore entered judgment for the Plaintiff granting his two reliefs in the following terms -

"(1) Declaration that in accordance with the authorisation of the Akayepe family acting by their head, the Plaintiff is entitled to the use and possession of one of the five shops (formerly occupied by a tenant Mr. Ajewole) situate any lying at Akayepe Compound, Agboni, Ibadan, is hereby granted.

(2) Injunction restraining the Defendants, their Agents or Servants from interfering With the Plaintiff's possession and use of the said Shop in dispute is hereby granted".

The Defendants who were not satisfied with the judgment of the trial Court allowing their own brother to use one of the five shops allocated to him by the family, appealed against the judgment to the Court of Appeal raising four issues for the determination of the appeal in their Appellants' brief. However, in a unanimous decision given on 21st March, 1996, the Court of Appeal, Ibadan Division dismissed the Defendants/Appellants' appeal and affirmed the judgment of the trial High Court Ibadan. Still not happy with the dismissal of their appeal, the Defendants/Appellants are now on a further final appeal to this Court. Their Notice of Appeal contains four grounds of appeal from which the following four issues were raised in their Appellants' brief of argument.

"1. Whether having regard to the failure of learned Justices of Court of Appeal to pronounce on propriety of Order of injunction granted by the learned trial Judge, their judgment was conclusive as to the right of the parties.

2. Can any order of injunction be granted against a family property in which he has interest and that has not been partitioned.

3. Whether from the evidence adduced at trial the land upon which the five (5) shops were built belong to Ayanrinola Akayepe family or not.

4. Whether from the evidence on records, the Respondent is not caught by the doctrine of Res judicata or issue estoppel from re-contesting the possession of the shop in dispute with the Appellants."

These four issues as identified by the Appellants were adopted by the Respondent in his Respondent's brief of argument filed on his behalf by his learned Counsel Mrs. Ayoola.

Although an Appellants' reply brief of argument was filed by the Appellants, in the absence of new or fresh points in the Respondent's brief, there is hardly any need for that reply brief in this appeal. A reply brief is filed when an issue of law or argument raised in the Respondent's brief of argument calls for a reply. That is to say, a reply brief is not a forum for introducing fresh arguments or repetition of arguments already advanced in the Appellant's brief. See *Okpala v. Ibeme* (1989) 2 N.W.L.R. (Pt. 102) 208. The Appellants' reply brief which in spite of noting the fact that the Respondent merely adopted the same issues as identified in the Appellants' brief, all the same proceeded to respond to the Respondent's argument on each of the four issues argued, is certainly not a reply brief worthy of consideration in the resolution of the issues arising for determination in this appeal.

Coming back to the issues for determination in this appeal, the Appellants' first issue is a complaint against the failure of the Court below to consider and determine one way or the other, the third issue placed before it on whether the trial Court was right in granting the second relief of injunction to the Plaintiff/Respondent. Learned Counsel argued that the failure to take and resolve the issue on injunction, was a violation of the warning by this Court in several cases that all Courts other than the Supreme Court should endeavour to resolve all issues put before them. The cases relied upon include, *Odunayo v. The State* (1972) 8-9 S.C. 290; *Ifeyanyi Chukwu (Osondu) Co. Ltd. v. Soleh Boleh (Nig.) Ltd.* (2000) 5 N.W.L.R. (Pt. 656) 322; *Katto v. C.B.N.* (1999) 5 S.C. (Pt. II) 21; *Onifade v. Olayiwola* (1990) 11 S.C.N.J. 10; *Abiegbe v. Ugbodume* (1991) 11 S.C.N.J. 11 and *Owodunni v. Registered Trustees of Celestial Church* (2000) 10 N.W.L.R. (Pt. 675) 315 at 347 - 348. It is also the contention of the Appellants that the failure of the Court below to pronounce on the propriety of the Order of injunction, made the judgment of that Court inconclusive as the rights of the parties on it were not finally disposed of if the case of *Olurotimi v. Ige* (1993) 8 N.W.L.R. (Pt. 311) 257 at 268, is taken into consideration. Learned Counsel concluded his argument by urging this Court on the authority of *Onifade v. Olayiwola* (1990) 7 N.W.L.R. (Pt. 161) 130 at 165, to regard the action of the Court below as a breach of the Appellants' right of fair hearing which occasioned a miscarriage of justice.

For the Respondent however, the rights of the parties in the Respondent's suit against the Appellants were not rooted on the order of injunction but on whether or not there had been a partition of the land in dispute; that both the trial Court and the Court below made concurrent findings exhaustively on the rights of the parties, that the order of injunction was made following the determination of the crucial issue between the parties and that the Appellants having failed to show that the failure of the Court below to pronounce on the issue of injunction is a substantial error which occasioned a miscarriage of justice, the Appellants are not entitled to any intervention by this Court going by its decision in *Onifade v. Olayiwola* (1990) 7 N.W.L.R. (Pt. 161) 130 at 159. Learned Counsel concluded by pointing out that the case of *Olurotimi v. Ige* (supra), relied upon by the Appellants does not support their position on this issue since they failed to show that the issue of injunction was the very issue before the Court of Appeal in the same way as the very point in issue of declaration of title to land that was left undetermined by the trial Court in the case in question.

The law is indeed well settled that where the Court of Appeal in hearing an appeal against the judgment of a trial Court failed to determine one or more of the issues placed before it by the parties for determination, this Court in hearing an appeal from such a failure, may in proper cases remit such case back to the Court to hear and determine the issue it left undetermined. This is because by the provision of Section 213 of the 1979 Constitution, now Section 233 of the 1999 Constitution, the appellate jurisdiction of this Court is to hear and determine appeals from the decisions of the Court of Appeal after hearing and determining the issues placed before it. See *Kalu v. Odili* (1992) 5 N.W.L.R. (Pt. 240) 130 and *Katto v. Central Bank of Nigeria* (1999) 6 N.W.L.R. (Pt. 607) 390 at 407. The question for consideration therefore in the present case is whether the circumstances in the case at hand justify the remitting of the case back to the Court below to hear and determine issue 3 which the Appellants are claiming was not determined by that Court in its judgment now on appeal. This issue as contained at page 137 of the record of appeal in the Appellants' brief reads -

"03. Whether an order of injunction granted against the Appellants who are still members of Ayanrinola Akayepe family Was

justified when the 5 shops belong to all the members of Ayanrinola Akayepe and such shops had not been partitioned.”

It is quite clear from the terms of this issue that the complaint on the justification or otherwise of the injunction granted against the Appellants was deeply rooted in their claim or assertion that the land on which the five shops were built had been partitioned and became the property of their father and that the five shops had not been partitioned. Similarly their complaint in their issue one at pages 136 - 137 of the record, also centered principally on their assertion that the land on which the five shops were built had been partitioned contrary to the claim of the Respondent that no such partition took place. The issue states as follows:-

“Whether the learned trial Judge was right in granting the declaration as sought by the Respondent when the shops over which the declaration was granted was no longer Akayepe family but Ayanrinola Akayepe family, one of such branches which make up Akayepe family to which the shop was partitioned.”

There is no doubt whatsoever that the question of the partition of the land on which the five shops were built, forms the central issue for determination in the Appellants’ issues one and three which carried the declaratory and injunctive reliefs as mere branches. This situation resulted in the Court below in the lead judgment per Okunola JCA (of blessed memory), remarking thus at page 162 of the record

“I have gone through the submissions by learned Counsel to the parties made orally and in their briefs on the issues for determination vis-a-vis the records and the prevailing law. It is my view that the common Complaint of both parties centers on whether or not the vacant land on which the 5 shops were built has been partitioned among the Akayepe family? It is intended to consider this issue as it is this principal issue that will determine all the subsidiary issues raised in this appeal.”

I entirely agree with him. ***The partition or otherwise of the vacant plot of land upon which the 5 shops were built is the crux of the dispute between the Appellants and their brother the Respondent who was allowed to occupy and use one of the 5 shops by the head of the Akayepe family. With the resolution of this central or common issue by the Court below in favour of the Respondent, the declaratory and injunctive re-***

liefs granted him by the trial Court remained intact on the confirmation of the finding of the trial Court that the land on which the 5 shops were built had not been partitioned as claimed by the Appellants. It is therefore not correct to say that issue three in the Appellants' brief at the Court below was not considered and determined in their appeal against the judgment of the trial Court. The issue was clearly considered along with the first issue and resolved by the Court below. **In any case, it is the law that even where an Appellant is able to show that the Court below had committed an error, without showing that such error is substantial or material in that it has affected the merits of the case one way or the other or has occasioned a miscarriage of justice, the appeal may still be dismissed.** See Adeyemi v. Attorney General Oyo State (1984) 1 S.C.N.L.R. 525. Furthermore, the claim of the Appellants that the failure of the Court below to pronounce on the propriety of the order of injunction by the trial Court had resulted in denying the Appellants fair hearing thereby making that decision perverse and occasioning a miscarriage of justice, is not at all supported by the evidence. **The phrase 'miscarriage of justice', simply means failure of justice. With the overwhelming evidence in support of the decision of the trial Court as affirmed by the Court below, no elements of miscarriage of justice have been disclosed in the present case to warrant any interference.** See State v. Ajie (2000) 11 N.W.L.R. (Pt. 678) 434 and Ojo v. Anibire (2004) 10 N.W.L.R. (Pt. 882) 571 at 583. This issue is accordingly resolved against the Appellants.

The second issue is whether an order of injunction can be made against a family member in respect of a family property in which he has an interest and that has not been partitioned. It was argued for the Appellants that since both parties are undisputed members of the same Ayanrinola Akayepe family, the Respondent should not have absolute right to the property unless the property has been validly partitioned relying on the case of Adesanya v. Otuewu (1993) 1 N.W.L.R. (Pt. 270) 414. That since the nature of interest of the Respondent in respect of the shop allotted to him was merely for his use and occupation as part of the family property in which all members of the family have joint interest, it was wrong for the trial Court to have granted the relief of injunction against the Appellants and in the

same vain it was wrong for the Court below to have affirmed that order.

On the part of the Respondent, the order of injunction granted by the trial Court and affirmed by the Court below was based on concurrent findings of facts of the two Courts below. That the Appellants having failed to show that the findings were perverse or unsupportable from the evidence before the Courts, or that there was a miscarriage of justice in anyway, the concurrent findings cannot be disturbed by this Court. The cases of *Dibiamaka v. Osakwe* (1989) 3 N.W.L.R. (Pt. 107) 101 and *Akeredolu v. Akinremi* (No. 3) (1989) 3 N.W.L.R. (Pt. 108) 164 at 167, were relied upon in support of this view.

It is not at all in dispute in the present case that the Appellants and the Respondent are children of the same father and members of the same Akayepe family of the whole. There was finding by the trial Court that the shop in dispute was allocated to the Respondent by the head of the Akayepe family for his use and occupation. This finding was affirmed by the Court below. There was also evidence on record that the Appellants prevented the Respondent from enjoying the use and occupation of the shop. The order of injunction was therefore made to protect the special interest of the Respondent in the use and occupation of the single shop allocated to him by the head of the Akayepe family with the consent of all principal members of that family with the exception of course of the Appellants who refused to attend that meeting. ***The overall interest of the Akayepe family including the Appellants over the unpartitioned vacant plot upon which the five shops were built remains intact in spite of the order of injunction on the Appellants to prevent them from interfering with the right of the Respondent conferred upon him by the same family to occupy and use one of the five shops.*** See *Bamgbose v. Oshoko* (1988) 19 N.S.C.C. 899. ***The complaint of the Appellants in this issue is therefore baseless.***

The third issue raised by the Appellants is whether from the evidence adduced at the trial Court the land upon which the five shops were built belong to Ayanrinola Akayepe family or not. It was observed on behalf of the Appellants by their learned Counsel that although the two Courts below had earlier found that the shops be-

long to the large Akayepe family and not to the Ayanrinola Akayepe family, those decisions according to the learned Counsel are perverse upon a closer look at the evidence led by the parties at the trial. Learned Counsel referred to the evidence of the Respondent as the Plaintiff at the trial Court at pages 15 and 17 of the record where he stated that only Ayanrinola Akayepe family house has been partitioned but the shops of the family have not been partitioned and that the Respondent and the second Appellant had been collecting the rents from the shops since 1974. This evidence together with the one at page 18 of the record where the Respondent referred to the shops as property left behind by his late father, is enough evidence to support the claim of the Appellants that the five shops belong to the Ayanrinola family; that the Respondent having failed to prove his claim for declaration on his own evidence, the admission of the Appellants notwithstanding, on the authority of several cases including *Adebayo v. Adusei & An.* (2004) 4 N.W.L.R. (Pt. 862) 44; *Igbinovia v. University of Benin Teaching Hospital* (2000) 8 N.W.L.R. (Pt. 667) 53 and *Ndayako & Ors. v. Dantoro* (2004) 13 N.W.L.R. (Pt. 889) 187. Learned Counsel also alleged contradictions in the evidence of PW2 at page 18 of the record and the earlier evidence of the Respondent and PW1 on the ownerships of the shops as being Akayepe family or Odedele and Opadeji families. Learned Counsel therefore concluded that since the two Courts below have failed to properly evaluate the evidence on record and come to the correct decision on who owns the land on which the five shops were built, this Court is urged to take and weigh the evidence on record and enter the correct decision in favour of the Appellants.

Learned Counsel to the Respondent maintained that the concurrent decisions of two Courts below are fully supported by evidence. Learned Counsel accused the Appellants of trying to use ambiguities in the records to serve their purpose; that the evidence of DW1 which the Appellants avoided in their submissions, clearly supported the decision of the trial Court as affirmed by the Court below; that it is clear from the Respondent's statement of claim and the evidence led at the trial Court, that the land in dispute belongs to the extended Fagbohun Akayepe family and has not been partitioned; that the Appellants also admitted paragraphs 3, 4, 5, 15 and 16 of the same statement of claim showing that the land originally belong

to Fagbohun Akayepe who had two male children Odedele and Opayedí who constituted the two branches of the Akayepe family; that it was the descendants of these two branches that took a loan from one Gabriel Ajewole with which the five shops were built. Learned Counsel also pointed out that the lease agreement was executed between Ajewole and the head of the extended Akayepe family, Folashade Opadeyi; that there was indeed overwhelming evidence on record to support the findings of the trial Court as affirmed by the Court below that the land upon which the five shops were built, belongs to the whole Fagbohun Akayepe family and that the land had not been partitioned.

This issue in fact constitutes the foundation of the dispute between the parties in this case. From the pleadings and the evidence on record of this appeal, it is common ground between the parties that they are descendants and members of the family of Fagbohun Akayepe who was the original owner of the land upon which the five shops were built. Fagbohun died intestate leaving behind two male children Odedele and Opayedí who constituted two branches of the Akayepe family to whom the estates of Fagbohun Akayepe devolved. While the Respondent a member the Appellants' section of the Akayepe family and the other members of the extended Akayepe family including the head of the family are saying that the land upon which the five shops were built had not been partitioned between members of the Akayepe family, only the Appellants who are also members of the same family are insisting that the land in question had been partitioned to their section of the Akayepe family. The learned trial Judge who saw and heard the witnesses give evidence before him and after carefully evaluating the evidence, accepted the version of the evidence of the Respondent and his witnesses and found as a fact that the land upon which the five shops were built had not been partitioned as claimed by the Appellants and therefore remained the property of the entire members or sections of the Akayepe family. ***The learned trial Judge took a number of factors from the evidence in arriving at his decision. These factors include; the fact that the descendants of both sections of Akayepe family took part in taking the loan from Ajewole to build the five shops in question and also were parties in the lease agreement including the head of the family in letting out***

the shop for renting and the admission of these same factors by the Appellants in their statement of defence that the land in question had not been partitioned. The confirmation of this finding by the Court below therefore is on firm ground, in my

view. The glaring facts admitted by the Appellants on their pleadings are contained in paragraphs 15 and 16 of the statement of claim where it was averred -

"15. The Plaintiff avers that sometime in 1974, Lasisi Akayepe (2nd Defendant), Folashade Akayepe and Olaniyi Akayepe collected from one Gabriel Ajewole the sum of N960.00 to built five shops on the said family land.

16. Plaintiff avers that after the shops have been completed the 1st and 2nd Defendants together with the other persons named in paragraph 15 above let to the said Gabriel Ajewole, one shops for 10 years in consideration of the sum N960.00 lent to the family pursuant to which a lease agreement dated 19th January, 1974 was executed by the above mentioned parties."

What the Appellants admitted in these paragraphs is full participation of both sections of the Akayepe family including the then head of the family in the building and renting out of the five shops in question. Evidence was also led by the Respondent and his witnesses in support of these findings by the trial Court that the land in question is the property of the entire members of the Akayepe family as affirmed by the Court below. In any case even if the Appellants had succeeded in proving that the five shops and the land upon which they were built had been partitioned to their own section of the Akayepe family, the right of the Respondent as a member of the same section of the Akayepe family as the Appellants to occupy and use the single shop remains unaffected.

The last and fourth issue for determination is whether from the evidence on record, the Respondent is not caught by the doctrine of Res-judicata or issue Estoppel from recontesting the possession of the shop in dispute with the Appellants. Learned Counsel to the Respondent referred to paragraphs 16 and 17 of the statement of defence of the Appellants where the defence of res-judicata or issue estoppel was clearly pleaded in relation to the judgment in suit No. 1/255/87. He observed that since the entire arguments of the Appellants on this issue related to suit No. CM/2/86, the arguments must

be ignored for being not related to the issue at all.

I have examined the arguments of the Appellants in their brief of argument from page 10 thereof to the last page 15 and it is quite obvious that all the arguments were predicated on the judgment in case No. CM/2/86 in which the 1st Appellant claimed possession of the shop in question from Ajewole. Although the plea of res-judicata was more relevant to the judgment of the High Court Ibadan in suit No. 1/255/87 as pleaded in paragraphs 16 and 17 of the statement of defence, no argument at all was advanced by the Appellants in support of the plea of res-judicata as raised in those paragraphs where it was pleaded as follows:-

“16. The Defendants aver that the Plaintiff is claiming the reliefs which he claimed in suit No. 1/255/87; Ganiyu Ayanrinola Akayepe v. Lasisi Ayanrinola Akayepe and others. The said suit was dismissed by Oluborode J. in High Court No. 14 Ibadan on 27th day of September, 1998. The Defendants will rely on the Judgment at the trial of this action.

17. The Defendants will contend at the trial of this action that this Honourable Court has no jurisdiction to entertain the action on the ground that the subject matter is res-judicata in view of the Judgment referred to in paragraph 16 above.

Definitely the entire arguments of the Appellants on this issue were not addressed to the relevant judgment in suit No. 1/255/87, of the Ibadan High Court as pleaded by them in support of their plea of res-judicata. Instead of directing his arguments on this issue to the relevant High Court judgment clearly pleaded, learned Counsel to the Appellants devoted his time in pursuing arguments in support of paragraph 13 of the statement of defence where it was pleaded that the shop in contention between the parties was once recovered by the Akayepe family from the tenant Ajewole following a judgment in case No. CM/2/86, delivered by the Magistrate’s Court Ibadan on 26th February, 1987. Thus, the arguments not having been directed to the subject of this issues, are completely irrelevant for the determination of the appeal.

In any case, the defence of res-judicata as raised by the Appellants in paragraphs 13, 16 and 17 of their statement of defence was duly considered and determined by the trial Court in its judgment

after quoting the relevant paragraphs and finding that the copies of the judgments in suits No. 1/255/87 and CM/2/86, were not tendered and received in evidence in the course of the trial as found at page 59 of the record by the learned trial Judge:-

“Since it is now clear that no other form of secondary evidence of the contents of the judgments pleaded in paragraphs 13, 15 and 16 of the amended statement of Defence could be admitted in evidence besides their certified true copies and neither their originals nor their certified true copies have been tendered in evidence, the oral evidence so far given in proof of their contents is hereby discounted on the ground that such evidence is inadmissible in law and it has been wrongly admitted.

As there is no proof of the contents of the said judgments upon which the defences of res-judicata and standing by could be based, it is my considered view that there is no foundation upon which neither of the two defences could be based. The two defences therefore fail.”

This decision of the trial Court which is based on failure to establish the defence by admissible evidence, was further affirmed by the Court below on appeal in its judgment at page 168 where the Court said -

“I have considered the submissions of both learned Counsel to the parties on this issue vis-a-vis the records and the prevailing law. The law is that not only must the parties and the subject matter be the same in both judgments, the judgment on which the plea of res-judicata is predicated must be proved. See Sections 53 and 131 of the Evidence Act.”

I indeed agree completely with the two Courts below on the position of the law on the burden on the Defendants/Appellants to prove their defence of res judicata and standing-by. It is trite that to sustain a plea of res-judicata, the party must satisfy the following conditions -

- (a) that the parties or their privies as the case may be are the same in the present case as in the previous case; and
- (b) that the issue and the subject matter are the same in the previous case or suit as in the present suit; and
- (c) that the adjudication in the previous case was given by a Court of competent jurisdiction; and

(d) that the previous decision finally decided the issues between the parties.

Failure to satisfy any of these conditions means failure of the plea in its entirety. See Nkanu v. Onun (1977) 5 S.C. 13; Ikpong v. Edoho (1978) 6 - 7 S.C. 221; Dzungwe v. Gbishe (1985) 2 N.W.L.R. (Pt. 8) 528 Udo v. Obot (1989) 1 N.W.L.R. (Pt. 95) 59 and Afolabi v. Governor, Osun State (2003) 13 N.W.L.R. (Pt. 836) 119 at 130 - 131. In the present case, **in the absence of the certified true copies of the judgments in the previous cases being relied upon in support of res-judicata, there is nothing to compare with the present case in determining if any or all the conditions have been met by the Appellants to sustain their plea. This issue is accordingly resolved against the Appellants.**

Finally, as this appeal is clearly predicated on the question of facts requiring proof by evidence, the attitude of this Court on concurrent findings of facts by two lower Courts is well settled. This Court will not interfere with those findings of facts except the Appellants can show special circumstances of either that there was miscarriage of justice or a serious violation of some principles of substantive law or procedure or that the findings do not flow at all from the evidence adduced by the parties or that the findings are perverse. See Enang v. Adu (1981) 11 - 12 S.C. 25 at 42; Lokoyi v. Olojo (1983) 8 S.C. 61 at 73; Ojomu v. Ajao (1983) 9 S.C. 22 at 53 and Ibodo v. Enarofia (1980) 5-7 S.C. 42 at 55. In the present case, the Appellants have not met any of these requirements to justify any interference with the concurrent findings of the trial Ibadan High Court and the Court of Appeal.

In the result this appeal must fail. It is accordingly hereby dismissed with N50,000.00 costs to the Respondents.

TOBI JSC

In the High Court of Justice, Ibadan, the respondent as plaintiff claimed against the appellants as defendants in the following terms:

“1. Declaration that in accordance with the authorization of the Akayepe family acting by their Head, the plaintiff is entitled to the use and possession of one of the five door shops (formerly occupied by a tenant, Mr. Ajewole) situate and lying at Akayepe Compound,

Agbeni, Ibadan.

2. Injunction to restrain the defendants their agents or servants from interfering with the plaintiff's possession and use thereof."

It appears that both parties agreed at the trial that all the properties in dispute, including a house and vacant land originally belonged to Fagboun, their common ancestor. The issue in dispute is whether the whole land of Fagboun Akayepe was partitioned or not. It is the case of the respondent that the land upon which the five shops in dispute were built belong to the Akayepe family. It is the case of the appellants that Fagboun Akayepe land has been partitioned and that the land upon which the five shops were built belong to Ayarinola Akayepe, the late father of all the parties in the suit.

The learned trial Judge gave judgment to the respondent. He said at pages 59 and 60 of the Records:

"On the totality of the evidence in this case which I have weighed on the imaginary scale I find the plaintiff's case proved on the balance of probabilities. It is my considered view that no other point of substance has been raised in this case. Judgment is therefore given to the plaintiff against the defendants as follows:-

(1) Declaration that in accordance with the authorization of the Akayepe family acting by their head, the plaintiff is entitled to the use and possession of one of the five door shops (formerly occupied by a tenant, Mr. Ajowolo) situate and lying at Akayepen Compound, Agbeni, Ibadan, is hereby granted.

(2) Injunction restraining the defendants, their agents, or servants from interfering with the plaintiffs possession and use of the said shop in dispute is hereby granted."

An appeal to the Court of Appeal was dismissed. The court held that the appellants failed to prove the decision of the court in G Suit No. CM/2/86 which they claimed constituted *res judicata*. In dismissing the appeal, the court said at page 169 of the Record:

"In sum, this appeal lacks merit and it is dismissed. The judgment of the High Court of Oyo State holden at Ibadan in Suit No. 1/825/88 delivered on 23/3/90 is hereby affirmed with N1.000.00 costs to the respondent."

Still dissatisfied the appellants have come to the Supreme Court. They formulated four issues for determination. The respondent agrees with the issues formulated by the appellants. The main plank on which

this appeal rests is whether or not the vacant land on which the five shops were built has been partitioned among the Akayepe family. On the issue, the learned trial Judge said at pages 56 of the Record:

"From such particulars the only reasonable and irresistible presumption is that the five shops and the land on which they were built belong to the whole Akayepe family regard being had to the common course of natural events and human conduct, and I so hold. In any event there is no sufficient evidence that the land upon which the shops were built has been partitioned between the two sections of the whole Akayepe family".

Again, on the issue, the Court of Appeal said at page 165 of the Record:

"Only Ayanrinola Akayepe family house has been partitioned, but shops of the family have not been partitioned. This piece of evidence of the plaintiff which has been materially corroborated by the admission of the appellants supra via the syndication of loan for building of the shops and the subsequent letting of the five shops by the entire Akayepe family whose evidence was rightly accepted by the trial Judge show clearly that the five shops are entire Akayepe family property which has not been partitioned and remained (entire) Akayepe family property and I so hold...."

The above are concurrent findings of the two lower courts. As they are clearly borne out from the evidence, I cannot interfere with them. I accept the findings as correct, and I so hold.

What is the legal incidence of partition? Where family property is partitioned, the property belongs exclusively to the party as it is no more in the family melting pot. As owners of the partitioned portion, they have acquired all the incidents of ownership in the sense that they can do anything they like with the property. The owners of the partitioned property are not subject to the rights of another person. Because they are the owners, they have the full and final right of alienation or disposition without seeking the consent of another person because as a matter of law and fact, there is no other party's right over the partitioned property that is higher than theirs. They have the inalienable right to sell the property at any price, even at a give away price. They can even give it out *gratis*, that is, for no consideration. Is that the position in this case? Is the land in dispute partitioned? I think not.

Where a portion of land has not been partitioned, the relief of injunction lies in favour of the family that owns the land against any trespasser. That is what the respondent asked for in the second relief in respect of the unpartitioned land of Akayepe family. The learned trial Judge was right in granting the injunction and the Court of Appeal was equally right in affirming the decision of the learned trial Judge. B

I agree entirely with my learned brother Mohammed, JSC that the appeal has no merit and should be dismissed. I also award N50.000.00 in favour of the respondent. C

OGUNTADE JSC

I have had the advantage of reading in draft a copy of the lead judgment by my learned brother Mohammed J.S.C. I agree with his reasoning and conclusion. I only wish to briefly emphasis an aspect of the lead judgment relating to the second issue for determination. It was the argument of the appellants' counsel that an order of injunction could not be made against a family member in respect of a family property which has not been partitioned and in which admittedly the said family member has a subsisting interest. The case relied upon is *Adesanya v. Otuewu (1993) 1 N.W.L.R. (Pt. 270) 414*. E

It is my view that the appellants' counsel has in making this submission, not fully averted his mind to the nature of the dispute in this appeal and the findings of fact made thereon by the two courts below. It was the contention of the appellants who were the defendants before the trial court that the shops one of which was in dispute were erected on a parcel of land which belongs to the Salami Ayanrinola Akayepe sub-family of the larger Akayepe family headed by Madam Folashade Akayepe. This argument was extended by the defendants to yield the reasoning that whereas madam Folashade Akayepe was the head of the larger Akayepe family and could allocate the land belonging to that family, she could not allocate the land which belonged to the Salami Ayanrinola Akayepe sub-branch of the Akayepe family to the plaintiff/respondent. That argument failed before the two courts below on the concurrent findings by the two courts that the land although unpartitioned belonged to the Akayepe family and not to a sub-branch as canvassed by the defendants/ap- F G H

pellants.

It is generally an accepted principle of customary land law that a court will not grant an injunction against a member of a family in respect of family land which has not been partitioned. This principle however is and must be subject to exceptions depending on the facts in each case. The dispute in this case was in respect of a shop, not on an expanse of land. The right asserted by the defendants/appellants over the shop was inconsistent with the right granted to the plaintiff/respondent by the head of the family to use same. Necessarily, the use of the place as a shop must be exclusive to the grantee of the shop. All the members of the Akayepe family could not in exercise of their rights as Akayepe family members be allowed to use one shop. Further, the grant of the shop to the plaintiff/respondent did not destroy the radical interest of the Akayepe family in the land upon which the shops were built. It was still necessary to protect the limited interest granted by the head of the family to the plaintiff/respondent. The two courts below were therefore correct in their decision to protect the possessory rights of the plaintiff/respondent. To have failed to do so would create a situation where the defendants /appellants could go to the shop *qua* their interest as a members of the Akayepe family to disturb the enjoyment of the shop by the plaintiff/respondent. The dispute submitted to the court for adjudication would have remained unresolved. The result is that the order of injunction granted to the plaintiff/respondent against the defendants/appellants could not be seen as a derogation of the relevant principle of the customary law. It is in fact an affirmation of it. The shop in dispute remains on Akayepe family land but the right to its exclusive use for the time being is in the plaintiff/respondent. In order to prevent anarchy or lawlessness, the situation could not have been otherwise.

It is for this and other reasons ably discussed in the lead judgment of my learned brother Mohammed J.S.C. that I would also dismiss this appeal as unmeritorious. I also subscribe to the orders made in the lead judgment on costs.

H

OGBUAGU JSC

I have had the privilege of reading before now, the lead Judgment of my learned brother, Mohammed, JSC just delivered. I agree

with his reasoning and conclusion. But by way of emphasis, I wish to make my few contributions in respect of two areas. Firstly, there is the undisputed fact and evidence by the Respondent and his witnesses that one of the five shops that was formerly leased to a tenant - one Gabriel Ajewole for a period of ten years in consideration of a loan with which the said shops were built or erected, was, at the expiration of the said term of the lease, allotted to the Respondent by the head of the whole Akayepe family - Madam Folashade Akayepe with the consent of or together with some principal members of Akayepe family, for his use and occupation. The said shops were erected on a portion of the unpartitioned vacant land. It is now firmly settled that what is important, is the consent of the/a majority of the principal members of the family that is required and not that of every member for the alienation, allotment etc. of the said family unpartitioned property or land. See the case of Adewuyin v. Ishola (1958) WRNLR 110; and Olorunfunmi & 2 ors. v. Saka & 2 ors. (1994) 2 SCNJ. 39 @ 49, 50 - per Kutigi, JSC (as he then was now CJN). If the alienation, sale, lease or allotment etc. is/was made by the principal members of the family without the consent of the head of the family who is recognised as the Custodian of the family property, the same, will be *void Ab initio*. See the cases of *Adedube & anor. v. Makanjuola* 10 WACA 33 and *Agbloe v. Sapper* 12 WACA 187. If however, the alienation, sale, lease or allotment, etc. was/is made by the head of the family, without the consent of the principal members of the family, the same will be voidable. See the cases of the *Shelle v. Chief Asafon* (1957) 2 FSC 65 @ 67: Ekpendu & 2 ors. v. Erika (1957) 4 FSC 79: Ofondu v. Onuoha (1964) NMLR 120; Lukan v. Ogunsosi (1972) 5 S.C. 40; (1972) (1) NMLR 13; (1972) 2 ANLR 41; Akani & ors. v. Makanju & ors. (1978) 11 & 12 S.C. 13; Atunranse & ors. v. Sumola & ors. (1985) 1 S.C. 349 and Babayeju & anor. v. Chief Ashamu & anor. (1998) 7 SCNJ. 158 @ 166- 168 and many others.

It needs be borne in mind always and this is also settled that family land ceases to be family land, after partition. See the case of *Alhaji Adebajo & ors. v. Alhaji Olowosoga & ors.* (1988) 9 SCNJ. 78. Where however, there is no partition as in the instant case leading to this appeal, an allotment to the allottee, acquires what is known or described as usufruct - i.e. a right to use and occupy. See the case

of *Alao & ors. v. Ajani & ors. (1989) 6 SCNJ. (Pt.III) 243 @ 252* and this right, can be inherited by his descendants.

This brings me to the next or second area of my contribution. The relief sought by the Respondent in his claim which were accordingly granted/ordered by the trial court and affirmed by the court below, are clear and unambiguous. They read as follows:

“(1) Declaration that in accordance with the authorization of Akayepe family acting by their Head, the plaintiff’s entitled to the use and possession of one of five door shops (formerly occupied by a tenant, (Mr. Ajewole) situate and lying at Akayepe compound, Agbeni, Ibadan.

(2) Injunction to restrain the Defendants, their agents or servants from interfering with the plaintiffs possession and use thereof”.
[the underlining mine]

It is obvious that the declaration and the injunctive orders were/are limited to the said one shop and not in respect of the rest of the vacant unpartitioned land of the family of the parties. There is evidence from the Records that the Appellants had interfered with the possession of the shop by the Respondent and had in fact, prevented him from enjoying the use and occupation of the shop. The order of injunction by the trial court and affirmed by the court below, was in fact and obviously made, to protect the lawful and equitable interest of the Respondent in his use and occupation of the shop. It could not have been otherwise. There is evidence uncontroverted, by the Respondent that the Appellants, refused to attend the meeting held by the other principal family members with their said Head of the family where the allotment, was made to the Respondent.

The order of injunction, in my respectful view and on decided authorities, did not and has not, affected the ownership and interest of the said Akayepe family, on the land on which the said shops were built. The Respondent’s right of use and occupation of the one shop, cannot, ripen into full ownership. See the cases of *Adegun v. Fagbola (1932) 11 NLR 110, 111*; *Shelle v. Chief Asanjon (supra) Ajeja v. Ajayi & anor. (1969) 1 ANLR 72*; *Falaju v. Amosu (1983) 10 S.C. 1* and *Bamgbose & ors. v. Oshoko & anor. (1988) 2 NWLR (Pt. 78) 509 (a), 523*; *(1988) 5 SCNJ. 116*; *(1988) 19 NSCC 899* and *Eme Ndukwe v. Uma Acha & 4 ors. (1998) 5 SCNJ. 28 @ 41* just to mention but a few.

However, since the Respondent has occupational right to occupy and use the said shop, but cannot alienate it without the consent of the head and the principal members of the family, the said right, is transmissible to his successors. See the case of *Tongi v. Kalil* 14 WACA 331, 332 - per Foster-Sutton P. The Respondent, as an allottee in possession of the said shop, I respectfully hold, had and has the right to sue the Appellants, their agents and/or servants, for damages for trespass in respect of the said shop. See the case of *Lengbe v. Imade* (1959) WNLR 325 (FSC) cited and referred to in the case of *Agbomaji v. Bakare & 4 ors.* (1998) 7 SCNJ. 33 @ 55 - per Ogunbare, JSC. The order of injunction, naturally, followed/flowed as a consequential order which I hold, was rightly and justifiably made by the trial court. The Appellants claim that the said vacant land had been partitioned. It is now settled that where partition of a family land is alleged, as in the instant case, the onus, is on the person who so alleges, to satisfy the court that there was in fact, a partition. See the case of *Gbadamosi Ajayi & anor. v. Gabriel Pabiekun & ors.* (1970) IANLR 142 @ 145 and *Atuanya v. Onyejekwe & anor.* - In re: Ofiaju Mbajekwe (1975) 3 S.C. 161, 167. I note however, that the trial court, after stating that there are two issues to be resolved, had these to say inter alia, at page 56 of the Records:

"From such particulars the only reasonable and irresistible presumption is that the five shops and the land on which they were build (sic) belong to the whole Akayepe family regard being had to the common course of natural events and human conduct, and I so hold. In any event there is no sufficient evidence that the land upon which the shops were built has been partitioned between the two sections of the whole Akayepe family".

[the underlining mine]

At page 57 of the Records, the learned trial Judge in respect of the second issue, stated inter alia, as follows:

"In this case there is uncontroverted evidence that Madam Folashade, the Plaintiff and the P.W.2 were present at the meeting where Madam Folashade in her capacity as the head of the whole Akayepe family allotted the shop in dispute to the plaintiff and the Defendants were not present at the meeting. It follows that only those present at the meeting have special knowledge of what happened there and can give account of it and that the plaintiff and the P.W.2

have creditably done. It is therefore hold (sic) that Madam Folashade in her capacity as the head of the whole Akayepe family in fact allotted the shop in question to the plaintiff”.

[the underlining mine]

At pages 166 and 167 of the Records, the court below - per B Okunola, JCA (of blessed memory), stated inter alia, as follows:

“The position in the instant case is that the shop was allocated to the respondent by the head of the family with the consent of the principal members of the family present at the meeting called for the purpose. This renders the transaction valid under customary law. It needs to be emphasised here that it is the consent of majority of members of the family that is required and not that of every member. See Ishan Olounfunmi & others. v. Bashiri Salea (sic) & ors. (1994) 2 SCNJ. 39. See also Universal Vulcanising (Nig.) Ltd., v. D Ijesha United Trading and Transport Coy. Ltd. (I, U. T. T. C.) and others (1992) 11/12 SCNJ. 243; Jimoh Akinfolarin & ors. v. Solomon Oluwole Akinola (1994) 4 SCNJ. 30.

In consequence, I hold that the head of Akayepe family could allocate one of the shops to the respondent for use and enjoyment. E The plaintiff/respondent had proved that the land on which the five shops had been built had not been partitioned. Anybody asserting the contrary has to prove same which the appellants had failed to do in the instant case.....”.

I had already stated and held the same view earlier in this Judgment. F

Mukhtar, JCA (as he/she then was) in his/her concurring Judgment at page 172 of the Records, stated inter alia, as follows:

“At least with that evidence he (meaning the 1st defendant/ G Appellant under cross-examination) admitted that, she (meaning Madam Folashade) was at the time the head of the Akayepe family and was involved in the leasing of the shops, that is the subject matter of the suit. The claim before the lower court was for a declaration that she as a head of that family authorised the use of the shop by the H Respondent. That being so, I think the learned trial Judge was right to give judgment in favour of the Respondent”.

Finally, there are the concurrent findings of fact or judgments of the two lower courts that cannot be faulted by me or this Court as they are borne out from the Records, The attitude of this Court has

been stated and restated in a line of many decided authorities. See the case of Arabambi & anor. v. Advance Beverages Industries Ltd. (2005) 12 SCNJ. 331 @ 349 citing some other cases therein.

I have wondered why the Appellants, in spite of the overwhelming evidence in the trial court not in their favour, have pursued this case up to this Court in spite of the fact that the Respondent, is not only their blood relation, but the subject-matter of the dispute, is just one shop out of five others, allotted lawfully and customarily to the Respondent. Since this Court or any other court for that matter, or myself, is not allowed or permitted to speculate anything, I leave the reason or reasons, to the conscience of the Appellants. It is from the foregoing and the more detailed lead Judgment of my learned brother, Mohammed, JSC, that I too find no merit whatsoever in this appeal which I accordingly also dismiss. I abide by the consequential order in respect of costs.

OGEBE JSC

I read before now the lead judgment of my learned brother Mahmud Mohammed JSC and I agree entirely with his reasoning and conclusion. The appeal is devoid of merit and I also dismiss it with costs as assessed in the lead judgment.