

**SUPREME COURT OF NIGERIA**

26TH JUNE, 2009 SC. 419/2001

**CORAM:- N. TOBI, D. MUSDAPHER, I. F. OGBUAGU,  
I. T. MUHAMMAD, J. O. OGEBE, JJSC**

1. POPOOLA BAMGBEGBIN
2. LAMIDI DIEKOLA
3. LAPADE ADISA
4. GBADAMOSI ODUOLA  
(for themselves and on behalf of the  
Apete family)
5. SAFIU ADAORUBGBO
6. ALFA OBAJI AGBADUN
7. LAYIWOLA ORISALEYE
8. GANIYU SANGOUNDE
9. LIASU TIJANI
10. ALHAJI ELEGBEDE
11. LALEKAN BABAAGBA
12. RAMONI BABAAGUN
13. AYOADE ADELEKE
14. BAMIJ I OKE-ESU
15. ADEBISI ALADURA
16. AMINATU ARANSI
17. ADESINA ELEDIE
18. MUKAILA ABA IDI-ORO
19. LAWAL ALABI
20. OLADEJO AKANBI
21. ALHAJI WAHABI SANUSI
22. BAMIDELE GBADAMOSI
23. MURTALAB SUARA
24. TIAMIYU AROLA
25. AMOPE LASISI AKINWALE

..... APPELLANTS/  
CROSS RESPONDENTS

AND

1. JIMOH ATANDA ORIARE ..... PLAINTIFFS/RESPONDENTS/
2. ALHAJI SALAWU ORIARE ..... CROSS-APPELLANTS  
(for themselves and on behalf  
of Oriare Family)

3. LAWAL BALOGUN

4. RAIMI IKUPAKUN ..... RESPONDENTS/

5. JAMES OLADIMEJI CROSS-RESPONDENTS

[5th, 8th and 21st Defendants]

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ESTOPPEL - Issue estoppel - Effect - It is an impediment which bars a person from re-litigating an issue - Which has been isolated and raised in a particular proceeding - In which it was finally determined (H1)

ESTOPPEL - Issue estoppel - Applicability - Issue of title having been earlier resolved - Between same parties and privies - Trial judge properly applied the principle - As rightly upheld by Court of Appeal (H2)

PLEADINGS - Statement of defence - General traverse - Propriety - In respect of essential and material allegations in statement of claim - General traverse is not enough to controvert them - They must be specifically denied (H3)

EVIDENCE - Proof - Document pleaded but not tendered - Effect - Once plaintiff puts sufficient evidence in support of his claim - It is not the law that all documents pleaded - Must be tendered in evidence (H4)

APPEALS - Issue - That is irrelevant to decision appealed against - Competence of - It is incompetent and liable to be struck out - As it is akin to an academic question (H5)

APPEALS - Concurrent findings of fact - Interference with - Propriety - Where lower courts found that no case was made against 3 of the defendants - As perversity has not been shown in the finding - It will not be interfered with (H6)

CUSTOMARY LAW - Customary tenancy - Grant of forfeiture - Propriety - In the absence of specific finding by trial court on ishakole - And as such on issue of customary tenancy - There can be no grant of forfeiture (H7)

### **FACTS**

The plaintiffs/cross-appellants sued the rest of the parties as defendants before the High Court of Oyo State holden at Ibadan. Plaintiffs' claim against all the defendants was for declaration of title to the Land in dispute, injunction and damages for trespass. In addition, the plaintiffs claimed against the 1st to 4th defendants for forfeiture, possession and injunction. Pleadings were settled. Plaintiffs in their statement of claim, inter alia, pleaded a deed of surrender which they said was executed by the defendants' predecessor-in-title in favour of them. Though documents were tendered by plaintiffs in evidence, including Exhibits P1 & P2 - judgments in earlier suits between them and defendants/their privies - the deed of surrender was not tendered in evidence.

After hearing, trial court found that issue estoppel applied in respect of the issue of title against the defendants on the basis of Exhibits P1 & P2. Consequently, he made several orders including grant of forfeiture and injunction. Some of the parties, being dissatisfied, appealed/cross-appealed to the Court of Appeal, which allowed both the appeal and cross-appeal in part. By this further appeal to the Supreme Court, appellants/respondents are questioning the propriety of the application of issue estoppel, as well the effect of the non-tendering of the deed of surrender. On the other hand, the cross appellants question the setting aside of the grant of forfeiture by the Court of Appeal.

### **ISSUES FOR DETERMINATION**

#### **APPEAL:**

1) *"Whether the Justices of the lower court were not wrong in not dismissing the 1st and 2nd Respondents claims against the 1st - 4th appellants when their reliance was on a judgment used as issue estoppel when the conditions precedent to its application was not fulfilled and when the claims of the 1st and 2nd Respondents' privies in the earlier case relied upon was dismissed against the named defendants therein on the same subject matter.*

2) *Whether the Justices of the Court of Appeal were not wrong in still resolving appellants issue 4 before it against the Appellants when the court had earlier held that, 'It is my judgment that having not produced it, the Respondents/Cross-appellant did not establish*

that Oyebanji surrendered land to Oriare family’.”

**CROSS - APPEAL**

iii. “Whether the court below was right in dismissing the plaintiffs case against the 5th, 8th, 20th and 21st Defendants (Grounds 3 and 4 of the cross-appeal).

B iv. Whether the court below was right in dismissing the plaintiffs claim against the 1st - 4th Defendants for forfeiture and possession of the area edged PURPLE on the plaintiffs’ plan tendered as exhibit ‘P1’.

C v. What orders will this Honourable court make in the circumstances of this case?”

**HELD** (Unanimously dismissing both the appeal and the cross-appeal per **MUHAMMAD JSC**)

**D Issue estoppel - Effect**

1. Estoppel has many branches such as the one on hand, i.e. issue estoppel. Issue estoppel is an impediment which bars a person from relitigating an issue which has been isolated and raised in a particular proceeding and has been finally determined in that proceedings. Lord Denning, again, is on record where he stated, in the case of Fidelitas Shipping Co. Ltd. v. Exportchleb (1966) 1 QB 630 at p. 640, as follows:

F “Within one cause of action there may be several issues raised which are necessary for the determination of the whole case. The rule then is that once an issue has been raised and distinctly determined between the parties, then as a general rule neither party can be allowed to fight that issue all over again.”

(underlining supplied for emphasis) (p. 1538 D)

**G Issue estoppel - Applicability**

2. In its consideration of the case, particularly on issue estoppel, the court below held, among other things, as follows:

H “In the instant case being a claim for statutory right of occupancy the onus is on the claimant to establish and route his title to the radical owner hence the pleading of the first settler on the land and a denial by the appellants, so the parties joined issue on the material fact directly in issue which was resolved and confirmed in Exhibits P1, P2, P3 and P8 being between the same parties and privies, the

*same subject matter and final judgment by competent High Court. As the three elements co-exist as stated by the Supreme Court in FARIDA V. GBADEBO (1978) 3 SC 219 followed in OYEROGBA V. OLAOPA (1998) 13 NWLR (Pt.583) page 526 supra I come to the irresistible conclusion that the learned trial judge applied the doctrine of issue estoppel properly under sound principle of law.”* B

Now, having x-rayed the decisions of the two courts below, I am satisfied that there is a concurrent decision of the two courts. The general rule is that this court does not interfere with such decisions except where perversity or weighty issues are found. I accordingly affirm the decisions of the two courts below. Issue one is resolved against the appellants. (pp. 1541 F/1542 B/D) C

### **Statements of defence - General traverse - Propriety**

3. Although the appellants stated that they denied in paragraph 3 of their statement of Defence, the averment in paragraph 28 of the Statement of Claim, the denial was through a general traverse in paragraph 3 of the Statement of Defence. The position of the law on a traverse of a general nature as held by this court in the case of Lewis Peat (N.R.I.) Ltd. v. Akhemien (1976) 7 SC 167 is that in respect of essential and material allegations in the statement of claim, the GENERAL TRAVERSE ought not to be adopted and that such essential and material allegations should be specifically TRAVERSED. The decision in Lewis Peat’s Case was further adopted and applied by this court in several cases, that a general traverse is not enough to controvert MATERIAL and ESSENTIAL IMPORTANT averments in the statement of claim which are the foundation of the plaintiffs case and that such averments are radical and must be specifically denied. (p. 1544 D) E F G

### **Proof - Document pleaded but not tendered - Effect**

4. In a civil action where there is an overwhelming evidence in proof of the claim before the trial court, the plaintiff will have discharged the onus of proof placed upon him by law where he puts sufficient evidence in support of his claim. It is not the requirement of the law that all documents pleaded must be tendered in evidence. In the appeal on hand, the non-tendering of the Deed of surrender could not be fatal to the case before the trial court as the learned trial Judge H

was already satisfied with what he so far had on evidence to be preponderant which sustained the claim of the plaintiffs. (p. 1545 B)

**Issues - Irrelevant to decision appealed against - Competence**

5. The last issue formulated by the cross-appellants is a novelty. It is based on speculation and pre-emption. This, in my view, is a premature question which has little or no relevance to the decisions handed by the trial court and the court below. I think it is not part of the assignment of a counsel to pre-empt what decision a court of law may hand down to the parties. It will be too early even for a judge, whose duty it is to deliver judgment on a given case, within a given time, to pre-empt what his judgment will be until after he finishes with every aspect of hearing and collation. This issue, to me, is based on mere conjuncture. A conjuncture or speculation has no place in our systems of laws operating in this country. It is akin to an academic question which I am not ready to entertain. This, is an incompetent issue and I hereby strike it out. (p. 1545 H)

**Concurrent finding of fact - Interference with - Propriety**

6. The court below had this to say:

*“The 5th, 8th and 21st Defendants traced the route of title to the radical owner of ASAYINKA. Though cross appellants challenged Asayinka’s radical title, there was no satisfactory and convincing evidence to dislodge it and no finding of fact to the contrary, the learned trial judge was right to uphold that no case was made against the 5th, 8th and 21st Appellants/Cross-Respondents the cross appeal fails on issue one and it is hereby dismissed.”*

These are two concurrent findings of the two courts below. The trite position of the law is that where there are concurrent findings of facts, an appeal court is always loathe in interfering with such findings except where perversity in such findings are shown.

The cross-appellants have failed to show this court where such perversity exists in the findings of the two lower courts. I find it difficult to interfere with such concurrent findings of fact. I affirm the concurrent decisions of the trial court and the court below. (pp. 1548 H/1549 A/D)

***Customary tenancy - Grant of forfeiture - Propriety***

7. I have myself examined the record of the trial court and could hardly see any specific finding on the payment of Ishakole which, as a traditional tribute, would indicate the status of such a customary tenant. It is trite that decisions of a trial court must be anchored on facts which were tested and found by the trial court to be true and can sustain or negate a claim. Failure of the trial court to properly relate the facts of the case to Ishakole, which was regarded to be a pre-condition for a customary tenancy must defeat the forfeiture granted by the trial court. (p. 1550 A)

***NOTABLE POINT OF INTEREST***

***TOBI JSC***

*1. Issue estoppel - cannot be based on mere affinity of issues*

The law requires that the issue must be an essential element of the claim or defence in both sets of proceedings. A mere agglomeration of proximity or affinity of the current issue with the previous one cannot found the equitable remedy. No. An issue, for this purpose, is a decision as to the legal consequence of particular facts constituting a necessary step in determining what are the legal rights and duties of the parties resulting from the totality or bundle of facts. (p. 1552 G)

***REPRESENTATION***

J. O. Badejo with him; P. E. C. Ekwueme for 1st and 2nd respondents/cross-appellants

Mr. B. A. Aiku for appellants/Cross-Respondents.

K. O. Obamogie with him; O. M. Eboigbe for 3rd, 4th and 5th respondents/cross-respondents.

***CASES REFERRED TO***

Ikoku & Ors v. Ekenkwu & Ors (1995) 7 NWLR (Pt.410) 637 at p. 649

Madumere and Ors v. Okafor and Ors (1996) 4 SCNJ 72

Shittu v. Egbeyemi and Ors (1996) 7 SCNJ 43

Jiaza v. Bamgbose (1991) 7 NWLR (Pt.610) 182 at p. 197 F-G

Okoromaka v. Odiri (1995) 7 NWLR (Pt. 408) 411 at page 439

Lagos City Council v. Ogunbiyi (1961) 1 All NLR 297 at p. 299

Adelaja v. Alade (1999) 4 SCNJ 225 at p. 240

Owonikoko v. Arowosaiye (1997) 10 NWLR (Pt.523) 61 at page 73

Durosaro v. Ayorinde (2005) 8 NWLR (Pt. 927) 407 at p. 428 B

Thody v. Thody (1964) 181 at pp 197- 198

Yusuf & Ors v. Toluhi (2008) 6 SCNJ 37

Gbadamosi v. The Governor of Oyo State & Ors (2006) 13 NWLR  
B (Pt.947) 363 at pp 375 – 376

Buhari v. Obasanjo (2005) 2 NWLR (Pt.910) 241 at p.483 G - H

*Eshugbayi Chief Olotu v. Dawuda & ors. 1 NLR 57 @ 60*

*OPARAJI V. OHANU 1999 9 NWLR pt 618 page 290SC*

C **STATUTE REFERRED TO**

Evidence Act, s. 149 (d)

**LEAD JUDGMENT BY MUHAMMAD JSC**

D Paragraph 43 of the statement of claim of the respondents in this appeal and plaintiffs in the High Court of Justice of Oyo State holden at Ibadan (trial court) reads as follows:

*“WHEREOF the plaintiffs claims:*

*a) AGAINST ALL THE DEFENDANTS*

E *1) DECLARATION that the members of Oriare family of Oriare Compound are the persons entitled to apply for and granted the certificate of Statutory rights of occupancy in respect of a piece or parcel of land situate, lying and being at APETE AREA OF IBADAN*  
F *excepting the areas already granted by the plaintiff’s family absolutely and more particularly described and odgo(sic) GREEN on PLAN NO. LW 551/87 of 23-11-87 drawn by L. LAYI ARINOLA licensed surveyor or Ibadan.*

G *2) INJUNCTION against the defendants, their heirs, agents and servants and all manner of persons that may be claiming through them from committing any act of trespass entering and/or doing anything whatsoever with the said land.*

H *3) FIVE THOUSAND NAIRA (N5,000.00) from each of the defendants being damages for trespass being committed by each of the defendants on the said land.*

*b) AGAINST THE 1st - 4th defendants only*

*a. Forfeiture of the area edge (sic) PURPLE on the plaintiff’s (sic) plan*

*b. Possession of the said land.*



*c. INJUNCTION restraining the said defendants from entering the said portion or doing anything or claiming any right that may affect the interest of the plaintiffs.”*

Pleadings were settled. Hearing commenced and closed. Addresses by learned counsel for the respective parties were taken by the trial court. At the end, the learned trial Judge made several orders including grant, forfeiture, injunction etc. Some of the parties were dissatisfied with the trial court’s decision. Notices of Appeals including cross-appeals were, as a result, filed to the Ibadan Division of the Court of Appeal (court below). The main appeal and the cross appeal were, each, partly allowed by the court below. The present appellants were dissatisfied with the portion which dismissed their appeal and they now appealed to this court. The cross-appellants also challenged that portion of the lower court’s decision with which they were dissatisfied.

In this court, briefs were filed and exchanged. In his brief of argument the learned counsel for the appellants formulated two issues for consideration. They read as follows:

1) *“Whether the Justices of the lower court were not wrong in not dismissing the 1st and 2nd Respondents claims against the 1st - 4th appellants when their reliance was on a judgment used as issue estoppel when the conditions precedent to its application was not fulfilled and when the claims of the 1st and 2nd Respondents privies in the earlier case relied upon was dismissed against the named defendants therein on the same subject matter.*

2) *Whether the Justices of the Court of Appeal were not wrong in still resolving appellants issue 4 before it against the Appellants when the court had earlier held that, ‘It is my judgment that having not produced it, the Respondents/Cross-appellant did not establish that Oyebanji surrendered land to Oriare family’.*”

The 1st and 2nd respondents, who are the cross-appellants, filed in one brief, both the 1st and 2nd respondents’ brief of argument as well as the cross-appellants’ brief of argument. On the main appeal, they formulated two issues viz:

1. *“Whether the trial court and the court below properly considered and applied issue estoppel in the determination of the case of the Plaintiffs against the 1st to 4th Defendants and their privies (Ground 1 of the main Appeal).*

*2. Whether the trial court and court below were right to have granted the plaintiffs' case against the 6th, 7th and 9th defendants who are members of the Adaorugbo Family despite the failure of the Plaintiffs to tender the deed of surrender pleaded in paragraph 28 of the Statement of Claim (Ground 2 of the main Appeal.)”.*

B On the cross-appeal, the cross-appellants formulated issues for determination. The cross-respondents, although there are two sets: [a] appellants/cross-respondents and 3rd, 4th and 5th respondents/cross-respondents. The former did not file any brief of argument. C The latter filed a brief in respect of the cross-appeal. I shall consider the cross appeal later.

It is the submission of learned counsel for the appellants on issue 1 that the 1st and 2nd respondents as plaintiffs before the trial court, relied heavily on Exhibit P1, a judgment in suit No.1/3/79 D between Raji Ishola Oriare (for himself and on behalf of Oriare Family) v. Salami Adigun and 12 Ors.

Learned counsel for the appellants submitted that the appellants' contention before the court below was that as far as EXB. 'P1' was concerned, parties therein were not the same as in this case. E Further, the case in EXB 'P1' was not shown to have been defended in a representative capacity for the Oguntayo Apete Family by the named defendants therein. But the resolution and conclusion in law and fact according to the lower court amounted to issue estoppel and that the trial court applied sound principle of law. And as the F earlier suit, Exhibit P1 was not brought against the defendants as family, the family could not be said to be a party to Exh. P1. The findings in the said Exh. P1 could not constitute estoppel as against the 1st - 4th defendants' family. Learned counsel cited the cases of G Okoromaka v. Odiri (1995) 7 NWLR (Pt. 408) 411 at page 439; Brown v. Bassey (2000) 4 NWLR (Pt.651) 1 at 17 - 18. He submitted further that the learned Justices of the court below committed serious error of law by holding that Exhibit P1 constitutes estoppel in the present action and the error had occasioned a miscarriage of H justice. Learned counsel for the appellants urged this court to allow the appeal on this issue and dismiss the plaintiffs' claim against the 1st - 4th defendants and their grantees and enter judgment in favour of the defendants.

In his issue No. II; the learned counsel for the appellants re-

stated the position of the law that he who asserts must prove. Where no evidence is led on pleading, the pleading is deemed to have been abandoned. Learned counsel for the appellants submitted that the averment in section 28 of the statement of claim was denied by the appellants. The 6th defendant also denied the alleged handing over of the existence of any document evidencing any act of surrender of the land in dispute by the Adarorugbos to the Oriares. He testified further that the portion of the land in dispute that was occupied by his family lawfully belonged to them by inheritance and not to the Oriare as claimed by the plaintiffs/respondents. Throughout the entire proceedings before the learned trial judge no document evidencing such a surrender was tendered as an exhibit before the court. The attempt made by the respondents to support the assertion in paragraph 28 of the statement of claim was futile. The oral evidence not supported by pleaded document was speculative of plaintiffs' claims that the 6th and 7th defendants were their ancestors' customary tenants'. Several authorities were cited by the learned counsel in support of his submissions. They include inter alia, the following: *Jiaza v. Bamgbose* (1991) 7 NWLR (Pt. 610) p.182 at 197 F-G; *Fatunde v. Onwoamanam* (1990) 2 NWLR (Pt.132) 322 at 334 B-C, section 99 of the Evidence Act. Learned counsel argued that the respondents have failed not only to prove due execution of a document surrendering to them a parcel of land allegedly granted to the defendants as customary tenants, but have failed also to establish the existence of any document. He finally urged this court to allow the appeal in respect of the issue over which the lower court dismissed the appellants' appeal before it.

In their brief of argument, the 1st and 2nd respondents (who are described in the brief as ("plaintiffs/respondents/cross-appellants")) argued the two issues they formulated in deference to those raised by the appellants in the main appeal. In issue No. 1, they contended that the argument put forward by the appellants on res-judicata did not arise from the Notice of Appeal as the appellants did not plead res-judicata at the trial and goes to no issue. They urged this court to disregard the argument on res-judicata. They cited and relied on the case of *Owonikoko v. Arowosaiye* (1997) 10 NWLR (Pt.523) 61 at page 73. Learned counsel for the 1st and 2nd respondents argued that there are two kinds of estoppels: cause of action and issue estop-

pels. He submitted that whereas cause of action estoppel covers the reliefs, issue estoppel relates, strictly, to specific issues raised and determined in the case in focus. The issue placed before the trial court, he argued further, was to determine whether it was the plaintiffs family (Oriare) or the 1st to 4th defendants family (Oguntayo Apete) who first settled on the land in dispute. Further, issue estoppels, it was argued, was not the sole basis of the trial court's decision. Learned counsel for the 1st and 2nd respondents cited paragraphs 21 and 22 of the statement of claim and paragraphs 1 and 9 of the reply to statement of defence on issue estoppel. He stated that the appellants merely traversed paragraph 21. They never denied paragraph 22. He relied on the cases of *Romaine v. Okagbue* (1976) 1 SC 24; *Imana v. Robinson* (1979) 3-4SC 1. The trial court resolved the evidence before it decisively in favour of the plaintiffs before utilizing issue estoppel to reinforce the decision. Learned counsel urged us to resolve issue No.1 against the appellants.

Appellants' issue No. 2 relates to the effect of failure of the plaintiffs to tender the deed of surrender as pleaded in the statement of claim. Learned counsel for the appellants submitted that failure to tender the deed of surrender was not fatal to plaintiffs case as the case made against the 6th, 7th and 9th defendants were so overwhelming. It is not in all cases that failure to tender a document is fatal to the plaintiffs' case and the court will consider available evidence given by both parties and decide the issue on the balance of probabilities. Learned counsel cited the cases of *Ezemba v. Ibeneme* (2004) 14 NWLR (Pt.894) 617 at 660 A-C; *Durosaro v. Ayorinde* (2005) 8 NWLR (Pt.927) 407 at p. 428 B. He made further submission that it will not serve the interest of justice to dismiss the plaintiffs' claim based on the failure to tender a deed of surrender while ignoring the overwhelming evidence of traditional history and issue estoppel resolved in favour of the plaintiffs by both the trial and the lower court. He urged the court to resolve the second issue against the appellants.

From their joint brief of argument, the 3rd - 5th respondents/cross-appellants filed their brief of argument only in respect of the cross-appeal. They did not respond to the main appeal which they contended, was irrelevant to them. I shall consider this brief along with others at the appropriate time, when I come to treat the cross-

appeal.

Appellants' issue No.1 is premised on issue estoppel. Estoppel, is generally said to be a term that defies precise definition. It connotes, in common law dispensation, a bar or impediment which precludes allegation or denial of a certain fact or state of facts, in consequence of previous allegation or denial or conduct or admission, or in consequence of a final adjudication of the matter in a court of law. (see: Blacks Law Dictionary sixth Edition p. 551). The Master of Rolls, Lord Denning, in the case of MCKENNY V. CHIEF CONSTABLE OF WEST MIDLANDS POLICE FORCE & ANOR, (1980) 2 All E.R; 227, stated, inter alia, as follows:

*"From that simple origin there has been built up over the centuries in our law a big house with many rooms. It is the house called ESTOPPEL. In COKE'S time it was a small house with only three rooms, namely, estoppels by matter of record, by matter in writing, and by matter "IN PAIS". But by our time we have so many rooms, that we are apt to get confused between them. Estoppels per rem judicatam, ISSUE ESTOPPEL, estoppels by deed, estoppels by representation, estoppels by conduct estoppels by acquiescence, estoppels by election or waiver, estoppels by negligence, promissory estoppels, proprietary estoppels and goodness knows what else.*

*These several rooms have this much in common, they are all under one roof. Someone is stopped from saying something or other, or contesting something or other. But each room is used differently from the others. If you go into one room, you will find a notice saying "ESTOPPEL is only a rule of evidence. If you go into another room you will find a different notice. ESTOPPEL can give rise to a cause of action." Each room has its own separate notices. It is a mistake to suppose that what you find in one room you will also find in the others."*

In the New Oxford Dictionary of English, estoppel has been defined as follows:

*"The principle which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person or by a previous pertinent judicial determination with origin mid 16th century from Old French ESTOPPEL - to bar or preclude stop up or impede."*

Stroud's Judicial Dictionary, 4<sup>th</sup> ed. At p.943 defines estoppel as fol-

lows:

*“ESTOPPEL Cometh of a French word ESTOUPPE from whence the English word stoppel, and, it is called an estoppel, or conclusion, because a man’s own act or acceptance stoppeth or closes up his mouth to allege or plead the truth and LITTLETON’S case here (S667) proveth this description.”*

Although difficult to define, estoppel plays important role in most legal systems of the world and gave rise to the Latin maxim, “INTEREST REIPUBLICAE UT SIT FINIS LITIIUM. It is in the interest of the state that there be a limit to litigation.

This is accepted as a matter of public policy. See the case of Adomba & 3 Ors v. Odiese & 2 Ors (1990) 3 NWLR (Pt.125) 165. The other Latin Maxim of same potency is the one expressed as follows: “Nemo Debet Bis Vixari, Si Constet Curiae Quod Sit Pro Uma et Eadem Causa.” i.e. No one ought to be twice troubled, if it appears to the court that it is for one and same cause. See: Thody v. Thody (1964) 181 at pp 197- 198.

***Estoppel has many branches such as the one on hand, i.e. issue estoppel. Issue estoppel is an impediment which bars a person from relitigating an issue which has been isolated and raised in a particular proceeding and has been finally determined in that proceedings.*** See: Ikoku & Ors v. Ekenkwu & Ors (1995) 7 NWLR (Pt.410) 637 at p. 649. ***Lord Denning, again, is on record where he stated, in the case of Fidelitas Shipping Co. Ltd. v. Exportchleb (1966) 1 QB 630 at p. 640, as follows:***

***“Within one cause of action there may be several issues raised which are necessary for the determination of the whole case. The rule then is that once an issue has been raised and distinctly determined between the parties, then as a general rule neither party can be allowed to fight that issue all over again.”***

***(underlining supplied for emphasis)***

Learned counsel for the appellants argued that the court below was in error when it held that the appellants were caught by issue estoppel in the judgments in Exh. P1 and P2 when parties in the said case, are not the same.

One may begin by asking: what are Exhibits P1 and P2? From

the printed record of appeal, PW1, Rasoki Akande, who was an Assistant Registrar in charge of exhibits attached to the High court Ibadan, was subpoenaed by the trial court to tender some documents. About five documents were tendered through him including Exhs.P1 and P2. P1 was a judgment in suit 1/3/79 Rail Oriare v. Salami Adigun which was marked as “Exhibit P1”. P2 was another judgment in suit 1/16/78 Karimu Adigun v. Salami Ayinla. It was marked as ‘Exhibit P2’. The findings of the learned trial judge on these exhibits are as follows:

*“The respective traditional histories put forward appear to have been settled in a previous case, suit No 1/3/79– Raji Ishola Oriare (for and on behalf of Oriare family) and Salami Adigun and 12 Ors in respect of the same land at Apete village. Salami Adigun, the 1st defendant therein was, at the material time, the Mogaji (and baale) of Oguntayo Apete family. The case appears to be fought gallantly on a representative capacity. Though the claims there included damages for trespass. Further to that the learned trial judge found that the plaintiffs therein claimed for additional relief which was:-*

*‘Declaration of Title as owners, under native law and custom of the Yorubas, the land mentioned under paragraph 5 above’ (see page 2 of Exh. P1).’*

*The judgment in that case 1/3/79 was tendered as Exh. P1. Both Oriare family and Oguntayo Apete family put their respective title in issue therein. After the review of evidence and proper consideration of the issues involved, the learned trial judge - Adeyomi J. has this to say on page 20 of Exh. P1 that:-*

*‘After a most thoughtful and sober reflection on the whole evidence adduced by both sides in this case, I am satisfied, and I find as of fact, that Odolotan Oriare was the first to settle on the land said to be in dispute, part of which is now known as Apete Village. I accept as true the evidence of the plaintiff and his witnesses in the regard and reject the contention of the defendants to the contrary. I also accept as true the evidence of the plaintiff and his witnesses to the effect that Odolotan Oriare invited Oguntayo Apete to settle with him and gave him the area known as Apete. And again, I reject the evidence to the contrary. Further, I find on the evidence before me that Oguntayo Apete took possession of the land granted him by his senior brother and he and his children continued in possession thereof henceforth.’*

*The above has conveniently and convincingly summarised the claims and counter-claims by Oriare and Apete respective families. The issue as to the original owner has been finally settled, nailed and buried. Both parties are thereby stopped from raising the issue again in any subsequent action in relation to the land at Apete area including Apete Village, Ibadan. This is an issue Estoppel."*

As a result of the finding by the trial court, set out above, the learned trial judge concluded that:

*"The 1st - 4th, 25th and 26th defendants are estopped from denying that Oriare the ancestor of the plaintiffs first settled on the land and settled their ancestor, Oguntayo Apete on a portion of the land at Apete village in Apoto area, Ibadan. There is no evidence before me to show that Exh. P1 is not the final judgment. There is no averment nor evidence to show that there is an appeal on it and such appeal has been decided. Of course, the High Court of Oyo State is a court of competent jurisdiction.*

*I hold therefore as of fact that as against the 1st - 4th, 25th and 26th defendants, members of Oguntayo Apoto family, the plaintiffs have proved title to the land."*

Again, in relation to Exhibit P2, the trial court made the following findings:

*"It is pleaded in paragraph 30 of the statement of claim that the sale of the land by the said Ezekeil Atoyobi led to suit 1/16/79 - Alhaji Karimu Adigun v. Salami Ayinla & Ors. - Exh. P2. In that case the then Mogaji Oriare sold the land claimed by Adaorugbo family to Alhaji Karimu Adigun (the plaintiff therein). Member of Adaorugbo family unlawfully entered the land and Karimu Adigun sued Salami Ayinla (Mogaji Adaorugbo) and other members of that family to Court for damages for trespass. In the process, Oriare family and Adaorugbo family with their respective titles in issue.*

*After he had reviewed the evidence of all parties and considered the issues involved, the learned trial judge, Abodorin J. had "no difficulty in believing the plaintiff's version of the history of the land in dispute" and found as of fact:-*

1. That the land originally belonged to the Oriare family and that Oriare family made a grant of it for farming purpose only to Laoye through Ogundoyin his wife in consideration of the marriage.

2. That Oyobanji Ajao, the 4th defendant is now the sole survi-



vor of the issues of Laoye and Ogundoyin and by virtue of this, he is the only one who can dispose of the possessory title vested in his ancestor; Laoye;

3. That Oriare family and Oyobanji Ajao are the only people who have interest in the land and accordingly, only they can dispose of the land; B

4. That Oriare family (as owners in the reversion) represented by Mogaji Oriare and Olapado Ayinla and Oyobanji Ajao, as owner in possession, have disposed of their respective beneficial interests in the land in dispute to the plaintiff in 1972 and this is evidenced by the duo execution of Exhibit 2 which is a land sale agreement; C

5. That the Adaorugbo family, as such, have no title to, and have never had any title to the land in dispute.’

The rule as to issue estoppel as discussed above affects this case. The plaintiff in that case is a privy of Oriare family therefore, the parties have complied with the three conditions precedent to the rule. Both parties are therefore stopped from denying the issues therein discussed, ascertained and adjudged upon. The judgment Exh. P2 appears to be final in the sense that there is no appeal on it, and if there is any, such appeal has not been determined.” E

The learned trial judge concluded in respect of exhibit P2 as follows:

“In that case - Exhibit P2. a Survey Plan No. CG 586/78 which was used in that court identified the then land in dispute, which is interposed on Survey Plan - Exh. P9 and thereon verged ‘GREY.’ F

The plaintiff have established their title on the parcel of land claimed by the 6th and 7th defendants in the instant case.”

**In its consideration of the case, particularly on issue estoppel, the court below held, among other things, as follows:**

**“In the instant case being a claim for statutory right of occupancy the onus is on the claimant to establish and route his title to the radical owner hence the pleading of the first settler on the land and a denial by the appellants, so the parties joined issue on the material fact directly in issue which was resolved and confirmed in Exhibits P1, P2, P3 and P8 being between the same parties and privies, the same subject matter and final judgment by competent High Court. As the three elements co-exist as stated by the Supreme Court in FARIDA V. GBADEBO (1978) 3 SC 219 followed in** G H

***OYEROGBA V. OLAOPA (1998) 13 NWLR (Pt.583) page 526 supra I come to the irresistible conclusion that the learned trial judge applied the doctrine of issue estoppel properly under sound principle of law.***

The court below, as a result, resolved that issue against the appellants before it while it resolved issue 2 of the first set of respondents/cross-appellants before that court in their favour.

***Now, having x-rayed the decisions of the two courts below, I am satisfied that there is a concurrent decision of the two courts. The general rule is that this court does not interfere with such decisions except where perversity or weighty issues are found.*** See: *Iseru v. Catholic Bishop of Warri Diocese* (1997) 4 SCNJ 102; *Odeniyi and Anor v. Akinpelu and Ors* (1998) 5 SCNJ 113; *Madumere and Ors v. Okafor and Ors* (1996) 4 SCNJ 72; *Shittu v. Egbeyemi and Ors* (1996) 7 SCNJ 43. ***I accordingly affirm the decisions of the two courts below. Issue one is resolved against the appellants.***

Appellants' issue No. 2 is on the effect of failure of 1st and 2nd respondents to prove that the 6th and 7th defendants in the trial court, were their customary tenants as pleaded in paragraph 28 of the statement of claim. Learned counsel for the appellants quoted the averment in paragraph 28 of the statement of claim and argued that throughout the entire proceeding before the learned trial judge, no document evidencing such surrender of land was tendered as exhibit. Learned counsel buttressed his submission with the case of *Jiaza v. Bamgbose* (1991) 7 NWLR (Pt.610) 182 at p. 197 F-G; *Fatunde v. Onwoamanam* (1990) 2 NWLR (Pt.132) 322 at 334 B - C; Section 99 of the Evidence Act. He urged the court to resolve this issues in appellants favour.

The 1st and 2nd respondents submitted in their brief of argument that failure to tender the deed of surrender is not fatal to the plaintiffs' case and that the case made against the 6th, 7th and 9th defendants was so overwhelming. He made references to the evidence given by the 2nd plaintiff and that of PW3. In reference to the decisions of the trial court and the court below, learned counsel submitted that the review of the facts upon which the Judgment of the trial court and its affirmation by the court below demonstrates that the decision was never based and need not to be based on the Deed

of surrender pleaded in paragraph 28 of the statement of claim. The trial court, he argued further, had other evidence on record and decided the matter on a preponderance of evidence as required in civil cases. Learned counsel urged this court to resolve this issue against the appellants.

I think I should start considering this issue by quoting the averment in paragraph 28 of the statement of claim. It reads as follows:

*“28. After the death of Laoye, Oriare family demanded the land back from Oyobanji the only survivor of the four children which Ogundoyin had for Laoye. Oyobanji surrendered the land back to Oriare and same was later evidenced by agreement dated the 14th day of May, 1974 executed by the said Oyebanji in favour of the plaintiffs’ family, the agreement is hereby pleaded.”*

The lower court, in reviewing the case, particularly on the averment in paragraph 28 of the statement of claim, stated as follows:

*“As the document of surrender of land was pleaded since it is an interest affecting land it falls within the meaning of an instrument under section 2 of the Lands Instrument Registration Law of Oyo State unless registered it shall not be pleaded and inadmissible in evidence under section 15 Land Instrument Registration Law, see SAKA BURAIMOH V. MRS. KARIMU (1999) 9 NWLR (Pt.618) page 310 page 323, CA JIAZA V. BAMGBOSE 1999 7 NWLR pt 610 page 182 SC.*

*Generally the court does not speculate on the content of document not produced before the court and tender(sic) in evidence GBAJOR V. OGUNBUREGNI 1961 1 ALL NLR 853, OPARAJI V. OHANU 1999 9 NWLR pt 618 page 290 SC, ECOBANK (NIG.) PLC V. GATEWAY HOTELS (NIG.) LTD. 1999 11 NWLR 627 page 397 CA.*

*At page 83 after reference to paragraphs 24 to 28 of the statement of claim with focus on paragraph 28 in which the respondent/cross appellants averred and pleaded the untendered document of surrender of land by Oyebanji to plaintiffs/1st Respondents, the learned trial judge then state(sic) thus:-*

*‘The 2nd plaintiff gave sufficient evidence in support of their pleadings.’*

*I have looked critically in vain where the learned trial judge made a finding of fact on the unpleaded document. It was at page 84*

*of the record of appeal that the learned trial judge based his decision on the statement of ABODERIN J in Exhibit P2 that he had:-*

*'NO difficulty in believing the plaintiffs' version of the history of the land in dispute.'*

*He then proceeded to apply the rule of issue estoppels based on Exhibit P2 that both parties are therefore stopped from denying the issues therein discussed, ascertained and adjudged upon. The appellants drew red herrings on the unpleaded document of surrender of land as baseless, lacking in substance and merit notwithstanding the sound proposition of the law on giving extrinsic oral evidence of a document worst still to an unpleaded document. It was not established nor the learned trial judge made finding that Oyebanji surrendered land originally granted to his ancestor by ORIARE family back to the said family. Issue 4 appellants' brief of argument is resolved against the appellants resulting in the dismissal of the appeal on this ground, as the lower court did not rely or based his(sic) finding on the unpleaded document."*

***Although the appellants stated that they denied in paragraph 3 of their statement of Defence, the averment in paragraph 28 of the Statement of Claim, the denial was through a general traverse in paragraph 3 of the Statement of Defence. The position of the law on a traverse of a general nature as held by this court in the case of Lewis Peat (N.R.I.) Ltd. v. Akhemien (1976) 7 SC 167 is that in respect of essential and material allegations in the statement of claim, the GENERAL TRAVERSE ought not to be adopted and that such essential and material allegations should be specifically TRAVERSED. The decision in Lewis Peat's Case was further adopted and applied by this court in several cases, that a general traverse is not enough to controvert MATERIAL and ESSENTIAL IMPORTANT averments in the statement of claim which are the foundation of the plaintiffs case and that such averments are radical and must be specifically denied. See: Akintola v. Solano (1986) 2 NWLR (Pt. 24) 598; Lagos City Council v. Ogunbiyi (1961) 1 All NLR 297 at p. 299; Ibeanu v. Ogbeide (1998) 9 SCNJ 77 at p. 86; Adelaja v. Alade (1999) 4 SCNJ 225 at p. 240.***

That apart, although paragraph 28 was averred by the plaintiffs and they failed to lead evidence on it as claimed by the appel-

lants, it should be noted that the law is trite that any averment in a statement of claim that has not been established and is not clearly admitted by the defendants in their statement of defence, that averment is deemed abandoned. See: Agbayi v. Ibru Sea (Nig.) Ltd (1975) 2 SC 50.

Further, ***in a civil action where there is an overwhelming evidence in proof of the claim before the trial court, the plaintiff will have discharged the onus of proof placed upon him by law where he puts sufficient evidence in support of his claim. It is not the requirement of the law that all documents pleaded must be tendered in evidence. In the appeal on hand, the non-tendering of the Deed of surrender could not be fatal to the case before the trial court as the learned trial Judge was already satisfied with what he so far had on evidence to be preponderant which sustained the claim of the plaintiffs.*** See: D Ezemba v. Ibeneme (2004) 14 NWLR (Pt. 894) 617 at p. 660 A - C; Durosaro v. Ayorinde (2005) 8 NWLR (Pt. 927) 407 at p. 428 B; Nwankwere v. Adewunmi (1967) 4 NWLR 45. I therefore have no cause to tamper with the lower court's decision. I resolve issue No.2 against the appellants. E

Accordingly, I find the appeal unmeritorious. I dismiss the appeal and affirm the judgment of the court below.

I now treat the cross-appeal. The 3th - 5th respondents are the cross-appellants. The issues they formulated are as follows:- F

iii. *"Whether the court below was right in dismissing the plaintiffs case against the 5th, 8th, 20th and 21st Defendants (Grounds 3 and 4 of the cross-appeal).*

iv. *Whether the court below was right in dismissing the plaintiffs claim against the 1st - 4th Defendants for forfeiture and possession of the area edged PURPLE on the plaintiffs' plan tendered as exhibit 'P1' (Grounds 1 and 2 of the Cross Appeal).* G

v. *What orders will this Honourable court make in the circumstances of this case?"*

It is my observation, that ***the last issue formulated by the cross-appellants is a novelty. It is based on speculation and pre-emption. This, in my view, is a premature question which has little or no relevance to the decisions handed by the trial court and the court below. I think it is not part of the assign-*** H

***ment of a counsel to pre-empt what decision a court of law may hand down to the parties. It will be too early even for a judge, whose duty it is to deliver judgment on a given case, within a given time, to pre-empt what his judgment will be until after he finishes with every aspect of hearing and collation.***

***B This issue, to me, is based on mere conjecture. A conjecture or speculation has no place in our systems of laws operating in this country. It is akin to an academic question which I am not ready to entertain. See: Yusuf & Ors v. Toluhi (2008) 6 SCNJ 37. This, is an incompetent issue and I hereby strike it out.***

Issue No.3 (issue 1 of the Cross-appeal) is on whether the court below was right in dismissing the plaintiffs case against the 5th, 8th, 20th and 21st defendants. Learned counsel for the cross-appellants submitted that the finding of the trial court which was affirmed by the court below was manifestly without basis. He set out the averments in paragraphs 24 - 36 of the statement of claim and paragraphs 25 - 28 of the Statement of Defence. A reply was also filed by plaintiffs/respondents from which learned counsel quoted paragraphs 5A and 5B. Learned counsel submitted that on the survey plan (Exh. P9) tendered by the 2nd plaintiff, the various portions on which the defendants had entered were indicated. The exact locations of the 5th, 8th, 20th and 21st defendants were put into evidence in Exhibit 'P9'. Learned counsel argued further that 5th, 8th and 21st defendants never challenged the feature in Exh. 'P9'. They did not prepare or tender a composite plan to show that they were outside plaintiffs' land. They did not show the extent of their land called Idi-Oro Family Land. In paragraph 27 of their pleadings they admitted that they were within the land in dispute: cited and relied on the case of Adere v. Adesanya (1993) 4 NWLR (Pt. 288) 484 at p. 496. He submitted that it was a serious misdirection on the part of the learned trial judge and also affirmed by the court below, to have found otherwise. Learned counsel urged this court to reject the finding that there was no indication of the 5th, 8th and 21st defendants presence on the land. Learned counsel's submission on the 20th defendant is that the pleadings and evidence have not really shown that the 20th defendant was privy to Idi-Oro family. He urged this court to set aside the lower court's judgment in which it allowed the appeal in respect of

the 20th defendant.

Issue 2 of the cross-appeal (referred to by cross-appellants as issue “No 4”) is on whether the court below was right in dismissing the claim against the 1st - 4th defendants for forfeiture and possession of the area edged purple on the plaintiffs’ plan, i.e. Exh. ‘P9’. It is the submission of learned counsel for the cross-appellants that failure to tender the Deed of surrender is totally irrelevant to the plaintiffs’ claim for forfeiture against the Apete family. Further, the presumption in section 149(d) of the Evidence Act is irrelevant and uncalled for. On the question of Proof of Payment of Isakole, it was submitted that the issue was identified and resolved by the trial court. The parties Oriare (plaintiffs) and Apete (1st to 4th defendants) joined issues not only on the traditional history of settlement on the land but also on the status of Apete family on a portion of the land and the payment of Isakole. The trial court held that Exh. ‘P1’ operates as issue estoppel against the 1st - 4th defendants. The trial judge, it was argued further, preferred the evidence of the plaintiffs on all the issues joined by the plaintiffs and the 1st to 4th defendants, including the Apete family’s Customary tenancy and Isakole on a balance of probabilities. The plaintiffs, according to the learned counsel, had given sufficient evidence on Isakole, learned counsel urged this court to hold that the issue of customary tenancy of the Apete family and the payment of Isakole tributes had been sufficiently resolved by the trial court in the circumstances of this case in view of the findings by both the trial court and the court below that the issues decided in Exh. ‘P1’ operated as estoppel against the 1st to 4th defendants. Learned counsel urged this court to resolve this issue in favour of the plaintiffs/cross-appellants.

In their joint brief of argument on the cross-appeal, the 3rd - 5th respondents made the following submissions: that there were admissions made by the plaintiffs/cross-appellants in respect of the land called Idi-Oro and on the Idi-Oro family. There was sufficient evidence as well on same. There was a finding by the trial court that there is no indication whatsoever of the portion allegedly trespassed upon by Idi-Oro family. This finding was upheld by the court below. Submits further that this court will not disturb concurrent findings of fact unless special circumstances are shown. Cases of Gbadamosi v. The Governor of Oyo State & Ors (2006) 13 NWLR (Pt.997) 363 at

pp 375-376; Agbi v. Ogbah & Ors (2006) 11 NWLR (Pt.990) 65 at 125 B - D, among others, were cited and relied upon that no special circumstances have been shown in this appeal to warrant interference by this court. On the evidence extracted from the 3rd respondent under cross-examination that it was Fijibi who granted Asayinka land in that area, the learned counsel argued that it was not pleaded and goes to no issue. The cases of Woluchem v. Gudi (1981) 5 SC 291 at 319 - 321; Buhari v. Obasanjo (2005) 2 NWLR (Pt.910) 241 at p.483 G - H; among others, were cited in support. Learned counsel urged us to resolve this issue in favour of the 3rd - 5th cross-respondents and dismiss the cross-appeal.

The findings of the trial court on the cross-appellants' first issue reads as follows:-

*"Now, claims by Idi-Oro family. These are the 5th, 8th and 21st defendants who claim to be descendants of Asayinka alias Idi-Oro. Their claim as to the land is pleaded in paragraph 27 of the Statement of Defence where they say-*

*'27. Shortly after Jalumi war, he (Asayinka) also settled at a place called Idi-Oro, within Apete Area and within the land in dispute on which he and his family founded a village, Idi-Oro village.'*

*The 5th defendant who gave evidence for Idi-oro family insisted that he did not know the land in dispute. He limited his knowledge only to Idi-Oro village. He however knew Oriare Family and confirmed that they (Oriare Family) have land in that area but he did not know the location. It appears that this witness is consistent and a witness of truth. I have carefully gone through the Survey Plan - Exh 'P9' filed and depended upon by the plaintiffs in this case and there is no indication whatsoever of the portion allegedly trespassed upon by the Idi-Oro Family who happen(sic) to be a boundaryman on the Northern part of the land. The plaintiffs cleverly put Onidowuro Family as a boundaryman instead of Idi-Oro Family for, Onidowuro derived their title to the land from Idi-Oro Family. It is my view that the plaintiffs have failed to establish any claim against the 5th, 8th and 21st Defendants. All the claims against them are accordingly dismissed."*

In affirming the above decision, **the court below had this to say:**

***"The 5th, 8th and 21st Defendants traced the route of title to the radical owner of ASAYINKA. The 1st set of Respondents/Cross Appellants averred to the contrary and to reiterate that***



*pleadings alone without backed up credible evidence does not discharge the burden on a plaintiff to succeed on the strength of his own case. **Though cross appellants challenged Asanike's radical title, there was no satisfactory and convincing evidence to dislodge it and no finding of fact to the contrary, the learned trial judge was right to uphold that no case was made against the 5th, 8th and 21st Appellants/Cross-Respondents the cross appeal fails on issue one and it is hereby dismissed.***" B

**These are two concurrent findings of the two courts below. The trite position of the law is that where there are concurrent findings of facts, an appeal court is always loathe in interfering with such findings except where perversity in such findings are shown.** See: Gbadamosi v. The Governor of Oyo State & Ors (2006) 13 NWLR (Pt.947) 363 at pp 375 – 376. C

**The cross-appellants have failed to show this court where such perversity exists in the findings of the two lower courts. I find it difficult to interfere with such concurrent findings of fact. I affirm the concurrent decisions of the trial court and the court below.** Further, on the position of the 20th defendant, I agree entirely with the court below's decision where it stated:- D E

*"Having sustained the defence of the vendors of the 20th defendant and the claim against them dismissed established that the grant to 20th Defendant is valid through his grantors, the finding by the trial judge and without indication of Idi-Oro family in Exhibit P9, the 20th Defendant is entitled to lean and ride on the success of his vendors' issue 1 in appellants' brief is therefore resolved in favour of 20th defendant by dismissing all claims against him the appeal of 20th Defendant succeeds and is allowed."* F

I therefore resolve issue No.1 of the cross-appeal against the cross-appellants. G

Cross-appellants issue No. 2 is on the trial court's dismissal of the claim against the 1st - 4th defendants on forfeiture and possession of the area edged purple on Exh. P9. The court below, in its judgment held, in respect of the forfeiture, as follows: H

*"With respect the grant of forfeiture was based on non-finding of a condition precedent that Oguntayo Apete was a customary tenant to ORIARE family. For this failure to grant of forfeiture is perverse and having been based on wrong principle of law, the grant of forfei-*

*ture is hereby set aside being exception upon which an appeal court loathes to interfere with findings of fact by the lower court."*

***I have myself examined the record of the trial court and could hardly see any specific finding on the payment of Ishakole which, as a traditional tribute, would indicate the status of such a customary tenant. It is trite that decisions of a trial court must be anchored on facts which were tested and found by the trial court to be true and can sustain or negate a claim.*** See: *Uka & anor v. Irolo & ors* (2002) 7 SCNJ 137. ***Failure of the trial court to properly relate the facts of the case to Ishakole, which was regarded to be a pre-condition for a customary tenancy must defeat the forfeiture granted by the trial court.*** This is the crux of the matter in this issue. All other arguments are rhetorics and diversionary from the actual issue involved. I resolve this issue as well against the cross-appellants.

Finally, the cross appeal lacks merit it is hereby dismissed.

As observed by the learned trial judge that this was an inter family fued, I shall order and I do hereby order that each party in the main appeal and the cross-appeal to bear its own costs.

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### **TOBI JSC**

In the High Court of Ibadan, Ibadan judicial Division, the plaintiffs who are the 1st and 2nd respondents claims are:

A) AGAINST ALL THE DEFENDANTS:

i) DECLARATION THAT THE MEMBERS OF Oriare Family of Oriare Compound, are the persons entitled to apply for and granted the Certificate of Statutory Right of Occupancy in respect of a piece or parcel of land situate, lying and being at APETE AREA OF IBADAN excepting the areas already granted by the Plaintiffs' family absolutely and more particularly described and edged GREEN on PLAN NO. W/551/87 of 23-11-87 drawn by L. LAYI ARINOLA, Licensed Surveyor of Ibadan.

ii) INJUNCTION against the defendants, their heirs, agents and servants and all manner of persons that may be claiming through them from committing any act of trespass entering and/or doing anything whatsoever with the said land.

iii) FIVE THOUSAND NAIRA (N5,000.00) from each of the defendants being damages for trespass being committed by each of the defendants on the said land.

B) AGAINST THE 1st - 4th Defendants only:

i) Forfeiture of the area edged PURPLE on the Plaintiffs' Plan

ii) Possession of the land.

iii) INJUNCTION restraining the said defendants from entering the said portion or doing anything or claiming any right that may affect the interest of the Plaintiffs."

The learned trial Judge dismissed the claims against the 5th, 8th and 21st defendants who are the 3rd, 4th and 5th respondents in this appeal. He gave judgment in favour of the plaintiffs against all the other defendants. On appeal, the Court of Appeal partly allowed the appellants' appeal and the respondents/cross appellants' appeal.

Dissatisfied, this is a further appeal to the Supreme Court. Briefs D were filed and exchanged. The appellants filed cross-respondents reply to the respondents' brief of argument and cross-respondents' brief to the cross/appellants' brief. They also filed reply to 3rd, 4th and 5th respondent's brief. The appellants formulated the following issues for determination:

"1) *Whether the Justices of the lower court were not wrong in not dismissing the 1st and 2nd respondents claim against the 1st - 4th appellants when their reliance was on a judgment used as issue estoppel when the conditions precedent to its application was not fulfilled and when the claims of the 1st and 2nd respondents privies in the earlier case relied upon was dismissed against the named defendants therein on the same subject matter.*

2) *Whether the Justices of the Court of Appeal were not wrong in still resolving appellants Issue 4 before it against the appellants G when the court had earlier held that, 'It is my judgment that having not produced it, the Respondents/Cross Appellant did not establish that Oyebanji surrendered land to Oriare family.'*"  
The plaintiffs/respondents/cross appellants formulated five issues for determination:

"i) *Whether the trial court and the court below properly considered and applied issue estoppel in the determination of the case of the Plaintiffs against the 1st to 4th defendants and their privies.*

ii) *Whether the trial court and the court below were right to*

have granted the plaintiffs' case against the 6th, 7th and 9th defendants who are members of the Adaorugbo Family despite the failure of the plaintiffs to tender the deed of surrender pleaded in paragraph 28 of the Statement of Claim.

B iii) Whether the court below was right in dismissing the plaintiffs case against the 5th, 8th, 20th and 21st Defendants.

iv) Whether the court below was right in dismissing the plaintiffs' claim against the 1st to 4th defendants for forfeiture and possession of the area edged PURPLE on the Plaintiffs' Plan tendered as Exhibit 'P9'.

C v) What orders will this Honourable Court make in the circumstances of this case?"

The 3rd, 4th and 5th respondents formulated the following issue for determination:

D "Whether or not the lower court was right in affirming the decision of the trial court dismissing the Cross Appellant' claim against the 3rd, 4th and 5th respondents/cross respondents."

E As it is, the appellants have raised two issues. They are issue *estoppel* and the resolution of Issue 4 by the Court of Appeal against the appellants. I will take them briefly *seriatim*.

F Issue *estoppel*, as the name is or as the name implies, is that the party is *estopped* from litigating on an issue which had been previously litigated and disposed of. Like all types of *estoppel*, issue *estoppel*, as a remedy founded on equity, can only be invoked: (a) When the same question has been decided. (b) The judicial decision which gave rise to the *estoppel* or which created the *estoppel* is final. An interlocutory decision will not give rise to a successful invocation of issue *estoppel*. (c) 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.

H The law requires that the issue must be an essential element of the claim or defence in both sets of proceedings. A mere agglomeration of proximity or affinity of the current issue with the previous one cannot found the equitable remedy. No. An issue, for this purpose, is a decision as to the legal consequence of particular facts constituting a necessary step in determining what are the legal rights and duties of the parties resulting from the totality or bundle of facts.

The learned trial Judge found in Exhibit P1 the defence of

issue *estoppel*. After a careful examination of the exhibit in the context of issue *estoppel*, the learned trial Judge came to the following conclusion:

*“However, there are three conditions to sustain the issue estoppel:*

*(1) The main question as is currently in issue must have been decided in the earlier judgment;*

*(2) That judgment must have been final and*

*(3) The parties in the earlier case or their privies must be the same persons as the parties to the proceedings in which the estoppel is raised or their privies. See Carl-Swiss Stiffling v Kayner and Kooles (1967) 1 A. C. 553 (H.L).*

*It appears that the conditions herein before enumerated above are fulfilled in the instant case. The 1st - 4th, 25th and 26th defendants are estopped from denying that Oriare the ancestor of the plaintiffs first settled on the land and settled their ancestor, Oguntayo Apete on a portion of the land at Apete village in Apete Area, Ibadan. There is no evidence before me to show that Exh. P1 is not the final judgment. There is no averment nor evidence to show that there is an appeal on it and such appeal has been decided. Of course, the High court of Oyo State is a court of competent jurisdiction. I hold therefore as of fact that as against the 1st - 4th, 25th and 26th defendants, members of Oguntayo Apete family, the plaintiffs have proved title to the land.”*

Reacting to the above findings, the Court of Appeal said at page 230 of the Record:

*“In the instant case being a claim for statutory right of occupancy the onus is on the claimant to establish and route his title to the radical owner hence, the pleading of the first settler on the land and a denial by the appellants, so the parties joined issue on the material fact directly in issue which was resolved and confirmed in Exhibits P1, P2, P3 and P8 being between the same parties and privies, the same subject matter and final judgment by competent High court. As the three elements co-exist as stated by the Supreme court in Fadiora v Obadebo 1978 3 SC 219 followed in Oyerogba v Olaopa 1998 13 NWLR (Pt.583) page 526 supra I come to the irresistible conclusion that the learned trial Judge applied the doctrine of issue estoppel properly under sound principle of law.”*

The above are findings of facts by the two courts. Like my brother, I do not see any perversity in the findings of the two courts. They are clearly borne out from the evidence before the learned trial Judge. I was not there. He was there and he saw it all - both the evidence and the attendant mannerisms of the witnesses and all that. B I think the above should be an answer to Issue No.1, which I resolve against the appellants.

That takes me to Issue 2. It is the argument of learned counsel for the appellants that as the 1st and 2nd respondents did not lead C any evidence to prove paragraph 28 of the Statement of Claim the action must fail. He argued that non- tendering of document in evidence to prove the surrendering of the land in dispute is against the case of 1st and 2nd respondents.

In paragraph 28 of the Statement of Claim, the 1st and 2nd D respondents pleaded thus:

*"After the death of Laoye, Oriare family demanded the land back from Oyebanji the only survivor of the four children which Ogundoyin had for Laoye. Oyebanji surrendered the land back to Oriare and same was later evidenced by agreement dated the 14th E day of May, 1974, executed by the said Oyebanji in favour of the plaintiffs family, the agreement is hereby pleaded."*

In their Statement of Defence the appellants as defendants averred inter alia:

*"The defendants deny paragraph 28 of the Statement of Claim F and puts the plaintiffs to proof of all the averments therein."*

I entirely agree with my brother that paragraph 3, a general G traverse, cannot in our law of pleadings destroy the averment in paragraph 28 of the Statement of Claim. It is the requirement of the law that a traverse must be concise and specific. It must deny the state- ment of Claim in its specific detail and not just a rigmarole of or a dancing around the averments. Where a traverse, as in paragraph 3, is general, generic and omnibus, a plaintiff is handicapped in a Reply H to the Statement of Defence. That is possibly one reason why the law requires a traverse to be specific and not general. In my view, paragraph 3 of the Statement of Defence is not only general but also bogus.

I am not with learned counsel for the appellants that failure on the part of the 1st and 2nd respondents to tender documents is det-

rimental to their case. While I agree that documents are most valid evidence, non-tendering of documents in a case does not in all instances, destroy the case of the plaintiff. A trial Judge can give judgment in favour of a plaintiff who gives satisfactory parole or oral evidence in proof of his case, if the evidence passes the usual test of preponderance of evidence or the balance of probability. Both the learned trial Judge and the Court of Appeal were so satisfied. I do not see my way clear in disturbing the findings. B

In the light of the above and the more detailed reasons given by my brother in the lead judgment, I also dismiss the appeal. I equally agree with him that the cross appeal should also be dismissed. I accordingly dismiss both appeals. I abide by his order as to costs, that is, each party in the main appeal and the cross appeal to bear its own costs. C

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### **MUSDAPHER JSC**

I have read before now the judgment of my Lord Muhammad, JSC with which I entirely agree. In the aforesaid judgment, his Lordship has meticulously dealt with all the issues submitted for the determination of both the appeal and the cross-appeal. I agree also that the issues raised border on the concurrent findings of facts by the two lower courts. It is trite that the Supreme Court will not easily interfere with such findings. I accordingly dismiss both the appeal and the cross-appeal and abide by the order for costs proposed in the aforesaid judgment. E F

### **OGBUAGU JSC**

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This is a further appeal against the Judgment of the Court of Appeal, Ibadan Division (hereinafter called “the court below”) delivered on 7th December, 2000 which Partly allowed the Appellants’ appeal.

By a writ of summons at the Oyo State High Court, Ibadan Judicial Division, the Plaintiffs/Respondents/Cross-Appellants, claimed against the Appellants/Cross-Respondents and the three Respondents/Cross Respondents a declaration, damages for trespass and injunction. They claimed specifically against the 1st, 2nd, 3rd and 4th De- H

defendants/Appellants for forfeiture of the area verged PURPLE in the Plaintiffs' Survey Plan, possession of the said land and injunction. Pleadings were filed and exchanged. After the hearing and addresses of the learned counsel for the parties, the trial learned Judge - Falade, J. in a considered Judgment delivered on 1st August, 1990, dismissed the claims against the 5th, 8th and 21st defendants who are the 3rd, 4th and 5th Respondents in this appeal but gave Judgment in favour of the Plaintiffs/Respondents/Cross-Appellants against all the other defendants.

Dissatisfied with the said Judgment, the 1st to 4th, 6th and 7th, 9th, 10th to 20th, 22nd, to 24th, 25th to 28th defendants, appealed to the court below.

I note that at page 220 of the Records, the court below, in respect of the 20th defendant - Oladejo Akanbi, allowed the appeal. In respect of issues 2, 4, 5 and 6, it dismissed the appeal. The two issues of the Appellants, are subsumed in the above issues. In respect of issue 3, it allowed the appeal in part. It described the victories, as Pyrrhic to the parties except that in respect of the 3rd, 4th and 5th Defendants and not involving the 1st and 2nd defendants.

Dissatisfied with the said Judgment, the Appellants have appealed to this Court and have, formulated two issues for determination, namely,

"1). *Whether the Justices of the lower court were not wrong in not dismissing the 1st and 2nd Respondents (sic) claims against the 1st - 4th appellants when their reliance was on a judgment used as issue estoppels when the conditions precedent to its application was not fulfilled and when the claims of the 1st and 2nd Respondents (sic) Privies in the earlier case relied upon was dismissed against the named defendants therein on the same subject matter.*

2). *Whether the Justices of the Court of Appeal were not wrong in still resolving appellants issue 4 before it against the Appellants when the Court had earlier held that, It is my judgment that having not produced it, the Respondents/Cross-Appellant did not establish that Oyebanji surrendered land to Oriare family".*

On their part, the Plaintiffs/Respondents/Cross-Appellants, have formulated five issues for determination. They read as follows:

"i) *Whether the trial court and the court below properly considered and applied issue estoppels in the determination of the case*



*of the Plaintiffs against the 1st to 4th Defendants and their Privies (Ground I of the main Appeal).*

ii) *Whether the trial court and the court below were right to have granted the Plaintiffs' case against the 6th, 7th and 9th Defendants who are members of the Adaorugbo Family despite the failure of the Plaintiffs to tender the deed of surrender pleaded in Paragraph 28 of the Statement of Claim (Ground 2 of the main Appeal).* B

iii) *Whether the court below was right in dismissing the Plaintiffs' case against the 5th, 8th, 20th and 21st Defendants (Grounds 3 and 4 of the Cross Appeal)..*

iv) *Whether the court below was right in dismissing the Plaintiffs' claim against the 1st to 4th Defendants for forfeiture and Possession of the area edged PURPLE on the Plaintiffs' Plan tendered as Exhibit 'Pg' (Grounds 1 and 2 of Cross-Appeal).* C

v) *What orders will this Honourable Court make in the circumstances of this case?'* D

It is stated/submitted that this issue (v), arose out of a consideration of the Judgment of the lower Court, the grounds of Appeal and the peculiar circumstances of this case.

On their part, the 3rd, 4th and 5th Respondents, have formulated a lone issue for determination, namely, E

*"Whether or not the lower court was right in affirming the decision of the trial court dismissing the Cross Appellants' claim against the 3rd, 4th and 5th Respondents/Cross Respondents "* F

When this appeal came up for hearing on the 31st March, 2009. Aiku, Esqr, - learned counsel for the Appellants, adopted their Brief. He urged the Court, to allow the appeal. Badejo, Esqr, - the leading learned counsel for the 1st and 2nd Respondents/Cross Appellants, adopted both their main Brief and the Reply Brief. He urged the Court, to allow the Cross-Appeal and dismiss the appeal of the Appellants. The leading learned counsel for the 3rd to 5th Respondents - Obimogie, Esq, adopted their Brief. He told the Court that they are not in the main appeal of the Appellants. He however, urged the Court, to dismiss the Respondents/Cross Appellants' appeal on the ground, according to him, there is no perversity. Thereafter, Judgment, was reserved till to-day. H

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

noted earlier in this Judgment, the findings and holdings of the court below in respect of the issues before it. I have also noted that the two issues of the Appellants, are subsumed in the said issues before the court below. In the result, I agree with the conclusions in the said lead Judgment.

B My short contribution in respect of issue (iv) of the Plaintiffs/ Respondents/Cross-Appellants which led to their asking what Order this Court, can make in the circumstances of this case leading to the instant appeal, is that firstly, there is the concurrent decisions of the two lower courts about the proof of ownership of the land in dispute  
C by the Plaintiffs/Respondents/Cross Appellants.

I note that at pages 86 and 87 of the Records, the trial court, granted forfeiture because, according to it, it took into consideration “the plea of the plaintiffs” (not evidence or proof by them) that the  
D grant was subjected to annual Isakole”. The said Order of forfeiture, was even suspended for one year from the date of the judgment to “enable the Oguntayo Apete family, represented by the 1st - 4th, 25th and 26th defendants, reconcile with the Odelotan Oriare family, the plaintiffs in this case”.

E It concluded thus:

“*This Suspension Order subsists till 31st July, 1991. If the Oguntayo Apete family neglect or refuse to reconcile with the plaintiffs by then, their buildings which is the area edged ‘PINK’ on Survey Plan No. LW551/81, are forfeited to the Odelotan Oriare family (the plaintiffs)“.*”  
F

The court below, in my respectful view, was right when it set aside the grant of the said Order of forfeiture on the ground that the Order, was perverse. There was no finding of fact by the trial court, that the Oguntayo Apete family, was a customary tenant of the Oriare family and paid any tribute or Ishakole to their purported land-lord.  
G I say so because, it is settled that denial of an overlord’s title, is one of the gravest breaches that a customary tenant, could commit. See the cases of *Akpagbue & anor. v. Ogu & ors. (1976) 6 S.C. 63* and  
H *Buhari v. Obasanjo (2005) 2 NWLR (Pt.910) 241 at p.483 G - H*; Native law, gives the owner of land, the right to recover possession against a tenant who wrongfully claims ownership. See the cases of *Eshugbayi Chief Oloto v. Dawuda & ors. 1 NLR 57 @ 60* and *Akinkuowo v. Fafimoju (1965) NMLR 349*. From the foregoing and

if I may, the Plaintiffs/Respondents/Cross-Appellants, can see that the order that this Court can make, is that contained in the said lead Judgment. The result is that I too, dismiss both the appeal by the Appellants and that of the Plaintiffs/Respondents/Cross-Appellants and I also affirm the Judgment of the court below. I abide by the order in respect of costs.

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**OGEBE JSC**

I had a preview of the lead judgment of my learned brother Tanko Muhammad, JSC just delivered and I agree with his reasoning and conclusion. Accordingly, I dismiss both the main appeal and cross-appeal. I endorse the order of costs made in the lead judgment.

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