

**SUPREME COURT OF NIGERIA**

4th JUNE, 2010, SC. 287/2003

**CORAM:- N. TOBI, W. S. N. ONNOGHEN, I. F. OGBUAGU,  
J. A. FABIYI, O. O. ADEKEYE, JJSC**

1. AUGUSTINE OBINECHE
2. PATRICK OKWARA
3. ADOLPHUS UBAWUIKE
4. RICHARD AGONSI ..... APPELLANTS
5. GREGORY NWAOGU
6. GODWIN ANYANWU

(For themselves and as representatives  
of the Umuabor Community of Dikenafai  
in the Ideato South LGA of Imo State)

AND

1. HUMPHREY AKUSOBI
2. ALEXANDER OHAJIANYA
3. ORISAKWE DURU
4. REUBEN ANAMEGE ..... RESPONDENTS
5. MADUAKO OSIGWE
6. ADIMEKWE IZUEGBU
7. GODWIN OGUERI

(For themselves and as  
representatives of  
the Umuchoke Community  
of Dikenafai in the Ideato  
South LGA of Imo State)

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PLEADINGS - Joinder of issues - Nonjoinder on material fact - Effect  
- Where a party fails to join issue on an averred fact - He cannot lead  
any evidence in rebuttal thereof (H1)

EVIDENCE - Admissibility - Exhibit F - Challenge to - Propriety - As  
appellants failed to challenge - The application for leave to file same  
at trial court - They cannot challenge the exhibit on appeal without  
leave (H2)

LAND LAW - Title - Proof - Onus - Where plaintiff proves grant of

title by an earlier judgment - The onus is on defendant - To lead evidence to nullify that grant - Which defendants herein failed to do (H3)

ACTIONS - Decisions - Estoppel by conduct - Applicability - Where a party knew of - But took no part in previous proceedings on a subject matter affecting him - He is bound by the decision therein (H4)

LAND LAW - Title - Proof - Traditional history - Relevance - Where a party proves his title through an earlier court judgment - Traditional history is irrelevant in proof of same - In that proceedings (H5)

ACTIONS - Counterclaim - Dismissal - Propriety - Court of Appeal rightly dismissed appellants' counterclaim - In view of respondents' proof of their title to the land in dispute (H6)

### **FACTS**

The plaintiffs/respondents sued defendants/appellants before the High Court of Imo State claiming sundry reliefs by which they contended that appellants were not members of the respondents' Umuchoke community and as such had no part in the ownership of the pieces of land in dispute, which land belonged to the said community by virtue of a judgment in their favour in the Governor's Court of Appeal under the Native Courts Ordinance (cap. 142), given in 1952 in Enugu. Respondents pleaded and relied on certified true copies of the judgment. Appellants did not traverse respondents' pleadings of the judgment and its effect beyond averring that the judgment was "irrelevant" and ought to be ignored by the court. Moreover appellants also counterclaimed against respondents for similar reliefs, relying on traditional history.

At the end of hearing, the learned trial judge found for appellants. Accordingly, he dismissed respondents' claim and gave judgment to appellants on their counterclaim. In its judgment, the judge held that respondents did not plead their root of title much less establishing same. Aggrieved, respondents appealed to Court of Appeal which allowed the appeal, dismissed the counterclaim and gave judgment to respondents as prayed. That court held that respondents needed not plead or prove their root of title as their case was

based on documents i.e. Exhibit B - B2 which were the previous judgment and the plans on which it was based. Dissatisfied, appellants have brought this appeal against the judgment of Court of Appeal.

### **ISSUES FOR DETERMINATION**

*“(1) Was the Court of Appeal correct in holding that the case of the plaintiffs/respondents was predicated on the production of documents Exhibit B - B2 relying on the case of Idundun v. Okumagba (1976) 9-10 SC pg. 227.*

*(2) Did the respondents discharge the burden of proof of declaration of title in their favour.*

*(3) Was the Court of Appeal correct in holding that the defendants/appellants ought to have known about the 1952 case.*

*(4) Was the court below right when it dismissed the defendants/appellants counter-claim.”*

**HELD** (Unanimously dismissing the appeal per **ADEKEYE JSC**)  
***Joinder of issues - Nonjoinder on material fact - Effect***

1. In view of the fact that the appellants only pleaded that the judgment of 1952 is irrelevant and nothing more, they are not in a position to lead any evidence in rebuttal of their contention. It is trite that facts not pleaded go to no issue.

Cases are fought and decided only on the issues joined and established on the pleadings of parties. Going by the pleading of the parties, the appellants failed to join issues on the facts of substance raised by the respondents regarding the 1952 judgment in their favour.  
(p. 2066 G/2067 A)

### ***Admissibility - Exhibit F - Challenge to - Propriety***

2. There is no sufficient basis for the rejection of Exh. F as canvassed by the appellants on the basis that it was not pleaded. Exhibit F arose from superimposing of Exhibit A and C on Exhibit B2. Exhibits A, C and B2 were pleaded and Exhibit F arose from other pleaded documents. The respondents filed a motion on Notice at the trial court for leave to file and rely on a composite dispute survey plan which leave was granted. The composite plan was subsequently tendered in the course of trial by the surveyor P.W. II. The appellants did not challenge the application. Vide pages 406 - 410 of the record. The ap-

pellants cannot raise the issue of the composite plan for the first time without leave of this court, when they did not oppose the admissibility at the trial court. (p. 2067 G)

***LAND LAW - Title - Proof - Onus***

- B 3. Since the respondents had proved that title to the land in dispute had been granted to them by a competent court, the onus to challenge the title fell on the appellants. They must adduce cogent evidence to nullify the title to the land in dispute vested in the respondents by the 1952 Governor's Court judgment. The appellants failed to plead such facts in their counter-claim. Such judgment vested a title on the respondents against the world at large until reversed by a competent court. (p. 2068 D)

***D ACTIONS - Decisions - Estoppel by conduct - Applicability***

4. The appellants did not attempt to lead evidence that they had no knowledge of the 1947 - 1952 litigation. In the case of *Mana Abuakwa v. Mana Adanse* (1957) 3 ALL ER pg. 559 - the privy council restated the rule as to estoppel by conduct and held that a party who knew of but took no part in previous proceedings is bound by the decision in those proceedings.

The appellants cannot fold their arms and allow members of Umuchoke family to fight their battle against members of Nkahu family and now turn round to take the benefit of the situation. (p. 2069 A/F)

***LAND LAW - Title - Proof - Traditional history - Relevance***

5. The Court of Appeal was correct to have concluded in the prevailing circumstance that the respondents had already proved their title to the land in dispute in the 1947-1952 litigation and through traditional evidence. Having concluded that the title to the land in dispute belonged to the respondents in the said litigation of 1947 - 1952 through traditional evidence, their title is already established. It was therefore unnecessary to consider traditional history in proof of same title and any defect, omission or errors in proof of such traditional history is irrelevant. A conclusive Native Court judgment may operate as estoppel per rem judicatam or issue estoppel. (p. 2070 D)

***ACTIONS - Counterclaim - Dismissal - Propriety***

6. The respondents led concrete and convincing evidence by tendering the judgment of the Governor's Court, Exhibits B - B2 delivered in 1952, a composite plan which showed that the pieces of the land in dispute are part of a larger piece of land which formed the subject-matter of the 1952 judgment. The judgment apportioned the large area of land including the three pieces now in dispute to the respondents. This evidence comes under the (e) method of establishing ownership of a land in dispute - proof by possession of connected or adjacent lands. On this premises, I agree that the Court of Appeal was right to allow the appeal, set aside and reverse the judgment of the High Court which granted the appellants' counter-claim. (pp. 2072 C/2073 A)

**REPRESENTATION**

Mr. J. N. Egwuonwu for the Appellant/Applicants

Mr. N. U. Nwokocha-Ahaaiwe for the Respondents.

**CASES REFERRED TO**

Babatunde v. Olatunji (2000) 2 SC 9

Ajao v. Alao (1986) 5 NWLR pt. 45 pg. 802

Atanda v. Ajani (1989) 3 NWLR pt. 111 pg. 511

Obioha v. Duru (1994) 8 NWLR pt. 365 pg. 631

Atolagbe v. Shorun (1985) 4 SC (Pt. 1) 250 at 265

Igwego v. Ezeingo (1992) 6 NWLR pt. 249 pg. 561

Kamalu v. Umunna (1999) 5 NWLR pt. 505 pg. 321

Adeosun v. Jibessin (2001) 11 NWLR pt. 724 pg. 290

Omorggbe V. Daniel Lawani (1980) 3 - 4 S.C. 108 @ 117

FRN v. Zebra Energy Ltd. (2002) 3 NWLR pt. 754 pg. 471

Magagi v. Cadbury Nigeria Ltd. (1985) 2 NWLR pt. 7 pg. 393

Olohunde & anor .V. Prof. Adeyoju (2000) 6 SCNJ. 470 @ 475

Karibo & 2 ors. V. Grend & anor. (1992) 3 NWLR (Pt. 230) 426 @ 441

Chukwuma v. Ifeloye (2008) 8 NWLR pt. 1118 pg. 204 at pages 231 - 232

Sabrue Motors Nig. Ltd. v. Rajah Enterprises Nig. Ltd (2002) 4 SCNJ. 370 @ 382

**STATUTE REFERRED TO**

Native Court Ordinance, Cap 142, s. 31

B

**LEAD JUDGMENT BY ADEKEYE JSC**

This is an appeal against the judgment of the Court of Appeal, Port Harcourt Division delivered on the 8<sup>th</sup> day of July 2003. The respondents were plaintiffs at the High Court of Imo State, Orlu Judicial Division where they filed a suit for themselves and as representatives of the Umuabor Community of Dikenafai in the Ideato South Local Government Area of Imo State. By an amended Statement of Claim filed on the 16<sup>th</sup> of July 1996, the respondents as plaintiffs claimed against the defendants now appellants before this court jointly and severally as follows -

(a) A declaration that the defendants are not descendants of Nchoke the founder of the Umuchoke Community of Dikenafai in the Ideato Local Government Area of Imo State and as such that the defendants are not members of the Umuchoke Community aforesaid.

(b) A declaration that all those pieces and parcels of land known as and called “Ala Isiobi Akasobi” “Ala Isiobi Amaechi” and “Ala Mgbola Onyewuchi” form part of larger pieces and parcels of land all lying and situate at Ndiabo Umuchoke Dikenafai in the Ideato Local Government Area of Imo State over which members of the plaintiffs Ndiabo Umuchoke are entitled to customary Right of Occupancy to the exclusion of the defendants.

(c) Injunction perpetually restraining the defendants by themselves, their agents and or by any other person acting for or on their behalf from -

(i) Representing themselves to any person as members of or descendants of the Umuchoke Community of Dikenafai in the Ideato South Local Government Area of Imo State and

(ii) Committing any further act of trespass on or over any part of the said land of the Umuchoke Community of Dikenafai in the Ideato South Local Government Area of Imo State.

(d) A declaration that the defendants have forfeited that customary grant of land for residential purpose made by Ike Alisigwe of

the plaintiffs' Ndiabo Umuchoke to the defendants Anthony Agonsi and Dominic Okwaranyaegbu Ubawuike on the ground that they have challenged the title of their grantor.

The appellants as defendants were sued in a representative capacity for themselves and as representatives of Umuabo Community of Dikenafai in Ideato South Local Government Area of Imo State. They also counterclaimed in a representative capacity. B

By their pleadings and evidence, the plaintiffs/respondents gave the description of the lands in dispute as forming part of a larger area of land, lying at Nchabo Umuchoke Dikenafai in the Ideato South Local Government Area of Imo State. The pieces of land are known as "Ala Isiobi Akusobi", "Ala Isiobi Amaechi" and "Ala Mgbala Onyewuchi". The plaintiffs/respondents claimed ownership of the land in dispute through a judgment in their favour in the Governor's Court of Appeal under the Native Courts Ordinance (Cap 142) Section 31 in Enugu on 21<sup>st</sup> February 1952 in appeal No. 5/1952. This was an appeal against the decision of the Senior District Officer with Residents power (flight Lieutenant O.J.F. Jones Lloyd), in an appeal against the decision of the Acting District Officer, Orlu Division, Mr. A.E. Rylands in an appeal in the Northern Isu Native Court in Civil Suit No. 301/47. They pleaded and relied on certified true copies of the said judgment. They tendered plans of the disputed land. The appellants as defendants at the High Court traced their lineage to Abo and hence are known as Umuabo. They claimed to be owners of the land in dispute having settled there from 1890. They however at one stage moved away to Nkahu which is another part of Dikenafai because of the hostility of the people of Umuokuodu. They returned to the land in 1944 and published this fact in the Eastern Nigerian Guardian of 12<sup>th</sup> of June 1954. As at that time, they discovered that one Felix Akusobi - their blood relation and father of the first respondent had given out part of the land in dispute to other respondents - who are strangers and belong to other kindred in Umuchoke. The defendants/appellants established their ownership of the land in dispute through various acts of possession and occupation until the trespass by the respondents in 1990 and 1991. C  
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In the considered judgment of the trial High Court delivered on the 14<sup>th</sup> of August 1996, the court found for the defendants/appellants in their counterclaim. The court found amongst other facts

that the plaintiffs/respondents did not plead their root of title and even failed to establish it. The traditional history of the plaintiffs/respondents as to their origin was conflicting and contradictory. There is evidence to show that no section of Umuchoke can own land in another section and the claim of the plaintiffs/respondents to communal ownership of land in Umuchoke is not only false but also unfounded. The respondents failed to link themselves to Ibeke Alisigwe. Though the plaintiffs/respondents claimed for declaration and injunction, they failed to prove the extent of the land in dispute, or the extent of the land the defendants/appellants have trespassed upon, or the extent of the land which Ibeke Alisigwe purportedly granted to Dominic Okwaranyaegbu Ubawuike and Anthony and Agonsi. The appellants as defendants had proved undisputed acts of possession over the land in dispute. They proved that they had a relationship with the 1<sup>st</sup> respondent whose father pledged part of the land which they redeemed. The appellants established acts of trespass on the part of the respondents.

The respondents were dissatisfied by the said judgment and consequently appealed to the Court of Appeal, Port Harcourt Division. The Court of Appeal allowed the appeal, set aside the judgment of the trial court, dismissed the counter-claim of the appellants at the trial court and entered judgment in favour of the plaintiffs/respondents in terms of their amended statement of Claim before the trial court. The defendants/appellants being aggrieved by the judgment of the Court of Appeal have appealed against the judgment to this Court. The Notice of Appeal filed on the 28<sup>th</sup> of September 2003 contained seven grounds of appeal. The appellants distilled four issues for determination in their brief filed on 12/2/04 and reply brief deemed filed on 8/3/10 before this court as follows -

- (1) *Was the Court of Appeal correct in holding that the case of the plaintiffs/respondents was predicated on the production of documents Exhibit B - B2 relying on the case of Idundun v. Okumagba (1976) 9-10 SC pg. 227.*
- (2) *Did the respondents discharge the burden of proof of declaration of title in their favour.*
- (3) *Was the Court of Appeal correct in holding that the defendants/appellants ought to have known about the 1952 case.*
- (4) *Was the court below right when it dismissed the defen-*



*dants/appellants counter-claim.*”

The respondents in their brief filed on 29/3/04 settled two issues for determination as follows -

“(1) *Whether the Court of Appeal was right in holding that the plaintiffs/respondents title to the land in dispute had been established by the 1952 judgment in their favour by the Governor’s Court of Appeal Eastern Nigeria.*”<sup>B</sup>

(2) *Whether having found that the respondents have proved and established their title to the land in dispute, the Court of Appeal was right to have reversed and set aside the decision of the trial High Court, entered judgment for the respondents and dismissed the appellants’ counter-claim.*”<sup>C</sup>

I agree with the submission of the learned counsel for the plaintiffs/respondents that the germane claim before the trial court by the respondents was for declaration of their title to the land in dispute and forfeiture by the appellants of the customary grant to them by the respondents of parts of the land in dispute. Issues (a) - (c) are covered by the same argument, submission and facts, they shall therefore be considered together by me for ease of reference. The appellants’ four issues for determination shall now be compressed into two. The appellants equally counter-claimed for declaration of title and forfeiture against the respondents.<sup>D</sup>

The case of the plaintiffs/respondents was predicated on-

(a) Declaration that the appellants are not descendants of Nchoke the founder of the Umuchoke Community of Dikenafai and therefore members of Umuchoke Community.<sup>F</sup>

(b) That the members of the respondents’ Ndiabo Umuchoke are the ones entitled to the Customary Right of Occupancy to the exclusion of the appellants over the three parcels of the land in dispute which form part of the larger parcels of land at Ndiabo Umuchoke Dikenafai in the Ideato Local Government Area of Imo State.<sup>G</sup>

(c) Injunction to restrain the appellants from parading themselves as members of Umuchoke Community and from committing any further act of trespass on any part of the land of Umuchoke Community of Dikenafai.<sup>H</sup>

(d) Declaration that the appellants have forfeited the customary grant of land for residential purpose made by Ibeke Alisigwe of the respondents’ Ndiabo Umuchoke to members of the appellants’

family.

In proof of their claim to title, the plaintiffs/respondents at paragraph 19 (b) of their amended statement of claim pleaded as follows -

“The entire portions, which the defendants now claim falsely, form part of a larger area of land over which the plaintiffs as Umuchoke secured judgment in the Governor’s Court of Appeal under the Native Court Ordinance (Cap 142) Section 31 in Enugu on 21<sup>st</sup> February 1952 in Appeal No. 5/1952 which was an appeal against the decision of Senior District Officer with Residents powers (flight lieutenant OJF Jones Lloyd) on appeal against the decision of the Acting District Officer, Orlu Division (Mr. A.E. Rylands) in an appeal in the Northern Isu Native Court in civil suit No. 301/47. The plaintiffs hereby plead and shall at the trial rely on certified true Copy of the judgment of J.G. Pkye v. Wott (Lieutenant-Governor, Eastern Nigeria) in that appeal No. 5/1952 between Obiese Dike and three others of Umuchoke family of Dikenafai as plaintiffs/respondents and Maduagugbo Okwaranobi and three others of Nkahu family of Dikenafai as defendants/appellants and also pleads the certified true copy of that dispute survey plan No. OR/1/48 made for case No. 301/47 as well as pleads that treasury receipt No. 99427 dated 17<sup>th</sup> March 1952 by which the plaintiffs forbear Obiesie Dike paid for certified copies above.”

Pg. 163 paragraphs 6-33, and page 164 paragraphs 1-6 of the Record. By way of reaction to the foregoing, the appellants only pleaded as follows -

“The defendants deny paragraph 19 (a) and (b) of the Statement of Claim with particular reference to paragraph 19 (b) of the Statement of Claim, the defendants shall contend that judgment is irrelevant to this suit and should be disregarded.”

**In view of the fact that the appellants only pleaded that the judgment of 1952 is irrelevant and nothing more, they are not in a position to lead any evidence in rebuttal of their contention. It is trite that facts not pleaded go to no issue.**

Adimora v. Ajufo (1988) 3 NWLR pt. 80 pg.1

Atanda v. Ajani (1989) 3 NWLR pt. 111 pg. 511.

Uredi v. Dada (1988) 1 NWLR pt. 69 pg. 257.

Ajao v. Alao (1986) 5 NWLR pt. 45 pg. 802.

Eze v. Atasie (2000) 10 NWLR pt. 676 pg. 470.

**Cases are fought and decided only on the issues joined and established on the pleadings of parties. Going by the pleading of the parties, the appellants failed to join issues on the facts of substance raised by the respondents regarding the 1952 judgment in their favour.**

The respondents pleaded further and led evidence to the fact that the lands in dispute form part of a larger area of land over which the plaintiffs as Umuchoke secured judgment in the Governor's Court of Appeal. This piece of evidence was equally not challenged by the appellants. The foregoing are facts of importance in the case of the respondents - on which issues were never joined. With that the respondents averred in their pleadings that a competent court of record had declared their title to a larger portion of the land of which that in dispute formed a part and so their title was established.

The Court of Appeal affirmed that the respondents had successfully proved their title to the land in dispute by virtue of the said 1952 judgment and consequently gave judgment in favour of the respondents. Certified true copies of the judgment of the Governor's Court of Appeal were tendered as Exhibits B - B2. The respondents invited expert evidence from the Office of the Surveyor-General in respect of the composite plan of the entire land tendered as Exhibit F. The composite survey plan tendered by the Surveyor from the office of the Surveyor-General who was summoned by subpoena showed that the lands in dispute formed part of the larger area of the land in dispute in the 1952 case in which title of the land was granted to the respondents. The evidence of this witness - as P.W. II was not controverted. The evidence of the respondents in support of the 1952 judgment in Exhibits B - B1 was uncontroverted. **There is no sufficient basis for the rejection of Exh. F as canvassed by the appellants on the basis that it was not pleaded. Exhibit F arose from superimposing of Exhibit A and C on Exhibit B2. Exhibits A, C and B2 were pleaded and Exhibit F arose from other pleaded documents. The respondents filed a motion on Notice at the trial court for leave to file and rely on a composite dispute survey plan which leave was granted. The composite plan was subsequently tendered in the course of trial by the surveyor P.W. II. The appellants did not challenge the application. Vide**

**pages 406 - 410 of the record. The appellants cannot raise the issue of the composite plan for the first time without leave of this court, when they did not oppose the admissibility at the trial court.**

- FRN v. Zebra Energy Ltd. (2002) 3 NWLR pt. 754 pg. 471.
- B Obioha v. Duru (1994) 8 NWLR pt. 365 pg. 631.
- Yusuf v. U.B.N. Ltd. (1996) 6 NWLR pt. 457 pg. 632.
- Eze v. A-G Rivers State (2001) pt. 18 NWLR pt. 746 pg. 524.
- A-G Oyo State v. Fairlakes Hotesl Ltd. (1988) 5 NWLR pt. 92 pg. 1.

The appellants raised the issue for determination as to whether the Court of Appeal was correct in holding that the defendants/ap-pellants ought to have known about the 1952 judgment. The ap-pellants were not parties to the 1947 - 1952 dispute in which the Governor's Court granted title to the larger area of land of which the land in dispute is a part - but they are bound by the decision and they ought to have known about it having pleaded that they re-turned to the land in 1944 while the litigation was in 1947-1952.

**Since the respondents had proved that title to the land in dis-pute had been granted to them by a competent court, the onus to challenge the title fell on the appellants. They must adduce cogent evidence to nullify the title to the land in dispute vested in the respondents by the 1952 Governor's Court judgment. The appellants failed to plead such facts in their counter-claim. Such judgment vested a title on the respondents against the world at large until reversed by a competent court.**

- Gomwalk v. Military Administrator Plateau State (1988) 7 NWLR pt. 558 pg. 413.
- G Ezeokafor v. Ezeilo (1999) 9 NWLR pt. 619 pg. 513.
- There is a presumption of the validity and bindingness of a previous judgment until it is upturned on appeal.
- Kamalu v. Umunna (1999) 5 NWLR pt. 505 pg. 321.
- Nwanwata v. Esumei (1998) 8 NWLR pt. 563 pg. 650.
- H Babatunde v. Olatunji (2000) 2 SC 9.
- Oguigo v. Oguigo (2001) 1 WRN pg. 131.
- Furthermore, the appellants claimed possession of the land in dispute by their publication of Exhibit D that they returned to the land in 1944. The dispute over the land was between 1947-1952.

When the Lt. Governor gave judgment in favour of Umuchoke family – the respondents, the appellants admitted that they were back on the land since 1944 and before the litigation started in 1947. **The appellants did not attempt to lead evidence that they had no knowledge of the 1947 - 1952 litigation. In the case of Mana Abuakwa v. Mana Adanse (1957) 3 ALL ER pg. 559 - the privy council re-stated the rule as to estoppel by conduct and held that a party who knew of but took no part in previous proceedings is bound by the decision in those proceedings.** Nnamani JSC (of blessed memory) in the case of Oke & Anor v. Atoloye & Ors (1986) NSCC Vol. 17 pt. 1 pg. 165 said that:

*“It is trite law that estoppel stretches beyond estoppel per rem judicata to estoppel in pais, estoppel by deed, estoppel by negligence etc more relevant to the present proceedings is estoppel by conduct. Again, and perhaps even more relevant to the present proceedings, if a party stands by and allows another to fight his battle in a litigation which touches on his interests he cannot be heard later on to complain.”*

In the case of Chukwuma v. Ifeloye (2008) 8 NWLR pt. 1118 pg. 204 at pages 231 - 232, Oguntade JSC (Rtd.) aptly gave a simple illustration of standing by - by saying that: -

*“Where a land owner stood by and knowingly by his inaction allowed a stranger to develop the land in good faith without the owner appraising the stranger the defect of his title, then the doctrine of acquiescence and standing may be properly invoked to estop the owner from reaping the benefit of the stranger’s labour.”*

*Solomon v. Mogaji (1982) 11 SC 1.*

**The appellants cannot fold their arms and allow members of Umuchoke family to fight their battle against members of Nkahu family and now turn round to take the benefit of the situation.**

From the available facts, the Court of Appeal was right to hold that the appellants ought to have known about the 1947 - 1952 case. Such admitted facts are -

(i) That the Umuchoke family litigated over the land in dispute between 1947- 1952.

(ii) That the lands in dispute in the present case is (sic) the same that formed part of the land disputed between 1947-1952.

(iii) That the Umuchoke family won and title to the land in

dispute was granted to them by the court.

(iv) That throughout the pendency of the litigation, the appellants were resident on the land in dispute by their own admission since 1890 (a period of over 57 years) with the Nkahu people with whom the respondents litigated (as claimed by the respondents in either case, the appellants ought to have known and are deemed to have had knowledge of the said previous litigation. These were not speculations as erroneously canvassed by the appellants at pages 26 - 28 of the appellants' brief but inferences of fact.

Where ordinarily a judgment of court, which is final between the same parties, with the same questions for determination and before a competent court, cannot operate as estoppel per rem judicatam, it may constitute a prima facie act of possession where it pertains to a land in dispute.

Igwego v. Ezeugo (1992) 6 NWLR pt. 249 pg. 561.

Achiakpa v. Nduka (2001) 19 NWLR pt. 734 pg. 623.

***The Court of Appeal was correct to have concluded in the prevailing circumstance that the respondents had already proved their title to the land in dispute in the 1947-1952 litigation and through traditional evidence. Having concluded that the title to the land in dispute belonged to the respondents in the said litigation of 1947 -1952 through traditional evidence, their title is already established. It was therefore unnecessary to consider traditional history in proof of same title and any defect, omission or errors in proof of such traditional history is irrelevant. A conclusive Native Court judgment may operate as estoppel per rem judicatam or issue estoppel.***

Kamalu v. Umunna (1997) 5 NWLR pt. 505 pg. 321. The Court of Appeal was also right to have reversed and set aside the judgment of the trial court which granted title to the appellants, an order of forfeiture of the right of the respondents over all the portions of the land in dispute and an order of perpetual injunction against the plaintiffs/respondents.

Issue 4

Another issue for determination is whether the court below was right when it dismissed the defendants' appellants' counter-claim.

The defendants/appellants at the trial court counter-claimed against the plaintiffs/respondents as follows-

(i) An order of court that the defendants are the owners of the land in dispute.

(ii) N1,000,000 (one million naira) general damages for trespass.

(iii) An order of forfeiture of the right of the plaintiffs over all the portions of land occupied by them on the disputed land. B

(iv) An order of perpetual injunction restraining the plaintiffs by themselves, their servants, agents, privies, heirs, assigns and workers from further trespass to the said land.

The appellants pleaded their root of title based on traditional history and acts of possession through the evidence of DW1 and DW2. They gave evidence that they have been on the land since 1890 until they fled to Nkahu and returned in 1944. They gave evidence of the various boundaries and features in the land. That they had redeemed some of the land pledged by Felix Akusobi the father of the 1<sup>st</sup> respondent. They canvassed that the Court of Appeal was therefore wrong in holding that Exhibits B-B2 were documents of title. The Court of Appeal found that the respondents established their title to the land not through traditional historical evidence, but proved it by virtue of the 1952 judgments. The title to the land therefore resides in the respondents. C D E

In order to succeed in a claim for a declaration of title to land, the court must be satisfied as to -

(a) The precise nature of the title claimed that is to say, whether it is title by virtue of original ownership, or customary grant or conveyance or sale by customary law or long possession or otherwise. F

(b) Evidence establishing title of the nature claimed must be credible, convincing and equivocal.

The five different ways or methods of establishing ownership G or proving ownership of a land in dispute - are: -

(a) Proof by traditional evidence.

(b) Proof by production of documents of title duly authenticated, unless they are documents twenty or more years old produced from proper custody. H

(c) Proof by act of ownership in and over the land in dispute such as selling, leasing, making grant or farming on it or a portion thereof extending over a sufficient length of time numerous and positive enough to warrant the inference that the persons exercising such

proprietary acts are the true owners of the land.

(d) Proof by acts of long possession and enjoyment of the land which prima facie may be evidence of ownership not only of the particular piece of land with reference to which such acts are done, but also of other land so situate and connected therewith by locality or Similarity that the presumption under Sections 46 and 146 of the Evidence Act applies and the inference can be drawn that what is true of the one piece of land is likely to be true of the other piece of land.

(e) Proof by possession of connected or adjacent land in circumstances rendering it probable that the owner of such connected or adjacent land would in addition be the owner of the land in dispute.

***The respondents led concrete and convincing evidence by tendering the judgment of the Governor's Court, Exhibits B - B2 delivered in 1952, a composite plan which showed that the pieces of the land in dispute are part of a larger piece of land which formed the subject-matter of the 1952 judgment. The judgment apportioned the large area of land including the three pieces now in dispute to the respondents. This evidence comes under the (e) method of establishing ownership of a land in dispute - proof by possession of connected or adjacent lands.***

Alli v. Alesinloye (2000) 6 NWLR pt. 660 pg. 177.

Adeosun v. Jibesin (2001) 11 NWLR pt. 724 pg. 290.

Diaro v. Tenalo (1976) 12 SC pg. 31.

Idundun v. Okumagba (1976) 9-10 SC 227.

Magagi v. Cadbury Nigeria Ltd. (1985) 2 NWLR pt. 7 pg.

G 393.

Ogunleye v. Oni (1990) 2 NWLR pt. 135 pg. 745.

Kodilinye v. Odu (1935) 2 WACA 336.

Where the evidence of tradition is inconclusive, the case must rest on a question of fact. In the instant case, any loopholes in the evidence of the respondents based on traditional history - was given necessary cogency and support by the facts of act of possession and ownership of connected and adjacent land as established by the Governor's Court judgment of 1952.

Fasoro v. Beyioku (1988) 2 NWLR pt 76 pg. 263.



Kaiyuoja v. Egunla (1974) 12 SC pg. 55.

I resolve the two issues in favour of the respondents.

***On this premises, I agree that the Court of Appeal was right to allow the appeal, set aside and reverse the judgment of the High Court which granted the appellants' counter-claim.***

In the circumstance of this case, the counter-claim of the appellants was rightly dismissed. B

In the final analysis, I dismiss the appeal for lacking in merit. I affirm the judgment of the lower court with N50,000 costs in favour of the respondents. C

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### **TOBI JSC**

I have read in draft the lead judgment of my learned brother, Adekeye JSC and I agree with her that the appeal should be dismissed. I accordingly dismiss the appeal for lacking in merit. I affirm the judgment of the lower court with N50,000.00 costs in favour of the respondents.

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### **ONNOGHEN JSC**

I have had the benefit of reading in draft, the lead judgment of my learned brother, ADEKEYE, JSC just delivered.

I agree with his reasoning and conclusion that the appeal is without merit should be dismissed. F

The appeal is consequently dismissed with costs as assessed and fixed in the said lead judgment. I abide by other consequential orders made by ADEKEYE, JSC.

Appeal dismissed. G

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### **OGBUAGU JSC**

This is an appeal against the Judgment of the Court of Appeal, Port-Harcourt Division (hereinafter called "the court below") delivered on 8th July, 2003 allowing the appeal of the Plaintiffs/Respondents and setting aside, the judgment of the High Court of Imo State sitting at Nkwere/Isu - per Ezemagu, J. in favour of the Appellants delivered on 15<sup>th</sup> August, 1996. H

Dissatisfied with the said Judgment, the Appellants have appealed to this Court on Seven (7) grounds of appeal. They have formulated four (4) issues for determination which read as follows:

B “(a) Was the Court of Appeal correct in holding that the case of the plaintiffs/respondents was predicated on the production of documents, Exhibit (sic) B-B2 relying on the case of IDUNDUN v. OKUMAGBA (1976) 9-10 S.C. 227. Grounds 1, 3 and 4.

(b) Did the respondents discharge the burden of proof of declaration of title in their favour Grounds 2 and 7.

C (c) Was the Court of Appeal correct in holding that the defendants/appellants ought to have known the 1952 case. Grounds (sic) 5.

(d) Was the Court below right when it dismissed the defendants/appellants (sic) counter claim. Ground 6”.

D I note observe that no question mark (?) was inserted in all the said issues. I note also that in their Reply Brief, the Appellants most unusually, also formulated another set of issues for determination. As this is/was contrary to what a Reply Brief is all about or means, the learned counsel for the appellants, withdrew the said issues on E the hearing of this appeal.

The Respondents on their part, have formulated two (2) issues for determination, namely,

“3.0 ISSUE ONE:

F *Whether the Court of Appeal was right in holding that the Plaintiffs/respondents’ title, to the land in dispute had been established by the 1952 Judgment in their favor (sic) by the Governor’s Court of Appeal, Eastern Nigeria. (Grounds 1, 2, 3, 4, 5 and 7 of the appellants’ grounds of appeal).*

G 3.01 ISSUE TWO:

H *Whether having found that the respondents had proved and established their title to the land in dispute, the Court of Appeal was right to have reversed and set aside the decision of the trial High Court, entered judgment for the respondents and dismissed the appellants’ Counter-Claim (Ground 6 of the appellants’ grounds of appeal)”.*

The Respondents were the plaintiffs at the trial court and they claimed in a representative capacity, certain declarations and injunction against the Appellants who were the defendants who

were sued in a representative capacity. The Appellants, counter-claimed. Pleadings were filed and exchanged. The Respondents called Eleven (11) witnesses in proof of their case, while the Appellants, called two (2) witnesses. At the end of the trial, the learned counsel for the parties, addressed the court. The learned trial Judge found in favour of the Appellants in their counter-claim and dismissed the Respondents claims. The appeal of the Respondents to the court below, was successful hence the instant appeal. B

When this appeal came up for hearing on 8<sup>th</sup> March, 2010, the learned counsel for the Appellants - Egwuonwu, Esqr., moved their motion for extension of time to file their Reply Brief of Argument which was not opposed and it was accordingly granted. He thereafter, adopted their two Briefs and he urged the Court to allow the appeal. He withdrew their said issues in the Reply Brief and the said issues are accordingly struck out. Nwokocha, Esq. – the learned D counsel for the Respondents, adopted their Brief of Argument and he urged the Court to dismiss the appeal. Thereafter, Judgment was reserved till to-day.

I note that while the Respondents relied on the Judgment in/ by the Governor's Court of Appeal in 1952 in appeal No. 5/1952 in their favour and which was an appeal against the decision of the Acting District Officer, Orlu Division in an appeal in the Northern Isu Native Court in Suit No. 301/47 all in respect of the land in dispute, the Appellants in paragraph 19 of their Amended Statement of Defence at page 214 of the Records, pleaded "that the judgment is irrelevant to this suit and should be disregarded". The trial court held that the Respondents had failed to prove their case and dismissed it. It upheld the counter-claim of the Appellants. The court below held that the findings of facts by the trial court, was perverse and that it did not properly evaluate the evidence before it. That if it had done so, it would have come to the conclusion that the Respondent's proved their title in the land in dispute. It is against the said decision that the Appellants have appealed to this Court. F G

I will deal with issues a, (b) and (d) of the Appellants together H with the two issues of the Respondents because in my respectful view, there lies or hangs the crucial issues for determination in this appeal. I here is no dispute about the location or identity of the land in dispute as rightly found out and held by the court below. The Respon-

dents called the P.W.2 - the Surveyor who made or produced Exhibit F. He gave evidence that Exhibit A - the Survey Plan and Exhibit C - I. The Respondents' Survey Plan, relate to the same land in dispute which is within the land reflected in Exhibit B2 for which judgment, was given in their favour against the defendants in that suit in 1948.

B The said Judgment, was affirmed by the said Governor's Appeal Court of Eastern Nigeria in Appeal No. 5/1952.

The Appellants' case briefly put in the trial court, was that they are natives of Ndiabor Umuchoke Dikenafai and that they are also known as Umuabor to distinguish them from those they alleged C infiltrated Ndiabor as strangers and to show their direct linkage and lineage to Abor. They maintain that they are the owners of the land in dispute having according to them, settled there from time immemorial until in or about 1890 when they fled from the land in D dispute to Nkanu in another part of Dikenafai because of the hostility of the people of Umuohuodu. It is their case that in 1944, they returned to the land in dispute and published this fact in the Eastern Nigeria Guardian of 12<sup>th</sup> June, 1954 (See also paragraphs 5(a) and 35 of their Amended Statement of Defence) at pages 206 and 217 - E 218 of the Records.

They further pleaded and testified that when they returned to the land in dispute, they found that late Felix Akusobi - the father of the 1<sup>st</sup> Respondent who was from Ndiabor Umuchoke and who was their relation by blood, had given out part of the land in dispute F to other Respondents who are from other kindreds of Umuchoke. That the late Felix Akusobi, also pledged part of the land in dispute which according to them, they redeemed. That they protested to late Felix Akusobi, but that he could not ask the said strangers to whom G he pledged the land, to leave them/ it.

It is their pleadings and further testimony that sometime in 1990 -1991, the Respondents, invaded the land in dispute, damaged their houses and halls, carried away their building materials and cut their palm fruits on the said land. That they reported to the police H who arrested and charged them to the Chief Magistrate's Court, Ideato. I note that significantly or incidentally, they did not say what was the outcome of the said case in the said Chief Magistrate's Court. They say that the matter is still pending in that court (see page 367 of the Records). However, they traced their origin to Abor who they say

was their ancestor who founded Ndiabor kindred or a Section of Umuchoke, Dikenafai. They assert that they have been in possession of the land in dispute until the Respondents, trespassed on it.

As I have stated earlier in this Judgment, the trial court found in favour of the Appellants. The court below, after stating the long settled five ways of proving title relying on the case of *Idundu v. Okumagba* (1976) 9-10 S.C. 222, reproduced the relevant portions of the evidence of PW2 in respect of Exhibits B - B2 at pages 411-413 of the Records which include the following :

*"Counsel seek to tender the composite plan and without objection it tendered and received in evidence and marked Exhibit 'F'. My finding is that Exhibits 'A' and 'c' relate to the same land and the land reflected in Exhibit B2 for which judgment was given in 1948.*

*Under cross – examination, P.W. 11 said that the area verged Blue in 'F' is the 'Nkoro' on the northern part of which is the land of D Nkanu people while on the southern part is the land of Umuchoke Dikenafai."*

I note that at page 740 of the Records, the court below stated or found as a fact and held inter alia, as follows:

*"It is beyond argument from the evidence of P.W 11 reproduced above, that Exhibit 'A' the appellants' (i.e. respondents') Survey Plan and Exhibit 'C' the respondents' Survey Plan is the portion of land for which Exhibit (sic) B-B2 was given in 1948 which supports the appellants' (i.e. the Respondent') case. In view of the evidence of P. W. 11, the contention of learned counsel for the respondents (i.e. Appellants) that the appellants failed to link the land in dispute to the land covered by the 1952 case is of no moment so also his submission that if the people of Ndiabor own the land in dispute as found by the trial court, they are not bound by the decision of the native court in 1952 in respect of their (Ndiabor) land which has not been shown to be part of the land in dispute in 1952".*

I agree.

After reproducing, part of the finding of the learned trial Judge in considering Exhibits B - B2 at page 601 lines 13 - 25, the court below – per Akpiroroh, JCA, stated inter alia, as follows:

*"In the first place, there is no evidence on record from which the learned trial Judge arrived at this finding. There is evidence at page 309 of the records lines 10 - 30 that Exhibit A was tendered by*

*the respondents (i.e.-Appellants) during the cross-examination of P.W.6 and being evidence elicited under cross-examination, it formed part of the evidence put forward by them and as such they cannot challenge or reject it. The conclusion reached on Exhibit A cannot be sustained on the face of the evidence of P. W. 11”.*

B *With regard to Exhibit (sic) B - B2, they were duly pleaded and not denied. See paragraphs 19 and 20 of the amended statement of claim and paragraph 19 of the amended statement of defence at page 214 lines 17 - 21 of the records where the respondents (i.e. the Appellants) pleaded thus.*

C *“With particular reference to paragraph 19(b) of the Statement of claim, the defendants shall contend that the judgment is irrelevant to this suit and should be disregarded ”.*

I also agree. I have also referred to this pleading at page 3 of this Judgment. At page 741 thereof, it continued further to state inter alia, thus:

*“They did not deny that the land now in dispute formed part of a larger area of land over which judgment was given in Exhibit (sic) B - B2.*

E *The evidence of P.W. 11, which I reproduced above, was clearly that of an expert. The respondents did not call any other expert evidence to contradict or challenge his evidence.....*

F *In the face of the unchallenged evidence of P. W. 11, the finding of the learned trial Judge that Exhibit ‘A’ cannot be realistic and that it is a product of an imaginary areas of land amounts to no more than a postulation of presumptions in face (sic) of land evidence”.*

I am unable to fault the above as it is borne out from the Records. It concluded inter alia as follows:

G *“Looking at Exhibits A and C, it is crystal clear the appellants (i.e. the Respondents) and the respondents (i.e. Appellants) know clearly the land in dispute between them, and that it is clearly defined in both plans and the land in dispute is one and the same land and as such the findings of the learned trial Judge cannot stand in the face of in Exhibits A.C.F and B2. It is therefore my view that Exhibit B2, the certified copy of the appellate judgment in favour of the appellants, (i.e. Respondents) of Umuchoke constitutes unchallenged proof of title to the land in dispute by appellants (i.e. Respondents). D. W. 1*

*and D.W.2 gave traditional evidence of the land in dispute but in the face of Exhibits A, B - B2 and F which showed clearly that it was the same land in which judgment was given in favour of the appellants (i.e.) Respondents) in 1952, the learned trial Judge could have not relied on their evidence in arriving of his decision, that the land belonged to the respondents” .* B  
*(the underlining mine)*

It resolved the issue in favour of the Respondents and I also agree. This is because, it is now settled that an Appellate Court is as in good a position as the trial court in evaluation of evidence before it. C

It must be borne in mind always as that is also settled firstly, that in Order 8 rule 2 (1) of the Court of Appeal Rules, 2002, all appeals shall be by way of rehearing. In other words, an appeal, is in the nature of rehearing In respect of all the issues raised in respect of the case. See the cases of Sabru Motors Nig. Ltd .v. Rajah Enterprises Nig. Ltd (2002) 4 SCNJ. 370 @ 382 and Maersk Line anor. V. Addide Investment Ltd & anor. (2002) 4 SCNJ. 433 @ 473- per Ayoola, JSC. Of course, by Section 16 of the Court of Appeal Act, the court is given full jurisdiction over the whole proceedings as if the same had been initiated in that court as the court of first instance and may therefore, re-hear the case in whole or in part or may even remit it to the lower trial court for the purpose of such re-hearing. E  
 See the case of Attorney-General, Anambra State & 5 ors. v. Okeke & 4 ors. (2002) 5 SCNJ- 318 @ 333. F

Secondly, where evidence by a party to any proceedings was not challenged or controverted by the opposite party who had the opportunity to do so, it is always open to the court seized of the case, to act on such unchallenged or uncontroverted evidence before it as the court below did in respect of the said evidence of the P.W.11 in the instant case. There are too many decided authorities in this regard. See the cases of Nwabuoku V. Otteh (1961) 1 ANLR 487 @ 490; Odulaja V. Haddad (1973) 11 S.C. 357; Nigerian Maritime Services Ltd. v. Alhaji Bello Afolabi (1978) 2 S.C. 79 @ 81; Isaac Omorogbe V. Daniel Lawani (1980) 3 - 4 S.C. 108 @ 117 and Olohunde & anor .V. Prof. Adeyoju (2000) 6 SCNJ. 470 @ 475 just to mention but a few. G

Thirdly, as regards evaluation, of evidence, I have already stated in this Judgment, that an Appellate Court is in as good a position or H

vantage position as a/the trial court to evaluate evidence and ascribe value or values to it. See the cases of *Fatoyinbo V. Williams* 1 FSC. 87 and *Chief Akpan & 2 ors. V. Chief Umo Otong & 3 ors.* (1996) 12 SCNJ. 213 and many others. Thus, where a trial court, approaches the evidence called by the parties wrongly as is in the instant case leading to this appeal, the Appellate Court such as the court below, will have no alternative ,but to allow the appeal. See the case of *Karibo & 2 ors. V. Grend & anor.* (1992) 3 NWLR (Pt. 230) 426 @ 441; (1992) 4 SCNJ. 12.

In fact, by the said pleading in paragraph 19 (b) of their Amended Statement of Defence, it is clear and it is an admission by the Appellants, that they knew and aware of the case leading to the said Judgment of 1952, but they decided to ignore it or care less about it and say, that it was irrelevant while in truth, it was their undoing as regards their claim to the land in dispute. The court below having held that the Respondents established their title to the land in dispute, the obvious conclusion, is that the learned trial Judge, was definitely wrong in granting the counter-claim of the Appellants. From page 743 to page 744 of the Records, the court below stated *inter alia*, as follows:

*“There is no doubt in this case that the findings of facts by the trial Judge were perverse because if he had properly evaluated the evidence led before him, he could have come to the irresistible conclusion that the appellants (i.e. the Respondents) proved their title to the land in dispute in the face of Exhibits A, B, B2, C and F”.*

I completely agree. The court below is right and justified in its pronouncement or holding. I so hold. It is from the foregoing and the fuller Judgment of my learned brother, Adekeye, JSC, just delivered and I agree with the reasoning and conclusion, that I too, hold that there is no merit whatsoever in this appeal which fails. I too, dismiss it and I too, hereby and accordingly, affirm the said Judgment of the court below.

Costs follow the event. The Respondents are entitled to costs fixed at 50,000.00 (Fifty thousand Naira) payable to them by the Appellants.



**FABIYI JSC**

I have had a preview of the judgment just delivered by my learned brother, Adekeye JSC. I agree with the reasons therein advanced to arrive at the conclusion that the appeal lacks merit and should be dismissed. B

At the trial High Court of Imo State, the respondents herein relied upon the judgment of the Governor's Court of Eastern Nigeria in 1952- Exhibit B-B2. They pleaded same and adduced evidence through P.W.

9. The appellants, on their own part, were evasive. They merely pleaded that the judgment was irrelevant. That was not proper as it runs contrary to the function of pleadings. Such is fatal to the case of the appellants as decided by this court in *Atolagbe v. Shorun* (1985) 4 SC (Pt. 1) 250 at 265; *T. Lawal Owosho & Ors v. Michael Adebowale. Bada* (1984) 7 SC 149 at 164. Based on the state of pleadings, the ease of the respondents could be taken as duly established. C D

The respondents further called P.W. 11, a surveyor from the office of the Surveyor General of Imo State who tendered a composite survey plan Exhibit F which showed that the land in dispute formed part of the land in dispute in the 1952 case in which title was granted to the respondents. Since there was no contrary evidence which discredited the evidence of P.W. 11, an expert witness, same cannot be wished off by a wave of the hand. It must be relied upon as done by the court below which rightly placed reliance on the case of *Seismograph Service Nig. Ltd. v. Akporuovo* (1974) 6 SC 119. E F

The appellants said they were on exile in Nkanu between 1890 and 1944 when they came back to the land in dispute. They published their return in Exhibit D in 1954. The respondents' Umuchoke family had the 1947-1952 case with Nkahu family. The appellants ought to have had knowledge of the dispute. But they did not intervene or interplead their title to their own chagrin. They are no doubt in breach of the doctrine of estoppel by conduct or estoppel by standing by and watching the respondents fighting their cause for them. The appellants must be deemed to have knowledge of the case. See: *Nana Abuakwa v. Nana Adanse* (1957) 3 All E.R 559; *Oke & Anr v. Atoloye & Ors.* (1986) NSCC (Vol. 17) part 1, 165. G H

In my considered opinion, the court below was right when it allowed the appeal and found in favour of the respondents. I cannot fault same.

For the above reasons and those well set out in the judgment of my learned brother, I too, hereby come to the conclusion that the  
B appeal is without merit and should be dismissed. I order accordingly. I endorse the consequential orders therein contained; inclusive of that relating to costs.

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