

SUPREME COURT OF NIGERIA
14TH JANUARY, 2011. SC. 179/2003
CORAM:- A. M. MUKHTAR, W. S. N. ONNOGHEN,
F. F. TABAI, I. T. MUHAMMAD, M. S.
MUNTAKA-COOMASSIE JJSC

DANIEL TAYAR TRANS. ENT. APPELLANT
NIG. CO. LTD.

AND

1. ALHAJI LIADI BUSARI
2. LAMIDI YUSUF DARAMOLA RESPONDENTS
(For themselves and as representatives
of Ashade Family of Iba Town)

LAND LAW - Consent judgment - Effect of - Non consenting parties
- That took steps unto getting the courts - To set aside the judgment
- Are not bound by it (H1)

JUDGMENTS - Consent judgment - Nature & legal effect - It is not
like regular judgment of the court - Entered after trial - What matters
is the agreement of parties - Which is binding on them (H2)

LAND LAW - Consent judgment - Basis & effect - Parties agreed to
exclude the parcel of land claimed by 6th to 8th defendants - And as
such recognised their rights to the said portion of land (H3)

ESTOPPEL - Res judicata - Nature and effect - It is a doctrine that
brings an end to litigation - To the effect that once a matter - Has
been pronounced upon by a court of competent jurisdiction - Parties
are not allowed to re-litigate same (H4)

ESTOPPEL - Res judicata - Conditions - Party relying on it must
establish that - Parties and subject matter are the same - That valid
and subsisting judgment had been pronounced - By a competent
court (H5)

APPEALS - Issue for determination - Essence of - Is that a decision
thereon - Will affect the fate of the appeal (H6)

APPEALS - Grounds of appeal - Purpose of - They attack the defects in the ratio decidendi - Thus deciding an issue based on a ground - That will not secure setting aside of judgment - Is an exercise in futility (H7)

FACTS

Plaintiffs/Respondents before the High Court of Lagos, claimed against defendant/appellant for a declaration that they are entitled to the Statutory Right of Occupancy in respect of the land in dispute edged blue on the composite plan No. APAT/LA/428/1994, and other sundry reliefs. Pleadings were duly exchanged between the parties and the matter proceeded to trial, in the course of which the appellant brought an application praying the court inter alia for an order striking out respondents' claim as offending the doctrine of res judicata. It was the case of the appellant that the subject matter, the issue before the court, has been decided upon by the Supreme Court between the parties; that the respondents were parties to both 1972 and 1980 consent judgment of the High Court and the Supreme Court respectively. Appellant exhibited the judgment of the Supreme Court delivered on 14th November, 1980.

However, it was the position of the respondents that the relevant consent judgment is not the ruling of 14th November, 1980; that the court did not create another consent judgment in 1980 but decided that the consent judgment of 20/11/72 should stand, subject to the fact that it does not affect the claims of those who were not parties thereto; and that the Supreme Court had no original jurisdiction to enter consent judgment which differs from one concluded at the trial court and as such the judgment of 1980, conferred no title to the 6th - 8th defendants therein, to constitute a res judicata. At the conclusion of the argument, trial court held that the principle of res judicata did not apply to the facts of the case and dismissed the application. Aggrieved, appellant appealed to the Court of Appeal which appeal was dismissed. Still dissatisfied, appellant has come on a further appeal to the Supreme Court, questioning whether there was consent judgment by that court in 1980 and whether the doctrine of res judicata applied to the facts of this case.

ISSUES FOR DETERMINATION

1. Was there a consent judgment by this court in 1980 and if so whether the principles or doctrine of res judicata apply to the facts of this case or whether the lower courts are right in holding that the principle/doctrine of res judicata do not apply to the facts of this case.

2. Whether the four page malignation of the Appellant's counsel by the lower court, per Aderemi, JCA, is in the manner of exercise of judicial authority in a civil case, when the said counsel substantiated his allegation in the particulars of the relevant ground of appeal and when the trial court's ruling bears the counsel out.

HELD (Unanimously allowing the appeal per **ONNOGHEN JSC**)
LAND LAW - Consent judgment - Effect of

1. There is no dispute as to the fact that there was a consent judgment entered by the trial court in 1972, in which the 6th - 8th defendants were not parties to and therefore not bound by it; that the 6th – 8th defendants, whose parcels of land were included in the claims of the plaintiffs in that suit, were not satisfied with the consent judgment and applied for same to be set aside, which the trial court obliged, resulting in an appeal to the Court of Appeal against the order setting aside the said consent judgment, which court affirmed the setting aside order; that the affirmation resulted in a further appeal to this court which culminated in the judgment of 1980, in which this court affirmed the consent judgment of 1972, with a directive that the said consent judgment excludes the claims of the 6th – 8th defendants, as evidenced in survey plan No. CW/649/62 of 20/11/62. (p. 283 B)

Consent judgment - Nature & legal effect

2. Consent judgments are not like the regular judgments of the court, entered after a trial conducted by the court either summarily or upon full trial. It is not dependant upon exchange of pleadings or calling of evidence and/or address of counsel. In fact, there is no stage in the proceedings where the law requires a consent judgment to be entered, as the same can be entered at any stage in the proceedings because, it is simply based on agreement between the parties to the litigation, which agreement they consider binding on them and those who claim through them.

To me, I hold the considered view that, in view of the fact that consent judgment is a contract whereby new rights are created be-

tween the parties, in substitution for and in consideration of the abandonment of the claim(s) pending before the court, it does not matter whether at the stage in which it was entered, the defendant had filed a defence to the claim(s) of the plaintiff or the plaintiff has filed a defence to a counter claim or that evidence had been called or issues resolved. What matters is the agreement of the parties concerned. (p. 287 A/D)

LAND LAW - Consent judgment - Basis & effect

3. It is therefore my considered opinion that this court affirmed the consent judgment of 1972, subject to the rights of the 6th to 8th defendants, as evidenced in their claims before the court, particularly in survey plan No. CW 649/62 of 20/11/62 and as consented to by all the parties to the consent judgment of 1980. It is therefore clear that, by agreeing to exclude the parcel of land claimed by the 6th – 8th defendants from the large piece or parcel of land in dispute from the consent judgment of 1972, it means that the parties to the consent judgment of 1980, recognised the right of the 6th – 8th defendants to the portion of the land they claimed, as evidenced in survey plan No. CW 649/62 of 20/11/62. (p. 287 G)

ESTOPPEL - Res judicata - Nature and effect

4. What then is the doctrine of res judicata and does it apply to the facts of this case?

It is simple, that once a dispute or matter has been finally and judicially pronounced upon or determined by a court of competent jurisdiction, neither the parties thereto nor their privies can subsequently be allowed to relitigate the matter because, a judicial determination properly handed down, is conclusive until reversed by an appellate court. The veracity of that decision or determination is also not open to a challenge nor can it be contradicted. The doctrine is grounded in public policy which stipulates that there must be an end to litigation as captured in the Latin maxim “ interest rei publicae at sit finis litium.” (p. 288 B)

ESTOPPEL - Res judicata - Conditions

5. For a successful plea of res judicata, this court has decided by a long line of cases, that the following conditions must be established

by the party relying on it:-

(a) that the parties or their privies in both the earlier case and the case in which it is raised are the same;

(b) that the judgment relied upon is valid, subsisting and final;

(c) that the claim or issue in dispute in the proceedings are the same; B

(d) that the subject matter of the litigation in both cases is the same; and,

(e) that the court that decided the previous suit, is a court of competent jurisdiction. (p. 288 E) C

APPEALS - Issue for determination - Essence of

6. It is now settled law, that appeals in this court and also in the Court of Appeal, are now argued on the issues formulated by counsel as arising from the ground(s) of appeal. An issue for determination is simply a combination of facts and circumstances including the law applicable thereto, which when decided one way or the other by the court, affects the fate of the appeal. D

It is sufficient that it will serve no useful purpose for me to proceed to determine the 'issue', as its determination will definitely not enhance the success of the appeal in any way, the issue not being one that arose from a ground of appeal attacking the ratio decidendi of the decision on appeal, which clearly was that from the facts of the case, the doctrine of res judicata does not apply and that the trial court was not in error in so holding. (p. 290 A/H) E F

APPEALS - Grounds of appeal - Purpose of

7. On the other hand, the grounds of appeal from which issues are formulated, attack the defects in the ratio decidendi of the judgment appealed against. However, for an issue or issues arising from the grounds of appeal to be relevant, its resolution in favour of the appellant ought to result in the setting aside of the judgment concerned, else, it is an exercise in futility as it is not every error committed by a lower court that would lead to the judgment being set aside. It is therefore settled law, that a resolution of a properly formulated issue based on a ground or grounds of appeal, which attack the ratio decidendi of the case, will affect the fortune of the appeal one way or the other, since an issue is a question usually a proposition of law or H

fact in dispute or combination of both between the parties, necessary for determination of which will affect the result of the appeal.
(p. 290 B)

NOTABLE POINTS OF INTEREST

B ONNOGHEN JSC

1. The plea of res judicata is a shield and not a sword

The plea of res judicata is however available to a defendant as a shield and not to be employed by a plaintiff as a sword, as the legal effect of its sustenance by the court, amounts to a decision to the effect that the court before which it has been raised, has no jurisdiction to entertain the matter. (p. 288 D)

2. Every decision against counsel is not actuated by malice

A court of law is usually presided over or composed of or constituted by human beings who are prone to making mistakes. In fact, the idea of appeals against the decisions of lower courts, is designed to correct the human errors associated with decision making.

I do not intend to go into a summary of the arguments for and against the issue in question and the nature of the language employed, which I consider very unfortunate of counsel, as it is not right for one to think that every decision given against one, is actuated by malice or bias or ethnicism. (p. 290 F)

F MUNTAKA- COOMASSIE JSC

3. Estoppel - Pleading - Need not be in any form

It is not necessary to plead estoppel in any particular form, so long as the matter constituting estoppel is stated in such a manner as to show that the party pleading relies upon it as a defence or answer.
(p. 300 H)

4. Judgment - Res judicata - Personal action differs from representative action

It is also to be noted that a judgment obtained against a party in his personal capacity cannot constitute res judicata in a judgment action against the party in a representative capacity. I rely on Okukiye v. Akanido (2001)10 WRN 1. However, a judgment obtained by a party in a representative capacity binds every member who falls within the

group or persons represented. (p. 301 A)

REPRESENTATION

Taiwo Kupolati Esq. for the respondents.

No appearance for the appellant who is reportedly sent hearing notice on 3/6/2010.

B

CASES REFERRED TO

Agu v. Ikamba (1991) 3 NWLR (pt. 180) 385

Balogun v. Ode (2007) 4 NWLR (pt. 1023) 1

Ebba v. Igodo (2000) 10 NWLR (pt. 675) 307

Alahija v. Abdullahi (1998) 6 NWLR (pt. 552) 1

Ajiboye v. Ishola (2006) 13 NWLR (pt. 998) 628

Igwegu v. Ezengo (1992) 6 NWLR (pt. 249) 561

Dakubo v. Omomi (1999) 8 NWLR (pt. 616) 647

Ezenwa vs. Kareem (1990) 3 NWLR (pt. 138) 258

Ademola v. Odiese (1990) 1 NWLR (pt. 125) 165

Ogbogu v. Ndiribe 1992 6 NWLR pt. 245 page 40

Alize v. Umaru (2002) FWLR (pt. 121) 2009 at 2030 -203

Dawazi of Dare v. Dagachi of Ebwa (2006) 7 NWLR (pt. 979) 282

C

D

E

STATUTE REFERRED TO

Evidence Act 1990, s. 10

F

LEAD JUDGMENT BY ONNOGHEN JSC

This is an appeal against the judgment of the Court of Appeal, Holden at Lagos in appeal No. CA/L/303/2000 delivered on the 30th day of June, 2003, in which the court dismissed the appeal of the appellant against the ruling of the High Court of Lagos State in suit No. ID/2321/94 delivered on the 18th day of December, 1998.

The respondents as plaintiffs at the trial court, instituted an action against the appellants claiming:

(1) A declaration that the plaintiffs are entitled to the statutory Right of Occupancy in respect of the land in dispute edged blue on the composite plan No. APAT "LA428" 1994 of 29th December, 1994.

(2) N200,000 (Two Hundred Thousand Naira) being damages against the Defendants for trespass. (3) Perpetual Injunction.

Pleadings were duly exchanged between the parties and the matter proceeded to trial, in the course of which the appellant brought an application by way of summons on notice filed on 31st July, 1998, praying the court for the following reliefs:

B “1. *An order striking out the Plaintiffs’ claims as offending the doctrine of res judicata, in that the very matter in issue has been decided by the Supreme Court between the parties or those claiming through them.*

C 2. *An order giving the applicant just a very short date to prove its counter-claim.*”

The judgment of the Supreme Court in appeal No. SC/24/1979, delivered on the 14th day of November, 1980, was exhibited to the summons and marked as Exhibit B in addition to other documents. At the conclusion of arguments on the application, the trial D court held that the principle or doctrine of res judicata does not apply to the facts of the case and dismissed the application, resulting in an appeal by the appellant to the Court of Appeal, the result of which I had earlier stated in this judgment. It is however instructive to note that one of the grounds of appeal, which formed an issue before the E lower court, was an attack on the learned trial judge by way of imputation of improper conduct as a judicial officer.

However, in the instant appeal, learned counsel for the appellant, Tony Anozie Esq., in the appellant brief of argument filed on 7th October, 2005, has formulated the following issues for determination, to wit:- F

G “1. *Whether the 6th - 8th Defendants (the Okokomaiko Community) were parties to the consent Judgment of the Supreme Court of 1980.*

2. *Whether Joinder of issues in the sense of formal statement of claim and statement of defence, is a condition precedent for the binding of a consent judgment on parties.*

H 3. *Whether the consent judgment of the Supreme Court of 1980, found the issue of ownership of the parcel claimed by the 6th - 8th Defendants therein (i.e. Okokomaiko Community) to rest.*

4. *What, in view of the failure of the lower court to resolve the issues of same-ness of:*

(i) *Parties*

(ii) *Subject matter*

(iii) *Claims*

(iv) *Issues*

would be the Supreme Court findings on each of the above issues.

5. *Whether the four page malignation of the Appellant's counsel by the lower court, per Aderemi, JCA is in the manner of exercise of judicial authority in a civil case, when the said counsel substantiated his allegation in the particulars of the relevant ground of appeal and when the trial court's ruling bears the counsel out.*" B

On the other hand, learned counsel for the respondents Taiwo Kupolati Esq., in the respondents' brief of argument filed on 9th March, 2006, formulated two issues for the determination of the appeal. These are: C

"3.1 *Whether the consent judgment of 20 November, 1972, which was affirmed by the Supreme Court on 12 June 1980, as well as the pronouncements of the Supreme Court in that judgment in anyway constitute a judicial affirmation of the title of Okokomaiko Community (6th - 8th defendants by joinder to suit No. HK/25/61: Shonibare II (for himself and the chiefs and people of Iba) v. Ayilara (for himself and the Chiefs and People of Ojo) to the land covered by plan No. CW 649/62 of 20/11/62 or the title of the 3^d defendant, Ataribo family of Okokomaiko Community, to the land in dispute, as to entitle the appellant who purportedly claimed through the 3^d defendant to enter a plea of res judicata to this suit.*" D E

3.2 *Whether the remonstrance of appellant's counsel, Mr. Tony Anozie, by the Court of Appeal following his unproved or unsubstantiated statement in ground 6 of the Notice of Appeal dated 15 June 1999, (page 75 of the record) "that the trial judge is unduly interested in this case" was justified in all the circumstances of this case and in keeping with the duty of court to keep the altar of justice true or whether it was of the nature in which the appellant's counsel could claim to have been maligned by the Court of Appeal.*" F G

I have had to reproduce the simple prayers on the summons on notice, on which the trial court ruled resulting in the appeal before the lower court and the resultant issues arising from the dismissal of that appeal now before this court, to show how a simple matter of application of the doctrine of res judicata to the facts of the case, has degenerated into personal attacks on judicial officers saddled with H

the important responsibility of balancing the scale of justice between contending parties before them. Is it not strange that out of a ruling refusing to apply the doctrine of res judicata to the facts of this case which was affirmed by the lower court, we have five issues for determination!! To me, the only issue for determination is:

B Was there a consent judgment by this court in 1980 and if so whether the principles or doctrine of res judicata apply to the facts of this case or whether the lower courts are right in holding that the principles/doctrine of res judicata do not apply to the facts of this case.

C The question as to whether the lower court maligned the learned counsel for the appellant in its judgment is of no moment as a resolution of same in favour of the appellant will not result in the setting aside of the judgment which was based on the application of the principle or doctrine of res judicata to the facts of the case.

D The above issue has to be constantly kept in mind because we are not engaged in a review of the judgment of the Supreme Court of 1980, as what is decided therein is very clear and unambiguous and secondly that was not the prayer before the trial court resulting in the appeals.

E Turning now to a consideration of the issue in the appeal, it is the submission of learned counsel for the appellant that the 6th - 8th defendants: Okokomaiko Community, were parties to both the 1972 and 1980 consent judgments of the High Court and the Supreme Court respectively; that while the consent judgment of 1972 was made between the plaintiffs therein, i.e. the Oniba of Iba, the Chiefs and People of Iba and the Olojo of Ojo, the Chiefs and people of Ojo, the 1980 Supreme Court consent judgment, was entered between the Oniba of Iba, the Chiefs and people of Iba, the Olojo of Ojo, the Chiefs and People of Ojo, the Odan Parapo Family including 15 the Ado Family and the Okokomaiko Community; that while the 1972 Judgment sought to divide the land in dispute as claimed by the 2nd to 8th defendants, the one of 1980, subtracted the parcels claimed by the 2nd - 5th and 6th - 8th defendants leaving the remainder to be governed by the 1972 judgment; that whereas the 2nd - 5th defendants were not parties to the 1972 judgment, they were to the 1980 judgment; that 6th to 8th defendants were parties to the original suit by joinder but not parties to the 1972 consent judgment; that the

application of the appellant resulting in the instant further appeal was anchored on the consent judgment of 1980; that there is a “tinge of ethnicism” to the lower court holding that the 2nd - 5th and 6th – 8th defendants were not parties to the 1980 judgment particularly as the court, i.e. Supreme Court, included them in the list of parties before it and took their interests in plan NOS. AS/1381/62 and CW/ 649/62 into consideration therein; that when this court stated that issues were not joined between the plaintiffs and 6th-8th defendants, it was referring only to the 1972 consent judgment and not the 1980 judgment and that the issue of joinder of issues cannot be in contention in a consent judgment and that the lower courts were therefore in error in basing their decision on non-joinder of issues; that part of what was decided in the 1980 judgment was the ownership of a parcel of land in plan CW/649/62 which was included in the large piece or parcel of land claimed by the plaintiffs thereby making claims to relate to the same res which was settled by the consent judgment of 1980; that consent judgment is a sui generis, relying on *Vulcan Gases Ltd. v. Env* (2001) 5 S.C (pt. 1) 1 at 22; that parties to the 1980 judgment were ad idem as the settlement was complete and unconditional.

Referring to the decision of the court in the case of *Nkwo v. Uchendu* (1996) 3 NWLR (pt. 434) I and *Olukoga vs. Fatunde* (1996) 7 NWLR (pt. 462) 516, on the conditions which must exist for the doctrine of res judicata to apply to the facts of a case, learned Counsel submitted:

- (a) that the parties in the previous case are the same as the parties in the instant case as they claim through the previous parties;
- (b) that the claims and issue in both cases are the same;
- (c) that the subject matter in controversy or part thereof are the same in the two suits, and,
- (d) that the judgment of the previous court i.e. the 1980 judgment is final; relying on *Abel Woluchem v. Dr. Charles Wokoma* (1974) 38C 153; *In re South American & Mexican Co., Ex parte Bank of England* (1995) I CH 50.

Finally, learned counsel urged the court to resolve the issue in favour of the appellant and allow the appeal.

On his part, learned counsel for the respondents submitted that the relevant consent judgment is not the ruling of 14th Novem-

ber 1980- Exhibit B, but the extract written by Sowemimo, JSC (as he then was) produced at pages 1- 3 of the ruling of Aniagolu, JSC at page 106 of the record. Learned counsel agreed that the 6th - 8th defendants were not parties to the consent judgment of 1972 which was later set aside upon application by the 6th - 8th defendants by the trial court and the Court of Appeal resulting in a further appeal to this court which culminated in the 1980 judgment in which this court held that the consent judgment of 20th November, 1972, between the plaintiff and the 1st defendant should stand; that the judgment does not affect the claims of the Okokomaiko Community i.e. the 6th - 8th defendants as evidenced in plan No. CW/649/62 of 20/11/ 62 and that parties are not to use this agreed settlement for purpose of claiming compensation to be paid by the Lagos State Government which had acquired the land in dispute; that the case of the 6th - 8th defendants remained as claims and untried and therefore cannot constitute *res judicata*; that the consent judgment which was ratified by the Supreme Court excluded the claims of Okokomaiko Community; that the court did not create another consent judgment in 1980 but decided that the “consent judgment of 20/11/72, should stand” subject to the fact that it does not affect the claims of those who were not parties thereto; that it is erroneous to contend that there are two consent judgments, one in 1972 and the other in 1980 particularly as the Supreme Court had no original jurisdiction to enter consent judgment which radically differs in character from the one concluded in the trial court; that the Supreme Court merely affirmed the consent judgment of 1972 with a caveat that it does not affect the claims of the 6th - 8th defendants; that the judgment of 1980 did not confer any title on the 6th - 8th defendants to constitute *res judicata*. Learned counsel urged the court to resolve the issue against the appellant.

In the reply brief filed on 25/4/06, learned counsel after stating that “The Respondents’ brief of argument has no serious response to the conditionalities for *Res Judicata*” yet went on in 22 pages to, in effect, reargue the appeal and stated the claims in the 1980 judgment to the effect “that the judgment does not affect the claims of the Okokomaiko Community, the 6th - 8th defendants”, it “means that the parties to the 1972 consent judgment should subtract the claim of Okokomaiko as represented in plan CW/649/62 of 20/11/

62 (and other claims by other communities) from the larger moiety claimed by IBA Community against Ojo Community before the High Court consent judgment between Iba community and Ojo community could stand,” which meant that Iba Community acceded to the claims of Okokomaiko and others to their claims of title to their parcels; that there were two consent judgments; that a consent judgment being an endorsement of the agreement of parties can be entered at any stage of litigation including the Supreme Court and as such the court has jurisdiction to so enter same.

There is no dispute as to the fact that there was a consent judgment entered by the trial court in 1972, in which the 6th - 8th defendants were not parties to and therefore not bound by it; that the 6th – 8th defendants, whose parcels of land were included in the claims of the plaintiffs in that suit, were not satisfied with the consent Judgment and applied for same to be set aside, which the trial court obliged resulting in an appeal to the Court of Appeal against the order setting aside the said consent judgment which court affirmed the setting aside order; that the affirmation resulted in a further appeal to this court, which culminated in the judgment of 1980 in which this court affirmed the consent judgment of 1972, with a directive that the said consent judgment excludes the claims of the 6th – 8th defendants, as evidenced in survey plan No. CW/649/62 of 20/11/62. Whereas appellant contends that the judgment of this court of 1980 is another consent judgment, the respondents insist that there was only one consent judgment made in 1972 and affirmed by this court in 1980. The reason for appellant insisting that there are two consent judgments are as stated in the reply brief at page 4 inter alia, as follows:-

“In answer to paragraph 4.30 of the Respondents brief, I emphasise that there are two consent judgments. One in 1972 and the other in 1980. It was in respect of the consent judgment of 1980 that the Supreme Court said:

“The parties before us upon whose consent the said Judgment was given”

The question is which of the two versions is correct? The answer is contained in Exhibit B attached to the affidavit in support of the summons on notice. It is the ruling of Aniagolu, JSC delivered on

14th November, 1980. It opens with the following:

"On 12th June, 1980, this court, upon consent of the parties, delivered a consent judgment in the above case which came on appeal to the court from the judgment of the Federal Court of Appeal. The details of the consent judgment (hereinafter simply referred to as the consent judgment) were as contained in the judgment of this court.....

..... The parties before us upon whose consent the said judgment was given, were the chiefs and people of Iba; the chiefs and people of Ojo; the Odan Parapo family which included the Adu family whose members were represented by different counsel, and the Okokomaiko Community...."

Emphasis supplied by me.

It is clear from the above that apart from the consent judgment of 1972, to which the 6th – 8th defendants were not parties, there was another consent judgment by the Supreme Court entered in June, 1980.

The said consent judgment of this court made in 12th June, 1980 and the order made therein are in the following terms:

"JUDGMENT

This case was instituted in 1961 and the judgment of the Federal Court of Appeal came before us in 1980, that is 19 years after the "institution of the case in the court of first instance i.e. the High Court Ikeja. At the court of first instance, the 2nd to 5th defendants i.e. the Odan Parapo family (including Adu family), who are the 1st respondents before us; the 6th to 8th defendants, the Okokomaiko Community, who are the 2nd respondents before us properly made an application at the Ikeja High Court to be joined to the suit. The court of first instance granted the application but failed in its order to comply with the Western Region High Court (Civil Procedure) Rules 1958, order 7 rules 11 and 12 which made it mandatory that the order to be; made by the court should be that the writ of summons be amended as well as the pleading so as to include the claims which the two sets of respondents who were later joined, but the court of first instance only asked that the two sets of defendants should be served with the original writ of summons and statement of claim filed by the plaintiffs, within 14 days and that the defendants joined should file defence within specified number of days. The plaintiff therefore served

the writ of summons and statement of claim, which is against the 1st defendant alone (not before us) and the result was that at the close of pleadings, there was no issue joined between the plaintiff and the 2nd to 8th defendants, and the defence purported to be filed by the 1st to 5th and 6th to 8th defendants who were joined were not defences at all but claims. The result was that on the 20th of November, 1972, when the High Court of Ikeja made an order to the effect that the settlement of the case and the terms of settlement filed in the Ikeja High Court be treated as a consent judgment between the plaintiff, the Guiba of Iba etc., and the 1st defendant, Olojo of Ojo etc., that was the only judgment that could be given, taking into consideration that the court had erroneously excluded the 2nd to 8th defendants from filing proper statements of defence when the writ of summons and statement of claim of the plaintiff were later amended. Therefore, the ruling of the High Court Ikeja dated the 20th of July, 1974, was made without jurisdiction and so also the purported appeal to the Federal Court of Appeal. “ Judgment of which was given on the 20th of July, 1970, cannot also stand. In the circumstances of this case therefore, the parties have agreed to settle the matter and agreed to this order. ORDER OF COURT

It is hereby ordered that the consent judgment given on 20th of November, 1972, between the plaintiff and the 1st defendant should stand, subject however that the judgment does not affect the claims of the 2nd to 5th defendants i.e. the Odan Parapo family (Adu family included) and the Okokomaiko community, the 6th to 8th defendants. The plan of the land which they are claiming are delineated in plans Nos. AB 2381 of 23/8/62 (Odan or Ado Family) Parapo and CW 649/62 of 20/11/62 Okokomaiko community. The ruling and costs awarded on the 20th of July, 1974, by the High Court Ikeja are hereby set aside and judgment and costs ordered by the Federal Court of Appeal on 20th July, 1978, are hereby set aside and all costs be refunded to the plaintiff if they had been paid. We make no order as to costs and parties before us should bear their own expenses. The appeal before us is therefore allowed, subject to the above qualifications. The parties are not to use this agreed settlement for purposes of claiming compensation to be paid by the Lagos State Government which had acquired the land in dispute.

(Sgd.) (C. S. SOWEMIMO)

JUSTICE, SUPREME COURT.”

Emphasis supplied by me.

The court went further to state in the ruling of 14th November, 1980, thus:

B *“The parties before us upon whose consent the said judgment was given were the chiefs and people of Iba; the Chiefs and people of Ojo; the Odan Parapo family which included the Ado family whose members were represented by different counsel, and the Okokomaiko Community....”*

C Emphasis supplied by me.

I agree with the submission of learned counsel for the appellant that whereas the consent judgment of 1972, included the parcels of land of parties to the suit who were not parties to the consent judgment, that of 1980, in which 6th - 8th defendants were party subtracted from the totality of the land, subject matter of the consent judgment of 1972.

E The issue is the legal effect of the agreement of the parties to the subtraction of the parcel of land of the 6th - 8th defendants from the large piece of land, subject matter of the consent judgment of 1972. It is the case of the appellant that by the court excluding the parcel of land claimed by the 6th - 8th defendants from the judgment of 1972, it means that the parties to the consent judgment of 1980, recognised the right of the 6th - 8th defendants to the portion or parcel of the land they laid claim to in their plan.

F On the other hand, the respondents contend that since the claims of the 6th – 8th defendants were untried, their title to the portion remained un-established and as such the judgment cannot constitute res judicata. In fact, the substance of the appeal depends on the resolution of the issue as to the legal effect of the order of this court excluding the parcel of land claimed by the 6th - 8th defendants from the consent judgment of 1972, which the court affirmed. It should however be pointed out that there is no evidence on record that the case of the plaintiff and the 1st defendant went into full trial before the consent judgment of 1972, which was affirmed by this Court in June, 1980 was ever entered into. There is no clear evidence as to the stage in which the proceedings in that suit had reached before the said consent judgment was entered between the parties concerned.

To me, the answer to the poser lies in the understanding of the nature of consent judgments. **Consent judgments are not like the regular judgments of the court, entered after a trial conducted by the court either summarily or upon full trial. It is not dependant upon exchange of pleadings or calling of evidence and/or address of counsel. In fact, there is no stage in the proceedings where the law requires a consent judgment to be entered as the same can be entered at any stage in the proceedings, because it is simply based on agreement between the parties to the litigation which agreement they consider binding on them and those who claim through them.** As held by this court in the case of Woluchem v. Wokama (1974) 3 SC 153.

“The rule is that action may be settled by consent during the trial, usually such settlement is a compromise and in order to have a binding effect on the parties, it is imperative that it should have the blessing of the court. Settlement between parties may be described as a contract whereby new rights are created between them in substitution for, and in consideration of, the abandonment of the claim or claims pending before the court. When the court moves and takes action as agreed upon by the parties, it becomes a consent judgment.”

Emphasis supplied by me.

To me, I hold the considered view that in view of the fact that consent judgment is a contract whereby new rights are created between the parties, in substitution for and in consideration of the abandonment of the claim(s) pending before the court, it does not matter whether at the stage in which it was entered, the defendant had filed a defence to the claim(s) of the plaintiff or the plaintiff has filed a defence to a counter claim or that evidence had been called or issues resolved. What matters is the agreement of the parties concerned.

It is therefore my considered opinion that this court affirmed the consent judgment of 1972, subject to the rights of the 6th to 8th defendants as evidenced in their claims before the court, particularly in survey plan No. CW 649/62 of 20/11/62, and as consented to by all the parties to the consent judgment of 1980. It is therefore clear that, by agreeing to exclude the parcel of land claimed by the 6th – 8th defendants

from the large piece or parcel of land in dispute from the consent judgment of 1972, it means that the parties to the consent judgment of 1980, recognised the right of the 6th – 8th defendants to the portion of the land they claimed, as evidenced in survey plan No. CW 649/62 of 20/11/62.

B What then is the doctrine of res judicata and does it apply to the facts of this case?

It is simply that once a dispute or matter has been finally and judicially pronounced upon or determined by a court of competent jurisdiction, neither the parties thereto nor their privies can subsequently be allowed to relitigate the matter because a judicial determination properly handed down is conclusive until reversed by an appellate court. The veracity of that decision or determination is also not open to a challenge nor can it be contradicted. The doctrine is grounded in public policy which stipulates that there must be an end to litigation as captured in the Latin maxim “*interest rei publicae at sit finis litium.*”

E The plea of res judicata is however available to a defendant as a shield and not to be employed by a plaintiff as a sword as the legal effect of its sustenances by the court amounts to a decision to the effect that the court before which it has been raised has no jurisdiction to entertain the matter.

F For a successful plea of res judicata, this court has decided, by a long line of cases that the following conditions must be established by the party relying on it:-

(a) that the parties or their privies in both the earlier case and the case in which it is raised are the same;

G (b) that the judgment relied upon is valid, subsisting and final;

(c) that the claim or issue in dispute in the proceedings are the same;

H (d) that the subject matter of the litigation in both cases is the same; and,

(e) that the court that decided the previous suit, is a court of competent jurisdiction.

See Agu v. Ikamba (1991) 3 NWLR (pt. 180) 385; Ebba v. Igodo (2000) 10 NWLR (pt. 675) 307; Ajiboye v. Ishola (2006) 13

NWLR (pt. 998) 628; Fadiora vs Gbadebo (1978) 3 SC 219; Ekpose v. Osiolo (1978) 6-7 SC 187; Ezenwa vs Kareem (1990) 3 NWLR (pt. 138) 258; Ademola v. Odiese (1990) 1 NWLR (pt. 125) 165; Chukura v. Ofochebe (1972) 12 SC 189 etc.

Has the appellant met the above pre-conditions for the application of the doctrine of res judicata? Does res judicata apply to consent Judgments? B

On parties, it is not in doubt that the 6th - 8th defendants, Okokomaiko Community through whom appellant claims, were parties to the 1980 consent judgment of this court as earlier found and held in this judgment. The plaintiffs in this case are members of Iba Town who were the plaintiffs who submitted to the consent judgment of 1980, while the appellant bought the land in dispute in the instant case from Atariobo family who is a claimant to Okokomaiko land - see Exhibits B at pages 7 and 25 of the record of appeal. C D

With respect to the claims and/or issues subject of the litigation, it is clear that the instant suit is for declaration of a right of occupancy over part of the land in plan No. CW/649/62 which the plaintiffs claim as customary landlords, the same claim is before this court - see page 10 of Exhibit B where this court stated that: E

“The action was brought by the plaintiff in that suit in a representative capacity claiming that the Defendants in that suit were their customary tenants - a contention which the Defendant stoutly denied.”

From the survey plan, Exhibit H at pages 46 - 48 of the record, it is clear that the subject matter of the instant claim is within Exhibit E and in the composite plan, Exhibit C at page 30 of the record. F On the finality of the consent judgment of 1980, it is very clear that the judgment is of a court of competent jurisdiction and that it is final. G It is a judgment based on the agreement of the parties to the litigation entered by a court of competent jurisdiction before whom the claim(s) was pending.

On the second issue which is appellant's issue 5, which is as follows:- H

“Whether the four page malignation of the Appellant's counsel by the lower court, per Aderemi, JCA is in the manner of exercise of Judicial authority in a civil case, when the said counsel substantiated his allegation in the particulars of the relevant ground of appeal

and when the trial court's ruling bears the counsel out. ”

It is now settled law that appeals in this court, and also in the Court of Appeal, are now argued on the issues formulated by counsel as arising from the ground(s) of appeal. An issue for determination is simply a combination of facts and circumstances including the law applicable thereto which when decided one way or the other by the court, affects the fate of the appeal.

On the other hand, the grounds of appeal from which issues are formulated attack the defects in the ratio decidendi of the judgment appealed against. However, for an issue or issues arising from the grounds of appeal to be relevant, its resolution in favour of the appellant ought to result in the setting aside of the judgment concerned, else, it is an exercise in futility as it is not every error committed by a lower court that would lead to the judgment being set aside. It is therefore settled law, that a resolution of a properly formulated issue based on a ground or grounds of appeal which attack the ratio decidendi of the case, will affect the fortunes of the appeal one way or the other since an issue is a question, usually a proposition of law or fact in dispute or combination of both between the parties, necessary for determination of which will affect the result of the appeal.

The question is, in view of the position of the law supra, will a resolution of the above issue in favour of the appellant result in the setting aside of the judgment of the lower court entered on the principle or doctrine of res judicata? A court of law is usually presided over or composed of or constituted by human beings who are prone to making mistakes. In fact, the idea of appeals against decisions of lower courts is designed to correct the human errors associated with decision making.

I do not intend to go into a summary of the arguments for and against the issue in question and the nature of the language employed, which I consider very unfortunate of counsel, as it is not right for one to think that every decision given against one is actuated by malice or bias or ethnicism. ***It is sufficient that it will serve no useful purpose for me to proceed to determine the ‘issue’ as its determination will definitely not enhance the success of***

the appeal in any way, the issue not being one that arose from a ground of appeal attacking the ratio decidendi of the decision on appeal, which clearly was that from the facts of the case, the doctrine of res judicata does not apply and that the trial court was not in error in so holding.

In conclusion, however, I find merit in the appeal which is hereby allowed by me. The judgments of the lower courts are hereby set aside and the summons on notice of the appellant filed on 31st July, 1998, is hereby ordered as prayed with costs assessed at N10,000 at the trial court, N30,000 at the lower court and N50,000 in this court.

MUKHTAR JSC

I have read in advance, the lead judgment delivered by my learned brother, Onnoghen JSC, and I am in full agreement with him that the appeal has substance and deserves to succeed. In the High Court of Lagos State, the appellant, who was the defendant applied for an order striking out the plaintiffs' claim as offending the doctrine of Res Judicata in that the very matter in issue has been decided by the Supreme Court between the parties or those claiming through them. The learned trial judge after considering the submissions of counsel found no basis for the application, and dismissed it. I believe the learned judge was wrong to dismiss it, for if she had painstakingly studied the materials before her, she would have realized that the issue of res judicata should have succeeded, as indeed the principle of the defence of res judicata was met. See *Ogbogu v. Ugwuegbu* 2003 10 NWLR part 827, page 189, and *Ogbogu v. Ndiribe* 1992 6 NWLR part 245 page 40. This has been amply enunciated in the lead judgment. In effect, the Court of Appeal also erred by affirming the ruling of the court of first instance. I also allow the appeal, and set aside the ruling and judgment of the lower courts. I abide by the consequential orders made in the lead judgment.

MUHAMMAD JSC

I read in advance the judgment of my brother, Onnoghen, JSC. I agree with his reasoning and conclusion that the appeal is full

of merit and should be allowed. I allow the appeal. I abide by all consequential orders made in the leading judgment including order on costs.

B

MUNTAKA-COOMASSIE

The respondents, who were the plaintiffs at the trial High Court of Lagos, claimed the following reliefs in their writ of summons:-

C i) A DECLARATION that the plaintiffs are entitled to Statutory Right of Occupancy in respect of the land in dispute edged blue in the composite plan No. APAT/LA/428/1994 of 29th December, 1994.

D ii) N200,000.00 (two hundred thousand Naira) being damages against the defendant for trespass on the piece or parcel of land situate, lying and being at Igbo-Elerin Village Okokomaiko, Badagry Local Government Area and contained in plan. APPAT/LA/428/1994 of 29th December, 1994.

E iii) PERPETUAL INJUNCTION restraining the defendant, its servants, agents and privies from further entering upon or committing any further act of trespass on the said land. In response, the appellants, who were the defendants at the trial court, filed a summons on notice, in which they prayed for the following:-

F “1) *AN ORDER striking out the plaintiffs’ claims as offending the doctrine of Res Judicata in that the very matter in issue has been decided by the Supreme Court between the parties of those claiming through them.*

2) *AN ORDER giving the applicant, just a very short date to prove its counter-claim.*

G 3) *AND FOR such further order and/or orders as this honourable court may deem fit to make in the circumstances”.* The motion was supported by an affidavit the relevant averments in the said affidavit are herewith reproduced:-

H “2. *that the writ of summons hereto attached and marked Exhibit A, the plaintiff claimed to sue” for themselves and as representatives of Ashaille family of Iba town.*

3. *that the first plaintiff witness, one Mr. Laidi, a younger brother of the 1st plaintiff, admitted in cross-examination that he knew of the consent judgment and ruling of the Supreme Court in suit No. SC.*

24/1979 whereof is hereto attached and marked Exhibit B.

4. that the said consent judgment and ruling were in respect of suit instituted by the chiefs and people of Iba Badagry division of which Ashailla family and the plaintiffs are members.

5. that at page 3 of the lead ruling of Justice Aniaogolu JSC, the learned justice stated:

“The parties before us upon whose consent the said judgment was given were the people of Ojo Re Odun Perapo family, which included the Ado family whose members were represented by different counsel and the Okokomaiko family”

6. that at page 3 of justice Obaseki’s ruling, the learned justice said:-

“the hearing of the appeal had concluded on the 2nd of June, 1980 and counsel had agreed on the consent order to be made in appeal”.

7. the leading counsel who had agreed on the consent order referred to in six supra are:-

1. Chief F. R. A. Williams SAN for Iba Community

2. D. A. Agosto Esq., - for Odan Parapo family

3. S. A. Bashua Esq., - for Ado family

4. Dele Aroniya Esq., - for Okokomaiko family

8. that the said consent judgment of Justice Sowemimo JSC is at page 3 of Exhibit B.

9. that on the said judgment all the parties consented to respect the right of ownership of Okokomaiko community to the parcel of land as presented in plan No. CW/649/12/ of 20/11/02.

10. that the parcel of land the subject matter of this suit is clearly within plan or CW/649/42 of 20/11/02 as per the composite plan hereto attached and marked Exhibit C.

11. that the plaintiffs are claiming the whole of Okokomaiko to be theirs as the customary landlords of Okokomaiko Community in spite of the consent judgment of the Supreme Court as agreed - upon by Chief F. R. A. Williams SAN for Iba Community”

The respondents filed a counter-affidavit and the averments germane to the application are herewith reproduced as follows:-

“7. that I have read the judgment of the Supreme Court in suit No. SC/24/1979 annexed as Exhibit in this application.

8. That my counsel informs me and I verily believe that the

said judgment is also reported as *Alhaji Raimi Edun V. Odan Community, Ado family and Okokomaiko community* on page 210 of volume I of 1998 *All Nigerian Law Reports*.

9. That the suit is different in form and content from suit SC 24/1979.

B 10. that I verily believe that it is necessary to explain the nature and content of the said judgment Exhibit B is from pages 1 - 4 as follows:-

a) the suit was commenced in 1996 at the Ikeja High Court of Justice.

b) the original parties to the suit were chiefs and people of Iba represented by Gbadomosi Amodu Sonibare II as plaintiffs and people of Ojo represented by Bello Ajilara as defendants.

c) that family of Odan Parapo including Ado family and D Okokomaiko community later applied to be joined and were joined at the High Court.

d) However the high court did not comply with the applicable rules in that it failed to order an amendment of the writ of summons and the statement of claim.

E e) this portion did not permit the Odan family and the Okokomaiko community to become proper parties as to enable them file proper statement of defence and as such their interest was neither considered nor determined by the court".

F "11. that I am informed by my counsel and I verily believe him that neither the plaintiffs nor the defendants in the present suit were parties to suit No. SC/24/1979.

G 12. that my counsel also informed me and I verily believe him that the Supreme Court has declared in the said judgment that the consent judgment does not affect the claims of the parties joined by the order of court, the Odan Parapo family and the Okokomaiko family whose interest were not adjudged upon as they did not file appropriate pleadings in the suit".

H The Defendants/Appellants also filed a further affidavit, where it was deposed to in paragraph two (2) thus:-

"That in order to show that the representative of Okokomaiko, that is the 6th to 8th defendants/respondents in the Supreme Court with all members of Akaribo family and that the defendants of Akaribo family are the Chiefs of Okokomaiko land, as per the Supreme Court

Judgment, copies of a power of attorney of 30/7/76, a conveyance for one Aremu Clegg dated 2/8/63, out of the moiety represented in Exhibit A and the conveyance to the 1st defendant out of the moiety are hereto attached and marked Exhibit F, C and N”.

Both parties filed written submissions on the application, and in his ruling dated 18/12/98, the trial judge refused the application. B
The learned trial judge in his conclusion held as follows:-

“As rightly stated by the learned counsel for the defence, quoting from Nkwo v. Uchendu (1996) 3 NWLR (pt. 414) 1, the conditions that must exist to sustain a plea of Res Judicata are:

- 1) The parties must be the same.*
- 2) The claim and the issues are the same.*
- 3) The subject-matter in controversy is the same.*
- 4) The judgment of the previous court must be final and by a court of competent jurisdiction.* C

In the instant case however, neither the claim nor the issues in both cases are the same, even though the parties in the present case were incorporated in the former case, their rights were not determined as by the holding of the Supreme Court, issues were not joined. Their purported defences were their only claims. I accordingly dismiss the application of the defendants. I also order that the order for accelerated hearing made by me is hereby rescinded as I find that rather than the parties take advantage of this concession by the court have instead engage (sic) in one application after the other.....”. D

Dissatisfied with ruling of the trial court, the defendants unsuccessfully appealed to the Court of Appeal Lagos division, hereinafter called the lower court. After hearing the parties on the appeal, the lower court affirmed the decision of the trial court, and dismissed the appeal. The Appellant has further appealed to this court by a notice of appeal dated 10th day of July, 2003. E

In accordance with the rules of this court, both parties filed and exchanged their respective briefs of argument. The appellant in its brief of argument formulated five (5) issues for determination as follows:- F

- 1) Whether the 6th - 8th defendants (the Okokomaiko Community) were parties to the consent judgment of the Supreme Court of 1980. H

- 2) Whether joinder of issues in the sense of formal statement

of claim and statement of defence, is a condition precedent for the bindingness of a consent judgment on parties.

3) Whether the consent judgment of the Supreme Court of 1980, laid the issue of ownership of the parcel claimed by the 6th - 8th defendants thereon (I dest(*sic*) Okokomaiko Community) to rest.

B 4) What, in view of the failure of the lower court to resolve the issues of sameness of:-

i) Parties

ii) Subject-matter

C iii) Claims

iv) Issues

would be the Supreme Court findings on each of the above issues.

5. Whether four page malignation of the Appellant's counsel D by the lower court, per Aderemi JCA, is in the manner of exercise of Judicial authority in a Civil case, when the said counsel substantiates his allegation in the particulars of the relevant ground of appeal and when the trial court's ruling bears the counsel out.

E Whilst the respondents' counsel in his brief of argument distilled two (2) issues for the determination as follows:-

1. Whether the consent judgment of 20th November, 1972, which was affirmed by the Supreme Court on 12 June, 1980, as well as the pronouncements of the Supreme Court in that judgment in any way constitutes a judicial affirmation of the title of Okokomaiko F Community 6th - 8th defendants by joinder to suit No. HK/25/61 - Shomibare II (for himself and the Chief of and People of Ojo) to the land covered by plan No. CW649/62 of 20/11/62 or the title of the 3rd defendant, Atariobo family of Okokomaiko Community to the G land in dispute, as to entitled the appellant who purportedly claimed through the 3rd defendant to enter a plea of *res judicata* to this suit.

2. Whether the remonstrations of the appellant's counsel Mr. Tony Anozie by the Court of Appeal following his un-proven or unsubstantiated statement in ground 6 of the notice of appeal dated H 15th June, 1999 (page 15 of the Record) that the trial Judge is unduly interested of this case, was justified in all the circumstances of this case and in keeping with the duty of court to keep the altar of justice pure or whether it was of the nature in which the appellant's counsel could claim to have been maligned by the Court of Appeal.

At the hearing of the appeal the learned counsel to the Appellant adopted his brief of argument and urged this court to allow the appeal. Learned counsel to the Appellant submitted on his issue No. I that the 6th - 8th defendants i.e. Okokomaiko community were parties to the consent judgment of the Supreme Court 1980. He referred to the judgment of Justice Aniagolu JSC, where it was held that parties before us upon whose consent the said judgment was given were - IBA, OJO, ODAN/ADO, and Okokomaiko. He pointed out that once 6th - 8th defendants were joined by a competent court and there was no order of any court divesting them of the same parties, they continued to be parties to the suit.

On the third issue, learned counsel submitted that the consent judgment of the Supreme Court of 1980, laid issue of ownership of the parcel claimed by the 6th - 8th defendants therein (id est, Okokomaiko community) to rest. He further submitted that the finality of the judgment is underscored by the interpretation of it under the canons of interpretation and a consideration of facts under section 10 of the Evidence Act, 1990. Consent judgment being a contract between the parties has three cardinal characteristics viz. offer, consideration and acceptance and this can be found in IBA community, according to the claim of Okokomaiko and Odan Parapo/Ado family, for their withdrawal of opposition to the 1972 High Court consent judgment between Iba Community and Ojo community. Counsel referred to the cases of:

WOLUCHEM v. WOKOMA (1974) 3 SC 153;

RE SOUTH AMERICAN & MEXICAN CO. EXPARTE BANK OF ENGLAND (1895) 1 CH at 50;

SHELL TRUSTEES (NIG) LTD. vs. IMANI & SONS LTD. (2006) 6 NWLR (PT. 662) 641 at 670.

On issue No 4, learned counsel submitted that Exhibit A at page showing the plaintiffs and the defendants in the present case, Exhibit B page 7, shows the parties in the previous suit, that the Iba Community, in whose behalf the plaintiffs before the Supreme Court submitted to the consent judgment. That the 1st defendant/Appellant bought the land, the subject matter from Atariobo family, and by the application for joinder, the 6th - 8th defendants represented Okokomaiko community.

On the subject matter, counsel referred to the plan attached,

Exhibit 4 shows the subject matter of the present claim to be within Exhibit E i.e. the moiety claimed by the Okokomaiko community and acceded to by the IBA Community in the Supreme Court judgment.

B On the issue No 5, counsel submits that his malignation by the lower court in its judgment is not in the manner of exercise of judicial authority, when he substantiated his allegation on the particulars of the relevant ground of appeal and when the trial court's ruling bears him out.

C Appellants applied to make fresh issue of jurisdiction on the ground that the plaintiffs lack of locus standi and competency of the suit. (*sic*) Counsel referred to section 54 of 1972 and 1980 as conclusive proof as against parties and privies.

D It was also submitted that the suit was not commenced in compliance with the provisions of order 4 and 10 of (the Lagos State Civil Procedure) Rules, 1994.

E Learned counsel to the Respondents also adopted his brief of argument and urged the court to dismiss the appeal. In arguing his issue No I, learned Counsel submitted that the relevant consent judgment to this appeal is not the ruling of 14/11/80 attached as Exhibit B, but the extract written by Sowemimo SC produced on pages 1 - 3 of the ruling. The original parties to the suit were Gbadomosi, Shonibare (for chief and people of Iba) and Bello Ayilara for chief and peoples of Ojo) it was a dispute on land which whole land was F acquired by the Lagos State Government. Although Okokomaiko community (to which the 3rd defendant belongs) was joined to the original suit, they were served with the un-amended original process served. Hence the Okokomaiko community i.e. 6th - 8th defendants G did not join issue as no statement of defence was filed - they only filed claims which were not tried, thus the 6th - 8th defendants were not party to the consent judgment, which they applied to set aside, both the High Court and the lower court set same aside. It was the appeal against the judgment of the Court of Appeal that led to the H Exhibit B, i.e. the consent judgment of the Supreme Court. He therefore submitted that the 6th - 8th defendants were not part of the consent judgment. The Supreme Court only affirms the consent judgment of 20/11/72.

On the issue No II, learned counsel submitted that the lower

court was right in the malignment of the counsel who accused the trial Judge of undue interest in the matter as there was no proof of such interest, he cited the case of *Alize v. Umaru* (2002) FWLR (pt 121) 2009 at 2030 - 2031.

Learned counsel opposed the notice to apply for leave to raise new points not raised at the lower court. He submitted that the issue of locus standi is by no means a different cause of action from res judicata while issues of res judicata are always determined after due trial, issue of locus standi can be determined on the pleadings. He cited in support the case of *Araka v. Ejeagwu* (2001) FWLR (pt 36) 830 at 859; and *Attorney-General Oyo State v. Fairlakes Hotels Ltd.* (1988) 5 NWLR (pt. 92) 1 at 29.

The Appellant filed reply brief, which is a further expatriation of the points already argued in the main appellant's brief.

The ruling of this court dated 14/12/1980, was in respect of the application filed by Chief Kahinde Sofola SAN, of blessed memory, for the chiefs and people of Iba seeking to set aside the consent judgment entered by this court on 12/6/80. Extracts from the decision of the court dated 12/6/80, the following can be seen: -

"At the court of first instance, the 2nd to 5th defendants i.e. the Odan Parapo family (including Ado family) who are the 1st respondents before us, the 6th -8th defendants the Okokomaiko community, who are the 2nd respondents before us, properly made an application at the Ikeja High Court to be joined to the suit. The court of first instance granted the application but failed on its order to comply with the Western Region High Court Rules..... The plaintiff therefore served the writ of summons and statement of claim which is against the 1st defendant alone, (not before us) and the result was that at the close of pleadings there was no issue joined between the plaintiff and the 2nd to 8th defendants and the defence purported to be filed by the 1st to 5th and 6th to 8th defendants who were joined were not defences at all but claims".

ORDER OF COURT

"It is hereby ordered that the consent judgment given on 20th of November, 1972, between the plaintiff and the 1st defendant should stand subject however that the judgment, does not affect the claims of the 2nd -5th defendants i.e. the Odan Parapo family (Odan family included) and the Okokomaiko community the 6th to 8th defendants.

The plans of the land which they are claiming delineated in plan area 1381 of 13/1/62 (Odan or Ado family) Parapo and CW 649/62 of 20/11/62 Okokomaiko community..... ”.

From the order, it is clear that it is only the claims of 2nd to 5th defendants i.e. Odan Parapo family (Odan family included) and Okokomaiko community the 6th to 8th defendants were excluded but all the parties were bound by their consent judgment, as it relates to the claims between the plaintiff and defendant, as they are parties to the proceedings. This was duly explained by this court in its ruling as follows per Aniagolu JSC:-

“the parties before us upon whose consent the said judgment was given, were the chiefs and people of Iba, the chiefs and people of Ojo, the Odan Parapo family which the Ado family whole members were represented by different council, and the Okokomaiko family, the suit originally taken out in the High Court was between the chiefs and people of the Iba represented by Gbadomosi Amodu Shonibare II and the chiefs and people of Ojo represented by Bello Ayilara. The family of Odan Parapo (including Ado) and the Okokomaiko Community later applied to be joined, and were joined in the High Court”.

The parties in the instant case do not dispute the fact that the parties in the present case are privies or agents of the parties in the consent judgment of this court delivered on 12/6/80. The only issue in dispute is whether the plaintiff's claim in the present case was covered by the “consent judgment”.

It is trite, my Lords, that before the doctrine of Res judicata could apply to a case, the following must exist:

- a) The parties must be the same in the case or their privies;
- b) The subject matter must be the same;
- c) The issue in both cases must be the same, and
- d) The judgment of the previous court must be final.

See the following decided cases:-

- i) Balogun v. Ode (2007) 4 NWLR (pt. 1023) 1
- ii) Dawazi of Dare v. Dagachi of Ebwa (2006) 7 NWLR (pt. 979) 282.
- iii) Igwegu v. Ezengo (1992) 6 NWLR (pt. 249) 561
- iv) Dakubo v. Omomi (1999) 8 NWLR (pt. 616) 647

It is not necessary to plead estoppel in any particular form, so

long as the matter constituting estoppel is stated in such a manner as to show that the party pleading relies upon it as a defence or answer. See *Alahija v. Abdullahi* (1998) 6 NWLR (pt. 552) 1; *Ebba v. Ogodu* (2008) 6 SC (pt. 1) 33.

It is also to be noted that a judgment obtained against a party in his personal capacity cannot constitute *res judicata* in a judgment action against the party in a representative capacity. I rely on *Okukiye v. Akanido* (2001) 10 WRN 1. However, a judgment obtained by a party in a representative capacity binds every member who falls within the group or persons represented.

As I have earlier stated in this judgment that the only issue in this case, is the subject matter covered by the 'consent judgment'. The Appellant strongly submitted that the present suit is for the ownership of the parcel of land, part of which is contained in plan W/649/62, based on the issue of customary tenancy and in respect of which two members of Iba community have come to simply re-enact the claim over part of the res in the previous case as customary land lords. Counsel referred to Exhibits H and E as the moiety claimed by the Okokomaiko community and acceded to by Iba community. The respondents' counsel was busy contesting that Okokomaiko community was not bound by the consent judgment without actually addressing the issue of the subject matter which is the main issue.

The Appellants exhibited two Exhibits C and E - composite plan which were referred to in the consent judgment which showed that the subject matter is still the same. It has no relevance to the claims of Okokomaiko, which were not affected by the consent judgment as clearly stated in the consent judgment. As long as the part of the claims in this case concerns the claim of Iba community which formed the basis of the 'consent judgment' of this court, that part of the claim is caught by the doctrine of estoppel per rem *judicata*.

On the second issue of malignment of counsel, it is my respectful view that to allege that a judge has taken side in a case by way of bias or interest, is a very serious allegation. The fact that a judge erred or committed a grave error in the determination of a matter is not a *prima facie* evidence of bias. There must be clear hard evidence in the record to back or prove the allegation of bias. Appellate courts were established to review or hear a matter decided by the lower courts in order to determine the correctness or otherwise of the deci-

sion. See *Alize v. Umaru* (2002) FWLR (pt. 121) 2009 at 2030 -203. The Appellant’s counsel in this case went further to attack the learned justices of the lower court over an alleged “ethnic solidarity” that day would not come where the decisions of our courts would be based on “ethnic solidarity” it is my prayers anyway. I think the Appellant’s
 B counsel did not exercise any restraint in making this wild allegation, which is not only dangerous but capable of eroding the oneness (and confidence) in our judiciary, which to a very large extent has bridged the gap (or differences) among Nigerians. Judiciary is correctly re-
 C garded as the last hope of a common man. A day a Nigerian would believe he would obtain justice by reason of the ethnic background of the presiding judge, would mark the beginning of the collapse of our judicial system. What is constant in our judicial system is justice and not ethnicity or tribalism.

D My Lords, I have carefully gone through the records of proceedings and it is my opinion that the lower court was right in cautioning the appellant’s counsel in the way and manner he tried or attempted to erase the public confidence in our judiciary. I say no more on the issue of malignation of the learned counsel by the lower
 E court. I think this issue is no longer a live one.

I was opportuned to read before now, the illuminating judgment of my learned Lord Walter Onnoghen JSC with which I am in agreement. For the above little contribution of mine and the elaborate reasons by my learned brother, I too hold that the appeal is
 F pregnant with a lot of merits and same is hereby allowed. I have no reasons to disagree with the comments of my learned bother in the leading judgment vis-a-vis the alleged malignation of the said counsel. I abide by the consequential orders of my learned brother. I also
 G endorse the orders as to costs.

Appeal allowed.

H