

SUPREME COURT OF NIGERIA

15TH APRIL, 2011. SC. 24/2002

**CORAM:- A. M. MUKHTAR, W. S. N. ONNOGHEN, J. A.
FABIYI, S. GALADIMA, B. RHODES-VIVOUR, JJSC**

1. BOSINDE AYUYA
 2. AKIMIS AKEMEYAI ZUOKUMOR
 3. YOUNBAI OGBE APPELLANTS/
 4. HUMPHREY CROSS RESPONDENTS
 - TEBE-OWEI PULLAH
 5. EGENA BRISIBE
 - (For themselves and on
behalf of OJOBO Community)
 - AND
 1. CHIEF NAGHAN YONRIN
 2. AMADU ODOGHA AYABEKE
 3. CHIEF PALMER EKPEFA RESPONDENTS/
 4. PRINCE KEREMA PERETUBO APPELLANTS
 - (For themselves and on behalf of
TORUGHENE COMMUNITY)
-

LAND LAW - Title - Proof - Standard of proof required is on the preponderance of evidence - Appellants herein have the burden to prove that the said boundary extends over surrounding land and bushes - As pleaded by them - Which they discharged (H1)

ESTOPPEL - Res Judicata plea - To succeed party raising it must inter alia establish - Sameness of parties, issue and subject matter (H2)

ESTOPPEL - Res judicata - Jurisdiction - Successful plea of res judicata means that - The court is without jurisdiction to hear the new matter - It is accordingly not available to a plaintiff in his statement of claim (H3)

LAND LAW - Title - Estoppel - Plaintiff may plead and rely on a previous judgment in his favour - Not as res judicata - But as an estoppel - In the sense that it constitutes a relevant fact to the issue in

the present action - And the judgment will be conclusive of the facts which it decided (H4)

COURTS - Evidence - Evaluation - Trial court is to evaluate evidence adduced by parties - Before arriving at a decision - Basis of the decision is not on the number of witnesses called - But on the quality or probative value of testimony of those witnesses (H5)

APPEALS - Evidence - Reevaluation - When necessary - Where trial court failed to evaluate a document tendered in evidence - Without involving the credibility of the witness - Appellate court can evaluate - But this is not applicable in the present case (H6)

FACTS

This action started at High Court of Delta State, holden at Warri. Plaintiffs/appellants/cross-respondents claimed that the Ojobo Community located in Burutu Local Government Area of Delta State were the original owners in possession of the land verged green in exhibit J. and it was founded by their ancestor known as Gbesa: That defendants/respondents/cross-appellants began to trespass on the piece of land in or about the year 1912, which resulted in a series of court actions between the two communities: That as a means of maintaining peace between the two communities, the then District Commissioner of Forcados District, Mr. J. Davidson suggested a boundary between the two communities in 1912 by drawing a line from the junction of Krisei and Ayibou creeks to the water front of Buloutoru Creek which later became known as Davidson boundary: That following renewed acts of trespass by respondents in 1967, appellants instituted this action against respondents. Respondents on their own counter-claimed that the land in dispute shown in survey plan No. AA/Rv95/909 - LD which is exhibit "N" is part of a continuous and unbroken mass of land belonging to and in the peaceful possession of their Torugbene community of Tuomo clan.

That it is respondents who have tenants on the land in dispute and that they also have farms, fishing ponds, economic trees, cash crops and burial ground on the said disputed land: That the only fishing rights exercised by appellants was over a small portion of the Ayegbon and Krisei creeks which were all within Torugbene territory:

That Mr. J. Davidson never fixed a land boundary between the two communities, rather what Mr. Davidson did was to mark a boundary at the junction of Kresei and Ayebou creeks to demarcate the fishing rights of the two communities. Appellants pleaded and tendered some proceedings and judgments in previous cases between the communities as constituting estoppel. At the conclusion of trial, the court ruled in favour of appellants and granted all the reliefs claimed. The learned trial Judge also added a relief not claimed by either party into the bargain resulting in an appeal and a cross appeal filed at Court of Appeal, Benin Division against the said judgment. The court allowed the appeal. Aggrieved, appellants have now appealed to Supreme Court, while respondents cross-appealed.

ISSUES FOR DETERMINATION

i. Whether the learned Justices of the Court of Appeal were right when they held that the learned trial judge was wrong to have found that Mr. Davidson fixed a recognizable and legally enforceable boundary between the Ojobo and Torugbene Community.

ii. Whether the learned Justices of the Court of Appeal were right when they held that the learned trial Judge was wrong in holding that the previous judgments tendered by the Appellants operates as estoppel against the Respondents in favour of the Appellants.

iii. Whether the learned Justices of the Court of Appeal were right when they held that the learned trial Judge was definitely wrong to have held that the Appellants had proved the extent and identity of the land in dispute.

iv. Whether the learned Justices of the Court of Appeal were right when they held that the learned trial judge did not properly evaluate the evidence adduced at the lower court before entering judgment for the appellants.

v. Whether the learned Justices of the Court of Appeal were right when they held that the Appellants cannot be said to have proved their case.”

HELD (Unanimously allowing the main appeal and dismissing the cross-appeal per **ONNOGHEN JSC**)

LAND LAW - Title - Proof

1. I had earlier stated that there is no dispute as to whether Mr. Davidson fixed a boundary between the two communities by which

it means that both parties agreed that there exists a Davidson boundary between them. What is however in dispute is whether the said boundary extends over the surrounding land and bushes from the creeks in question to the water front of Boloutonu creek. The burden of proving that the said boundary extends over the surrounding land and bushes as pleaded by the plaintiffs/appellants lies on the appellants and it is settled law that the standard of proof required is on the preponderance of evidence.

I had earlier stated that the Davidson boundary of 1912 is clearly shown/indicated in exhibit J which the trial court rightly found as clearly showing the extent and identity of the land in dispute. I have examined exhibit C, the sketch made by Mr. J. Davidson in 1912 and it is very clear thereon that the boundary extends beyond the creeks into the surrounding lands and bushes contrary to the contention of the respondents. In fact, the learned trial Judge at page 116 of the record also found that the boundary extends beyond the creeks and that the land in dispute and abutting the creeks fall within the side of the boundary of the appellants as shown in exhibit 'C'. I therefore find merit in the issue and resolve same in favour of the appellants. (pp. 890 D/892 B)

ESTOPPEL - Res Judicata plea

2. It is settled law that for a plea of estoppel by res judicata to succeed the party relying on it must plead and establish the following:-

- (a) that the parties or their privies involved in both the previous and present proceedings are the same.
- (b) that the claim or issue in dispute in both proceedings are the same;
- (c) that the res judicata or the subject matter of the litigation in the two cases is the same;
- (d) that the decision relied upon to support the plea is valid, subsisting and final; and,
- (e) that the court that gave the previous decision relied upon to sustain the plea is a court of competent jurisdiction. (p. 894 D)

ESTOPPEL - Res judicata - Jurisdiction

3. It is also settled law that a plea of estoppel per rem judicata is a shield rather than a sword and is accordingly not available to a plain-

tiff in his statement of claim because if allowed, the plaintiff would in reality be impugning the jurisdiction of the court to entertain his matter since a successful plea of res judicata means that the court is without jurisdiction to hear the new matter. (p. 895 A)

Estoppel - Plaintiff may plead and rely on a previous judgment B

4. The above statement of the law notwithstanding, a plaintiff in an action for declaration of title may plead and rely on a previous judgment in his favour not as res judicata but simply as an estoppel in the sense that it constitutes a relevant fact to the issue in the present action and the judgment will be conclusive of the facts which it decided. (p. 896 F) C

Evidence - Evaluation - Trial court's duty D

5. In any event, it is settled law that it is the primary duty of the trial court to evaluate the evidence produced by the contending parties in support of their contentions before arriving at its decision one way or the other. It does so by putting the totality of the acceptable testimony adduced by both parties on an imaginary scale with the evidence of the plaintiff on one side while that of the defendant is put on the other side. The court then weighs them together to see which is heavier, not by the number of witnesses called by each party but by the quality or probative value of the testimony of those witnesses. (p. 896 F) E

APPEALS - Evidence - Reevaluation

6. Where, however the trial court abdicates this sacred duty or when it demonstrates that it had not taken proper advantage of having heard and seen the witnesses testify, the matter i.e. evaluation of evidence, becomes at large for the appellate court to carry out. G

Where however the evidence which the trial judge failed or neglected to evaluate is a document tendered as exhibit which does not involve the demeanour of the witnesses then it is settled law that an appellate court is in as good a position to evaluate the evidence and come to its own decision. H

Did the trial judge fail in its primary duty to evaluate the exhibits tendered in support of the plea of estoppel and if he did, was the

lower court not in as good a position to have evaluated the exhibits to do justice between the parties? The exhibits in question are A, D, F, G and H.

“These judgments relied on by the plaintiffs dated as far back as 1920.

- B *They are as follows:- Exhibit “A” dated 28/1/20, ‘Exhibit “E” which was a criminal case arising out of the breach by the Defendants of the judgment in Exhibit “A” dated 21/7/20; Exhibit “D” is dated 13/7/29; Exhibit “E” is dated 12/11/29, ‘Exhibit “F” was suit No. SC/10/30; Exhibit “G” was suit No. W/11/31 and Exhibit “H” were suits NOS*
 C *W/36/52 and W/44/52. Both suits were consolidated and were decided by Mbanefo J, as he then was, on 4/9/53...*

In all the foregoing judgments, the community of the Defendants in the present case lost... The previous judgments being judgments between the same parties and in respect of the same subject-matter operated as estoppels in favour of the plaintiffs and I so hold.”
 D
 Emphasis supplied by me.

Is the above not sufficient evaluation of the evidence in relation to the plea of estoppel by the appellants? I hold the considered
 E view that it is and that the lower court is in error when it held that it did not.
 (pp. 897 A/898 E)

F **NOTABLE POINTS OF INTEREST** **ONNOGHEN JSC**

1. Difference between Estoppel and Res judicata

However, is there any difference between estoppel and res judicata? One may ask. The answer is in the positive. If a party pleads a judgment as estoppel what he is telling the court is simply that the court
 G should take the judgment into consideration in considering the totality of the evidence in the present case.

When the plea is res judicata on the other hand, the party is saying that although he has already gotten judgment on the piece or
 H parcel of land, he wants the court to adjudicate on the matter that had already been adjudicated upon in his favour which would be contradictory in terms since he would be asking the court to judge what had already been judged, that is why res judicata is a shield, not a sword particularly as the effect of its being sustained is that the

court has no jurisdiction to entertain the present action over the same subject matter between the same parties or their privies. (p. 895 F)

2. Identification of disputed land - Need for Survey plan

It follows therefore that where a plaintiff claims ownership of a piece or parcel of land against his neighbor and describes the boundaries of the said land in a survey plan which is tendered and admitted in evidence, that survey plan clearly refer to the particular piece or parcel of land in dispute and it cannot be said that the identity and extent of the said land is unknown. What the plaintiff/claimant now needs to do is to prove/establish his title to the said disputed land by one of the five ways/methods of proving ownership or declaration of title to land and to also testify as to the features, etc., on the land in issue.

Where the court agrees with him then he wins and is awarded title to the land in issue irrespective of the contrary case presented by the defendant as to the mode of “acquisition of the title, the identity and extent of the disputed land. In the instant case both parties filed survey plans and called evidence as to the features and extent of the disputed land. There is also the evidence to the effect that the communities have been disputing the land in question. (p. 901 D)

REPRESENTATION

Dafe Akpedeye Esq, SAN L. Omo-Aligbe. For the Appellants.
S. Larry Esq; Messrs O. Odanwu; Tabai; L. Neple; I. Ikemuke and C. Akwagbe For the Respondents

CASES REFERRED TO

Sha Jnr vs Kwan (2000) 8 NWLR (pt. 670) 685
Eboade v. Atomesin 5 NWLR (pt. 506) 490 at 501
Oke vs Atoloye (No.2) (1986) 1 NWLR (pt. 15) 241
Romaine vs Romaine (1992) 4 NWLR (pt. 238) 650
Dabup vs Kolo (1993) 9 NWLR (pt. 317) 254 at 269
Ntuks vs NPA (2007) 13 NWLR (pt. 1051) 392 at 410
Chinwendu vs Mbamodi (198m 12 NSCC 127 at 137
Udeze vs Chidebe (1990) 1 NWLR(pt. 125) 141 at 159
Fakuade vs Onwoamanam (1990) 2 NWLR (pt.132) 322
Ekpengong vs Etim (1990) 3 NWLR (pt. 140) 594 at 602

LEAD JUDGMENT BY ONNOGHEN JSC

This is an appeal against the judgment of the Court of Appeal Holden at Benin City in appeal No. CA/B/66/96 delivered on the 19th day of July, 1998 in which the court allowed the appeal of the present respondents against the judgment of the Delta state High Court Holden at Warri in suit No. W./135/71 delivered on the 25th day of August, 1995 in favour of the present appellants who were the plaintiffs before the court.

The appellants, then plaintiffs instituted the suit against the respondents, as defendants claiming the following reliefs in paragraph 24(2) of the still Further Amended statement of Claim:

“(a) A declaration of title to all those pieces of land lying and situate at and known as Ayiboubou (Ayebo) land, Kriseibou (Krise) land, Oruamabou land on the right (north) bank of Buloutoru Creek and collectively known and called Ojobodo - Ogbo land in the neighbourhood of Ojobo Village in the then Western Ijaw Division within the Bomadi Judicial Division, the exact extent of which is as shown in the Survey Plan No. KP 631A and verged GREEN.

(b) The sum of N5, 000.00 (Five Thousand Naira) being general damages for trespass committed by the 6th - 9th defendants who sometime in 1967 without the consent of the plaintiffs first obtained, broke and entered the plaintiffs said parcels of land, fished the creeks therein, cleared parts thereof and planted cassava, yams, and other crops therein, as well as illegal construction of buildings on parts of the land.

(c) Perpetual injunction to restrain the 6th - 9th defendants, their agents and/or servants from further entering and trespassing on the plaintiffs’ said pieces or parcels of land. “

The facts giving rise to the case include the following:

It is the case of the appellants that the Ojobo Community located in Burutu Local Government Area of the present Delta state were the original owners in possession of the land verged green in exhibit J. and was founded by their ancestor known as Gbesa; that the respondents began to trespass on the piece of land in or about the year 1912, which resulted in a series of court actions between the communities; that as a means of maintaining peace between the two communities, the then District Commissioner of Forcados District, Mr.

J. Davidson suggested a boundary between the parties in 1912 by drawing a line from the junction of Krisei and Ayibou creeks to the water front of Buloutoru Creek which later became known as Davidson boundary; that following renewed acts of trespass by the respondents in 1967, the appellants instituted this action against the respondents. B

On the other hand, it is the case of the respondents that the land in dispute shown in survey plan No. AA/Rv95/909 - LD which is exhibit "N", is part of a continuous and unbroken mass of land belonging to and in the peaceful possession of their Torugbene community of Tuomo clan; that it is the respondents who have tenants on the land in dispute and that they also have farms, fishing ponds, economic trees, cash crops and burial ground on the said disputed land; that the only fishing rights exercised by the appellants was over a small portion of the Ayegbon and Krisei creeks which were all within Torugbene territory; that Mr. J. Davidson never fixed a land boundary between the appellants' Ojobo Community and the respondents Torugbene Community, but that what Mr. Davidson did was to mark a boundary at the junction of Kresei and Ayebou creeks to demarcate the fishing rights of the two communities. C D E

It should be noted that the appellants pleaded and tendered some proceedings and judgments in previous cases between the communities as constituting estoppel.

At the conclusion of the trial, the learned trial Judge found for the plaintiffs/appellants and granted all the reliefs claimed. The learned trial Judge also added a relief not claimed by either party into the bargain resulting in an appeal and a cross appeal against the said judgment which appeals were allowed by the lower court in the judgment delivered on the 15th day of July, 1998 thereby giving rise to the instant appeal, the issues for the determination of which have been identified by learned Senior Counsel for the appellants, DAFE AKPEDEYE ESQ, SAN in the appellants brief of argument filed on 24/11/05 as follows:- F G

"i. Whether the learned Justices of the Court of Appeal were right when they held that the learned trial judge was wrong to have found that Mr. Davidson fixed a recognizable and legally enforceable boundary between the Ojobo and Torugbene Community. H

ii. Whether the learned Justices of the Court of Appeal were

right when they held that the learned trial Judge was wrong in holding that the previous judgments tendered by the Appellants operates as estoppel against the Respondents in favour of the Appellants.

iii. Whether the learned Justices of the Court of Appeal were right when they held that the learned trial Judge was definitely wrong to have held that the Appellants had proved the extent and identity of the land in dispute.

iv. Whether the learned Justices of the Court of Appeal were right when they held that the learned trial judge did not properly evaluate the evidence adduced at the lower court before entering judgment for the appellants.

v. Whether the learned Justices of the Court of Appeal were right when they held that the Appellants cannot be said to have proved their case.”

There is however, no appeal against the judgment of the lower court allowing the cross appeal against the decision of the trial court made on 15th August, 1995. The order which was set aside by the lower court was as follows:

“In the interest of good neighbourliness; it is hereby ordered that the occupiers/owners of the buildings now standing from the Grammar School to the Davidson line shall continue to occupy same without any hindrance, harassment, molestation, disturbance and interference whatsoever from any member of the plaintiffs community with their occupation of those buildings. For the avoidance of doubt, this order shall apply to only existing buildings.”

The defendants/respondents who were beneficiaries of that order did not counter claim against the claims of the plaintiffs/appellants at the trial court!

Turning to the issues for determination, it should be noted that the learned Counsel for the respondents/cross appellant, S. LARRY ESQ has, in the respondents’ brief of argument deemed filed and served on 29/11/09 adopted the five issues formulated by learned Senior Counsel for the appellants earlier reproduced in this judgment.

However, with respect to the cross appeal, the issue formulated by learned Counsel for the cross appellant is as follows:-

“Whether the Court of Appeal was right in ordering a retrial and remittal of this suit back to the High Court of Delta State for re-

assignment.”

In arguing issue 1, learned Senior Counsel for the appellants submitted that from the state of the pleadings and evidence, there was no dispute that Mr. J. Davidson fixed a boundary following series of litigation between the communities though the respondents contended that the boundary was limited to the Ayebou and Krisei creeks; that what was in issue is whether the boundary was limited to the Ayebou and Krisei creeks; that the existence and extent of the boundary so fixed is evidenced in exhibits C, K, J and H; that it was not disputed in the pleadings that Mr. Davidson had no capacity to fix or create a legally enforceable boundary between the parties and that it was consequently not the duty of the trial judge to make pronouncements on the enforceability and recognisability of the Davidson boundary.

It is the further contention of learned Senior Counsel for the appellants, that the question as to whether the Davidson boundary was recognizable in law was never raised in the pleadings of the parties, which the court is bound by, but by learned Counsel for the respondents in address to the court on the ground that the provisions of the Inter - Tribal Boundary Settlement Ordinance Cap 95, Laws of the Federation, 1933 were not complied with; that the said submission cannot take the place of evidence relying on *Ishola vs Ajiboye* (1998) 1 NWLR(pt. 532) 71; that the above notwithstanding, the learned Trial Judge went ahead to consider the submission in the judgment and overruled same.

Learned Senior Counsel then urged the court to resolve the issue in favour of the appellants.

It is, however, the contention of learned Counsel for the respondents that Mr. Davidson did not and could not have fixed a recognizable and enforceable land boundary between the Ojobo Community and Torugbene Community; that what Mr. Davidson did was to mark a boundary at the junction of Krisei and Ayebou creeks to demarcate the fishing rights of the two communities in the said creeks which boundary marks had nothing to do with the surrounding lands and bushes which were owned and in possession of the respondents; that it was the duty of the appellants to establish the existence of the boundary in relation to the surrounding lands on the preponderance of evidence, relying on *UBN Ltd vs Nnoli* (1990) 4

NWLR (pt. 145) 530, 544; Sanusi vs Ameyogun (1992) 4 NWLR (pt. 237) 527, 553, Amaeze vs Anyaso (1993) 5 NWLR (pt. 291) 20, 25, 33 at 41; that of the exhibits C, K and J tendered by the appellants in proof of Mr. Davidson's boundary, exhibit K reflects the truth that the dispute was limited to fishing rights between the two communities in the Ayebo and Krisei creeks; that the boundary mark shown in the said exhibit K did not extend to the water front at Bluetoru creeks neither did it traverse the land mass from the Krisei/Ayebo/Fonkoro creeks to the Bluetoru creek; that "the evidence of the appellants as to the so-called Davidson Boundary is unreliable..." and finally that there is no pleading of facts indicating how the appellants came to own the lands surrounding the Ayebo and Krisei creeks and urged the court to resolve the issue against the appellants.

In the reply brief filed on 20/1/2010, the learned Senior Counsel for the appellants submitted that there are facts as to how the appellants came to own the said lands pleaded in the Still Further Amended Statement of Claim and testified to by the witnesses for the appellants. Learned Senior Counsel particularly referred to paragraphs 6, 7, 8, 11 and 12 of the still Further Amended statement of Claim at pages 25 to 27 of the record and the evidence of PW2, PW4 and PW5.

To resolve the issue under consideration, it is my intention to begin the exercise from the pleadings of the parties and proceed to consider the evidence thereon.

In paragraphs 14 and 15(3) of the still Further Amended statement of Claim, the appellants pleaded as follows:-

"14. When the 6th - 9th Defendants were firmly established, they trespassed upon the land of the plaintiffs in the area of Tungbokorobri, Krisei (Krise) and Ayibou (Ayebo) creeks in 1912 and committed various acts of trespass. These ensured series of court actions both criminal and civil between the plaintiffs and the 6th - 9th Defendants. The then District Commissioner of Forcados District, Mr. J. Davidson, fixed a boundary for the two communities by drawing a line from the junction of Krisei and Ayibou creeks to the waterfront of Buloutoru creek now known as DAVIDSON BOUNDARY as clearly shown in the survey plan number KP 6316A as aforesaid. The plaintiffs aver that this is the boundary between them and the 6th - 9th Defendants and will rely on it at the trial of this action.

15 (3) notwithstanding, the fixing of the Davidson's Boundary between the two communities and subsequent actions and judgments against the Defendants, Torugbene people, continuously disregarded the said boundary as finally settled and trespassed on the creeks and lands which by that settlement were given to the plaintiffs. As a result of the constant friction between the two communities, the then District Officer Forcados referred the matter to the Resident Warri Province Mr. J Davidson who had previously dealt with the issue while as the District Commissioner of Forcados District and accordingly, in 1921, confirmed the SKETCH as the true boundary, he fixed for the two communities. The SKETCH will be founded upon at the trial of this action. "

In reaction to the pleadings of the plaintiffs/ the defendants pleaded in paragraph 20 of their 4th Further Amended statement of Defence as follows:-

"20. In still further answer to the said paragraph 14 of the Further, further amended statement of claim, 1st - 4th Defendants avers that Davidson fixed no land boundary between the plaintiffs and the 1st - 4th Defendants and their Torugbene people. During the dispute of the Davidson boundary, the plaintiff's predecessor conceded or did not contest or challenge the 1st - 4th Defendants' title, possession to and usage of the land in dispute and other lands and houses surrounding the Ayebou and Krisei Creek.

What Davidson did was to mark a boundary at the junction of Krisei and Ayebou creeks to demarcate the fishing rights of the two communities in the said creeks over which there was dispute and the said Davidson boundary was therefore confined to the two tiny creeks which boundary mark had nothing to do with the surrounding lands and bushes which had been in undisputed and continuous possession and effective control of the 6th - 9th Defendants and their people ever since Torugbene was founded. "

From the pleadings reproduced above, it is very clear, and I agree with learned Senior Counsel for the appellants, that the issue as joined between the parties with regards to the Davidson boundary is as to whether the said boundary, which both parties agreed was fixed by Mr. Davidson and therefore not disputed, is limited for the fishing rights of the parties in the creeks in question or extends over the surrounding lands and bushes to the waterfront of Buloutoru

creek. There is nothing in the pleadings of the defendants/respondents suggesting that the Davidson boundary was not recognizable and legally enforceable.

The passage in the judgment of the lower court giving rise to the issue under consideration can be found at pages 307 - 308 of the record where the court stated, inter alia:-

“...While the lower court made a finding on the right of Mr. Davidson to fix the said Davidson Boundary between the parties, there was no finding at all as to where the boundary is located and its relation to the land in dispute between the parties. The findings on the actual location of the boundary on the ground, is actually more relevant for the resolution of the dispute between the parties and the failure of the lower court to make such finding, after properly evaluating the relevant and credible evidence in support of such finding, is in my view a clear manifestation of the failure of the lower court to properly evaluate the evidence before it prior to the entering of judgment in favour of the respondents. “

The issue is whether the lower court is correct in finding/holding as above? ***I had earlier stated that there is no dispute as to whether Mr. Davidson fixed a boundary between the two communities by which it means that both parties agreed that there exists a Davidson boundary between them. What is however in dispute is whether the said boundary extends over the surrounding land and bushes from the creeks in question to the water front of Boloutonu creek. The burden of proving that the said boundary extends over the surrounding land and bushes as pleaded by the plaintiffs/appellants lies on the appellants and it is settled law that the standard of proof required is on the preponderance of evidence.***

To prove the existence and extent of the boundary in question, the appellants tendered exhibits C, K, J and H with exhibit C being the sketch of the boundary made by Mr. Davidson in 1912 creating the boundary which said boundary is clearly indicated in the litigation survey plan of the appellants. It is also instructive to note that exhibit K is a certified true copy of Plan No. BUC3 made by the Department of Lands and Survey dated the 5th day of August, 1927 showing the boundary between the communities.

The question is; what was the relevant issue put before the trial

court relevant to the instant issue under consideration? At page 110 of the record, the learned trial Judge stated in his judgment as follows:-

“Learned Counsel for the defendants in his address submitted that for the plaintiffs to succeed, they must prove three issues; and they are:-

(a) Whether in the light of the pleadings and the evidence, whether Davidson fixed a boundary between Ojobo and Torugbene recognizable in Law. If the answer is yes, then in respect of what area of the subject matter was the boundary fixed...”

Submitted that Davidson did not fix any boundary recognizable in law because the provisions of the Inter-tribal Boundaries Settlement Ordinance Cap 95, Laws of the Federation of Nigeria, 1933, sections 2, 3 and 10 were not complied with. Submitted that exhibit C was a mere suggestion and that there is nothing to show that the suggestion was adopted. Submitted that no boundary was therefore fixed by Davidson ...”

It is in the light of the above issue and the submission of learned Counsel for the respondents thereon that the trial court made the finding at pages 115 - 116 of the record. The finding was clearly within the issue as formulated by learned Counsel. Learned Counsel for the respondents had argued that Mr. Davidson did not fix a boundary between the parties recognizable in Law because he did not comply with the provisions of the Inter-tribal Boundary settlement Ordinance, 1933 to which the trial court held that Mr. Davidson had the administrative capacity to do what he did and that the Ordinance of 1933 had no retrospective effect over the acts of Mr. Davidson which took place in 1912 and concluded firmly thus:

“I therefore find as a fact that the boundary so created as shown in exhibit C is a recognizable boundary between Ojobo Community and Torugbene Community.”

I hold the considered view that the learned trial Judge was correct in so finding/holding in relation to the issue before the court.

The above notwithstanding, exhibit J is a survey plan of the appellants showing the land in dispute and the Davidson boundary as constituting the boundary between the parties and the extent of the land in dispute in respect of which the learned trial Judge had this to say at page 116 of the record:

“With regard to the submission that the plaintiffs have failed to prove the extent and identity of the land in dispute, with due respect to learned Counsel for the defendants, I hold that the submission lacks merit and this is in view of Exhibit J, the survey plan of the plaintiffs. The identity and area of the land in dispute were clearly
 B *shown in Exhibit J....”*

***I had earlier stated that the Davidson boundary of 1912 is clearly shown/indicated in exhibit J which the trial court rightly found as clearly showing the extent and identity of the land in dispute. I have examined exhibit C, the sketch made by*
 C *Mr. J. Davidson in 1912 and it is very clear thereon that the boundary extends beyond the creeks into the surrounding lands and bushes contrary to the contention of the respondents. In fact, the learned trial Judge at page 116 of the record also*
 D *found that the boundary extends beyond the creeks and that the land in dispute and abutting the creeks fall within the side of the boundary of the appellants as shown in exhibit ‘C’. I therefore find merit in the issue and resolve same in favour of the appellants.***

E On issue 2 on estoppel, learned Senior Counsel restated the law that a claim for declaration of title is provable by one of five recognizable ways/methods as laid down in the case of Idundun vs Okumagba, (1976) 10 NSCC 445. Learned Senior Counsel further
 F submitted that though a plea of res judicata is not one of the five ways listed in Idundun vs Okumagba supra, a successful plea of same is a relevant fact for the prove of title, relying on Ibero vs Ume-Ohana (1993) 2 NWLR (pt. 277) 510; that appellants tendered exhibit A, D, E, F,G and H being previous judgments between the parties which
 G were not denied by the respondents; that in paragraph 22 of the 4th Further Amended Statement of Defence, the respondents specifically averred that suit No./W/36/52 and suit No. W/44/52 were in respect of the land in dispute in the instant case and that the evidence in the said suits revealed that the respondents and their tenants were in
 H possession of the lands but did not contend that the suits ended in their favour nor that the parties and issues were not the same with those in the instant suit; that the pleadings and evidence before the trial court being as they were, the learned trial Judge had no issue to determine on res judicata and that the trial Judge was therefore right

in holding that the previous judgments being judgments between the same parties and in respect of the same subject matter, they operated as estoppel in favour of the appellants and that the lower court was in error in holding that the trial court did not properly evaluate the previous judgments before finding that they constitute estoppel against the respondents and urged the court to resolve the issue in favour of the appellants. B

On his part, learned Counsel for the respondents submitted that the previous judgments pleaded and tendered as exhibits by the appellants could not in any way be deemed to have created estoppel against the respondents particularly as estoppel is used as a defence not as a means of attack and is not usually pleaded in a statement of Claim, as a successful plea of *res judicata* ousts the jurisdiction of the court, relying on *Igwego vs Ezeugo* (1992) 6 NWLR (pt. 249) 561, 587; *Ike vs Ugboaja* (1993) 6 NWLR (pt. 301) 539, 565 - 566; that the pre-conditions for the application of *res judicata* are stated in *Igwego vs Ezeugo* supra, *Omokhafa vs Esekhome* (1993) 8 NWLR (pt. 309) 58, 66 & 73; *Ibero vs Ume-Ohana* supra; *Ntuks vs NPA* (2007) 13 NWLR (pt. 1051) 392 at 410; that every judgment relied upon as establishing *res judicata* must be looked at in detail; that an examination of all the exhibits (judgments) show clearly that they deal with fishing rights in the Ayebo and Krise Creeks and not title or trespass to land; that the only case that had anything to do with land abutting the Ayebo and Krise Creeks was the consolidated suit Nos. W/36/1952 and W/44/1952 - exhibit H- in which no finding was made on trespass to land against the respondents and their two tenants on the land who were put there to tap palm wine. C D E F

Finally, learned Counsel submitted that the cases cannot ground a plea of *res judicata* as they were not final decision on the merit by courts of competent jurisdiction and that the lower court was right in holding that the trial court failed to evaluate the evidence on *res judicata* before arriving at its decision and urged the court to resolve the issue against the appellants. G

In the reply brief of the appellants, learned Senior Counsel submitted that learned Counsel for the respondents is in error in submitting that the appellants were wrong in pleading facts raising a plea of *res judicata*. It is the contention of learned Senior Counsel that a plaintiff is not precluded in pleading *res judicata* in the State- H

ment of Claim and relied on the case of Ukaegbu vs Ugoji (1991) 6 NWLR (pt.196) 127 at 159 and Chinwendu vs Mbamodi (198m 12 NSCC 127 at 137.

In paragraphs 20 and 21 of the Still Further Amended statement of Claim, the appellants pleaded as follows:-

- B *“20. The plaintiffs will contend at the trial of this action that the 6th - 9th defendants are estopped by the various judgments against them from disputing the plaintiff’s title to and possession of the land in dispute.*
- C *21. The plaintiffs will rely on the above judgments as constituting res judicata between them and the 6th - 9th Defendants at the trial of this action.”*

The various judgments alleged to constitute estoppel had been pleaded in paragraphs 15 - 19 of the still Further Amended statement of Claim and were duly tendered and admitted in evidence as exhibits.

It is settled law that for a plea of estoppel by res judicata to succeed the party relying on it must plead and establish the following:-

- E ***(a) that the parties or their privies involved in both the previous and present proceedings are the same.***
- (b) that the claim or issue in dispute in both proceedings are the same;***
- F ***(c) that the res judicata or the subject matter of the litigation in the two cases is the same;***
- (d) that the decision relied upon to support the plea is valid, subsisting and final; and,***
- (e) that the court that gave the previous decision relied***
- G ***upon to sustain the plea is a court of competent jurisdiction -*** see Oke vs Atoloye (No.2) (1986) 1 NWLR (pt. 15) 241; Yoye vs Olubode (1974) 1 All NLR (pt. 2) 118; Fadiora vs Gbadebe (1978) 3 S.C 219.

H ***It is also settled law that a plea of estoppel per rem judicata is a shield rather than a sword and is accordingly not available to a plaintiff in his statement of claim because if allowed, the plaintiff would in reality be impugning the jurisdiction of the court to entertain his matter since a successful plea of res judicata means that the court is without jurisdic-***

tion to hear the new matter - see Yoye vs Olubode supra; Igwego vs Ezeugo also supra etc.

The above statement of the law notwithstanding, a plaintiff in an action for declaration of title may plead and rely on a previous judgment in his favour not as res judicata but simply as an estoppel in the sense that it constitutes a relevant fact to the issue in the present action and the judgment will be conclusive of the facts which it decided see Ukaegbu vs Ugoji (1991) 6 NWLR (pt. 196) 127; Esan vs Olowu (1974) 3 S.C 125. B

In the instant case, the appellants pleaded the judgments as constituting estoppel in paragraph 20 of the Still Further Amended Statement of Claim though in addition to the said paragraph 201 they pleaded in. paragraph 21 thereof that the said judgments also constitute res judicata. C

At page 115 of the record, the trial Judge found as follows:- D

“The previous judgments being judgments between the same parties and in respect of the same subject matter operated as estoppel in favour of the plaintiffs and I so hold.”

From the above, it is clear that the learned trial Judge did not hold that the previous judgments constitute res judicata but estoppel as pleaded in paragraph 20 supra. In any event it was not the respondent's case on the pleadings and evidence that the appellants' pleading was erroneous thereby joining issues thereon with the appellants. E

However, is there any difference between estoppel and res judicata? One may ask. The answer is in the positive. If a party pleads a judgment as estoppel what he is telling the court is simply that the court should take the judgment into consideration in considering the totality of the evidence in the present case. F

When the plea is res judicata on the other hand, the party is saying that although he has already gotten judgment on the piece or parcel of land, he wants the court to adjudicate on the matter that had already been adjudicated upon in his favour which would be contradictory in terms since he would be asking the court to judge what had already been judged, that is why res judicata is a shield, not a sword particularly as the effect of its being sustained is that the court has no jurisdiction to entertain the present action over the same subject matter between the same parties or their privies etc, etc. See G

H

Ukaegbu vs Ugoji supra.

In the instant case and as stated earlier in this judgment, the trial court relied on paragraph 20 of the Still Further Amended Statement of Claim to find that the respondents are estopped by the judgments in the previous cases and I am of the considered view that the court is right.

However, the decision of the lower court on the issue is at page 309 of the record and is inter alia, as follows:-

“The learned trial Judge apart from listing the previous judgments by their exhibit numbers in the present case, their case or suit numbers and the years of filing with dates of judgment and one being a criminal case, other necessary and relevant contents of these judgments were not reviewed at all to show how they are related to the present action in the respondents claim title to the parcels of land specified in their Survey Plan Exhibit J”, damages for trespass and a perpetual injunction against the appellants, In other words, there was no proper evaluation of the contents of these judgments between 1920 to 1953 to support the finding of the learned trial judge that the judgments were between the same parties, as in the present case. Therefore even here in respect of the previous judgments relied upon by the respondents, the fact that there was no proper appraisal of the evidence before the lower court found in favour of the respondents is quite obvious.”

The above clearly shows the reason why the lower court is of the view that the trial court was in error in holding that the respondents in this appeal were estopped. There was nothing about the pleadings relevant to the plea of estoppel etc.

In any event, it is settled law that it is the primary duty of the trial court to evaluate the evidence produced by the contending parties in support of their contentions before arriving at its decision one way or the other. It does so by putting the totality of the acceptable testimony adduced by both parties on an imaginary scale with the evidence of the plaintiff on one side while that of the defendant is put on the other side. The court then weighs them together to see which is heavier, not by the number of witnesses called by each party but by the quality or probative value of the testimony of those witnesses
- see Sha Jnr vs Kwan (2000) 8 NWLR (pt. 670) 685.

Where, however the trial court abdicates this sacred duty or when it demonstrates that it had not taken proper advantage of haven heard and seen the witnesses testify, the matter i.e evaluation of evidence, becomes at large for the appellate court to carry out. see Romaine vs Romaine (1992) 4 NWLR (pt. 238) 650; Akinola vs Oluwo (1962) 1 SCNLR 352; Ebba vs Ogodo ^B (1984) 1 SCNLR 372.

Where however the evidence which the trial judge failed or neglected to evaluate is a document tendered as exhibit which does not involve the demeanour of the witnesses then it is settled law that an appellate court is in as good a position to evaluate the evidence and come to its own decision. ^C

Did the trial judge fail in its primary duty to evaluate the exhibits tendered in support of the plea of estoppel and if he did, was the lower court not in as good a position to have evaluated the exhibits to do justice between the parties? The exhibits in question are A, D, F, G and H. ^D

The trial judge, at page 103 of the record stated thus:-

“In 1920 Adamagu of Ojobo sued Depebor and Ande both of Torugbene to the District court at Forcados for declaration of title over Ayebou Creek within Ojobo land and judgment was given in favour of Adamagu who was my grand father. The certified True Copy of the judgment in that case is Exhibit “A”. ^E

When the Torugbene people still persisted in fishing in the creeks, a policeman and some other persons were sent there but the Torugbene people beat up the policeman and the people sent them with him. As a result, the following Torugbene people were arrested: Cosen, Ayajio, Kulu Sin kuma, Warri and Thomas. All of them were tried and convicted. The certified True Copy of the proceedings in that case is Exhibit “B”. ^F

In 1929, some Torugbene people went to the Creek again. As a result, his father sued Torugbene people who were Iteime, Gbeghede, Egbele, Bemba and Ige for trespass and judgment was given in favour of my family. The certified True Copy of the judgment is Exhibit “D”. ^H Also in 1929 Eteime for himself and on behalf of Torugbene village council sued Gbedeke and Suokumor of Ojobo challenging the Davidson Boundary of 1912. After the trial, the Torugbene people lost the case. The certified True Copy of the judgment is Exhibit “E”.

The Torugbene people appealed against the judgment and they lost. The certified True Copy of the Supreme Court judgment is Exhibit "F".

In 1931, my late father sued Torugbene people over the Ayibou (Ayebo) and Krisei creeks (crise) in suit No. 11/1931 for declaration of title and won. The certified True Copy of that judgment is Exhibit "G".

In 1952, Chiefs Ekereke, Zipude and Adamagu sued Odokobafa, Lou, London, Opuakpo, Odigben and Obi all from Torugbene for trespass on Ayebou and Krisei creeks in suit No. 35/43/52 in the Magistrate Court, Warri. The case was later transferred to the Supreme Court, Warri in suit No. W 36/52.

In the same year, 1952 Egbalakame Eenifegha of Torugbene for himself and on behalf of Torugbene Community sued one Brisbe Adamagu of Ojobo in the Magistrate Court, Warri for trespass to the Ayebou and Krisei creeks in suit No. 1/1952 and it was also later transferred to the Supreme Court, Warri and numbered W/44/52. Both cases were consolidated and tried together. The Ojobo people in suit No W/36/52 won while the Torugbene people lost in suit No. W/44/52. The judgment in the consolidated suits is Exhibit "H". "At page 114 to 115 of the record, the trial court then held as follows:-

"These judgments relied on by the plaintiffs dated as far back as 1920.

They are as follows:- Exhibit "A" dated 28/1/20, 'Exhibit "E" which was a criminal case arising out of the breach by the Defendants of the judgment in Exhibit "A" dated 21/7/20; Exhibit "D" is dated 13/7/29; Exhibit "E" is dated 12/11/29, 'Exhibit "F" was suit No. SC/10/30; Exhibit "G" was suit No. W/11/31 and Exhibit "H" were suits NOS W/36/52 and W/44/52. Both suits were consolidated and were decided by Mbanefo J, as he then was, on 4/9/53...

In all the foregoing judgments, the community of the Defendants in the present case lost... The previous judgments being judgments between the same parties and in respect of the same subject - matter operated as estoppels in favour of the plaintiffs and I so hold." Emphasis supplied by me.

Is the above not sufficient evaluation of the evidence in

relation to the plea of estoppel by the appellants? I hold the considered view that it is and that the lower court is in error when it held that it did not.

Still in resolving the issue of estoppel particularly the question whether the said judgments relate only to fishing rights in the creeks, the learned trial Judge held at page 116 of the record as follows:- B

It was also submitted that the previous judgments related only to the creeks and not to land. I am unable to agree with this submission because the creeks are surrounded by land and I do not see how the creeks can be owned by one party while the other owns the land abutting them. Be that as it may, both creeks and the land abutting them as shown in Exhibit C are on the side of the plaintiffs..” C
 “Underlining mine for emphasis.

From the underlined sentence in the passage supra, it is clear that the trial Judge’s finding on the matter that the judgments relate both to the creeks and the abutting land is based on exhibit C, the sketch of Mr. Davidson made in 1912 which shows clearly that the land in dispute and the creeks involved fall on the side of Mr. Davidson’s boundary belonging to the appellants. This is not speculative at all. It follows therefore that the finding of the trial court that the previous judgments relate both to the creeks and land abutting same is supported by evidence and that the lower court was in error when it set same aside. D E

In the first place, there is no dispute as to the existence of these suits between the parties both in the pleadings and testimony before the court. All the exhibits clearly show that the suits were between the communities of Ojobo and Torugbene as represented by the parties therein stated and the trial court specifically found that the said judgments were between the same parties and in respect of the same subject matter. F G

That apart, the evidence being documentary, it is the duty of the lower court to have evaluated same if it saw that they were not evaluated as it was in as good a position as the trial court in that respect but it failed to do so. I therefore hold that issue 2 be and is hereby resolved in favour of the appellants. H

On issue 3, learned Senior Counsel for the appellants submitted that issues are joined in the pleading not in address of counsel, relying on Fakuade vs Onwoamanam (1990) 2 NWLR (pt.132) 322;

that from the state of the pleadings the identity and extent of the land in dispute was not in issue; that both parties pleaded ownership of the land in dispute as delineated in their respective survey plans which were tendered in evidence as exhibits 'J' and 'N' respectively; that where a party fails to raise an issue relevant to the determination
 B of its case, such issue would be deemed irrelevant, relying on *Bamgboye vs Olarewaju* (1994) 4 NWLR (pt. 184) 132; that the duty on a plaintiff to establish the extent and identity of the land claimed exists only where the identity and extent of the land in dispute is in issue, otherwise no such burden or duty arises. Referring to
 C the testimony of the 2nd plaintiff, PW4, DW2 and the 4th defendant, learned Senior Counsel submitted that the parties were clear as to the identity and extent of the land in dispute though appellants, in addition tendered exhibits C, E, K and J in proof of same and urged
 D the court to resolve the issue in favour of the appellants.

On his part, learned Counsel for the respondents referred to the findings on the issue by the trial Judge at page 116; of the record and submitted that the findings on the identity and extent of the disputed land was erroneous and that the lower court was therefore
 E correct in so holding and setting same aside; that it is the duty of a claimant of title to land to identify the area of land with certainty and prove the boundaries of the land particularly in this case where the respondents did not admit the identity of the land, relying on *Udeze vs Chidebe* (1990) 1 NWLR(pt. 125) 141 at 159; *Dabup vs Kolo*
 F (1993) 9 NWLR(pt. 317) 254 at 269; that the mere tendering of a survey plan does not necessarily prove the correctness of the boundary features and extent of the land in dispute without oral evidence to prove the contents of the survey plan, relying on *Ekpengong vs Etim* (1990) 3 NWLR (pt. 140) 594 at 602; that appellants ought to
 G have filed a composite plan to identify the portions of the land determined in the previous judgments; that the contents of exhibit 'N' is completely different from that of exhibit 'J' as regards the land in dispute; that the several judgments tendered by the appellants had
 H nothing to do with the lands in dispute herein as they relate to fishing rights in creeks; that appellants failed to prove the extent and identity of the land and that the lower court was right in so holding and urged the court to resolve the issue against the appellants.

In the reply brief, learned Senior Counsel submitted that the

appellants did not give contradictory evidence as regards the boundaries of the land as contended by learned Counsel for the respondents neither has learned Counsel pointed out the alleged conflicts to this Court.

Both parties filed pleadings in this action in which they claimed ownership of the land in dispute; they engaged the services of licensed surveyors who went on the land and carried out a survey indicating the essential features thereon including the boundaries of same which plans were duly tendered and admitted in evidence as exhibits 'J' and 'N' respectively. It is common occurrence in land matters for parties to refer to the same piece or parcel of land by different names and also to indicate in their respective plans different features but the bottom line remains the fact that the parties know the land in dispute otherwise there would be no dispute at all; what is usually in dispute is the ownership of the particular land being claimed by the plaintiff.

It follows therefore that where a plaintiff claims ownership of a piece or parcel of land against his neighbor and describes the boundaries of the said land in a survey plan which is tendered and admitted in evidence, that survey plan clearly refer to the particular piece or parcel of land in dispute and it cannot be said that the identity and extent of the said land is unknown. What the plaintiff/claimant now needs to do is to prove/establish his title to the said disputed land by one of the five ways/methods of proving ownership or declaration of title to land and to also testify as to the features, etc., on the land in issue.

Where the court agrees with him then he wins and is awarded title to the land in issue irrespective of the contrary case presented by the defendant as to the mode of "acquisition of the title, the identity and extent of the disputed land. In the instant case both parties filed survey plans and called evidence as to the features and extent of the disputed land. There is also the evidence to the effect that the communities have been disputing the land in question. The land is not in the imagination of the claimant as it has been brought into focus and reality by exhibits 'J' and 'N' respectively. From the records, both communities are neighbours and share a common boundary and it is clear that they exist on either side of Davidson's boundary, so none of them can pretend not to know the land in dispute being claimed

by the appellants.

However, both parties agree that the burden of proving clearly and unequivocally the area to which the plaintiff claims title is on the plaintiff except where the identity and extent of the disputed land is not put in issue by the parties, see *Fakuade vs Onwoamanam* (1990) 2 NWLR (pt. 132) 322; *Hayaki vs Dogara* (1993) 8 NWLR (pt. 313) 586 at 594.

What did the trial court find on the issue? At page 116 of the record, the trial Judge had this to say:

C *“With regard to the submission that the plaintiffs have failed to prove the extent and identity of the land in dispute, with due respect to the learned Counsel for the defendants, I hold that this submission lacks merit and this is in view of Exhibit ‘J’, the survey plan of the plaintiffs. The identity and area of the land in dispute were clearly shown in Exhibit ‘J’.*

D *The onus on the plaintiffs is an onus to prove an issue. The identity and extent of the land in dispute was not made an issue. This, in my view, was because these facts are well known to the parties especially in view of the previous cases between them over the land in dispute. See the case of Nwobodo Ezendu and ors. Vs Isaac Obiagwu (1986) 2 NWLR (pt. 21) 208 at 209 - 210.”*

It is the above finding that the lower court held erroneous and consequently set aside.

F What is the pleading of the parties on the issue? In paragraphs 6 and 7 of the still Further Amended statement of Claim, the appellants pleaded as follows:-

G *“6. The plaintiffs are the owners - in - possession of parcel of:*
(a) land called Beimobou - Ogbe or Ojobodo - Ogbe lying and situate between Tabagha creek and Akposeiye creek on the left (south) bank of Buloutoru (bluetoro) in the neighbourhood of Ojobo Town in Burutu Local Government Area which is verged GREEN on the survey plan number KP 6316A prepared by TK. Kpeji, a licensed surveyor of 1 Ofunmwegbe Lane, Benin city.

H *(b) Land lying and situate at and known as Ayiboubou (Ayebo) Land, Kriseibou (krise) land, Druamabou land on the right (north) bank of Buloutonu creek and collectively called and known as Ojobodo - Ogbe land in the neighbourhood of Ojobo Town of the then Western Ijaw Division now in Burutu Local Government Area*

within the Bomadi Judicial Division whose jurisdiction for the time being is exercised by the High Court of Warri, which parcels of land are verged GREEN on the survey plan number KP 6316A prepared by TK. Kpeji, a licensed Surveyor of 1, Ofunmwegbe Lane, Benin City and filed in support of this action.

7. The lands of the plaintiffs were originally founded by their ancestors who came from Operemot town in Eastern Ijaw (Brass Division) now Rivers State of Nigeria and at a time beyond human memory first settled at Amabulon in the then Western Ijaw Division now in Ekeremor Local Government Area of Rivers State and from there they settled on the banks of the Krisei Creek. From Bulou Ojobo, a section moved and settled in the present Ojobo site, properly called Toru-Ojobo on the bank of the Buloutoru Creek (now known and called Bomadi creek) as shown on the Survey Plan filed with the Statement of Claim. “

The respondents/defendants reacted to the above paragraphs in their paragraphs 5/ 6/ 7 and 8 of the 4th Further Amended statement of Defence of 1st - 4th Defendants as follows:-

“5. Paragraphs 6 to 12 inclusive of the further, Further Amended Statement of Claim are denied and plaintiffs are put to the strictest proof thereof

6. In further answer to paragraph 6(a) of the further amended Statement of Claim 1st - 4th defendants aver that plaintiffs own no land on the left south bank of Tuomo Creek, also called Buloutoro Creek, within the area in dispute.

7. Institute (sic) further answer to paragraph 6(a) of the further, further amended statement of claim, 1st - 4th defendants aver that plaintiffs own no land on the right North bank of Tuomo Creek, also called Buloutoro creek, within the area in dispute as clearly and correctly verged red in the amended survey plan No. ONC/83/R053 - LD dated 15th December, 1983 prepared by C.N. Onwunume, Licensed Surveyor earlier filed with the further amended Statement of Defence and now survey plan No. AA/RV95/090 - LD dated 6th January, 1995 prepared by Albert A. Alhaji, Licensed Surveyor on which plan the 1st - 4th defendants shall rely at the trial of this case.

8. In further answer to paragraph 7 of the Further, further amended statement of claim, 1st - 4th defendants aver that the ancestral home of the plaintiffs is Oukpoto in Ogbia, Brass Local Gov-

ernment Area of Rivers State. It was from there that the plaintiffs later joined the rest of Operemor clan at Amabulou and still later migrated to Bulou-Ojobo where they finally settled in their present site long after 1st - 4th defendants had settled in the area in dispute.
“

B Though the reaction of the respondents to the pleadings is a general denial, there is no dispute as to the fact that the respondents know the identity of the land in dispute and its extent as can be gleaned from their pleadings. What they dispute is ownership of the
C disputed land by the appellants.

However is there evidence to show that the parties know the land in dispute apart from the pleadings?

The 2nd plaintiff in his evidence in chief testified thus

*“I know the land which is the subject matter of this action, it is
D called Beimobou - Ogbe or Ojobodo - Ogbe and is situated at the Southern part of Bulou - Tora Creek or Bomadi Creek.”*

PW 4 stated thus:

*“I know the land called Beimobou-Ogbe or Ojobo-Ogbe. It
situates on the right hand south of Bulou Tora Creek.”*

E On behalf of the respondents, DW2 testified as follows:-

“I know the land in dispute” While the 4th defendants stated emphatically that:

“I know the land in dispute... The land in dispute is called
F Torugbene/Ruomo-Ogbo land. Bulon-Ojobo land do not exist.”

From the above, it is very clear that the parties know the land in dispute though they gave it different names and claim ownership of same. Apart from the above facts, the appellants also tendered exhibit “C” - the sketch of the Davidson boundary made by Mr.
G Davidson in 1912 and exhibit “K”, the Burutu Cadestral Survey from the Archives. The respondents admitted the existence of the Davidson Boundary though they contend that it does not extend over the surrounding lands and bushes between the parties, which, as seen earlier in the judgment during the consideration of issue 21 the trial
H judge rejected, which rejection is supported by exhibit “C”, the sketch of 1912.

It is therefore my considered view that from the totality of the pleadings and the evidence on record, the trial court was right in the conclusion it reached on the issue and that the lower court was in

error in holding otherwise. I therefore resolve the issue in favour of the appellants.

On issues 4 and 5, I hold the considered view that haven resolved the earlier issues in favour of the appellants which issues are sufficient to sustain the judgment of the trial court, a resolution of the above issues becomes superfluous particularly as the trial judge did not base his decision on the evidence of traditional history adduced by the parties, haven come to the conclusion that the traditional history of the people conflict, but on estoppel arising from the previous judgments between the parties. I had earlier in this judgment demonstrated how the trial court was right in coming to the conclusion that the previous judgments tendered by the appellants operated as estoppel against the respondents in favour of the appellants. The trial court, on the case presented by the respondents outside traditional history, examined the acts of recent possession pleaded and relied upon by the respondents to establish their claim of ownership of the disputed land and came to the following conclusion:

“Apart from the traditional evidence, the plaintiffs also relied on a series of previous judgment between them and the Defendants over the land in dispute. The judgments are Exhibits A, D, E, F, G and H. They also called some of their tenants put on the land in dispute.

The Defendants, apart from the traditional evidence, relied on acts of ownership and possession of the land in dispute. These acts include building, cemetery, and farms on the land in dispute. As there is a conflict between sets of traditional evidence, I shall now resort to facts or events in recent times to determine which of the two sets ought to be preferred.”

The learned trial Judge went further at page 115 of the record to say: G

“It was also earlier stated in this judgment that the defendants also relied on acts of possession and ownership apart from their traditional, Evidence. The nature of the acts of possession and ownership as stated earlier were buildings, farms, tenants and a cemetery... The defendants admitted that the buildings on the land in dispute were put up during the pendency of this case. The previous judgments being judgments between the same parties and in respect of the same subject matter operates as estoppel in favour of the plaintiffs and I so hold. The defendants cannot rely on unlawful acts to

prove possession and acts of ownership of the land in dispute. Thus the weight of evidence tilts heavily in favour of the plaintiffs and I so hold."

I do not see what else the learned trial judge should have done in the name of evaluation of evidence relevant to the determination of the matter before him. I must repeat that the learned trial Judge restricted himself to resolving the issue as to whether the previous judgments constituted estoppel against the respondents and whether the respondents had proved their possession of the land in dispute by acts of recent possession both of which issues he considered appropriately by evaluating the evidence before him and resolving them in favour of the appellants as reproduced supra.

On the cross appeal, it is the submission of learned Counsel for the respondents/cross appellants that the lower court erred in ordering a retrial of the case allegedly based on the conflict in traditional evidence of the parties as the resolution of the said conflict does not involve a consideration of the credibility of the witnesses who testify to such facts, relying on *Eboade v. Atomesin* 5 NWLR (pt. 506) 490 at 501; that the lower court was in as good a position as the trial court to evaluate the evidence on record as same is predominantly documentary and come to the conclusion that the cross respondents failed to establish their claim and consequently dismiss same; that the cross respondents did not prove the Davidson boundary, the identity and extent of the land in dispute etc as found by the lower court and that the same was enough for that court to have dismissed the claim of the cross - respondents, and urged the court to resolve the issue in favour of the cross appellants and allow the cross appeal.

On his part, learned Senior Counsel for the cross respondents adopted all arguments in the main appeal in support of the issues formulated in addition to those in the reply brief and submitted that the reason for ordering a retrial by the lower court did not flow from the record before that court; that a proper evaluation and appraisal of evidence by a trial court is not dependent on the length of the judgment at the end of trial; that the parties submitted specific issues to the court for determination which the court duly determined and urged the court to allow the cross appeal, set aside the order of retrial made by the lower court and restore the judgment of the trial court.

I had, while considering the issues in the main appeal resolved

all of them in favour of the appellants, which action automatically means the judgment of the lower court is set aside in its entirety while that of the trial judge is restored.

The above being the position, a consideration of the merit of the cross appeal which challenges the order of retrial made by the lower court in a judgment which has just been set aside by this Court becomes clearly, an exercise in futility apart from being hypothetical and/or academic.

Either way, it will be a colossal waste of time to consider same. It is therefore my considered view that the cross appeal be and is hereby dismissed.

On the whole and in conclusion, I find merit in the main appeal which is hereby allowed by me. The judgment of the lower court delivered on the 15th day of July, 1998 in appeal NO.CA/B/66/96 is hereby set aside while the judgment of the Delta state High Court in suit No. W/135/71 delivered on the 25th day of August, 1995 is hereby restored with costs assessed and fixed at N50, 000 against the respondents/cross appellants in favour of the appellants/cross respondents.

It is further ordered that the cross appeal be and is hereby dismissed with no order as to costs.

Main appeal allowed, Cross appeal dismissed.

MUKHTAR JSC

I have had the advantage of reading in advance the lead judgment delivered by my learned brother Onnoghen JSC. I fully agree with him that the appeal deserves to be allowed, as there was proper evaluation by the learned trial Judge. I also allow the appeal and dismiss the cross-appeal. I abide by the consequential orders made in respect of the main appeal, and the cross-appeal. I agree with the order as to costs.

FABIYI JSC

I have read in draft the judgment just handed out by my learned brother - Onnoghen, JSC. I agree with the reasons therein advanced to arrive at the conclusion that the main appeal should be allowed

while the cross appeal warrants to be dismissed. I adopt same and order accordingly.

RHODES-VIVOUR JSC

B I have had the privilege of reading in draft the leading judgment prepared by my learned brother, Onnoghen, JSC. I am in full agreement with his Lordship's reasoning and conclusions. I propose to add a few observations on issue No.2 in this appeal.

C It reads:

Whether the learned Justices of the Court of Appeal were right when they held that the learned trial Judge was wrong in holding that the previous judgments tendered by the appellants operates as estoppel against the respondents in favour of the appellants.

D The doctrine of estoppel per rem judicatam is one founded on considerations of justice and good sense. If an issue has been distinctly raised and decided in an action, in which the parties are represented, it is unjust and unreasonable to permit the same issue to be litigated afresh between the same parties or persons claiming under them. See *New Brunswick Rly Co v. British and French Trust Corp Ltd* 1939 AC p1.

Once a judgment is delivered, and it is a final judgment, or there is no appeal, it would no longer be necessary to prove that the judgment is correct in Law or fact. If it is a judgment on the same question, between the same parties and by a court of competent jurisdiction it is binding on the parties until upset on appeal. This is so because it is the policy of the Law that parties to a judgment are not after a judgment is delivered to re-litigate the same question even though the decision may be wrong. This is premised on the fact that a court of competent jurisdiction has jurisdiction to decide wrongly as well as correctly, and if it decides wrongly the wrong decision is binding unless corrected on appeal. The appellants tendered exhibits A, D, E, F, G and H, previous judgments between the parties. This was not denied by the respondents. In paragraph 22 of the respondents' pleadings it was averred that suit NO.W/36/52 and suit No. W/44/52 were in respect of the same land in dispute in this case.

The learned trial judge found as follows:

"The previous judgments being judgments between the same

parties and in respect of the same subject matter operated as estoppel in favour of the plaintiffs and I so hold”

The learned trial judge came to this conclusion by examining documentary evidence to wit: Exhibits A, D, E, F, G, and H. This is what his Lordship had to say:

“In 1920, Adamagu of Ojobo sued Depebor and Ande both of Torugbene to the District court at Forcados for declaration of title over Ayebon Creek within Ojobo land and judgment was given in favour of Adamagu who was my grandfather. The certified True Copy of the judgment in that case is Exhibit “A”.

When the Torugbene people still persisted in fishing in the creeks, a policeman and some other persons were sent there but the Torugbene people beat up the policeman. As a result, the following Torugbene people were arrested: Cosen, Ayajio, Kulu Sinkuma, Warri and Thomas. All of them were tried and convicted. The Certified True Copy of the proceedings in that case is Exhibit B.

In 1929, some Torugbene people went to the creek again. As a result, his father sued Torugbene people who were Iteime, Gbeghede, Egbele, Benba and Ige for trespass and judgment was given in favour of my family. The Certified True Copy of the judgment is Exhibit “D”. Also in 1929 Eteme for himself and on behalf of Torugbene village council sued Gbedeke and Suokumor of Ojobo challenging the Davidson Boundary of 1912. After the trial, the Torugbene People lost the case. The Certified True Copy of the Judgment is Exhibit “E”. The Torugbene people appealed against the judgment and they lost. The Certified True Copy of the Supreme Court judgment is Exhibit “F”.

In 1931 my late father sued Torugbene people over the Ayibon (Ayebo) and Krisei creeks (Crise) in Suit No.11/1931 for declaration of title and won. The Certified True Copy of that judgment is Exhibit “G”.

In 1952, Chiefs Ekereke, Zipude, and Adamagu sued Odokobfa, London, Opuakpo, Odigben, and Obi all from Torugbene for trespass on Ayebon and Krisei creeks in suit No.35/43/52 in the Magistrates Court, Warri. The case was later transferred to the Supreme Court, Warri in suit No.W.36/52.

In the same year, 1952 Egbalakame Benifegha of Torugbene for himself and on behalf of Tolugbene Community sued one Brusine

Adamagu of Ojobo in the Magistrate Court, Warri for trespass to the Ayebon and Krisei creeks in suit No.1/1952 and it was also later transferred to the Supreme Court, Warri and numbered W/44/52. Both cases were Consolidated and tried together. The Ojobo people in suit No.W/36/52 won while the Torugbene people lost in suit No. W/44/52. The judgment in the consolidated suits is Exhibit “H”.

My Lords, these judgments relied on by the appellants’ are from 1920. They are:

- (a) Exhibit A dated 28/1/20.
- (b) Exhibit B, a criminal case arising out of the breach by the Torugbene people of the judgment in Exhibit A dated 21/7/20.
- (c) Exhibit D is dated 13/7/29
- (d) Exhibit E is dated 12/11/29
- (e) Exhibit F is suit No. SC/10/30
- (f) Exhibit G is suit No W/11/31
- (g) Exhibit H is suit Nos. W/36/52 and W/44/52 decided by Mbanefo J. as he then was in 1953.

In all these judgments whether at first instance or on appeal the Torugbene people (the respondents) lost. The judgments are between the same people and the same questions as in this case, “LAND.” They were all decided by competent courts. These judgments are conclusive and create estoppel in favour of the appellants. The issue of ownership of the land was correctly resolved and put to rest in these judgments. The suits (supra) operated as estoppels in favour of the appellants.

For this and the much fuller reasoning in the leading judgment the main appeal is allowed. The judgment of the Court of Appeal in suit No: CA/B/66/96 delivered on 15/7/98 is hereby set aside, and the judgment of the High Court in Suit No. W/135/71 delivered on 25/8/95 is hereby restored with costs of N50, 000.00 in favour of the appellants.

The cross-appeal is dismissed.

For the avoidance of doubt the main appeal is allowed, and the cross-appeal is dismissed.