

SUPREME COURT OF NIGERIA
6TH JULY, 2012. SC. 87/2005
CORAM:- I. T. MUHAMMAD, J. A. FABIYI, S. GALADIMA,
B. RHODES-VIVOUR, N. S. NGWUTA, JJSC

ABIOLA & SONS BOTTLING
COMPANY LTD APPELLANTS
AND
1. SEVEN-UP BOTTLING
COMPANY LTD
2. ADEMOLA SOMORIN ESQ. F.C.A.
(Trading under the name and Style
of Ademola Somorin & Co.)
3. FIRST CITY MERCHANT BANK RESPONDENTS

RES JUDICATA - Estoppel - Plea - Conditions precedent - For the plea to be sustained - There must be inter alia judicial decision - And that court that heard the matter - Has jurisdiction over parties and subject matter (H1)

RES JUDICATA - Appeals - Judgments - Binding effect - Judgment on appeal can operate as res judicata - Provided it has not been upset (H2)

APPEALS - Cross appeal - Purpose - Cross appeal is filed by respondent - Who agrees with judgment - But wants to correct errors therein - Or to set aside a crucial finding (H3)

APPEALS - Issues - Formulation - Appellate court may formulate issues - That serve interest of justice - But it is not bound to decide on every issue (H4)

FACTS

3rd defendant/respondent/cross-appellant is a bank to plaintiff/appellant/cross-respondent. 3rd respondent granted credit facility amounting to N3.5 Million to appellant. The loan was secured by a Debenture Deed made in favour of 3rd respondent. However, due to appellant's default in repaying the loan with interest, 3rd respondent

relied on a provision in the said Deed and appointed 2nd defendant/respondent/cross-appellant the Receiver/Manager over the assets of appellant. In performing his duties 2nd respondent sold some of the assets of appellant to 1st defendant/respondent/cross-appellant.

Alarmed by the sale of its assets, appellant instituted this action against respondents at the High Court of Kwara State, Ilorin, wherein it claimed inter alia, a declaration that the sale of its assets is illegal, or a restitution of the sold assets, special and general damages. Appellant called several witnesses. Respondents brought application seeking to dismiss appellant's suit on the ground that the same was caught by estoppel per rem judicatam. The court dismissed the application and eventually entered judgment in favour of appellant. Respondents being aggrieved, filed appeal at the Court of Appeal, Ilorin. The court allowed the appeal. Dissatisfied, appellant appealed to Supreme Court, while respondents cross-appealed.

ISSUES FOR DETERMINATION

1. Whether, in view of the decision of this Honourable Court in the case of 7up-Bottling Co. Ltd & 2 ors v. Abiola & Sons Bottling Co. Ltd 2001 6 SC p.73, the lower court was still right in applying estoppel per rem judicatam in striking out the plaintiffs suit OR whether this suit is/was caught by estoppel per rem judicatam.

Whether the Court of Appeal was right in failing to consider issues 2, 3, 7, 8, 9, 10 and 11 contained in the brief of the appellants' who are now respondents/cross-appellants.

HELD (Unanimously dismissing the appeal and cross-appeal per **RHODES-VIVOUR JSC**)

Estoppel - Plea - Conditions precedent

1. The following must be established for res judicata by way of estoppel as a bar to the adverse parties claim to be sustained.

1. It must be a judicial decision and it not have been delivered.

2. The court that heard the matter had jurisdiction over the parties and the subject matter.

3. The decision was final and on the merits.

4. It determined the same question as that raised in the

subsequent case.

5. The parties in the subsequent case were either parties to the earlier case or their privies. (p. 2494 D)

RES JUDICATA - Appeals - Judgments - Binding effect

2. Now, can a judgment on appeal operate as res judicata. Res judicata gives effect to the policy of the Law that parties to a case should not afterwards be allowed to re-litigate the same question even if the decision is wrong. This is premised on the fact that a court properly constituted has jurisdiction to decide a case wrongly as well as correctly. Consequently once a decision is final on the same question and between the same parties it will be binding on them until upset on appeal. The judgment in KWS/122/91 was delivered before the judgment in KWS/270/89 (from where this appeal emanates). That judgment has not been upset on appeal. It is binding on the parties and it operates as estoppel to bar the parties from re-litigating in KWS/270/89. The Court of Appeal was correct. In the light of the fact that suit KWS/122/91 operates as estoppel per rem judicatam considering the main appeal from KWS/270/89 would amount to an academic exercise as the issues therein have already been decided in KWS/122/91. A judgment on appeal can operate as res judicata provided it has not been upset on appeal. Res judicata operates to prevent this court from hearing the main appeal. Appeal is hereby dismissed. (p. 2495 C)

Cross appeal - Purpose

3. A cross-appeal is filed by a respondent who agrees with the judgment appealed against but wants to correct errors in the judgment or to set aside a finding that is crucial and fundamental to the case. (p. 2496 A)

Courts - Issues - Formulation

4. An Appeal Court may adopt or even formulate issues for determination that would serve the interest of justice, or/and address the real grievance in an appeal. Where an appeal court decides to adopt issues formulated in the briefs of argument,

the court is not bound to address and render a decision on every issue, rather it should restrict itself to treating issues that raise a recognizable complaint. That is issues if addressed would resolve the appeal in a fair manner, and avoid treating issues that are an academic exercise and a waste of judicial time if answered. (p. 2496 G)

REPRESENTATION

Dr. J. O. Olatoke with D. A. Ariyoosu, A. O. Popoola, S. T. Abubakar,
B. O. Omodara, O. W. Akanbi, F. Aweda, for the Appellants
C A. A. Adegbonmire with S. Mann, for the Respondents

CASES REFERRED TO

7up Bottling Co Ltd v. Abiola & Sons Bottling Co Ltd (2001) 6 SC 7
D Odutola v. Oderinde (2004) 12 NWLR (Pt. 888) 574
Fadiora v. Gbadebo (1978) 3 SC 219
Honda Place Ltd. v. Globe Motors Ltd. (2005) 14 NWLR (Pt. 445) 273
Ojiako v. Ogueze (1962) 1 All NLR 58
E Onisango v. Akinkunmi (1955) 56 WRLR 39
Umeanah v. Attah (2006) 9 SCNJ 75
Ogunbiyi v. Ishola (1996) 6 NWLR (Pt. 452) 15
Stone Jason Ltd v. Omega Air Ltd (2006) 1 NWLR (Pt. 960) 17
F Aduku v. Adejoh (1994) 5 NWLR (Pt. 346) 582

BOOK REFERRED TO

Bryan Garner' Dictionary of Modern Legal Usage 2nd Ed. p. 763

LEAD JUDGMENT BY BODE RHODES-VIVOUR JSC

G The 3rd Respondent/cross-appellant is one of the Appellant's Bankers. It granted loans amounting to 3.5 Million (Three Million and Five Hundred Thousand Naira) to the Appellant. The loan was secured by a Debenture Deed dated the 27th of November, 1986 in
H favour of the 3rd respondent. Owing to the appellant's default in repaying the loan with interest, the 3rd respondent/cross-appellant relied on a provision in the Debenture Deed, and appointed the 2nd respondent/cross appellant the Receiver/Manager over the assets of the appellant. In performing his duties the 2nd respondent/cross ap-

pellant sold some of the assets of the appellant to the 1st respondent. Alarmed by the sale of its assets the appellant, as plaintiff took out a Writ of Summons in a Kwara State High Court, Ilorin Division, against the respondents/cross appellants' for:

i. A DECLARATION that the removal, sale, disposal of and/or sharing by the defendant of the (subject matter) 44 vehicles and/or plants in total disregard of a subsisting court order restraining them from so doing is illegal, null and void and of no effect whatsoever.

AND/OR

2. A DECLARATION that the removal, sale, disposal of and/or sharing of the said 44 vehicles and/or plants during the pendency of Suit No.KWS/215/88 is illegal, null and void and of no effect whatsoever

AND/OR

3. A DECLARATION that the removal, sale, and/or disposal of the said 44 vehicles and/or plants by the defendants without compliance with the provisions of the Auctioneers Law, Cap 10 Laws of Northern Nigeria applicable to Kwara State is illegal, null and void and of no effect whatsoever.

4. RESTITUTION OF THE SAID 44 VEHICLES AND PLANTS in the working conditions they were before the defendants illegally sold them

ALTERNATIVELY

5. A SUM OF N18,031,890.00K being the market value of the said 44 vehicles and plants illegally sold, disposed of and/or shared by the defendants.

6. GENERAL DAMAGES of a sum of N132,919,181.00k.

Gbadeyan J (as he then was) of the Ilorin High Court, Kwara State presided. On 28/5/98 the defendants urged the trial court to strike out the suit on the ground that it was caught by the doctrine of estoppel per rem judicatam in view of the judgment in KWS/122/91 delivered on 2/4/98. The learned trial judge dismissed the defendant's application. Before hearing the defendants' application trial had been concluded after nine witnesses gave evidence for the plaintiff and two for the defendants' and several documents admitted as exhibits. After dismissing the defendant's application the learned trial judge entered judgment for the plaintiff/appellant in these words: Consequently the plaintiff's claim succeeds in its entirety. The three defen-

dants jointly and severally shall pay to the plaintiff the sum of N18,031,980.00 as special damages and N132,000,000 as general damages. Aggrieved by the judgment the respondents' appealed against the Ruling and the judgment. On the 19th day of May, 2004 the Court of Appeal allowed both appeals and set aside the decision of the trial court. This appeal is against the Ruling and judgment of the Court of Appeal. In accordance with well settled practice and rules of this court briefs were filed and exchanged. The appellant, who was the plaintiff in the trial court and respondent in the Court of Appeal filed its brief on the 8th of August, 2005. The respondents' filed a respondents/cross appellants brief deemed duly filed and served on the 22nd of November, 2006. The appellant filed a reply brief on the 28th of April, 2011.

The appellant formulated six issues for determination. They are:

1. Whether, in view of the decision of this Honourable Court in the case of 7up-Bottling Co. Ltd & 2 ors v. Abiola & Sons Bottling Co. Ltd 2001 6 SC p.73, the lower court was still right in applying estoppel per rem judicatam in striking out the plaintiffs suit OR whether this suit is/was caught by estoppel per rem judicatam.

2. Whether the lower court was right in its failure, neglect and/or refusal to strike out Ground 2 of the Grounds of Appeal against the ruling and Grounds 5, 6, 7, 8 and 9 of the Grounds of Appeal against the final judgment before it for being incompetent.

3. Whether the lower court was right in allowing the appeal before it on the basis that disobedience to court order does not give rise to an independent cause of action when apparently the plaintiff's cause of action is a claim in tort of conversion.

4. Whether Exhibit D5 and D6 which relate to committal proceedings, constitute issue estoppels to this case, which is a claim in tort of conversion.

OR

Whether the lower court was right in holding that the parties and the subject matter do not have to be the same in the earlier and later case for issue estoppel to operate.

5. Whether the trial court relied on the doctrine of lis pendens as a basis for its judgment.

6. Whether, having regard to the circumstances of this case,

the lower court rightly set aside the decision of the trial court when the subject matter assets are not envisaged by a purported Deben-ture Deed.

The respondents adopted the six issues formulated by the ap-pellant. At the hearing of the appeal on the 30th of April, 2012 learned counsel for the appellant Dr. S.O. Olatoke adopted the appellant's B brief filed on the 8th of August, 2005 and the reply brief filed on the 28th of April, 2011. He urged the court to allow the appeal and restore the judgment of the trial court and dismiss the cross-appeal. Learned counsel for the respondents, Mr. A. A. Adegbonmire adopted C the respondents' brief deemed filed on the 22nd of November, 2006. He urged this court to dismiss the main appeal and allow the cross-appeal.

I have carefully considered the six issues formulated by the appellant and adopted by the respondents' and find that the first D issue is very important and crucial. If it succeeds there would be no need considering the other issues, which cover the main appeal.

In the trial court the respondents'/cross-appellants' were the defendants. They brought an application to strike out the suit. Their ground for bringing the application was that the entire suit, the plain- E tiff/appellants claims became the victim of estoppel by res judicata when judgment was delivered in a sister case by the High Court at Offa, Kwara State on the 1st of April, 1998. That suit is KWS/122/91. On this ground the learned trial judge dismissed the application after F finding that the plaintiff/appellant was not precluded from proceed-ing with their case. That Ruling went on appeal to the Court of Ap-peal. The Court of Appeal set aside the decision of the learned trial judge. The meaning of that Ruling is that the plaintiff/appellant's case was caught by the doctrine of estoppel per rem judicatam. Being the G pen-ultimate court, the Court of Appeal went on to consider the main-appeal. This is to afford this court to benefit of its views on the main appeal should it be found that its Ruling was wrong. Learned counsel for the appellant observed that the subject matter in this suit is different from that in Suit No. KWS/122/91. Relying on 7up-Bot- H tling Company Ltd. & 2 Ors. v. Abiola & Sons Bottling Co. Ltd. 2001 6 SC P. 73M Odutola v. Oderinde 2004 12 NWLR Pt.888 p.574. He further observed that suit No. KWS/122/91 cannot support the plea of estoppel per rem judicatam since it is on appeal. According to him

it is thus not a final judgment for the purpose of the plea.

Learned counsel for the respondents/cross appellants observed that the Court of Appeal was correct in its decision. Reliance was placed on *Fadiora v. Gbadebo* 1978 3 SC P.219, *Honda Place Ltd. v. Globe Motors Ltd.* 2005 14 NWLR Pt.445 p. 273. He submitted that
 B suit No. KWS/270/89 from which this appeal emanates is caught by the doctrine of *Res Judicatam*. *Res judicatam* can be explained as follows. If a plaintiff seeks to litigate a claim that has been adjudicated upon all over again, the defendant may answer it with the plea of *res*
 C *judicata*. That is to say exactly the same matter has already been decided. Judgment was delivered in suit KWS/122/91 on 1/4/98 by the trial court, while judgment of the trial court was delivered in this
 D suit (KWS/270/89) on 28/7/98. KWS/122/91 is on appeal to this court. It is SC.88/05 and it has been fixed for hearing on the 21st of January, 2012. The question is whether suit No.KWS/122/91 operates as *res judicata*.

The following must be established for res judicata by way of estoppel as a bar to the adverse parties claim to be sustained.

E ***1. It must be a judicial decision and it not have been delivered.***

2. The court that heard the matter had jurisdiction over the parties and the subject matter.

F ***3. The decision was final and on the merits.***

4. It determined the same question as that raised in the subsequent case.

5. The parties in the subsequent case were either parties to the earlier case or their privies.

G In KWS/270/89, now SC/87/2005 (this appeal) the parties are Abiola & Sons Bottling Co. Ltd

AND

1. 7Up Bottling Co. Ltd.

H Ademola Somorin (Trading under the name and style of Ademola Somorin).

3. First City Merchant Bank Ltd.

In KWS/122/91, now SC.88/2005 (pending in this court and slated for hearing on 21/1/2013) the parties are:

1. Abiola & Sons Bottling Co. Ltd

2. Samuel Abiola & Sons Co. (Nig.) Ltd.

AND

1. First City Merchant Bank Ltd

2. Ademola Somorin

3. 7up Bottling Co. Ltd.

It is clear that the parties in both suits are the same notwithstanding the inclusion of Samuel Abiola and Sons Co. (Nig) Ltd in KWS/122/91. The fact that, a new name was included would not make Res judicatum inapplicable. See Ojiako v. Ogueze 1962 1 All NLR p.58, O. Onisango v. Akinkunmi & Ors. 1955 - 56 WRLR p.39. After examining the statement of claim in both suits it is clear that the issue is the assets of Abiola & Sons Bottling Company.

Now, can a judgment on appeal operate as res judicata. Res judicata gives effect to the policy of the Law that parties to a case should not afterwards be allowed to re-litigate the same question even if the decision is wrong. See Crown Estate Comrs v. Dorset CC 1990 Ch p. 297 at 305. ***This is premised on the fact that a court properly constituted has jurisdiction to decide a case wrongly as well as correctly. Consequently once a decision is final on the same question and between the same parties it will be binding on them until upset on appeal. The judgment in KWS/122/91 was delivered before the judgment in KWS/270/89 (from where this appeal emanates). That judgment has not been upset on appeal. It is binding on the parties and it operates as estoppel to bar the parties from re-litigating in KWS/270/89. The Court of Appeal was correct. In the light of the fact that suit KWS/122/91 operates as estoppel per rem judicatum considering the main appeal from KWS/270/89 would amount to an academic exercise as the issues therein have already been decided in KWS/122/91. A judgment on appeal can operate as res judicata provided it has not been upset on appeal. Res judicata operates to prevent this court from hearing the main appeal. Appeal is hereby dismissed.***

CROSS APPEAL

The Sole issue in the cross-appeal is:

Whether the Court of Appeal was right in failing to consider issues 2, 3, 7, 8, 9, 10 and 11 contained in the brief of the appellants'

who are now respondents/cross-appellants.

A cross-appeal is filed by a respondent who agrees with the judgment appealed against but wants to correct errors in the judgment or to set aside a finding that is crucial and fundamental to the case. See *Eliochin (Nig.) Ltd v. Mbadiwe* 1986 1 B NWLR Pt.14 p.47.

Learned counsel for the respondents' cross-appellants observed that the failure of the Court of Appeal to consider issues 2, 3, 7, 8, 9, 10 and 11 denied the respondents/cross-appellants fair hearing. Reference was made to *Araka v. Ejeagwu* 2000 15 NWLR Pt.692 p.684.

Learned counsel for the appellant submitted that the Court of Appeal is not bound to consider all issues submitted to it, contending that it should only consider germane or material issues. Reliance was placed on *Umeanah v. Attah* 2006 9 SCNJ P.75. The appellants' filed eleven grounds of appeal from which they formulated nine issues for determination. The Court of Appeal examined the issues and identified the central or burning issue for determination in the appeal. It is:

Whether or not the 2nd defendant acted legally and within his powers when he allegedly sold the 44 vehicles and plants or machinery involved in this action.

The Court of Appeal was satisfied that this crucial issue was covered by issues 4, 5 and 6 since the issues attack the three main reasons given by the learned trial judge for his reasoning and conclusions. Was the Court of Appeal right not to consider issues 2, 3, 7, 8, 9, 10 and 11? In the pen-ultimate paragraph of the judgment of the Court of Appeal, the court said:

"I see no point in going into the remaining issues. Even if I resolve them in favour of the respondent, it will not change my ultimate decision to allow this appeal. As I pointed out, these three issues are the crucial ones. The other border more on academic exercise that cannot decide the fate of the appeal."

An Appeal Court may adopt or even formulate issues for determination that would serve the interest of justice, or/and address the real grievance in an appeal. Where an appeal court decides to adopt issues formulated in the briefs of argument, the court is not bound to address and render a decision on every issue, rather it should restrict itself to treating issues that raise a recognizable complaint. That is issues if addressed

would resolve the appeal in a fair manner, and avoid treating issues that are an academic exercise and a waste of judicial time if answered. See Ogunbiyi v. Ishola 1996 6 NWLR Pt.452 p.15, Stone Jason Ltd v. Omega Air Ltd. 2006 1 NWLR Pt.960 p.17, Aduku v. Adejoh 1994 5 NWLR Pt. 346 p. 582.

The opening paragraph of the respondents/cross-appellants brief reads: The respondents/cross-appellants herein by the leave of this honourable court filed a Notice of Cross-Appeal in this case. It is submitted that the sole issue arising for determination from the respondents/cross-appellants' cross-appeal is whether the Court of Appeal was right in failing to consider issues 2, 3, 7, 8, 9, 10 and 11 contained in the brief of arguments of the appellants who are now respondents/cross-appellants before this court.

The respondents/cross-appellants then proceeded to argue issues 2, 3, 7, 8, 9, 10 and 11 which the Court of Appeal did not consider and concluded by urging the dismissal of the appeal and that the cross-appeal should be allowed and the Court of Appeal decision affirmed on the additional arguments canvassed in respect of the cross-appeal. The respondents/cross-appellants were the appellants in the Court of Appeal. They won. They are to defend the judgment of the Court of Appeal in this court. A complaint of denial of fair hearing is rather strange. I am firmly of the view that the Court of Appeal was correct to resolve the appeal on the live issues identified in issues 4, 5, 6 and in my view found that considering issues 2, 3, 7, 8, 9, 10 and 11 would not change the ultimate decision. Considering these issues now would be a contradiction. I am in complete agreement with the Court of Appeal. The cross-appeal is hereby dismissed.

For the avoidance of doubt the main appeal is dismissed, it being caught by the doctrine of estoppel per rem judicatam and the cross-appeal is also dismissed. There would be no order on costs.

MUHAMMAD JSC

I read before now the judgment of my learned brother, Rhodes-Vivour, JSC. I am in agreement with him that the appeal is devoid of any merit. I too, dismiss the appeal. I adopt consequential orders made in the leading judgment including orders as to costs.

FABIYI JSC

I have read before now the judgment just delivered by my learned brother Rhodes-Vivour, JSC. I agree with the reasons advanced therein in arriving at the final conclusion that the main appeal as well as the cross-appeal should be dismissed.

The material facts in respect of this matter have been well set out in the lead judgment. Put briefly, two suits were filed by the parties. The suit at Offa High Court was determined before the one filed at the High Court sitting in Ilorin, Kwara State. The parties and subject matter of both suits are substantially the same. The defendants moved the court to strike out the suit before the High Court at Ilorin on ground of *res judicata*. The trial court overruled same. On appeal to the Court of Appeal, the decision of the trial court was reversed and suit was struck out. The stance of the Court of Appeal precipitated the appeal and the cross-appeal before this court.

The core issue canvassed in the main appeal relates, in substance, to the propriety or otherwise of the application of the doctrine of *res judicata* by the Court of Appeal to the scenario created by the parties to this appeal. My learned brother has treated the core issue in the main appeal properly. But I seek leave to say a word or two on same. Let me start by pointing it out that *res judicata* has been defined as a matter adjudged, a thing judicially acted upon or decided, a thing or matter settled by judgment. Rule that a final judgment rendered by a court of competent jurisdiction on the merit is conclusive as to the rights of the parties and their privies and so constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action. See: *Matchet v. Rose* 36 ILL. App. 3d, 638, 344; NE 2d 770, 779. A matter once judicially decided is finally decided. To be applicable, same requires the identity in thing sued for; identity of cause of action, person and parties to the action. (Black's Law Dictionary, Sixth Edition, pages 1305-1306).

Parties are not in doubt in respect of the identify of the vehicles sued for which precipitated the cause of action. The parties are substantially the same in both suits. Judgment at Offa High Court in KWS/122/91 was delivered on 1/4/98 while the judgment in KWS/270/89 at Ilorin was delivered on 28/7/98. The doctrine of *res judi-*

cata operates against the later judgment delivered on 28/7/98. Refer to *Fadiora v. Gbadebo* (1978) 3 SC 219. The Court of Appeal was correct in the stance taken by it. As such, the main appeal deserves to be dismissed.

The cross-appeal has been properly treated in the lead judgment. I adopt the reasons therein contained without any equivocation. B

For the above reasons and the fuller ones adumbrated in the lead judgment, I too, feel that the main appeal as well as the cross-appeal should be dismissed. I order accordingly. I make no order on costs. C

GALADIMA JSC

I have had the privilege of reading in draft the leading Judgment of my learned brother B. RHODES-VIVOUR JSC. I agree with his reasoning and conclusion that the main appeal as well as the cross-appeal should be dismissed. D

The facts of this matter have been carefully set out in the lead Judgment. Briefly, two suits were filed by the parties. The Judgment in Suit No. KWS/122/91 was delivered by the High Court of Offa, Kwara State on 1/4/98 and KWS/270/89 was delivered on 28/7/98. KWS/122/91 is on appeal to this Court that is SC.88/2005 and it has been fixed for hearing on 21/01/2013. E

Learned Counsel for the Appellant has submitted that the subject matter in Suit-No. KWS/270/89 is different from that in Suit No. KWS/122/91. He further observed that the suit cannot support the plea of estoppel per res judicatam since it is on appeal since that cannot be regarded as a final Judgment for the purpose of the plea. F
Learned Counsel for the Respondents/Cross Appellants has observed that the court below was correct in its decision that Suit No. KWS/270/87 from which the instant appeal emanates is caught by the doctrine of res judicatam. The decision of trial court that the case was not caught by the doctrine of res judicatam was reversed by the Court of Appeal. Thus this appeal and Cross-appeal was against the decision of that Court. Therefore the main issue canvassed in this appeal relates to the application of the doctrine of res Judicata. The Latin phrase res judicata means literally “a thing adjudicated”. It is trite law G
H

that a matter once judicially decided is finally settled. For the doctrine to apply, it is required that the parties and the subject-matter must be the same. A Judgment is not *res judicata* if these conditions are not met. (See Bryan Garner’ Dictionary of Modern Legal Usage, Second Edition page 763).

B It is not in doubt that the parties, and the identity of 44 vehicles and plants, the subject matter of this case, are the same in both suits. The Judgment of Ilorin High Court delivered on 28/7/98 was caught up by the doctrine of *res judicata*. See *FADIORA V. GBADEBO* (1978) 3 SC. 219. The Court below was therefore correct to so hold and therefore in the light of this the main appeal should be dismissed.

The main issue in the Cross-Appeal is whether the Court of Appeal was right in failing to consider issues 2, 3, 7, 8, 9, 10 and 11 contained in the Appellant’s brief of argument of the Appellant’s brief.

D Learned Counsel for the Respondents/Cross-appellants submitted that failure by the Court below to consider these issues denied the Respondents fair hearing relying on *ARAKA V. EJEAGWU* (2000) 15 NWLR (Pt. 692) 684. On the other hand learned counsel for the Appellant submitted that the court below is not bound to consider all issues submitted to it, contending that it should consider only important and germane issues necessary to determine the appeal.

The Appellants filed in the Court below 11 Grounds of Appeal, from which they formulated 9 issues for determination. The Court below examined the issues and identified the crucial issue thus:

F “*Whether or not the 2nd defendant acted legally and within his powers when he allegedly sold 44 vehicles and plants or machinery involved in this action.*”

G The court was satisfied that this sole issue thoroughly covered issues 4, 5 and 6 because the issues attack the three main reasons stated by the learned trial judge for his conclusion. Nothing prevents an appeal court from adopting or formulating crucial issue or issues that would effectively and justly determine the real grievance of the parties in an appeal. It is trite that where an appeal court decides to adopt issues formulated in the brief of argument of a particular party, it is not bound to address and render a decision on every issue. It would rather restrict itself to treating issues that raise a recognizable complaint or grievance of the parties, not those issues that are merely intended as academic or wasteful exercise See *ADUKU V. ADEJOH*

(1994) 5 NWLR (Pt. 346) 582 and *STONE JASON V. OMEGA AIR LTD.* (2006) 1 NWLR (Pt. 960) 17. The Respondents/Cross-Appellants cannot be heard to complain that they were denied fair hearing. They were the appellants who won in the court below. At best they should defend the Judgment of the Court below.

In view of the foregoing I must say that the Court of Appeal correctly resolved the live issues identified in issues 4, 5, 6. None consideration of issues 2, 3, 7, 8, 9, 10 and 11 would not, in any way, change the ultimate decision of the court below. In the circumstance, the Cross-appeal herein is equally dismissed for lacking in merit. Main appeal and Cross-appeal are dismissed. No order is made as to costs

NGWUTA JSC

I read in advance the lead judgment delivered by My Lord, Rhodes-Vivour, and I agree with the reasoning and conclusion therein.

The two cases involved in this appeal are Suits Nos. KWS/270/89 and KWS/122/91. The trial Court delivered judgments in the two cases on 28/7/98 and 1/4/98, respectively. Appeal in KWS/122/91 has been entered in this Court as Appeal No. SC.88/2005 and fixed for hearing on 21/1/2013. The issue appropriately dealt with in the lead judgment is

Whether the latter suit in the light of the earlier suit is caught by the doctrine of estoppel by res judicata.

The conditions for the application of estoppel by res judicata are as stated in the lead judgment. The parties and issues in the two cases are substantially the same. The doctrine of res judicata will be invoked where a final decision has been pronounced by a Court or judicial tribunal of competent jurisdiction over a cause or matter involving the same parties.

All the issues in the two cases have been pronounced upon so that neither party or their privies can raise any of the issues already decided for re-litigation between them. See *Odonigi v. Oyelede* (2001) 84 LRCN 658 at 674. It is immaterial that either of the cases is on appeal. A judgment of a Court subsists until it is set aside by a Court of competent jurisdiction and in any case it is trite that an appeal cannot operate as a stay of execution. See *Vaswani Trading Co Ltd v.*

Saralakh (1972) 12 SC 77 at 82.

As regards the cross-appeal, it has to be stressed that an appellate Court is not a rubber stamp of any party before it. The Court is not bound to resolve any issue which has no effect one way or the other on the matter in dispute.

B For the above and the fuller reasons in the lead judgment, I agree that both the appeal and the cross-appeal are devoid of merit. Accordingly, I also dismiss each of them.

C

D

E

F

G

H