

**SUPREME COURT OF NIGERIA**  
FRIDAY 17TH JANUARY, 2014. SC. 44/2002  
**CORAM:- I. T. MUHAMMAD, J. A. FABIYI,**  
**M. U. PETER-ODILI, O. ARIWOOLA,**  
**M. D. MUHAMMAD, JJSC**

1. ALHAJI SAFIANU AMINU  
2. ALHAJI ABASI WALI ..... APPELLANTS  
3. ALHAJI ISA  
(For themselves and as representatives  
of Balogun Osolo Family)  
AND  
1. ISIAKA HASSAN  
2. CHIEF SUNMONU BAKARE ..... RESPONDENTS  
3. ALHAJI IBRAHIM DUROJAIYE  
(For themselves and as Head and  
representatives of Hassan Komolafe family)

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PLEADINGS - Purpose of - Is to give notice to the other party of the case he is to meet - And each party is to clearly present his case - In order to prevent any party from being taken by surprise (H1)

PLEADINGS - Binding nature of - Issues are settled on pleadings - And evidence in respect of facts not pleaded must not be allowed - But where inadvertently received - Court must discountenance it (H2)

EVIDENCE - Admissibility - Previous evidence - Alade v. Aborishade - Evidence given in previous case can never be accepted by court trying a later case - Where Evidence Ordinance s. 34(1) applies (H3)

JUDGMENTS - Previous judgment - Use - Judgment in earlier case is used in a later case on a plea of res judicata - Provided incidents necessary to support such plea are fully observed (H4)

LAND LAW - Evidence - Estoppel - Application - Exhibit E is inadmissible and cannot bind respondents as estoppel - As they were not

party to it (H5)

RES JUDICATA - Principle of - It states that final judgment of court on merits is conclusive - As to rights of parties and their privies - And constitutes bar to a subsequent action involving same claim or cause of action (H6)

LAND LAW - Proof - Possession - Appellants by failing to prove that respondents are their customary tenants - Have raised presumption of ownership in favour of respondents - As provided by Evidence Act s. 146 (H7)

COURTS - Counter claim - Validity of - Where loosely framed by counsel to detriment of appellants - CA rightly held that same is unknown to law - And that order made in respect of the claim should be set aside (H8)

**FACTS**

Before the High Court of Lagos State, plaintiffs/respondents commenced this action against defendants/appellants seeking inter alia for a declaration of title in respect of the land in dispute, damages for trespass and injunction restraining appellants from committing further trespass on the land. On the other hand, appellants counter-claimed for reclamation. Respondents’ case is that appellants’ family had in the time past made an outright sale of the land in dispute to respondents’ ancestor. Respondents maintained that they have since been in an undisturbed possession of the land. On the other hand, appellants contend that the grant made to respondents’ ancestor was not an outright sale, but rather was in the nature of a customary tenancy subject to payment of rent/tribute to appellants’ family.

The learned trial Judge heard the case and held that the grant made to respondents was in nature of a customary tenancy. He placed reliance of Exhibit E (unpleaded record of evidence of witnesses in a previous case) and Exhibits G-G1 to grant the counter-claim of appellants. Respondents being dissatisfied, filed appeal in the Court of Appeal, Lagos Division. The court in its judgment upturned the judgment of the trial court. It held that the trial court wrongfully placed reliance on Exhibits E, G and G1 as the same were neither pleaded

nor tendered in proof of any pleaded fact. The court went on to hold that Exhibit E cannot bind respondents because they were not parties to it. It was also held that the trial Judge made findings that cannot be supported by facts and that appellants' counter-claim for reclamation is unknown to the law. Hence, orders made in terms of the counter-claim cannot stand. Aggrieved with the stance of the court, appellants lodged appeal in Supreme Court.

### **ISSUES FOR DETERMINATION**

*“(d) Whether the learned justices of the Court of Appeal were right to have held that Exhibit E was inadmissible on the ground that it was not pleaded, and did not comply with section 34 of the Evidence Act and could not operate as res judicata against the respondents.*

*(e) Whether the learned justices of the Court of Appeal were right to have held that Exhibits G - G1 were inadmissible on the ground that they were not pleaded.”*

**HELD** (Unanimously dismissing the appeal per **FABIYI JSC**)

*PLEADINGS - Purpose of*

**1. Let me say it right away that the object of pleadings is to require each party to give notice to his opponent with clarity and precision of the case which he is to meet. Each party is expected to place his cards on the table face-up. This is essential to prevent any of the parties from being taken by surprise and enable them frame and prepare their cases for trial.**  
(p. 260 E)

*PLEADINGS - Binding nature of*

**2. It is basic that in civil cases, issues are settled on pleadings and courts should not allow evidence to be given in respect of facts not pleaded. If such evidence is inadvertently received, it is the duty of the trial judge to discountenance it as it goes to no issue.**

**In short, the court below was on a firm stand when it found that Exhibits E, G and G1 upon which the judgment of the trial**

**court was based were not pleaded or tendered in proof of any pleaded fact and as such, they go to no issue.** (p. 260 H)

*EVIDENCE - Admissibility - Previous evidence*

**3. It has been pronounced with force long ago by this court in Alade v. Aborishade (1960) 1 NSCC 111 at 115 per Abbot, FJ ‘that evidence given in a previous case can never be accepted as evidence by a court trying a later case where section 34(1) of the Evidence Ordinance applies. The evidence given in an earlier case by persons who also testify in a later case may be used for cross-examination as to credit but is of no higher value than that.** (p. 261 H)

*JUDGMENTS - Previous judgment - Use*

**4. The judgment in an earlier case frequently is used perfectly properly in a later case, the classic instance being of course, on a plea of res judicata but it can properly be used there provided the incidents necessary to support such a plea are fully observed’.** (p. 262 A)

*Evidence - Estoppel - Application*

**5. The appellants contended that Exhibit E is relevant and admissible as an admission against the interest of the respondent’s Family. The contention is far-fetched as the respondent’s family - Hassan Komolafe Family is not a party to Exhibit E. In the prevailing circumstances Exhibit E was not properly admitted by the trial court. The court below was right when it found that same was inadmissible.**

**As extant in Exhibit E, it can be seen that same was filed against Abu Bakare Yesufu in his personal capacity. It goes without any doubt that Exhibit E cannot bind the respondents - Hassan Komolafe Family.**

**The point that I wish to make here is that even if Exhibit E is admissible, it cannot bind the respondents - Hassan Komolafe Family as estoppel because they were not party to it. There is no evidence on record upon which it can be rightly inferred with adequate precision and certainty that the land litigated upon in Exhibit E is the same as the land now in dispute herein.**

**This is because no plan was tendered in Exhibit E. The attempt by the trial judge to tie Exhibit E tendered by the appellants to the respondents' Exhibits F and F1 was without justification and to no avail in the absence of any plan tendered in Exhibit E. As well, contrary to the flawed finding of the trial judge, none of the plaintiffs was referred to in Exhibits G and G1. Put briefly, I cannot fault the stance taken by the court below in any respect.** (pp. 262C/263 B)

*RES JUDICATA - Principle of*

**6. The appellants attempted to rely on Exhibit E as constituting res judicata which 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 merits is conclusive as to the rights of the parties and their privies and so to them constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action. A matter once judicially decided is finally decided - To be applicable, requires identity in thing sued for; identity of cause of action, persons and parties to the action'.** (p. 262 G)

*LAND LAW - Proof - Possession*

**7. Perhaps I still need to state it here that the appellants by their counter-claim, asserted that the respondents are their customary tenants. Such raises in favour of the respondents the presumption of ownership provided by section 146 of the applicable Evidence Act which provides as follows:-**

**"When the question is whether a person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner."**

**It has been shown that the appellants failed to prove their assertion of customary tenancy by admissible, credible and cogent evidence. The appellants placed themselves within the consequence of their admission of the respondents' exclusive possession.** (p. 263 E)

*COURTS - Counter claim - Validity of*

**8. The last point which I wish to touch briefly is the appellants' counter-claim for 'reclamation'. This claim was loosely framed by counsel to the detriment of his client. No court of record should encourage such a carefree attitude by counsel.**

**B The court below was correct in its stance that same is not known to law and that the order made by the trial court in respect of the far-fetched claim should be set aside.**

(p. 263 H)

## **C NOTABLE POINTS OF INTEREST**

### **PETER-ODILI JSC**

**1. Documents to be pleaded provided facts are expressly pleaded**

**D** It is to be said that documentary evidence needs not be specifically pleaded to be admissible in evidence so long as facts and not the evidence by which such a document is covered are expressly pleaded. Consequently, where the contents of a document are material, it shall be sufficient in any pleading to avert the effect thereof as briefly as possible without setting out the whole or any part thereof, unless the precise words of the document or any part thereof are or any part thereof are material. (p. 275 C)

### **F 2. Document - Admissibility - When to object**

The rule of evidence and practice in civil as well as in criminal cases prescribes that an objection to the admissibility of a document sought to be tendered in evidence is immediately taken when it is offered in evidence. Barring some exceptions where by law certain documents are rendered inadmissible for failure to comply with the provisions of such law, the rule remains inviolate that where objection has not been raised by the opposing party to the reception in evidence of a document or other evidence, the document or evidence would be admitted and the opposing party would for all time hold his peace and cannot complain thereafter about that admission. (p. 276 E)

### **3. Appellate court can exclude inadmissible evidence**

It is not the law that once a document is received in evidence without

objection by a party, then such a party is forever automatically stopped, even in the appellate court from raising the issue of its admissibility. Thus, if a document is unlawfully received in evidence at the trial court, an appellate court has inherent jurisdiction to exclude and discountenance the document even though counsel at the trial did not object to its going into evidence. It goes without saying therefore that although a document was unlawfully received in evidence without objection by or on behalf of the appellant, it would still be open to him in the appellate court especially where such an appellant has in fact suffered injustice as a result, or a miscarriage of justice occasioned as a result, to object to it since it is the duty of the appellate court to excluded that inadmissible evidence which was wrongly received in evidence at the trial. (p. 279 A)

### **REPRESENTATION**

A. B. Kasunmu, for the Appellants

J. A. Molajo, SAN with E. Molajo (Mrs.), for the Respondents

### **CASES REFERRED TO**

Ipinlaye II v. Olukotun (1996) 6 NWLR (pt. 453) 148

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

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

Idahosa v. Orasanye (1959) 4 FSC 166

NIPC Ltd. v. Thomson Organisation (1969) NMLR 99

Ogbodo v. Adelugba (1971) 1 All NLR 68

Alade v. Aborishade (1960) 1 NSCC 111

Shonekan v. Smith (1964) 1 All NLR 313

Ayinde v. Salawu (1989) NWLR (pt. 109) 297

Dada v. Bankole (2008) 1 SC (pt. 111) 219

Eghobamien v. FMBN (2002) 17 NWLR (pt. 799) 488

Ajeigbe v. Odedina (1988) 1 NWLR 587

Okafor v. Obiwo (1978) 9 and 10 SC 112

Coker v. Sanyaolu (1976) 9 - 10 SC 203

Udeze v. Chidebe (1990) 1 SC 148

### **STATUTES REFERRED TO**

Evidence Ordinance, s. 34(1)

Evidence Act, s. 146

**BOOK REFERRED TO**

Blacks Law Dictionary 6th Ed. 1305-6

**LEAD JUDGMENT BY FABIYI JSC**

B        At the trial High Court of Lagos State, the plaintiffs who are respondents in this appeal claimed as follows:-

          “(i) *A declaration that the plaintiffs are the persons entitled to the grant of a Certificate of Occupancy in respect of the area of land measuring approximately 26.3276 hectares situate at Aiyetoro Village, Badagry, Lagos State and verged RED on Survey Plan No. CD 223/74 dated 20th December, 1973 prepared by C. Olu Dawodu, Licenced Surveyor.*

C         
D       “(ii) *N200,000:00 damages for trespass committed by the Defendants, their servants and agents.*

          “(iii) *An injunction restraining the Defendants, their servants and agents from continuing or committing further acts of trespass on the said land.*”

E        The defendants, on being served with the statement of claim, filed their statement of defence which was accompanied by a counter-claim that reads as follows:-

          “(a) *Forfeiture of the plaintiffs’ customary tenancy of the land in dispute to the defendants who are the original land owners and overlords, for challenging the defendants’ title.*

F       “(b) *Reclamation of the whole portions of land belonging to the defendants and which the plaintiffs held of them as customary tenants.*

G       “(c) *A declaration that the defendants are the persons entitled to the grant of statutory/customary right in respect of the area of land forming the subject matter of this suit.*

          “(d) *Perpetual Injunction restraining the plaintiffs, their servants, agents and privies from exercising any rights of ownership of the said land.*

H       “(e) *=N=500,000:00 damages*  
          “(f) *Further and or other reliefs.*”

          It is apt to state the facts briefly. The plaintiffs maintained that the land known as Aiyetoro belonged originally to the defendants, family - Balogun Osolo Family. That many years ago, the Balogun



Osolo family made an outright grant of the land in dispute to the plaintiffs' ancestor, Hassan Komolafe in consideration of the payment of the customary purchase price and thereby became the absolute owners of same. They used the land as such since the grant was made. As such owners, the plaintiffs maintained that they continuously and on divers occasions have let and sold the land to strangers who have built substantial houses thereon without protest from the defendants none of whom live in Aiyetoro. The present action was caused by the defendants' forcible entry onto the land in 1996. B

The defendants, on their part, agree that they made a grant of the land in dispute to the plaintiffs but contend that the grant was in the nature of a customary tenancy subject to payment of rent or tribute to the defendants' family. C

The learned trial Judge garnered evidence and was duly addressed by learned counsel to the parties. In the judgment delivered on 18th November, 1996, the learned trial judge accepted that the land in dispute was granted to the plaintiffs by the defendants. He rejected the plaintiffs' claim for title as he held that the grant to them was in the nature of a customary tenancy. Heavy reliance was placed on Exhibit E which the plaintiffs maintained was an unpleaded record of evidence of witnesses and judgment in an earlier case as well as unpleaded Exhibits G - G1 by the trial Judge who entered judgment for the defendants on their counter-claim. D E

The plaintiffs who were not satisfied with the judgment of the trial court appealed to the Court of Appeal, Lagos Division ("the court below" for short). In its judgment delivered on 22nd November, 2001 the court below set aside the judgment of the trial High court. It maintained that Exhibits E, G and G1 upon which the judgment of the High Court was based were neither pleaded nor tendered in proof of any pleaded fact. Exhibit E was not admissible being substantially the record of evidence of witnesses in a previous case and there was no compliance with section 34 of the Evidence Act. Further, that Exhibit E cannot bind the plaintiffs because they were not parties to it. The award of damages in favour of the defendants/ counter-claimants was wholly inconsistent with their case of forfeiture and same cannot stand in the absence of any claim for special damages. The court below found that the trial judge made findings which cannot be supported by the facts. It felt that the counter-claim for F G H

‘reclamation’ is unknown to our law and ipso facto the order in the same terms cannot stand.

The defendants felt unhappy with the stance posed by the court below and has appealed to this court. In the brief of argument filed on behalf of the appellants, the five issues distilled for a due determination of the appeal read as follows:-

*“(a) Whether the learned justices of the Court of Appeal were right to have allowed the appeal when from the evidence before the court the plaintiffs had not proved their case.*

*(b) Whether the learned justices of the Court of Appeal were right to have set aside the grant of the claim for reclamation of land on the ground that the manner the claim is framed is not known to law*

*(c) Whether the learned justices of the Court of Appeal were right in reversing the decision of the Trial Court on the issue of laches and acquiescence.*

*(d) Whether the learned justices of the Court of Appeal were right to have held that Exhibit E was inadmissible on the ground that it was not pleaded, and did not comply with section 34 of the Evidence Act and could not operate as res judicata against the respondents.*

*(e) Whether the learned justices of the Court of Appeal were right to have held that Exhibits G - G1 were inadmissible on the ground that they were not pleaded.”*

On behalf of the respondents, three (3) issues decoded for a proper determination of the appeal read as follows:-

*“(1) Whether Exhibits E, G and G1 were admissible in evidence and are binding on the respondents having regard to the following:-*

*(a) Exhibits E, G and G1 were neither pleaded by either side nor tendered in proof of any pleaded fact.*

*(b) Exhibit E, the record of evidence of witnesses in a previous case was tendered without compliance with section 34 of the Evidence Act.*

*(c) Neither the individual respondents nor their family i.e. the Hassan Komolafe family was party in Exhibit E.*

*(d) There is no evidence on record that the land litigated upon in Exhibit E is the same as the land now in dispute.*

*(2) Whether the appellants' counter-claim for 'reclamation' is known to law.*

*(3) Whether the learned trial judge made a fair assessment of the evidence."*

I wish to start the consideration of this appeal with regard to issues (d) and (e) formulated on behalf of the appellants which have the same tone with issue 1 as couched on behalf of the respondents. They touch on the propriety or otherwise of the admission in evidence of Exhibits 'E' 'G' and G1 by the trial court and whether they are binding on the respondents.

On behalf of the appellants, it was submitted that Exhibits E, G and G1 were duly pleaded. It was contended that Exhibit E was admissible as *res judicata* against the respondents and ought not to have been rejected by the court below as not complying with the provisions of section 34 of the Evidence Act. It was submitted that documentary evidence need not be specifically pleaded to be admissible in evidence so long as facts and not the evidence by which such a document is covered are expressly pleaded. Learned counsel maintained that Exhibit E is relevant and was sufficiently pleaded in paragraph 6 of the Statement of Defence and Counter-Claim. He felt that admission of Exhibit E was not predicated on compliance with section 34 of the Evidence Act but on relevancy of the document and the fact that it was admissible as an admission against interest by the respondents. He referred to the case of *Ipinlaye II v. Olukotun* (1996) 6 NWLR (Pt.453) 148.

Learned counsel further submitted that Exhibit E should operate as *res judicata* to prove that the respondents are tenants to the appellants and that they were not given absolute grant of the land in dispute.

With respect to Exhibits G and G1, learned counsel for the appellants submitted that the fact that Exhibit G-G1 were not specifically mentioned in paragraph 6 of the Statement of Defence and Counter-Claim does not mean that they were not pleaded. He felt that it was for the respondents to ask for further particulars of such documents as observed by the trial judge.

Learned senior counsel for the respondents maintained that Exhibits E, G and G1 were neither pleaded by either side nor tendered in proof of any pleaded fact. Exhibit E, the record of evidence

of witnesses in a previous case was tendered without compliance with section 34 of the Evidence Act, He further observed that neither the individual respondents nor their family was a party in Exhibit E and that there is no evidence on record that the land litigated upon in Exhibit E is the same as the land in dispute herein.

B        Learned senior counsel to the respondents further observed that Exhibit E is the record of proceedings and judgment in Suit No. CT.JCC/425, Yusuf Salami and Family v. Abu Bakare Yesufu. He maintained that it was not part of the case pleaded by either party at the trial court that there was any litigation on the land in dispute prior to the commencement of the current proceedings. As such, Exhibit E was not tendered in proof of any pleaded fact and ought to have been rejected when objection was taken to it. He felt that Exhibit E goes to no issue.

C  
D        In the same manner, senior counsel observed that Exhibits G and G1 are pages of a book purporting to contain a record of alleged payments of rents by respondents to the appellants. No such record is alleged to exist in the pleading. Senior counsel submitted that, in the circumstances, Exhibits G and G1 go to no issue and ought to have been rejected. He cited *Adimora v. Ajufo* (1988) 3 NWLR (Pt. 80) 1, *Atanda v. Ajani* (1989) 3 NWLR (Pt. 111) 511.

E  
F        ***Let me say it right away that the object of pleadings is to require each party to give notice to his opponent with clarity and precision of the case which he is to meet. Each party is expected to place his cards on the table face-up. This is essential to prevent any of the parties from being taken by surprise and enable them frame and prepare their cases for trial.***

G        Paragraph 6 of the Statement of Defence and Counter-Claim which says the defendants shall rely on all related documents in their possession on the said land at the trial and all relevant Survey plans including Survey Plan No. SEW/73016 does not disclose any fact in proof of which Exhibits E, G and G1 could have been properly tendered and admitted.

H        ***It is basic that in civil cases, issues are settled on pleadings and courts should not allow evidence to be given in respect of facts not pleaded. If such evidence is inadvertently received, it is the duty of the trial judge to discountenance it as it goes to no issue.*** See: *Adimora v. Ajufo* (supra); *Ajani v. Atanda*

(supra) at page 531; Idahosa v. Orasanye (1959) 4 FSC 166; NIPC Ltd. v. Thomson Organisation (1969) NMLR 99 at 104; Ogbodo v. Adelugba (1971) 1 All NLR 68.

***In short, the court below was on a firm stand when it found that Exhibits E, G and G1 upon which the judgment of the trial court was based were not pleaded or tendered in proof of any pleaded fact and as such, they go to no issue.***

It was seriously contested that Exhibit E is not admissible being substantially the record of evidence in a previous case in respect of which there was no compliance with section 34 of the Evidence Act.

Section 34(1) of the applicable Evidence Act reads as follows:-

*“34(1) Evidence given by a witness in a judicial proceedings, or before any person authorized by law to make it is relevant for the purpose of proving, in a subsequent judicial proceedings, or in a later stage of the same judicial proceedings, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party or when his presence cannot be obtained without an amount of delay or expense which in the circumstances of the case, the court considers unreasonable.*

*Provided:-*

*(a) That the proceeding was between the same parties or their representatives in interest.*

*(b) That the adverse party in the first proceedings had the right and opportunity to cross-examine, and*

*(c) That the questions in issue were substantially the same in the first as in the second proceedings.”*

It should be noted here that the appellants did not establish that the witnesses who testified in Exhibit E were dead or cannot be found, or were incapable of giving evidence, or were kept out of the way by the respondents or that their presence could not be obtained without such delay or expense as the court would have considered unreasonable. There was no attempt to comply with the conditions in the above proviso to section 34 of the Evidence Act.

***It has been pronounced with force long ago by this court in Alade v. Aborishade (1960) 1 NSCC 111 at 115 per Abbot, FJ ‘that evidence given in a previous case can never be accepted as evidence by a court trying a later case where sec-***

***tion 34(1) of the Evidence Ordinance applies. The evidence given in an earlier case by persons who also testify in a later case may be used for cross-examination as to credit but is of no higher value than that. The judgment in an earlier case frequently is used perfectly properly in a later case, the classic instance being of course, on a plea of res judicata but it can properly be used there provided the incidents necessary to support such a plea are fully observed’.***

The above has been further established and/or reinforced. See Shonekan v. Smith (1964) 1 All NLR 313 Ayinde v. Salawu (1989) NWLR (Pt. 109) 297 at 315; Dada v. Bankole (2008) 1 SC (Pt.111) 219 at 230.

***The appellants contended that Exhibit E is relevant and admissible as an admission against the interest of the respondent’s Family. The contention is far-fetched as the respondent’s family - Hassan Komolafe Family is not a party to Exhibit E. In the prevailing circumstances Exhibit E was not properly admitted by the trial court. The court below was right when it found that same was inadmissible.*** See the case of Eghobamien v. FMBN (2002) 17 NWLR (pt. 799) 488 at 500.

***As extant in Exhibit E, it can be seen that same was filed against Abu Bakare Yesufu in his personal capacity. It goes without any doubt that Exhibit E cannot bind the respondents - Hassan Komolafe Family.*** This is as pronounced by this court variously that “*the fact that a member of a community took part in a court action either as a party or a witness is not by itself enough ground for the conclusion that the community to which that member belongs should be identified with that court action*”. See Ajeigbe v. Odedina (1988) 1 NWLR 587 at 598; Ndukwe Okafor & Ors. v. Agwu Obiwo & Anr. (1978) 9 and 10 SC 112 at 115; Coker v. Sanyaolu (1976) 9 - 10 SC 203 at 224.

***The appellants attempted to rely on Exhibit E as constituting res judicata which 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 merits is conclusive as to the rights of the parties and their privies and so to them constitutes an absolute bar to a subsequent action in-***

***volving the same claim, demand or cause of action.*** See Matchett v. Rose 36 Ill App 3d 638, 344, NE 2d 770, 779 - ***A matter once judicially decided is finally decided - To be applicable, requires identity in thing sued for; identity of cause of action, persons and parties to the action.***' (Blacks Law Dictionary Sixth Edition 1305-6). B

***The point that I wish to make here is that even if Exhibit E is admissible, it cannot bind the respondents - Hassan Komolafe Family as estoppel because they were not party to it. There is no evidence on record upon which it can be rightly inferred with adequate precision and certainty that the land litigated upon in Exhibit E is the same as the land now in dispute herein. This is because no plan was tendered in Exhibit E. The attempt by the trial judge to tie Exhibit E tendered by the appellants to the respondents' Exhibits F and F1 was without justification and to no avail in the absence of any plan tendered in Exhibit E. As well, contrary to the flawed finding of the trial judge, none of the plaintiffs was referred to in Exhibits G and G1. Put briefly, I cannot fault the stance taken by the court below in any respect.*** C D E

***Perhaps I still need to state it here that the appellants by their counter-claim, asserted that the respondents are their customary tenants. Such raises in favour of the respondents the presumption of ownership provided by section 146 of the applicable Evidence Act which provides as follows:-*** F

***"When the question is whether a person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner."*** G

***It has been shown that the appellants failed to prove their assertion of customary tenancy by admissible, credible and cogent evidence. The appellants placed themselves within the consequence of their admission of the respondents' exclusive possession.*** See Dada v. Bankole (2008) 1 SC (Pt. 111) 219 at 258 - 259; Raphael Udeze & Ors. v. Paul Chidebe & Ors. (1990) 1 SC. 148; (1990) 1 NWLR (Pt. 125) 141 at 160-161. H

***The last point which I wish to touch briefly is the appellants' counter-claim for 'reclamation'. This claim was loosely***

***framed by counsel to the detriment of his client. No court of record should encourage such a carefree attitude by counsel. The court below was correct in its stance that same is not known to law and that the order made by the trial court in respect of the far-fetched claim should be set aside.***

B For the above reasons, I come to the conclusion that the appeal lacks merit and deserves to be dismissed. The judgment of the court below is hereby affirmed as the appeal is dismissed. I award the sum of N100,000 as costs in favour of the respondents and against the appellants.

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### ***I. T. MUHAMMAD JSC***

I read before now, the judgment of my learned brother, Fabiyi, D JSC, just delivered. I am in agreement with him that the appeal should be dismissed. I hereby dismiss the appeal. I abide by all orders made in the lead judgment including one on costs.

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### ***PETER-ODILI JSC, CFR***

E I have had the privilege of reading in draft the judgment of my learned brother, John Afolabi Fabiyi just delivered which decision and reasoning I agree with. In support I shall make some comments.

F This is an appeal from the Court of Appeal, Ibadan Division which overturned the judgment of the High Court and gave judgment in favour of the respondents. The trial court had held that the respondents as plaintiffs did not discharge the onus of proof on their holding rather, that it was appellants who were able to establish the G entitlement to a declaration of title to the land in dispute.

#### **FACTS BRIEFLY STATED**

The background leading to this appeal stated as follows.

H The respondents as plaintiffs in Suit No. LD/566/95 for themselves and as representatives of the Hassani Komolafe family sued the appellants herein as defendants for themselves and as representatives of Balogun Osolo family claiming declaration of title to an area of land measuring approximately 26.3276 hectares situate at Aiyetoro Village, Badagry Expressway, damages for trespass and injunction.

The appellants counterclaimed against the respondents for for-



feiture of the respondents' customary tenancy of the land in dispute to the appellants who are the original owners and overlords for challenging the appellants' title, declaration of title to land, reclamation, perpetual injunction and damages.

Pleadings were duly filed and exchanged by the parties. In the course of the proceedings, the respondents amended their Statement of Claim and the respondents filed a Reply and Defence to Counter-claim. B

On the whole, four (4) witnesses testified for the respondents whilst one (1) witness gave evidence for the appellants. C

The respondents' pleadings were to the effect that the appellants were the original owners of the land in dispute. The respondents said that their ancestor one Hassani Komolafe, a renowned hunter and a native of Owu in Abeokuta used to embark on periodic hunting expedition from Abeokuta to the area of land now known as D Aiyetoro where he often camped and gave gifts of game to the land owners who were the appellants' ancestors and in appreciation of these gifts and further payment of a customary price of gin and kola nuts to the appellants' ancestors, Hassani Komolafe was put into possession of the said land in pursuance of an absolute grant thereof. E

The said Hassani Komolafe was said to have gone into possession of the land and exercised full rights of ownership thereon including farming, building a house thereon and granting portions thereof to rent from paying tenants until his death. It was the respondents' case that they inherited the land in dispute from the said Hassani Komolafe their ancestor and they have been exercising maximum F acts of ownership over the whole of the land in dispute.

The appellant's case was that their family - the Balogun Osolo family - is the owner of the land in dispute and the family never G made any absolute grant to the respondents who were only granted customary tenancy of the said land in dispute by the appellants' family for which respondents' family paid rent (Isakole). They said that this status of the respondents being customary tenants of the appellants has not changed to the present day. They said further that the H respondents-contrary to their status as tenants- have been alienating portions of the land in dispute by way of transfer and sale and they have also been building on the land and have also challenged the title of the appellants as their overlords. It is the case of the appellants

that by reason of the respondent's aforementioned acts, and by their act of challenging the appellants' title, the respondents ought to forfeit their tenancy. The respondents did not call any witnesses.

In the course of their evidence, the appellants tendered in evidence Exhibit E which is a Certified True Copy of the Customary Court Judgment in Suit No. CT/425/74 in which the appellants' ancestors sued and obtained judgment against the respondents' ancestors for rent in respect of the land in dispute. The said Exhibit E was tendered through PW3 under cross-examination to disprove his earlier testimony that their ancestors were given an absolute grant of the land in dispute.

The appellants tendered in evidence Exhibits G - G1 the family record/book of the appellants' family in which they recorded payments by their customary tenants and in which the respondents were referred to as customary tenants of the appellants. The said family record/book was put into evidence and the same was admitted as Exhibits G - G1

After counsel addressed the court and on the 18th November 1999 the High Court gave a judgment holding that respondents had not proved their case and dismissed the same. That court of trial found the defendants/appellants' counter-claim proved and granted their claim for forfeiture of the respondents' title, customary right of occupancy, reclamation, perpetual injunction and damages.

The appellants appealed to the Court of Appeal which set aside the judgment of the trial court and ruled in favour of the respondents hence this appeal before this apex court.

The hearing of the appeal was on the 28th October 2013 at which learned counsel for the appellants adopted their amended Brief of Argument settled by O. M Lewis (Miss) filed on 31/10/07 and in it were formulated six issues for determination, viz:

1. Whether the learned Justices of the Court of Appeal were right to have allowed the appeal when from the evidence before the court the plaintiffs had not proved their case.
2. Whether the learned Justices of Court of Appeal were right to have set aside the grant of the claim for reclamation of land on the ground that the manner the claim is framed is not known to law.
3. Whether the learned justices of the Court of Appeal were right in reversing the decision of the Trial court on the Trial court on

the issue of laches and acquiescence.

4. Whether the learned Justices of the Court of Appeal were right to have held that Exhibit E was inadmissible on the ground that it was not pleaded, did not comply with Section 34 of the Evidence Act and could not operate as *res judicata* against the respondents,

5. Whether the learned Justices of the Court of Appeal were right to have held that Exhibits G - G1 were inadmissible on the ground that they were not pleaded. B

For the appellants was also adopted a Reply Brief settled by Alade Babatunde Kasunmu, filed on 17/10/12 and deemed filed on 10/7/13. C

For the respondents, learned counsel on their behalf adopted the Further Amended Respondents' Brief settled by Tani A. Molajo SAN and filed on 5/12/11. In the brief were raised three issues for determination which are as follows. D

1. Whether Exhibits "E" "G" and "G1" were admissible in evidence and are binding on the respondents having regard to the following:-

(a) Exhibits "E" "G" and "G1" were neither pleaded by either side nor tendered in proof of any pleaded fact. E

(b) Exhibit "E" the record of evidence of witnesses in a previous case, was tendered without compliance with Section 34 of the Evidence Act now S.46 of the Evidence Act 2012.

(c) There is no evidence on record that the land litigated upon Exhibit E is the same as the land now in dispute. F

2. Whether the appellants' counter-claim for "reclamation" is known to law.

3. Whether the learned trial Judge made a fair assessment of the evidence, G

I find the issues as crafted by the appellants easier to use and so I shall utilize them though some need to be combined as they relate.

### ISSUE 1, 2 & 3

These call to question whether the Court of Appeal was right to allow the appeal and set aside the judgment of the trial court. H

Learned counsel for the appellant stated that the root of title pleaded by the plaintiffs is that of absolute grant of the land in dispute to them by the defendants' ancestor. That the root of title must

therefore be proved first before any acts of possession can properly be considered by the court. That the plaintiffs having pleaded absolute grant as their root of title now have the burden of proving that absolute grant in order to succeed on their claim. He cited *Obioha v Duru* (1994) 8 NWLR (Pt.365) 641; *Fasoro v Beyioku* (1988) 2 NWLR (Pt.76) 263 at 271; *Folarin v Durojaiye* (1988) 1 NWLR (Pt. 70) 351.

Miss Lewis of counsel referred to paragraphs 2, 3, 4 and 5 of the Amended Statement of claim pointing out that the names of the witnesses to the sale were not pleaded nor the name of the person who of made the grant to Hassani Komolafe pleaded.

For the appellants was further submitted that the respondents having pleaded that the land in dispute originally belonged to the appellants and that they were put into possession by the appellants but not being able to prove an absolute grant to them, their claim automatically failed and all acts of ownership pleaded thus became acts of trespass. Also that since there had been no relief from forfeiture claimed, the claim for forfeiture of the appellants and the order of trial court ought to have been upheld by the Court of Appeal.

Learned counsel for the appellants went on to contend that the law is trite that the substance is what should be examined and determined and not the form. That where there is substantial compliance with the substance, slavish adherence to the form is not demanded. He referred to the case of *Bucknor-Maclean & Anor v Inlaks Limited* (1980) NSCC 232. That in the counter-claim, the appellants had sought for a relief described as reclamation which really translates to forfeiture of the customary tenancy of the respondents and the repossession of the land in favour of the appellants. He cited *Lasisi & Anor v Tubi & Anor* (1974) NSCC 613 at 615 - 616; *Dabiri & Ors v Gbajumo* (1961) NSCC 114 at 116 - 117.

Miss Lewis of counsel stated further that possession is the substance of the claim of the appellants and so the form in which that claim was couched is of no moment.

Responding on behalf of the respondents, Mr. Tani Molajo SAN submitted that implicit in the appellants' contention that the respondents are their customary tenants is an admission that the appellants put the respondents in possession of the land in dispute and so proof of handing over in the presence of witnesses is obviated. He an-

chored on Section 146 of the Evidence Act; Dada v Bankole (2008) 1 SC (Pt. 111) 219 at 258 - 259; Raphael Udeze & Ors v Paul Chidebe & Ors (1990) 1 SC 148.

Learned Senior Advocate stated on that appellants seek to limit the consideration of the correctness of the judgment of the court below to a consideration of the plaintiff/respondents' claim alone and thereby secure a reversal of that judgment on such a limited attack would prevent scrutiny of the appellants' counter-claim. B

On the matter of the way the claim for reclamation was crafted learned senior counsel said that this court would be setting a dangerous precedent if it permits a relief which is so loosely worded as to be open to speculative interpretation. He said the case of Bucknor-Maclean & Anor v Inlaks Limited (1980) NSCC 232 is distinguishable from the case at hand. C

That the court should hold that the claim for reclamation is D completely unknown to law.

In reply on points of law, learned counsel for the appellants said the tenancy of the respondents has been proved and so there is no presumption of ownership in favour of the respondents.

Briefly what is at stake here is on the appellants' contention E that they placed the respondents in possession of the land in dispute as the customary tenants of the appellants. A situation that came to be over a period of 200 years but there is no evidence of witnesses to the transaction. This therefore brings the follow up question of whether the appellants had established in keeping with the legal standard of F proof, the ownership they posit with the tenancy alluded to the respondents. This must be looked at within the purview of Section 146 Evidence Act which prescribes thus:

*"146. When the question is whether any person is owner of G anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner."*

The situation on ground seem to make relevant and applicable the decision of this court in Raphael Udeze & Ors v. Paul Chidebe H & Ors. (1990) 1 SC. 148 per Nnaemeka-Agu JSC wherein he stated at pages 160 - 161 thus:

*"It is left for me to mention that the courts below also found that although the appellants pleaded that the respondents were their*

*customary tenants who occupy the land in dispute on payment of tribute, they failed to prove such tenancy. It is significant to note that a customary tenants is in possession of his holding during good behavior and until it is forfeited for misbehavior. Once it is the case that such a person is a customary tenant and therefore in possession, then like any other person in possession of land, there is a presumption of ownership in his favour. Although the presumption is rebuttable to due proof of a tenancy, the onus is on the adversary to rebut it if he can."*

Bearing in mind the above judicial authority of no less than this court, I would like to reiterate what applies in practice and that is seen in the case of: *Oyovbiare v Onamurhomu* (1999) 10 NWLR (Pt. 621) 23 at 34 - 35 (SC) wherein it was held that the general rule in civil cases is that the burden of proof rests upon the party who substantially asserts the affirmative before the evidence is gone into. The position therefore is that the burden of proof lies on the person who would fail, assuming no evidence had been adduced on either side. Also in respect of particular facts, the burden rests on the party against whom judgment would be given if no evidence were produced in respect of those facts. Once that party produces the evidence that would satisfy the court then the burden shifts on the party against whom judgment would be given if no more evidence were adduced.

Tabai JSC anchoring the policy views of this court in *Dada v Bankole* (2008) 1 SC (Pt. III) 219 at 258 - 259 seems to have had the situation in this case at hand in mind when he postulated thus:

*"It is a settled principle of law that a claim which seeks a declaration that the defendants are customary tenants of the plaintiff and other consequential reliefs emanating therefrom postulates that the defendants are in exclusive possession of the land in disputes. And by the operation of Section 146 of the Evidence Act, Cap E14 of the Laws of the Federation, there is presumption that the defendants in such exclusive possession are the owners of the land in dispute until the contrary is proved to rebut that presumption. The only way to rebut the presumption is by strict proof of the alleged customary tenancy. That is the danger of a plea founded on the allegation of customary tenancy."*

Those guiding principles used in this case in hand, it is easy to

see that what the appellants have put forward in proof of their assertion of the respondents having been put into possession by them under a customary tenancy has not been established by them and has remained what it is and no more a mere assertion. That means in effect that the cases of Folarin v. Durojaiye (1988) 1 NWLR (Pt. 70) 351 and Cole v. Folami (1956) 1 NSCC 60 which they are clutching at would not avail them. The cases referred to being clear situations of a dispute of title between adverse parties different from the present scenario in which appellants claim to be overlords with the respondents as their customary tenants placed in possession by the appellants.

On the matter of the use of the word “Reclamation” in couching the relief in their counter-claim, the appellants as defendants had asked at paragraph 10 of the Statement of Defence and counter-claim as follows:

*“(b) Reclamation of the whole portions of land belongs to the defendants and which the plaintiffs hold of them as customary tenants.”*

The learned trial judge had entered judgment for the defendants on this counter-claim which decision was reversed on appeal by the appellate court holding that the counter-claim for reclamation is not a claim known to our law.

Appellants position on the point is that the use of a wrong word to explain their claim would not have the effect of denying them of the relief sought. They sought refuge in Bucknor-Maclean & Anor v Inlaks Limited (1980) NSCC 232.

That view of the appellants would be acceptable considering that the court is not bogged down or strait-jacketed by either technicalities or form at the expense of the substance of a case or the justice thereof. The point however has to be made that for the court to take such a line of thought can be operational, the necessary material on which the court would utilize to find for the counter-claimant must be in existence. In this instance the appellants are claiming ownership of land and that the respondents came on it as their customary tenants when they are unable to establish how their ownership came to be and how the transaction of tenancy to the respondents was arranged.

In this regard, I see no reason to depart from what the Court of Appeal did.

In respect to the matter of laches and acquiescence which the Court of Appeal departed from the view of the trial court on the plea of laches and acquiescence. The court below was right to hold that the trial court had failed to properly appraise the evidence with regard to the appellants (now respondents) plea of laches and acquiescence and so had no difficulty in reverse the finding of the trial court that the plea did not apply in the counter-claim. In this regard, this is one of those instances where an appellate court would disturb the finding of fact of a trial court. See the case of *Oyovbiare v Omamurhomu* (1999) 10 NWLR (Pt. 621) 23 at 35 & 41 SC.

An appellate court should be slow to disturb a finding of fact made by a trial court which is supported by evidence unless it is satisfied that such finding is unsound. *Lengbe v Imale* (1959) WNLR 325.

From what I have tried to say, it is clear that I answer Issues 1, 2 and 3 against the appellants and in favour of the respondents.

#### ISSUES 4 & 5:

Whether the Court below was right to have held that Exhibit 'E' was inadmissible on the ground that it was not pleaded and could not comply with Section 34 of the Evidence Act and could not operate as *res judicata* against the Respondents. Also whether the Court of Appeal was right to hold that Exhibits G - G1 were inadmissible not having been pleaded.

Arguing for the Appellants, learned counsel said it is trite law that pleadings should state material facts only and not the evidence by which those facts will be proved. That the facts which are relevant only to establishing the existence of material facts and which are the facts from which the existence or non-existence of the material facts and may be rationally inferred are evidence and should not be pleaded. He said paragraph 6 of the Statement of Defence and Counter-claim contains sufficient pleadings of all documents relating to the subject matter of litigation between the parties that is to show that the land in dispute was owned originally by the Defendants/Appellants and that the Plaintiffs/Respondents were their customary tenants. He relied on *Oseni v Dawodu* (1994) 4 NWLR (Pt.339) 390.

For the Appellants was further stated that Exhibit 'E' was not specifically mentioned in paragraph 6 of the Statement of Defence



and Counter-claim does not mean that they were not pleaded since appellants had stated reliance on all related documents. That Section 34 of the Evidence Act has not removed the fact of the admissibility of document. He cited *Ipinlaiye II v. Olutokun* (1996) 6 NWLR (Pt.453) 148.

Miss Lewis of counsel said that Exhibit 'E' is not only the proceedings in a previous suit but also contains the judgment of that court. That since the admission of Exhibit 'E' was not predicated on compliance with Section 34 of the Evidence Act but the same was based on relevancy of the document and the fact that the said document was admissible as an admission against interest by the respondents the Court of Appeal was wrong in holding that Exhibit 'E' was inadmissible. B  
C

It was further contended that since pleadings are the basis of the plea of *Res Judicata*, Exhibit 'E' can operate as *res judicata* to prove that the Respondents are tenants to the appellants and that they were not given an absolute grant of the land in dispute. That since from the nature of the subject matter for which Abu Bakare was sued - the family land of his family - the only reasonable inference is that he was being sued on behalf of his family, the Court of Appeal was wrong to have held that Exhibit 'E' was inadmissible against the Respondents' family and thus could not operate as *res judicata* in that the suit to which the said Exhibit 'E' relates was brought against the defendant in his personal capacity. E

Going on, learned counsel for the Appellants said the fact that Exhibits G - G1 were not specifically mentioned in paragraph 6 of the Statement of Defence and Counter-claim does not mean that they were not pleaded as it was stated in that paragraph that Appellants would rely on all related documents in their possession on the said land at the trial. That Exhibit G - G1 were relevant to the present suit as they show that the Respondents were in fact tenants of the Appellants and were not given any absolute grant of the land in dispute since those Exhibits reveal that their ancestors have been paying rent to the Appellants' ancestors. F  
G  
H

Responding, Mr. Molajo SAN stated that Exhibit 'E' is the record of proceedings and judgment in Suit No. CTJCC/425, *Yusufu Salami & Family v Abu Bakare Yusufu*. That it was not part of the case pleaded by either party in the court of trial that there was any litigation on the

land in dispute prior to the commencement of the current proceedings. That in the circumstances Exhibit 'E' was not tendered in proof of any pleaded fact and ought to have been rejected when objection was taken to it and so goes to no issue.

B Learned senior counsel also said that Exhibits 'G' and 'G1' are  
 pages of a book purporting to contain a record of alleged payments  
 of rents by the respondents to the Appellants. He said no such record  
 is alleged to exist in the pleadings and so Exhibits 'G' and 'G1' go to  
 no issue and ought not to have been admitted in evidence. He cited  
 C *Adimora v. Ajufo* (1988) 3 NWLR (Pt. 80) 1; *Atanda v. Ajani* (1989)  
 3 NWLR (Pt.11) 511.

For the Respondents was further contended that it trite that  
 the object of pleadings is to require each party to give notice to his  
 opponent with clarity and precision of the case which he is to meet.  
 D The essence of that being to prevent the other party from being taken  
 by surprise and that party able to prepare his own case at the trial.

Learned Senior Advocate canvassed further that the Appel-  
 lants argument that Exhibit 'E' is relevant and therefore admissible as  
 an admission against interest by the Respondents, family is untenable  
 E because the Respondents, family i.e. Hassani Komolafe Family is not  
 a party to Exhibit 'E'. That the court below was wrong to have held  
 that Exhibit 'E' was inadmissible against the Respondents, family and  
 could not operate as *Res Judicata* in that the suit to which the said  
 F Exhibit 'E' relates was brought against the Defendant therein in his  
 personal capacity and not as a representative of his family and so this  
 court should so hold.

In reply on points of law, learned counsel for the Appellants  
 stated that a document which is not admissible under one section of  
 G the Evidence Act can be admissible under other sections of the Evi-  
 dence Act. He referred to *Obawole v Williams* (1996) 10 NWLR  
 (Pt.477) page 146, Section 20(3) of the Evidence Act; *Udeze v Chidebe*  
 (1990) 1 NWLR (Pt.125) 1412.

H The questions as raised are whether or not Exhibits E, G - G1  
 not pleaded are admissible for the purpose of determining the dis-  
 pute between the parties. While the Appellants take the view that  
 because the documents are relevant and the facts already pleaded  
 could be found as their basis for the acceptability of those docu-  
 ments. The Respondents disagree on the ground that the documents

are such as could change the coloration of the case between the parties that it was essential that they were specifically pleaded. For clarity, Exhibit 'E' is certified true copy of the judgment and proceedings of the Customary Court of Ijanikin Suit No. CT/425/74 in which suit the Appellants, ancestors sued and obtained judgment against the Respondents, ancestors for nonpayment of rent in respect of the land presently in dispute between the parties. B

Exhibits G and G1 are pages of the family record/book of the Appellants' family in which they recorded payments of their customary tenants, that is the Respondents. C

It is to be said that documentary evidence needs not be specifically pleaded to be admissible in evidence so long as facts and not the evidence by which such a document is covered are expressly pleaded. Consequently, where the contents of a document are material, it shall be sufficient in any pleading to avert the effect thereof as briefly as possible without setting out the whole or any part thereof, unless the precise words of the document or any part thereof are or any part thereof are material. See *Ipinlaiye II v. Olukotun* (1996) 6 NWLR (Pt. 453) 148; *Thanni v. Saibu* (1977) 2 SC 88 at 114; *U.A.C. Ltd v. Owoade* (1954) 13 WACA 207. D  
E

Learned counsel for the Appellants pointed at paragraph 6 of the Statement of Defence and Counter-Claim as their cover for these documents tendered at the trial court and it is reproduced hereunder, thus:- F

*"The Defendant shall rely on all related documents in their possession on the said land at the trial, and all relevant survey plans including plan RC SEW/730/6."*

The Respondents contended that the position of the Appellants by asserting that what the Appellants put forward as pleadings on which they could place the documents, Exhibits E, G - G1 are not sufficient and not what was provided for in the Law of Evidence with particular reference to Section 34 thereof. G

On this matter, I shall seek recourse to the earlier position of this court in similar circumstances. See *Atanda v. Ajani & Ors* (1989) 2 NSCC 511 SC. H

It is settled law that in civil cases, issues are settled on the pleadings, and the court should not allow evidence to be given in respect of facts not pleaded. If however, such evidence is inadvertently re-

ceived, it is the duty of the trial judge to discountenance it because it goes to no issue.

Parties are bound by their pleadings, and the issues joined therein. Thus, the court must be on its guard so that it does not deviate from the case made by each party in the pleadings, otherwise  
 B it will unwittingly be making for the parties an entirely new case. *Olorunfemi v. Asho* (1999) 1 NWLR (Pt. 585) 1 at 9 & 11 per Belgore JSC; *Ojo v. Adejobi* (1978) SC 65; *Aseimo v. Amos* (1975) 2 SC 57; *Adeniji v. Adeniji* (1972) 4 SC 10.

C It is known to be a cardinal rule of pleadings that material facts, to be admissible in evidence must be pleaded. Consequently, none of the parties is allowed to raise at the trial of a suit, an issue of fact which has not been pleaded by him. Therefore, where such facts are not pleaded, they are in law inadmissible in evidence and where in-  
 D advertently or wrongly admitted go to no issue and should be disregarded as irrelevant to issues properly raised by the pleadings. *Ipinlaiye II v. Olukotun* (1996) 6 NWLR (Pt.453) 148 at 165 - 166; *Paul v. George* (1959) SCNLR 510; *Ajoke v. Oba* (1962) 1 SCNLR 137; *Idahosa v. Oronsaye* (1959) SCNLR 40; *N.I.P.C Ltd v. Thompson*  
 E *Organisation Ltd* (1969) 1 All NLR 138; *George v. UBA Ltd* (1972) 8 - 9 SC 284 at 274; *Njoku v. Eme* (1973) 5 SC 293; *Oke-Bola v. Molake* (1975) 12 SC 61.

The rule of evidence and practice in civil as well as in criminal  
 F cases prescribes that an objection to the admissibility of a document sought to be tendered in evidence is immediately taken when it is offered in evidence. Barring some exceptions where by law certain documents are rendered inadmissible for failure to comply with the provisions of such law, the rule remains inviolate that where objec-  
 G tion has not been raised by the opposing party to the reception in evidence of a document or other evidence, the document or evidence would be admitted and the opposing party would for all time hold his peace and cannot complain thereafter about that admission. See *Ipinlaiye v. Olukotun* (1996) 6 NWLR (Pt.453) 148 at 169; *Etim*  
 H *v. Ekpe* (1983) 1 SCNLR 120.

Back to the case in hand, the exhibits at the bottom of this contending or opposing view of the parties are to be utilized for the purpose of the Appellants establishing the operation of estoppel per rem judicatam. It needs be explored if the conditions for the plea as

put forth by the Appellants on an earlier decided case which had foreclosed this suit of the Respondents as plaintiffs at the court of trial. I would here place reliance on the case of:-*Udeze v Chidebe* (1990) 1 NWLR (Pt. 125) 141, where it was held thus:-

Where although there was a valid subsisting judgment on the same subject matter the issues are not the same or the right and capacity in which the present suit is being fought is not the same with those in the previous suit, it does not mean that the previous suit is completely valueless for purposes of the instant suit. Although the present defendant cannot take advantage of it as *res judicata*, it still goes to strengthen the defendant's case in the present suit as it is accepted as a good evidence of acts of possession which the parties thereto can now take advantage of along with other facts established by evidence. *Uluba v Sillo* (1973) 1 SC 37; *Ajuwa v Odili* (1985) 2 NWLR (Pt.9) 710; *Kobina Ababio III v Priest De-Charge Catholic Mission* 2 WACA 380 at 381 - 382; *Chinwendu v Mbamali* (1980) 3 - 4 SC 31 at 50.

Again, to be said is that a plea of estoppel per rem judicatam to apply as in this instance certain conditions must apply first.

A plea of estoppels per rem judicatam in a land case can be dealt by the party and the court in one of two ways, viz:-

(a) where the decision in the previous suit is clear and self-sufficient, then it is usually taken up in *linier(sic)*, often as the only issue. In that case, the success of the party's usually depends entirely on the success of the plea; or

(b) where, as is often the case when the previous suit being relied upon for the plea is a decision of a nature tribunal in which there was no plea or pleadings the court first hears the whole evidence before it can reach its decision on the rightness, or otherwise of the plea,

In this latter case, one of two situations may arise.

(i) It may be that when all the fact of the previous and present suit have been ascertained from the evidence, it becomes clear that all the ingredients of a successful plea of *res judicata* emerge;

(ii) It may turn out that, although there was a valid and subsisting judgment on the same subject matter as at present in litigation the present defendant cannot take advantage of it as *res judicata* either because the issues are not the same or because the right and capacity

in which the current suit is being fought is not the same with those in the previous suit even if the subject-matter is the same.

The principles above placed in context, Exhibit 'E' is a copy of the proceedings and judgment in a case between Yusufu Salam & Family v Abu Bakare Yusufu. Clearly the defendant in that case was a single individual named Abu Bakare Yusufu and so contradicts the assertion of the Appellants that the case was brought against the ancestors of the Respondents and so poses a curious question as to whether that Exhibit 'E' is relevant in the case at hand where the dispute is between two families. Even though not in contention that the said Abu Bakare Yusufu was the uncle of the 1st Respondent, Exhibit 'E' shows the suit thereby was brought against Yusufu in his personal capacity. It goes without saying that in such a circumstance Exhibit 'E' cannot bind the respondents as the Hassani Komolafe family since it is no where shown that Abu Bakare Yusufu was sued in that earlier case as a representative of that family. Several authorities of the Supreme Court support that position and some of them are:- Ajeigbe v Odedina (1988) 1 NWLR (Pt.587) 598; Ndukwe Okafor & Ors v Agwu Obiwo & anor (1978) 9 & 10 SC 112 at 115; Coker v Sanyaolu (1976) 9 - 10 SC 203 at 224.

For emphasis should be restated that the fact that a matter of a community took part in a court action either as a party or a witness is not by itself enough ground for the conclusion that the community to which that member belongs should be identified with that court action. See Ndukwe Okafor & Ors v Agwu Obiwo & Anor (supra).

Furthermore, Exhibits G and G1 did not refer to any of the plaintiffs/respondents. Therefore, the reception of Exhibits E, G and G1 has not been shown to be proper within the Evidence Act Section 34.

Neither a trial court nor the parties to an action has any power to admit without objection, a document that is in no way and under no circumstances admissible in law. If such a document is wrongfully received in evidence before the trial court, an appellate court has an inherent jurisdiction to exclude it even where no objection was raised to its going in at the Lower court. Oseni v. Dawodu (1994) 4 NWLR (Pt.339) 390 at 404; Alase v Olori-Olu (1965) NMLR 66 at 77; Olukade v Alade (1976) 1 All NLR (Pt. 1) 67; Yaya v Mogoga (1947) 12 WACA 132.

On this matter, I shall again refer to the case of: - *Ipinlaiye II v. Olukotun* (1996) 6 NWLR (Pt. 453) 148 at 167 - 165.

It is not the law that once a document is received in evidence without objection by a party, then such a party is forever automatically stopped, even in the appellate court from raising the issue of its admissibility. Thus, if a document is unlawfully received in evidence at the trial court, an appellate court has inherent jurisdiction to exclude and discountenance the document even though counsel at the trial did not object to its going into evidence. It goes without saying therefore that although a document was unlawfully received in evidence without objection by or on behalf of the appellant, it would still be open to him in the appellate court especially where such an appellant has in fact suffered injustice as a result, or a miscarriage of justice occasioned as a result, to object to it since it is the duty of the appellate court to excluded that inadmissible evidence which was wrongly received in evidence at the trial. *Yaya v Mopgoga* (1947) 12 WACA 132 at 133; *Ajayi v Fisher* (1956) SCNLR 279; *Esso West African Incorporated v Alli* (1968); *Akunne v Ekwuno* (1952) 14 WACA 59; *Olukade v Alade* (1976) All NLR 57 at 61 - 62; *Etim v Ekpe* (1983) 1 SCNLR 120; *Owonyin v Omotosho* (1961) 2 SCNLR 57; *Yassin v Barclays Bank D.C.O.* (1968) 1 All NLR 171; *Alashe v Olori-Ilu* (1964) 1 All NLR 390 at 397. From the foregoing, the principles of law, the facts of this case, there was no basis for the admission of those documents aforesaid without the appropriate pleading or a foundational statement of facts in the statement of Defence and counter-claim on which it can safely be said the Plaintiff/Counter-Claim defendant is properly and fully placed on notice of the areas and materials for such in the dispute. The Respondents were taken by surprise by document of such importance especially when sought to support a damning defence or plea of estoppels per rem judicatam. The trial court was wrong to admit those documents and the Court of Appeal right not only to say so but to have them expunged.

The issues herein are resolved against the Appellants and in favour of the Respondents.

From all the above and the better and fuller reasoning in the lead judgment, I too dismiss this appeal which lacks merit. I abide by the consequential orders already made by my brother, J.A. Fabiyi, JSC.

**ARIWOOLA JSC**

I had the privilege of reading in draft the lead judgment of my learned brother, **FABIYI, JSC** just delivered. I agree entirely with the reasoning and conclusion in the said lead judgment which dealt with all issues beautifully. I adopt same as my own and therefore also come to the conclusion that the appeal lacks merit and is liable to dismissal.

In the circumstance, the appeal is dismissed while the judgment of the court below is affirmed.

I abide by the consequential orders in the lead judgment including that on costs in favour of the respondents but against the appellants.

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**M. D. MUHAMMAD JSC**

I have read in draft the lead judgment of my learned brother **Fabiyi, JSC**. I entirely agree with the reasonings and conclusion therein which for my inability to improve on I adopt as mine in dismissing the appeal. I abide by the consequential orders made in the lead judgment including the order on costs.

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