

**SUPREME COURT OF NIGERIA**  
FRIDAY 9TH MAY, 2014. SC. 102/2005  
**CORAM:- W. S. N. ONNOGHEN, S. GALADIMA,**  
**B. RHODES-VIVOUR, M. U. PETER-ODILI,**  
**J. I. OKORO, JJSC**

1. DENNIS AKOMA

2. ADAMA MAXWELL

(For themselves and on behalf of

the People of Usebe Village Ebu) ..... APPELLANTS

**AND**

1. OBI OSENWOKWU

2. IDEBUBA OGBOI

(For themselves and on behalf

of the people of Ogodo)

3. COPANE FARMS (NIG) LTD ..... RESPONDENTS

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JUDGMENTS - Delivery - Delay in - Effect - Judgment will not be invalidated for non compliance with 1999 Constitution s. 294(1) - Unless appellate court is satisfied that the delay - Occasioned miscarriage of justice (H1)

APPEALS - Filing - Grounds - Basis - Party should not appeal merely on ground of delay in delivery of judgment - But should fight appeal on grounds - Which can render judgment unsustainable (H2)

APPEALS - Evidence - Evaluation - Judgment - Delay in delivery - 1999 Constitution s. 294 applies more to judgments of trial courts - And not to appellate courts - Which can rarely be said to have lost touch of printed records - Placed before them (H3)

APPEALS - Court - Finding - Decision of CA in this case - Is that facts which led to the judgment appealed against - Constitute issue estoppel as distinct from res judicata - Which robs court of jurisdiction (H4)

JUDGMENTS - Delivery - Delay in - Notice of - Failure to inform NJC cannot form a ground of appeal against the judgment - Since

**1916** Akoma v. Osenwokwu (2014) 5 KLR (pt. 347) 1915; (2014)

the report is not meant to form part of the judgment (H5)

RES JUDICATA - Meaning of - It arises where court of competent jurisdiction had earlier adjudicated upon an issue - And same comes up again - Between same parties or their privies (H6)

RES JUDICATA - Plea of - Is not available to plaintiff as basis of his claim - Except by way of reply to defence raised by defendant - As plaintiff cannot raise plea that ousts jurisdiction of court (H7)

ESTOPPEL - Plea of - Form - Estoppel need not be pleaded in any form - Provided that facts which can be interpreted as constituting estoppel - Are stated in a way to raise estoppel (H8)

APPEALS - Issues - Pleadings - CA did not suo motu make a case of issue estoppel - And proceeded to pronounce on same unilaterally - But issues on that fact has been joined in pleadings of parties (H9)

APPEALS - Land law - Issue estoppel - Appellants cannot raise same issue - Already determined in a previous suit - As to ownership of the land in issue (H10)

RES JUDICATA - Applicability - Land matters - A plea that does not meet all the conditions to constitute res judicata - May constitute Issue estoppel (H10)

APPEALS - Court - Issues - Estoppel - Appellants' contention here - Is based on mere technicality - As estoppel was a live issue presented before the courts for determination (H11)

### ***FACTS***

Before the High Court of Delta (then Bendel) State, plaintiffs/respondents commenced suit no. 01/11/75 against defendants/appellants. In their amended writ of summons, respondents claim inter alia for declaration of title, damages for trespass and injunction restraining appellants from continuing acts of trespass on the land in dispute. On the other hand, appellants instituted suit no. 01/11/76 against respondents, claiming for declaration of title, damages for

trespass and perpetual injunction restraining respondents from further acts of trespass on the land.

The parties filed their respective pleadings and tendered exhibits in support of their respective cases. At the end of hearing, the learned trial Judge entered judgment in favour of respondents. Appellants' suit no. 01/11/76 was dismissed. Not satisfied, appellants appealed to the Court of Appeal Benin City. After the final address in the court on the 18<sup>th</sup> February 2002, the court delivered its judgment on the 30<sup>th</sup> July 2003. The appeal was dismissed and judgment of the trial court affirmed. Dissatisfied again, appellant appealed to Supreme Court.

### **ISSUES FOR DETERMINATION**

*“(a) whether in the face of the provision of Section 294(1) and (6) of the 1999 Constitution, the judgment of the lower court is not a nullity.*

*(b) whether the learned justices of the Court of Appeal were right in dismissing the Appellant's Appeal on the ground that Exhibit 'C' constituted res judicata.*

*(c) whether the Court of Appeal was right in pronouncing on an issue not canvassed before the Court without inviting parties to address on it.”*

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

*JUDGMENTS - Delivery - Delay in - Effect*

**1. Firstly, the fact that Section 294 (1) of the 1999 Constitution makes it mandatory for a Court to deliver its judgment within 90 days after final address, and that by Section 294 (5) of the same Constitution, a judgment will not be invalidated or nullified for non-compliance unless and until the Appellate Court considering such a complaint on appeal is fully satisfied that the appellant has shown that it had suffered a miscarriage of justice by such late delivery of judgment. Further the fact that in determining whether a miscarriage of justice has occasioned due to inordinate delay, the emphasis is not the length of time simplicities, but on the effect it produced in the**

**mind of the court, such as if the delay is found to have obviously alleged the court's perception, appreciation and evaluation of the cases and that it is court would readily interfere. The delay per se does not lead to a judgment being vitiated or nullified. The delay must occasion a miscarriage of justice to**  
**B in such a conclusion. In other words it has to be established that the delay occasioned a miscarriage of justice in that the trial judge did not take a proper advantage of having seen or heard the witnesses to, testify or that he had lost his impressions of the trial due to such inordinate delay.**  
**C I do not agree with the submission of the learned counsel for the appellants that the delay of the lower court in delivery of its judgment affected the Courts' "perception, appreciation and evaluation of the case" or that the delay has eroded the**  
**D confidence in the entire judicial system. The reasons for my so holding are not farfetched. (pp. 1930 E/1931 G)**

*APPEALS - Filing - Grounds - Basis*

**2. The true position of the law, in the light of the foregoing**  
**E provision, is that a party should not just go on appeal merely on the ground that the judgment he wants to set aside was delivered outside the three months (90 days) period. He will have to fight the appeal on all known grounds of appeal which**  
**F can render the judgment unsustainable; not merely on the assessment of facts. Indeed, an appellant with good grounds of appeal may have no need at all to canvass a ground of non-compliance with the 90 days, except for the purpose of having the judge (or justice) disciplined by drawing attention of**  
**G the breach to the Court hearing the appeal in view of subsection (6) of the Section 294 of the 1999 Constitution (formerly subsection (5) of Section 258 of the 1979 Constitution.**  
**(p. 1931 D)**

*H Evidence - Evaluation - Judgment - Delay in delivery*

**3. Careful study of the provisions of S. 294 of the Constitution will show that they apply more particularly to judgments of the trial courts. In those courts the trial judge who, after seeing and hearing the testimonies of witnesses, inordinately**

**delays the delivery of his judgment for such a long time that from the judgment it becomes apparent that he has lost touch or grasp of the evidence led; and could also have forgotten the demeanour of the witnesses who testified before him thus leading to a miscarriage of justice. In the circumstance as opposed to the Appellate Court which duties are limited to reviewing the case of trial court and the judgment which followed, based on printed records only and written briefs of Argument of the parties and in some cases oral amplifications of such briefs which are recorded in writing. The Appellate Courts in these circumstances can rarely be said to have lost touch of the contents of the printed records placed before them, which could be said to have affected their perception and evaluation of the facts based on the printed records of the facts based on the printed records of appeal only.** (p. 1932 B)

*Court - Finding - Decision of CA*

**4. The learned justices of the court below did not, after finding that the learned trial judge was in error to have held that the native court proceedings and judgment in Exhibit "C" was res judicata, turn around to hold that same constituted res judicata, due to the inordinate delay in delivering their final judgment. Rather, I must observe, what the Justices did was to hold that the proceedings and judgment in Exhibit "C" was conclusive of facts (as stated in the testimonies of witnesses) forming the ground for the judgment. Put simply, that the facts which led to the judgment which was appealed against constitute issue estoppels as distinct from res judicata which robs the Court of jurisdiction to entertain the case at all.** (p. 1932 F)

*JUDGMENTS - Delivery - Delay in - Notice of*

**5. On this issue, the appellants have also argued that failure on the part of the presiding Justice at the Court of Appeal to send a report on the delay in delivery of his final judgment to the Chairman of the National Judicial Council as provided in subsection (6) of S. 294 (supra) even if the said delay did not**

occasion any miscarriage of justice to the appellant, renders the judgment of the Court of Appeal null and void. This argument is with due respect, preposterous and just a cent-worth as it is technical and misconceived. The requirement that “a person presiding at the sitting of the court to send a report on the case to the Chairman of the National judicial Council” in which judgment was delivered outside 90 days, so that he could inform the council to take such action as it may deem fit, is a purely administrative provision meant to notify the council, which in the circumstance of a particular, may deem it necessary to take any disciplinary action against Judges who flagrantly “or inordinately” refuse to comply with the provision of this section of the Constitution. The council does not have the power to declare a judgment of the Appellate Courts established under the Constitution, indeed the Court of Appeal null and void for failure of the presiding judge who delivered the judgment to send a report thereafter to NJC. Failure to inform the NJC cannot form a ground of appeal against the judgment since the report is not meant to form part of the judgment. (p. 1933 A)

*RES JUDICATA - Meaning of*

6. We know what is “res judicata” Simply put it arises where a court of competent jurisdiction had earlier adjudicated upon an issue the same comes up again between the same parties or their privies. (p. 1934 A)

*RES JUDICATA - Plea of*

7. In a long line of cases it has been decided judicata is not available to a plaintiff as basis of his claim except by way of a reply to a defence raised by the Defendant in a statement of defence. A plaintiff cannot be seen raising a plea that will oust the jurisdiction of the court to entertain the action he has brought before that court. As it is often said. It is a shield rather than a sword. (p. 1934 B)

*ESTOPPEL - Plea of - Form*

8. It is trite law that estoppels need not be pleaded in any

**special form, provided that the facts which can be interpreted as constituting estoppels are stated in such a way that estoppels is raised, and this has been clearly done by the respondents herein.** (p. 1935 F)

*APPEALS - Issues - Pleadings*

**9. With profound respect to the learned counsel for the appellants, it is not correct to argue that the court below made a case of issue estoppel for the respondents and proceeded to pronounce on same unilaterally. Issues on that fact had been joined in the pleading of parties.** (p. 1935 G)

*Land law - Issue estoppel*

**10. What is irksome in this case is the way the appellants have strenuously argued that the issue of res judicata does not avail the respondents as plaintiffs. That Exhibit "C" in suit No 74/50 does not constitute a plea of issue of estoppel was clearly pleaded. Therefore, even if this plea did not meet all the conditions to constitute res judicata, I agree with the respondents that, it would at least constitute a plea of issue estoppel in respect of the issue that the entire Ebu Community, including their Star Witness, Chief Okoda from the present appellants' Usebe Quarters or village of Ebu Community, claimed and led evidence that the land originally belonged to the said entire Ebu Community. It was after that the community sold the land out rightly to the respondents' ancestor. This fact was accepted by the court below in its judgment in Exhibit 'C', thus barring the appellants herein, who are only one set out of the nine villages that make up Ebu Community to raise the same issue, claiming now that their Usebe Village were the original owners of the said land.** (p. 1936 E)

*Court - Issues - Estoppel*

**11. The appellants have extensively addressed the Court on this issue, drawing a distinction between res judicata and issue estoppel on pages 184 to 185 and also canvassed in the respective briefs of argument of the parties on appeal on pages 266 to 269 to 285 of the record. This was a live issue**

***presented before the trial court and the Court of Appeal for determination. With due respect, the contention of the appellants' counsel that this was a new issue introduced at the trial court and raised by the Court of Appeal suo motu, is based on mere technicality, barren and lacks sustainability. Again, issue 2 and 3 are resolved in favour of the respondents.***  
(p. 1937 A)

### **REPRESENTATION**

C Folabi Kuti Esq., with Gospel Adamu Esq., for the Appellants  
C Chike Onyemenam Esq., with Philips Adu-Odogwu Esq., for the Respondents

### **CASES REFERRED TO**

D Ifezuo v. Mbadugha (1984) 1 SCNLR 427  
Odi v. Osafire (1985) 1 NWLR (pt. 1) 1  
Owoyemi v. Adekoya (2003) 18 NWLR (pt. 852) 307  
Maka v. Osakwe (1989) 3 NWLR (pt. 107) 101  
Akpan v. Umoh (1999) 7 SC (pt. II) 13  
E Fadiora v. Gbadebo (1978) 3 SC 29  
Ladega v. Durosimi (1978) 3 SC 64  
Ike v. Ugboaja (1993) 6 NWLR (pt. 321) 539  
Oyeyipo v. Oyinloye (1987) 1 NWLR (pt. 50) 356  
A-G Lagos State v. A-G Federation (2004) 18 NWLR (pt. 904) SC 1  
F Iyayi v. Eyigebe (1987) 3 NWLR (pt. 61) 523  
Ijade v. Ogunyemi (1996) 9 NWLR (pt. 470) 17  
Odojin v. Mogaji (1978) 2 NSCC 275  
D. T. T. Enterprise Nig. Ltd. v. Busari (2011) All FWLR (pt. 563)  
G 1818

### **STATUTE REFERRED TO**

Constitution of Federal Republic of Nigeria 1999, s. 294(1)(5)(6)

### **LEAD JUDGMENT BY GALADIMA JSC**

H At the trial Ugwashi-Uku High Court of the then Bendel State of Nigeria, two suits between two communities were consolidated. In Suit No. 01/11/75, the Appellants herein were the Defendants and in Suit No. 01/11/76, they were the plaintiffs. On consolidation of the

two land suits, the appellants were made the Defendants while the Respondents remained as plaintiffs. Suit No. 01/11/75 was first commenced at the Asaba High Court as Suit No. A/30/72, but was later transferred to Ugwuashi-Uku High Court as Suit re-numbered as 01/11/75. On 21/5/76, the Defendants Appellants herein also instituted an action at Ugwuashi-Uku High Court and it was numbered 01/11/76. The 1st and 2nd Respondents admitted in their pleadings that they granted a portion of the disputed land to the 3rd Respondents; hence it was not difficult for the trial Court to consolidate the two actions when an application to that effect was granted on 27/10/78.

I shall summarize the facts of the case leading to this appeal. In their Amended Writ of Summons, the Respondents as plaintiffs, claimed as follows:

*“The plaintiffs claim jointly and severally for themselves and on behalf of Ogodo against the Defendants jointly and severally for themselves and on behalf of Usebe Village, Ebu as follows:-*

*(a) A declaration that the piece and parcel of land described, known and called OFIA OGODO (Ogodo Bush) lying and situated in Ogodo, Asaba Division and verged pink in Survey plan No. Lus 3081 filed with statement of Defence in Suit No. 01/11/76 and now used for this Suit is the property of the plaintiffs according to Native Law and Custom.*

*(b) N600.00 (Six hundred Naira) being general damages for trespass.*

*(c) An injunction restraining the Defendants, their servants and/or agents and each of them from continuing or repeating similar or other acts of trespass on the said land.”*

On the other hand the appellants herein, as plaintiffs in Suit No. 01/11/76 also sought for a declaration thus:

*“(1) A declaration of title to all that piece or parcel of land known and called Iyi-Nkpume land in Ebu within Ugwuashi-Uku Judicial Division whose annual rental value does not exceed N10.00.*

*(2) N600.00 damage for trespass into the plaintiffs’ land which the said land will be particularly described in the plan to be filed in court by the Plaintiffs.*

*(3) Perpetual injunction restraining the defendants, their agents and/or privies from further acts of trespass into the said land.”*

The parties filed their respective pleading which were severally

amended. A total of 6 witnesses testified for the Plaintiffs and Defendants respectively. A number of Exhibits were tendered and admitted in evidence and some were rejected by the trial High Court. The witnesses for the parties were Cross-Examined after which the respective Counsel addressed the Court. The case was reserved to 6/12/96 for judgment when the learned trial Judge ODITA (J) (as he then was) after reviewing the evidence called by either side, entered judgment in favour of the Plaintiffs on pp. 228-229 of the records, in the following terms:

(1). I Declare that the plaintiffs are entitled to Customary Right of Occupancy of the entire land called OFIA OGODOR OR "OGODO BUSH" lying and situate in Ogodor, Aniocha North Local Government Area of Delta State verged PINK in plan No. LSU 3081 of 10th September 1977 Exhibit B in this proceedings or Plan No. LSU 5044 of 10th November, 1973 Exhibit A in this proceedings also verged PINK therein.

(2). The Defendants are to pay the Plaintiffs the sum of N600.00 (Six Hundred Naira) damages for trespass.

(3). I hereby order injunction restraining the defendants their servants and/or agents privies, and each of them from continuing or repeating similar or other acts of trespass on the land verged PINK in Plan No. LSU 3081 of 10th September, 1977 - Exhibit B in these proceedings or in Plan No. LSU 5044 of 10th November, 1973 Exhibit A in this proceedings and thereon verged PINK.

The Suit No. 0/11/76 of the defendants and their claims thereof are hereby dismissed in its entirety. Costs of N1000.00 to the plaintiffs against the defendants.

Dissatisfied with the judgment of the learned trial judge, the Appellants herein appealed to the Court of Appeal Benin Division vide their Notice of Appeal filed on 24/12 /96 on 3 Grounds of Appeal and with leave of Court added 2 additional grounds from which 5 issues were identified for determination. The Court below however, dismissed the appeal and affirmed the findings and judgment of the trial Court (see pp.300 - 323 of the records).

It is against that judgment that the Appellant have further appealed to this Court upon 3 Grounds of Appeal as follows:

#### GROUND (1)

The learned justices of the Court of Appeal erred in law for

failure to comply with S. 294 (1) and (6) of the 1999 Constitution which non-compliance has caused serious miscarriage of Justice.

GROUND (2)

The learned Justice of the Court of Appeal erred in law in relying on exhibit C as res judicata when they held “*the judgment in Exhibit ‘C’ was not appealed against up to the time consolidated suit 0/11/75 and 0/11/76 were instituted. The judgment is therefore conclusive of facts forming the ground for judgment*”

GROUND (3)

The learned justices of the Court of Appeal erred in law in pronouncing on an issue of estoppels not canvassed before them which had denied Appellant fair hearing.”

In the light of the judgment of the Court below, being appealed against and the grounds of appeal filed, the Appellant identified the following 3 issues for determination:

“(a) *whether in the face of the provision of Section 294(1) and (6) of the 1999 Constitution, the judgment of the lower court is not a nullity.*

(b) *whether the learned justices of the Court of Appeal were right in dismissing the Appellant’s Appeal on the ground that Exhibit ‘C’ constituted res judicata.*

(c) *whether the Court of Appeal was right in pronouncing on an issue not canvassed before the Court without inviting parties to address on it.*”

On the other hand, the Respondent have equally raised 3 issues similar to those identified by the Appellants for determination thus:

“(i) *Whether by virtue of the provision of Section 294 (1) (5) and (6) of the 1999 Constitution the judgment of the Court of Appeal amounts to a nullity.*

(ii) *Whether the Learned Justices of the Court of Appeal dismissed the Appellants appeal on the ground that Exhibit ‘C’ constitutes res judicata; and if so, whether same has led to a miscarriage of justice.*

(iii) *Whether the Court of Appeal pronounced on an issue not canvassed before the Court without inviting parties to address on it and if so whether same has led to a miscarriage of justice.*”

In the light of the foregoing, it is obvious that the 3 issues raised

by the respective parties in this appeal are similar. I cannot fathom out why the Respondents did not simply adopt the Appellants issues and simply canvass arguments in support of them.

In Issue No. 1 which I have observed is identical to the Respondent's Issue No. 1 on the main plank of the appeal, the Appellants have drawn our attention to the lapse of time between final addresses by Counsel on behalf of the parties at the lower court and when the learned Justices of that Court eventually delivered judgment on the appeal. Learned Counsel for the appellants FOLABI KUTI Esq., has submitted that it is evident on pages 299-324 of the records that final addresses were made on 18/2/2002, whilst judgment was delivered on 30/7/2003, a period of over 450 days after the conclusion of final addresses. It is submitted that the time within which the court below must deliver its judgment in writing as constitutionally provided by S. 294 (1) of the 1999 Constitution is not later than 90 days after the conclusion of the final addresses. That as a mandatory provision, its breach is unconstitutional and therefore renders the judgment given outside this mandatory period a nullity. Reliance was placed on the cases if *IFEZUO v. MBADUGHA* (1984) 1 SCNLR 427; *ODI v. OSAFILE* (1985) 1 NWLR (pt. 1) 1.

It is conceded that a cumulative reading of subsections 1 and 5 of Section 294 clearly show that a decision would not be nullified for non-compliance unless and until the Appeal Court considering a complaint is fully satisfied that the party complaining of such late delivery shows that it had suffered a miscarriage of justice as a result of such late delivery of the judgment: See *OWOYEMI v. ADEKOYA* (2003) 18 NWLR (pt. 852) 307.

Relying on the decision of this Court in *DIMBIA MAKU v. OSAKWE* (1989) 3 NWLR (pt. 107) 101 at 114, learned counsel for the Appellants has submitted thus:

That in deciding whether a party has suffered a miscarriage of justice as a result of inordinate delay between the conclusion of a trial and the delivery of judgment, the emphasis is not on the length of the time simpliciter but on the effect it produced in the mind of the Court. That is if the inordinate delay apparently and obviously affected the case, then the Appellate Court would intervene and hold that there has been a miscarriage of justice. It is submitted that the instant case, the inordinate delay in delivering judgment, has deeply

impacted in the Court's perception, appreciation and evaluation of the appeal, thus severely occasioning a miscarriage of justice as apparently shown in their Lordship's difficulty at having a proper appreciation and evaluation of the case evident in several passages of their judgment. Particularly those on pages 307 of the records.

To embellish the foregoing arguments, learned counsel concluded his submission on this note: That non-compliance simpliciter without more with the provisions of Section 294(1) by the lower court will not render its judgment a nullity, unless by virtue of Section 294(5) the party complaining has shown that he has suffered a miscarriage of justice by reason of non-compliance. It is urged on this court to give a literal interpretation to the clear and unambiguous words of Section 294, which intend merit is not difficult to see: as it reveals that the requirement of miscarriage of justice becomes evident only when subsections (1) and (5) are read together. Indeed whilst the community reading of subsection and (6) of S. 294 (supra) shows that the subsection was enacted to act as a check on both the trial and the Appellate Courts the failure of the Court (as in the case at hand) in not reporting the non-compliance to the National judicial Council would render any such decision null and void.

On issue No. 2, it is the contention of the Appellants' Counsel herein that the learned justice of the Court of Appeal fell into a grave error in relying on Exhibit 'C' as *res judicata*, when they held that the judgment in Exhibit 'C' is conclusive of the facts forming the grounds for the judgment. Learned Counsel for the Appellants has further contended that the Respondents never raised the issue of *res judicata* as it does not avail them, as plaintiffs, to make any such claim in the statement of claim. He submitted that learned trial judge erred when he came to the conclusion that 'Exhibit 'C' in Suit No. 74/50, constitutes *res judicata*, a position which the court below also had to support. It is submitted that the court below having held that the approach of the learned trial judge on the issue of plea of *res judicata* was wrong, the said lower court ought to have followed the ratio of this court in *ODOFIN & ORS v. MOGAJI & Ors* (1978) 2 NSCC 275 and accordingly order a retrial in the circumstance of this case.

It is further submitted that the court below failed to review the erroneous evaluation of the evidence by the trial court in Suit Nos. 0/11/75 and 0/11/76 and this led to their conclusion that Exhibit 'C'

created res judicata. He refers to the passage in the lead judgment on page 320 of the records paragraph 17.

B Arguing issue No.1, learned Counsel for the Respondent submitted that assuming but without conceding that this issue has merit and is consequently that resolved in favour of the Appellants, this would have the legal consequences, inter alia, of not entering judgment for a declaration of title to the land in dispute in favour of the Appellants by this court as prayed for by the Appellant in his brief; but most importantly, that would nullify the judgment of the court below while leaving intact, the 1966 judgment of the trial High Court, C which granted the Respondents a declaration of title to the said disputed land and restrained the Appellants perpetually from trespassing thereon.

However, arguing on the core issue, learned Counsel, agreed D with the submission of the Appellants' learned counsel on the legal effect of non-compliance with Section 294 (1) and 294 (5) of the 1999 Constitution. He equally agrees with their further submission that in determining whether a miscarriage of Justice has occasioned due to the inordinate delay, the emphasis is not on the length of time E simpliciter, but on the effect it produced in the mind of the court such as, if the inordinate delay is found to have obviously affected the court's perception, "*appreciation and evaluation of the case,*" and it is in such cases that the appellate court would interfere.

F However, the learned Counsel does not agree that the delay in delivery of the judgment by the court below has affected the perception, appreciation and evaluation of the case, neither has the delay "*eroded the confidence in the entire judicial system*". He advances the following reasons. The fact that Section 294 of the Constitution G applies mostly to judgments of trial courts where the judge after seeing and hearing the testimony of witnesses, has delayed delivery of judgment for such a long time that from the judgment it becomes apparent that he has lost touch or grasp of the evidence led, and perhaps forgotten the demeanour of the witnesses who had testified H before him, thus in this circumstances, a miscarriage of justice has occasioned, in the other hand, as opposed to the Appellate Court which has the duty of only reviewing the case at the trial court and arrived at its judgment based on printed records only. In the foregoing circumstances the Appellate Court can rarely be said to have lost

touch of the contents of the printed records placed before it. Learned counsel submitted therefore that the learned justices of the court below did not after finding that the learned trial Judge was in error to have held that the native court proceedings and judgment in Exhibit “C” was *res judicata*, then “*somersaulted*” to conclude that the said Exhibit “c” constituted *res judicata*, due to the inordinate delay in delivering their final judgment. B

Learned Counsel has flawed Appellants’ argument that failure of the presiding Justice of the court below to send a report on the delay in delivery of his final judgment to the Chairman of the National judicial Council as provided in Section 294 (6) of the Constitution (even if the said delay did not occasion any miscarriage of justice to the Appellants) renders the judgment of that court null and void. He has contended that the foregoing subsection of the Constitution, is purely administrative provision, meant to enable the National Judicial Council, the body vested with the power to discipline erring judicial officers) to take any disciplinary measures, it may seem fit to take against those judges who frequently disobey the said provision of Section 294 (1) *supra*. C D

Submitting on issues 2 and 3 together learned Counsel for the Respondents has submitted that the court below never found that the judgment in exhibit ‘C’ was *res judicata*, but that certain facts which were accepted by the National Court therein constituted issue estoppel which were clearly pleaded in paragraphs 15-17 of the Respondent’s pleadings pp 53-54. It is submitted that the phrase “issue estoppel” and “*res judicata*” need not be expressly stated in a party’s pleadings, provided facts Constituting such a plea are stated; as was clearly done by the Respondents herein, consequently, it is not correct for the Appellants to argue that the court below made out a case of issue of estoppel for the Respondents and proceeded to pronounce on same unilaterally as the parties fully joined issues on the plea in their Amended statement of claim and Amended statement of defence. E F G

On the concept of what constitutes *res judicata* or issue estoppel, the learned counsel though agrees with the general principle that it is used as a shield and not as a sword, it can not apply to the instant case. His reason is that there are two actions for declaration of title: one by the Respondents as plaintiff swing the Appellants as Defen- H

dants, and were perfectly entitled to rely on the plea in their defence in the suit against them by the Appellants claiming declaration of the title over the same parcel of land adjudged to belong to the Respondents by the Native Court in Exhibit “C”. He did not, however, concede that the Court below found that the proceedings and judgment in Exhibit “C” constituted res judicata or issue estoppel.

It is submitted however, that the judgment of the learned trial judge which was affirmed by the Court of Appeal was founded in traditional evidence of the parties and not necessarily on res judicata. Finally he urged the Court to dismiss the appeal and affirm the decision of the Court below.

As noted from onset this appeal emanated from a consolidated land suits between two communities in which the lower court affirmed the findings and judgment of the trial court. The appeal, however, falls within a narrow compass. The issues set out by the parties herein are simple and straight forward, Appellant’s issue No.1 is identical to the Respondent’s issue No. 1, which is the main plank of the Appellant’s appeal. This issue shall be taken and considered separately. Issues 2 and 3 of the respective party shall be considered together.

On issue No. 1, certain facts are not at all in dispute, having been legally provided/established and/or conceded. The facts are as follows:

**Firstly, the fact that Section 294 (1) of the 1999 Constitution makes it mandatory for a Court to deliver its judgment within 90 days after final address, and that by Section 294 (5) of the same Constitution, a judgment will not be invalidated or nullified for non-compliance unless and until the Appellate Court considering such a complaint on appeal is fully satisfied that the appellant has shown that it had suffered a miscarriage of justice by such late delivery of judgment. Further the fact that in determining whether a miscarriage of justice has occasioned due to inordinate delay, the emphasis is not the length of time simplicities, but on the effect it produced in the mind of the court, such as if the delay is found to have obviously alleged the court’s perception, appreciation and evaluation of the cases and that it is court would readily interfere.**

In view of the foregoing I find it appropriate to resort to the

provisions of the relevant subsections of S. 294 of the 1999 Constitution of the Federal Republic of Nigeria.

*“S. 294 (1). Every Court established under this Constitution shall deliver its decision in writing not later than ninety days after the conclusion of evidence and final addresses and furnish all parties to the cause or matter determined with duly authenticated copies of the decision within seven days of the delivery thereof.* B

*(5) The decision of a court shall not be set aside or treated as a nullity solely on the ground of non-compliance with the provisions of subsection (1) of this section unless the court exercising jurisdiction by way of appeal or review of that decision is satisfied that the party complaining has suffered a miscarriage of justice by reason thereof.* C

*(6) As soon as possible after hearing and deciding a case in which it has been determined or observed that there was non-compliance with the provisions of subsection (1) of this section, the person presiding at the sitting of the court shall send a report on the case to the Chairman of the National Judicial who shall keep the Council informed of such action as the Council may deem fit.”* D

***The true position of the law, in the light of the foregoing provision, is that a party should not just go on appeal merely on the ground that the judgment he wants to set aside was delivered outside the three months (90 days) period. He will have to fight the appeal on all known grounds of appeal which can render the judgment unsustainable; not merely on the assessment of facts. Indeed, an appellant with good grounds of appeal may have no need at all to canvass a ground of non-compliance with the 90 days, except for the purpose of having the judge (or justice) disciplined by drawing attending of the breach to the Court hearing the appeal in view of subsection (6) of the Section 294 of the 1999 Constitution (formerly subsection (5) of Section 258 of the 1979 Constitution. See OWOYEMI v. ADEKOYA (2003) 12 SC (Pt. 1) 1.*** E F G

***The delay per se does not lead to a judgment being vitiated or nullified. The delay must occasion a miscarriage of justice to in such a conclusion. In other words it has to be established that the delay occasioned a miscarriage of justice in that the trial judge did not take a proper advantage of having seen or heard the witnesses to, testify or that he had lost*** H

**his impressions of the trial due to such inordinate delay.** See *AKPAN v. UMOH* (1999) 7 SC. (Pt. II) 13.

**I do not agree with the submission of the learned counsel for the appellants that the delay of the lower court in delivery of its judgment affected the Courts' "perception, appreciation and evaluation of the case" or that the delay has eroded the confidence in the entire judicial system. The reasons for my so holding are not farfetched. Careful study of the provisions of S. 294 of the Constitution will show that they apply more particularly to judgments of the trial courts. In those courts the trial judge who, after seeing and hearing the testimonies of witnesses, inordinately delays the delivery of his judgment for such a long time that from the judgment it becomes apparent that he has lost touch or grasp of the evidence led; and could also have forgotten the demeanour of the witnesses who testified before him thus leading to a miscarriage of justice. In the circumstance as opposed to the Appellate Court which duties are limited to reviewing the case of trial court and the judgment which followed, based on printed records only and written briefs of Argument of the parties and in some cases oral amplifications of such briefs which are recorded in writing. The Appellate Courts in these circumstances can rarely be said to have lost touch of the contents of the printed records placed before them, which could be said to have affected their perception and evaluation of the facts based on the printed records of the facts based on the printed records of appeal only.**

My third reason is thus. **The learned justices of the court below did not, after finding that the learned trial judge was in error to have held that the native court proceedings and judgment in Exhibit "C" was res judicata, turn around to hold that same constituted res judicata, due to the inordinate delay in delivering their final judgment. Rather, I must observe, what the Justices did was to hold that the proceedings and judgment in Exhibit "C" was conclusive of facts (as stated in the testimonies of witnesses) forming the ground for the judgment. Put simply, that the facts which led to the judgment which was appealed against constitute issue estoppels as distinct from**

***res judicata which robs the Court of jurisdiction to entertain the case at all.***

***On this issue, the appellants have also argued that failure on the part of the presiding Justice at the Court of Appeal to send a report on the delay in delivery of his final judgment to the Chairman of the National Judicial Council as provided in subsection (6) of S. 294 (supra) even if the said delay did not occasion any miscarriage of justice to the appellant, renders the judgment of the Court of Appeal null and void. This argument is with due respect, preposterous and just a cent-worth as it is technical and misconceived. The requirement that “a person presiding at the sitting of the court to send a report on the case to the Chairman of the National judicial Council” in which judgment was delivered outside 90 days, so that he could inform the council to take such action as it may deem fit, is a purely administrative provision meant to notify the council, which in the circumstance of a particular, may deem it necessary to take any disciplinary action against Judges who flagrantly “or inordinately” refuse to comply with the provision of this section of the Constitution. The council does not have the power to declare a judgment of the Appellate Courts established under the Constitution, indeed the Court of Appeal null and void for failure of the presiding judge who delivered the judgment to send a report thereafter to NJC. Failure to inform the NJC cannot form a ground of appeal against the judgment since the report is not meant to form part of the judgment.*** Indeed of the appellants’ 4 Grounds of appeal none deals directly with or complains about the failure to send an Administrative Report to NJC. It is an issue I need not seriously consider as the learned counsel for the Appellants only merely relied on the submissions of their counsel in his brief of Argument to urge this Court to declare the judgment of the Court of Appeal null and void.

In the light of the foregoing I shall resolve this issue in favour of the respondent as no form of miscarriage of justice has been shown from the records to have been suffered by the appellants. On issue No.2, is the contention of the Appellants that the learned Justices of the Court of Appeal fell into grave error in relying on Exhibit ‘C’ as

res judicata when they held that the judgment in exhibit ‘C’ is conclusive of the facts forming the grounds for the judgment.

***We know what is “res judicata” Simply put it arises where a court of competent jurisdiction had earlier adjudicated upon an issue the same comes up again between the same parties or their privies.*** See FADIORA v. GBADEBO (1978) 3 SC. 29, LADEGA v. DUROSIMI (1978) 3 SC. 64. ***In a long line of cases it has been decided judicata is not available to a plaintiff as basis of his claim except by way of a reply to a defence raised by the Defendant in a statement of defence. A plaintiff cannot be seen raising a plea that will oust the jurisdiction of the court to entertain the action he has brought before that court. As it is often said. It is a shield rather than a sword.*** See IKE v. UGBOAJA (1993) 6 NWLR (pt. 321) 539.

However, in the case at hand contrary to the foregoing contention of the Appellants, I agree with the learned counsel for the Respondents that the court below never, at any time found that the judgment in Exhibit “C” was res judicata. It found on page 320 of the record of appeal thus:

*“The judgment in Exhibit “C” was not appealed against up to the time of the consolidated suits 0/11/75 and 0/11/76 were instituted. The judgment is therefore conclusive of the facts forming the ground for judgment.”*

In other words that certain facts which were accepted by the Native Court (Clan Court) therein, constituted issue estoppels and which facts constitute issue estoppels were clearly pleaded by the Respondent on pages 53 - 54 (lines 15 - 17) of the record of appeal, as follows:

*“15. In Odian Clan Court Civil case No. 57/50 Obi Osenwokwu Versus Okonkwo Mgbokole, the first plaintiff’s father sued the plaintiffs, Eastern Ibo tenants for arrears of rent as tenants in the farm land.*

*(a). One Chief Okoda from Defendants village, who is now dead testified on behalf of Mgbokojele, and as representing one Asieme, the then Obi of Ebu. He testified to the effect that the land belonged to Ebu and all rents were due to Asieme.*

*(b). The clan Court on noticing that ownership of the land was being contested by Ogodor and Ebu people, suspended judgment*

until one of the parties took action for a declaration of title to the area in dispute.

(c). Ebu people did not sue, but the plaintiffs in Odiani clan Court Suit No. 74/50 by the 1st plaintiff's father, Obi Osenwokwu, sued Obi Asieme of Ebu for a "Declaration of title to the land and bush of Ogodor known as Ogodor Town Land-Bush" and obtained<sup>B</sup> judgment.

16. (a) In that case one Ekpei a native of Ebu, but now dead testified on the 27th day of September, 1950 as follows:

"The whole of Ebu town of nine quarters gave this land in dispute to plaintiffs' fore-grand fathers before the advent of British in<sup>C</sup> Nigeria. We Okei and Usebe are one..."

(b). On the same day Chief Okoda aforementioned also testified and said inter alia, "It now comes to the British advent that plaintiff keeps one man called Isaac Anene in the land. We called the<sup>D</sup> plaintiff keeps one man called Isaac Anene in the land. We called the plaintiffs attention and asked him why he allows an Eastern Ibomen to come and carried all monies in the land and goes away without paying a farthing to you and also planting rubber depriving all the benefits that you will enrich yourself with." Okoda belonged to De-<sup>E</sup>fendants village of Usebe Anene's settlement is shown as old camp on plaintiffs' plan.

17. The Plaintiff will at the trial found on the said Odiani Clan Court suits and particularly rely on the testimonies of the deceased<sup>F</sup> witnesses."

**It is trite law that estoppels need not be pleaded in any special form, provided that the facts which can be interpreted as constituting estoppels are stated in such a way that estoppels is raised, and this has been clearly done by the respondents herein.** See MBONU v. NWOTI (1991) 7 NWLR (pt. 206) page 737; IKENI v. EFAMO (2001) 5 SC. (pt.1) 160; IBERO v. UME-OHANA (1993) 2 NWLR (pt 227) 510.<sup>G</sup>

**With profound respect to the learned counsel for the appellants, it is not correct to argue that the court below made a case of issue estoppel for the respondents and proceeded to pronounce on same unilaterally. Issues on that fact had been joined in the pleading of parties.** See SPACO VEHICLE and PLANT HIRE CO. v. ALRAIME (NIG.) LTD (1995) 8 NWLR (Pt. 416)<sup>H</sup>

655 at 670 -671, ALAO v. ACB LTD (1998) 3 NWLR (pt. 542) 339  
 at 369 -370, OSHODI v. EYIFUNMI (2000) 13 NWLR (pt. 684)  
 298; (2000) 7 SC (pt. 2) 145 D. T. I. ENT. (NIG.) LTD v. BUSARI  
 (2011) ALL FWLR (Pt. 563) 1818 at 1846 - 1847.

I am overwhelmed by the glib or facile further submissions of  
 B the learned counsel for the respondents on the issue in paragraph  
 4.02 of the respondent's brief of argument. This is a direct response  
 to the submission made by the learned counsel for the Appellants in  
 paragraph 5.2 of their brief, on the reliance of the principle of law  
 C that *res judicata* is used as a shield, (a defence) and not as a sword,  
 and that it is anomalous for the plaintiff who has invoked the jurisdic-  
 tion of the court by raising it as it is done by the respondents in this  
 case. Learned counsel for the respondents rightly conceded to the  
 principle as stated. It does not apply to the case in hand. The reasons  
 D are simple. In the instant case there are two actions in which declara-  
 tion of the title was sought: one by the appellants herein, as plaintiffs  
 suing the respondent as defendants. On the other hand the action  
 for the same claim by the respondents as defendants. Therefore, the  
 respondents were perfectly right and entitled to rely on the plea of  
 E *res judicata* in their defence in the suit against them by the appellants.  
 The appellants are not disputing these facts.

***What is irksome in this case is the way the appellants  
 have strenuously argued that the issue of res judicata does  
 not avail the respondents as plaintiffs. That Exhibit "C" in suit  
 F No 74/50 does not constitute a plea of issue of estoppel was  
 clearly pleaded. Therefore, even if this plea did not meet all  
 the conditions to constitute res judicata, I agree with the re-  
 spondents that, it would at least constitute a plea of issue es-  
 G toppel in respect of the issue that the entire Ebu Community,  
 including their Star Witness, Chief Okoda from the present  
 appellants' Usebe Quarters or village of Ebu Community,  
 claimed and led evidence that the land originally belonged to  
 the said entire Ebu Community. It was after that the commu-  
 H nity sold the land out rightly to the respondents' ancestor. This  
 fact was accepted by the court below in its judgment in Ex-  
 hibit 'C', thus barring the appellants herein, who are only one  
 set out of the nine villages that make up Ebu Community to  
 raise the same issue, claiming now that their Usebe Village***

***were the original owners of the said land.***

***The appellants have extensively addressed the Court on this issue, drawing a distinction between res judicata and issue estoppel on pages 184 to 185 and also canvassed in the respective briefs of argument of the parties on appeal on pages 266 to 269 to 285 of the record. This was a live issue presented before the trial court and the Court of Appeal for determination. With due respect, the contention of the appellants' counsel that this was a new issue introduced at the trial court and raised by the Court of Appeal suo motu, is based on mere technicality, barren and lacks sustainability. Again, issue 2 and 3 are resolved in favour of the respondents.***

In the final result all the issues having been resolved in favour of the respondents, the appeal is dismissed. However, in the circumstance of this case, I shall not award costs in favour of the respondents in the spirit and promotion of brotherhood and good neighbourliness amongst the parties.

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### **ONNOGHEN JSC**

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

I agree with his reasoning and conclusion that the appeal lacks merits and should be dismissed.

The main issue in the appeal is whether in the face of the provisions of Section 294(1) and (6) of the 1999 Constitution, as amended, the judgment of the lower court is not a nullity.

It is admitted by both parties and the record of appeal also confirms, that the judgment of the lower court was not delivered within ninety (90) days of the final addresses by counsel for the parties as required by the provisions of Section 294(1) of the Constitution of the Federal Republic of Nigeria, 1999, hereinafter referred to as the 1999 Constitution as amended. Also not in contention is the fact that the lower court was not a court of first instance in the case giving rise to this appeal but sat and heard the matter in its appellate jurisdiction. The question is what is the consequence(s) of the failure of the lower court, in the circumstances of the case, to deliver its decision within ninety days of the final addresses of counsel?

The answer is that the judgment/decision/order so delivered is valid except an appellant can satisfy the court that the non delivery of the judgment within the stipulated time has occasioned a miscarriage of justice to him - see Section 294(5) of the 1999 Constitution; Owoyemi vs Adekoya (2003) 18 NWLR (pt. 852) 307.

B In dealing with the provisions of Section 294 of the 1999 Constitution, as amended, it is necessary to draw a distinction between the proceedings in the trial Court and that before the Appellate Court. The distinction is necessary because you need to determine whether a miscarriage of justice has occurred following the inordinate delay in  
C delivering the judgment.

However in determining whether a miscarriage of justice has occurred as a result of the said delay, one has to take into consideration not simply the length of time between when the final addresses  
D were presented and the date the judgment was delivered, but the effect the delay has produced in the mind of the court: such as if the delay has affected the court's perception of case/evidence, appreciation and evaluation of the case of the parties particularly where the evaluation is based on the credibility of the witnesses as attested to by  
E their demeanour while testifying.

It is for the above reasons that it is very clear that the provisions of the said Section 294 of the 1999 Constitution, as amended, apply more to the Court of trial than an Appellate Court as it is a trial  
F court that has the primary responsibility to evaluate the evidence and proscribe probative value thereto particularly where the evaluation is not solely of documentary evidence but based on credibility of the witnesses concerned. It is the trial court that sees and hears the testimony of witnesses. Where it is apparent, on record, that the trial  
G court has lost touch or grasp of the evidence led or has forgotten the demeanour of the witnesses, it will be demonstrably clear that the delay complained of has led to a miscarriage of justice and such a decision is liable to be set aside by an Appellate Court under Section 294 of the 1999 Constitution, as amended.

H The above position, however, does not apply to an appellate court exercising its appellate jurisdiction where the duty of the court is limited to reviewing the case at the trial court and the judgment of same based on the printed record and the issues raised for determination and arguments proffered either in support or opposition

thereto. In such a situation, it cannot be said that the appellate court has lost touch with the case as contained in the record of appeal capable of affecting its perception and evaluation of the issues for determination in the appeal.

There is also the argument of learned counsel for appellant to the effect that the failure of the Presiding Justice of the Court of Appeal concerned to send a report on the delay in the delivery of the judgment to the Chairman of the National Judicial Council as provided in sub-section (6) of Section 294 of the 1999 Constitution, as amended, is fatal to the judgment so delivered contrary to Section 294(1) of the said 1999 Constitution as amended.

I hold the considered view that the above submission is misconceived as the provision of sub-section (6) of Section 294 of the 1999 Constitution is directive in nature - not mandatory - and it is crafted for administrative convenience for the purpose of discipline of the judicial officer(s) concerned, where appropriate. It has nothing to do with the validity of the judgment concerned which validity depends on appellant satisfying the Appellate Court that the inordinate delay has resulted in a miscarriage of justice as earlier discussed in this judgment and provided for under subsection (5) of Section 294 of the 1999 Constitution, as amended.

It is for the above reasons and the more detailed reasons assigned in the lead judgment of my learned brother that I too find the appeal devoid of any merit and dismiss same accordingly.

I abide by the consequential orders made in the said lead judgment including the order as to costs. Appeal dismissed

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### **RHODES-VIVOUR JSC**

I have had the benefit of reading in draft the leading judgment of my learned brother Galadima, JSC. I agree with his lordship on his reasoning and conclusions. I intend to add a few words of my own on the importance of Section 294 of the Constitution. Section 294(1) and (5) of the Constitution states that:

*“294(1) Every court established under this Constitution shall deliver its decision in writing not later than ninety days after the conclusion of evidence and final addresses and furnish all parties to the cause or matter determined duly authenticated copies of the decision*

*within seven days of the delivery thereof.*

(5) *The decision of a court shall not be set aside or treated as a nullity solely on the ground of non-compliance with the provisions of subsection (1) of this section, unless the court exercising jurisdiction by way of appeal or review of that decision is satisfied that the party*  
B *complaining has suffered a miscarriage of justice by reason thereof."*

The Court of Appeal heard closing speeches on the 18th of February 2002 and delivered judgment on the 30th of July 2003. That is to say judgment was delivered 450 days after address instead  
C of within 90 days as stated in subsection (1) of Section 294 of the Constitution.

All courts in Nigeria are to ensure that they comply with the provisions of Section 294(1) of the Constitution. Judgments from all our courts must be delivered within 90 days after closing speeches.

D Would subsection (5) of Section 294(1) of the Constitution apply to the decision of the Court of Appeal that delivered judgment 450 days after closing speeches?

A trial judge watches the demeanour of witnesses to see how readily they answer questions, were they evasive, contradictory or  
E vague. What was the reaction of the witnesses when confronted with evidence, be it documentary which suggests that their testimony is untrue. It is after the above that the judge can attach weight to the evidence of witnesses and that can only be done when the judge sits  
F in his study to prepare the judgment. A trial judge preparing a judgment after 90 days would have forgotten all the above or his memory would have faded on those issues.

Now, miscarriage of justice usually depends on the circumstances of the case. There would be miscarriage of justice when an error can  
G be seen in the proceedings/judgment, and had it not been for the error a decision more favourable to the party that lost would have been given. There is a miscarriage of justice when the decision given is inconsistent with established rights of the party complaining.

Would all that I have been saying apply to the judgment of the  
H Court of Appeal?

It cannot be said that there is miscarriage of justice when an Appeal Court delivers judgment after 90 days. This is so since delay cannot affect the court perception, and evaluation of the case, since appeals are heard and determined on briefs. The appellant has in the

circumstances failed to show how a delay of 450 days after address before judgment was delivered affected the judgment or how the delay has resulted in a miscarriage of justice. Non-compliance with Section 294(1) of the Constitution applies more to judgment of the High Courts.

For, this and the fuller reasons in the leading judgment the appeal is dismissed. B

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### **PETER-ODILI JSC**

I am in complete agreement with the judgment just delivered by my Lord, Suleiman Galadima JSC, and I shall make some remarks in support of the reasoning. C

This is a consolidated land suit between two communities. The appellants, as plaintiffs in suit No. 0/11/76 representing themselves and the people of Usebe Village Ebu, sued the respondents representing themselves and the people of Ogodor. D

In suit No/11/75, the respondents as plaintiff therein sued the appellants. On consolidation of the two suits, the plaintiffs in 0/11/75 remained plaintiffs, in the consolidated suits while the defendants in the said suit 0/11/75 remained defendants in the consolidated suits. In both suits, the claims of the parties, each on declaration of title to the land. E

#### **BACKGROUND FACTS**

The facts are best presented by the pleadings which shall be quoted extensively and they are thus: F

#### **FURTHER AMENDED STATEMENT OF CLAIM**

1. The plaintiffs are natives of Ogodo town and bring this suit for themselves and as representatives of the people of the said town, in Odiani Clan, of Asaba Division. The defendants are members of Usebe Village, Ebu, and are sued for themselves and representing the people of the said Usebe Village. G

2. The land in dispute which is known as Ofia Ogodo (Ogodo Bush) is situate in Ogodo within Ogwashi-Uku Judicial Division and in more particularly described and verged PINK in survey plain No. LSU 3081 made for the plaintiffs by Chief I. U. Ufoegbune, Licensed Surveyor. The Plan No. LSU 3081 was made for the plaintiffs in answer to the defendants, cross action - Suit No. 0/11/76 Adano Max- H

well and Another etc (as plaintiffs) vs. Obi Osenwokwu and others etc (as defendants). The plaintiffs will also rely on the plan No.LSU 3081 in the above suit at the trial with necessary changes as to title, suit Number and parties where applicable.

B 3. The land in dispute verged PINK, which is part of larger  
expanse of land owned by the plaintiffs shown verged YELLOW in  
the plaintiffs, Plan NO. LSU 3081 is bounded on the south by Ogodo  
town itself and other portion of plaintiffs, land not in dispute, on the  
North by the Utor River and land of Ishan people, on the West by Iyi  
C Anene and on the East by the Iyi Nkpume and the land of the Ebu  
people.

4. The plaintiffs inherited the entire land shown verged YEL-  
LOW in the plaintiffs, plan of which the land is dispute shown verged  
PINK in the lesser portion from one OKOGBOI the earliest ancestor  
D of the plaintiffs' people. Okogboi begat Akote, the father of Izoya  
who begat Bidokwu the father of Obi Osenwokwu and the second  
defendant. The Obi Osenwokwu begat Obi Akabude Osenwokwu.  
The 2nd plaintiff also has children.

5. The said Okogboi came from Bini. He first settled at Idumuje  
E Unor and later moved to Ugbody from where he moved to Obomkpo.  
He was a notable hunter and traveled far and wide in the forests  
around.

6. During his hunting expeditions Okogboi met and made friend  
F with one Igbo-Nwoodogwu, an Ezi man.

7. It was during Okogboi's association with his Ezi friend that  
he went on the hunting expedition that took him up to a stream now  
known as Iyi-Anene, and which is shown on plaintiff's plan.

8. Okogboi was fascinated by the area around this stream be-  
G cause of the numerous bush pigs which evidently resided therein.

9. Okogboi communicated his find to his friend Igbo -  
Nwoodogwu, and further expressed a desire to establish a perman-  
ent settlement in the area. He was told that the area belonged to  
the people of Ebu.

H 10. Okogboi and his Ezi friend arranged to meet the people of  
whereupon they went to one Agbeona who was then a leading fig-  
ure in Ebu, to whom they explained their mission.

11. Agebona advised a repeat visit so that he would have time  
to consult with his people of Ebu.

12. During a later visit as arranged, he bargained for an absolute grant of a piece of land to Okogboi, was concluded in the following terms

(a) That Okogboi was to take oaths before three juju shrines that he would not allow unfriendly people to pass through his territory into Ebu. The juju shrines which belonged to Ebu were Ani-Ebu, Ubueyi and Iyiaja. B

(b) That three goats were needed for the swearing ceremony which Okogboi had to produce.

(c) That in addition to this, Okogboi had to produce two women to be betrothed to Ebu people without payment of bride price. C

(d) Okogboi performed all these conditions. The two women produced and given to the two divisions of Ebu were named Mgbodudu and Amuasua, the two divisions of Ebu being Okomaje and Iyiakpati. D

13. On the conclusion of the ceremonies the people of Ebu led by one Odokpe of Iyiago-Shimili conveyed to Okogboi absolutely according to Native Law and Custom a portion of their land shown verged YELLOW in the Plaintiffs' Plan. The Eastern boundary was fixed between the cotton tree and the Iroko referred to as "OATH" Tree. (for oaths were taken thereat). These trees have now fallen leaving the stumps there. The oath tree stump and the cotton tree stump are shown in the plaintiffs, Plan. The Ebu people escorted Okogboi to the length and breadth of his land as shown verged YELLOW in the plaintiffs' plan. This happened before the advent of the Europeans. E F

14. The plaintiffs as their ancestors before them formed their land including the portion now in dispute, and exercised other acts of ownership and possession over the said land. They built houses thereon, set up and worshipped juju thereon, tapped the raffia palm trees and have continued to let out the land to various tenants including Copane mechanized farmers. The plaintiffs have also defended their rights of ownership and possession over the land and to the knowledge of the defendant's people. G H

15. In Odiani Clan Court Civil Case No. 57/50 Obi Osenwokwu v. Okonkwo Mgbokojele, the first plaintiffs father sued the plaintiffs' Eastern Ibo tenants for arrears of rent as tenants in the farm land.

(a) One Chief Okoda from defendants village, who is now dead

testified on behalf of Mgbokojele, and as representing one Asieme, the then Obi of Ebu. He testified to the effect that the land belonged to Ebu and all rents were due to Aseime.

(b). The Clan Court on noticing that ownership of the land was being contested by Ogodor and Ebu people, suspended judgment until one of the parties took action for a declaration of title to the area in dispute.

(c). Ebu people did not sue, but the plaintiffs in Odiani clan court suit No.74/50 by the 1st plaintiffs father, Obi Osenwokwu, sued Obi Asieme of Ebu for a *“Declaration of title to the land and bush of Ogodor known as “Ogodor Town Land-Bush”* and obtained judgment.

16. (a) In that case one Ekpei a native of Ebu, but now dead testified on the 27th day of September, 1950 as follows:

*“The whole of Ebu town of nine quarters gave this land in dispute to plaintiffs’ fore-grand fathers before the advent of British in Nigeria. We Okei and Usebe are one...”*

16(b). On the same day Chief Okoda aforementioned also testified and said inter alia, *“It now comes to the British advent that plaintiff keeps one man called Isaac Anene in the land. We called the plaintiff keeps one man called Isaac Anene in the land. We called the plaintiffs attention and asked him why he allows an Eastern Ibomen to come and carried all monies in the land and goes away without paying a farthing to you and also planting rubber depriving all the benefits that you will enrich yourself with.”* Okoda belonged to Defendants village of Usebe Anene’s settlement is shown as old camp on plaintiffs’ plan.

17. *The Plaintiff will at the trial found on the said Odiani Clan Court suits and particularly rely on the testimonies of the deceased witnesses.”*

18. In the month of August 1972 several members of defendant’s village including the defendants, their servant and or agents broke and entered the plaintiffs’ said land, cleared a portion of it and made a traverse thereon which is the cause of the present suit.

19. The plaintiffs therefore claim jointly and severally for themselves and on behalf of the people of Ogodor, against the defendants jointly and severally for themselves and on behalf of Usebe village Ebu as follows:

(a). A declaration that the piece and parcel of land described, known and called OFIA OGODO (Ogodo Bush) lying and situated in Ogodo, Asaba Division and verged pink in Survey plan No. LUS 3081 filed with Statement of Defence in Suit No. 01/11/76 and now used for this Suit is the property of the plaintiffs according to Native Law and Custom. B

(b) N600.00 (Six hundred Naira) being general damages for trespass.

(c). An injunction restraining the Defendants, their servants and/or agents and each of them from continuing or repeating similar or other acts of trespass on the said land. C

The facts as put forward by the defendants are stated hereunder as per their pleadings, viz:

#### FURTHER AMENDED STATEMENT OF DEFENCE

1. Save as is hereinafter expressly admitted the defendants deny each and every allegation of fact contained in the statement of claim as if each were specifically set out and traversed seriatim. D

2. Save that it is admitted that the defendants are members of Usebe village, Ebu and sued in a representative capacity, the defendant deny all the other allegations contained in paragraphs 1 and 2 of the Statement of Claim and put the plaintiffs to strict proof thereof. E

3. In further answer to the said paragraphs 1 and 2 of the Statement of Claim the defendants say that the plaintiffs are natives of Ugboba, Obomkpa in Ezechimo Clan of Aniocha Local Government Area. F

4. The defendants vigorously deny paragraphs 3 and 4 of the Statement of Claim and aver that the land in dispute forms part of the defendants' land known as and called IYI-MKPUME Land.

5. The said land in dispute is situate at Ebu within the Ogwashi-Uku Judicial Division of Bendel State of Nigeria and is more particularly described and delineated with its dimensions and abuttal on the Survey Plan No. MWC/1181/80 annexed hereto and therein verged PINK. G

6. The defendants deny paragraphs 5, 6, 7(a), 8, 9, and 11 of the Statement of Claim and put the plaintiff to strict proof of the allegations. H

7. In further answer to the said paragraphs 5, 6, 7, 7(a), 8, 9, 10, and 11 of the Statement of Claim the defendant's state:

(i) That when Odokpe was the Diokpa and head Chief of Iyagoshimi, Usebe and Aganike, that is to say, about 90 years ago, one Okolo Nwagba, a farmer and hunter from Ugboba, Obomkpa approached one Agbona, the then Chief and head of Usebe family in Ebu and asked for the grant to him of a portion of the defendants' Iyi-Nkpume land to live on and form subject to Ebu native law and custom.

(ii) That when Okolo Nwagba went to Usebe, Ebu to ask for a portion of the said Iyi-Mkpume land he was accompanied by one Morah, an Ezi man who led him on the said mission for grant of the said land under Ebu customary law.

(iii) That following the said request by Okolo Nwagba to Agbona for the grant to him of a portion of the defendants' Iyi-Nkpume land Agbona promised to take and did take him to the then Diokpa and head Chief of called Odokpe before whom Okolo Nwagba renewed his request for the grant of a portion of the said Iyi-Mkpume land after presenting to him three calabashes of palm wine, 20 kola nuts and one head of tobacco.

(iv) The said Diokpa and head Chief of Usebe and the elders of the defendants' village including Agbona after full and detailed discussions and consideration of Okolo Nwagba's request agreed to grant him a portion of Iyi-Mkpume land to live on and farm as a customary tenant. The portion of Iyi-Mkpume land granted to him is that shown and delineated in Survey plan No. MWC/1181/80 and therein verged GREEN.

Paragraph 12 of the Statement of Claim is emphatically denied and in further answer thereto the defendants say that their people did not grant any land absolutely or at all to Okogboi.

In still further answer to the said paragraph 12 of the Statement of Claim, the defendants say that about 90 years ago their people made a grant of their Iyi-Mkpume land to Okolo Nwagba in accordance of the Ebu customary law and subject to the following terms and conditions:

(a) That Okolo Nwagba will present goat and swear by the Ani-Ebu shrine not to allow unfriendly people and or enemies of Ebu to enter the said portion of land granted to him, pass through the same to invade the defendants and their other people of Ebu;

(b) To live on and form

(c) Not to seal, lease or in any other way to dispose of or alienate the same without the consent of the people of Usebe;

(d) To pay customary tributes of 60 yams, 50 kolanuts and one calabash of palm wine every year to the defendants;

(e) That in the event of the said Okolo Nwagba or his descendants not having an issue to succeed him or them that the said portion of Iyi-Mkpume land granted to him shall revert to the Usebe people. The defendants say that the land was not sold and no women were exchanged as is therein alleged or at all. B

The defendants deny paragraph 13 of the statement of claim and put the plaintiffs to strict proof thereof. The defendants say that the portion of Iyi-Mkpume land granted to Okolo Nwagba under Ebu native law and custom is shown and delineated in the Defendants, plan No. MWC/1181/80 and therein verged green and it was not the head Chief Odokpe who showed Okolo Nwagba the said land granted to him nor did he lead Ebu people to show the land as is alleged or at all. C D

The defendants further deny that the Eastern boundary of the land granted was fixed between a cotton tree and an “Oath” iroko tree, there being no “Oath” iroko tree as alleged or at all. The boundary of the land granted is shown verged green in the defendants Plan No. MEC/1181/80. The defendants put the plaintiffs to strict proof of all the other allegations contained in the said paragraph 13 of the Statement of Claim. E

1. Paragraph 14 of the Amended Statement of claim is denied and in further answer thereto the defendants say that neither the plaintiffs nor their ancestors were ever in possession of the land in dispute nor did they exercise acts of ownership and possession as are alleged in the said paragraph or at all. F

2. In answer to paragraphs 15, 16 and 17 of the Amended Statement of Claim, the defendants say that the said suits 57/50 (Obi Osenwokwu v. Okonkwo Mgbokojele) and 74/50 (Obi Osenwokwu v. Obi Asieme) were instituted by Osenwokwu and the said two suits were not instituted in respect of and did not concern the land now in dispute but concerned portions of the land granted by the defendants, ancestor and shown, delineated and verged green in Survey plan No. MWC/1181/80. The defendants will at the hearing contend that the said suits are irrelevant and inadmissible. G H

3. When Odokpe and his people granted the land to Okolo Nwagba, he Okolo Nwagba thankfully accepted the customary grant subject to the said terms and conditions and presented one goat with which he swore at the Ani-Ebu shrine.

B 4. After the said customary grant, Okolo Nwagba and his de-  
scendants faithfully kept the terms and conditions of the grant and  
paid the customary tributes until during the time of Obi Osenwokwu.  
At first Obi Osenwokwu carried out the terms and conditions of the  
grant and paid tributes to the defendants until about 1949 when he  
C began to put the tenants on the said land without the consent of (sic)  
to pay the said tributes, all contrary to the terms and conditions of  
the said grant.

5. Following the putting of tenants, including one Isaac Anene  
of Obosi, on the said land by Obi Osenwokwu without the approval  
D of the defendants in or about 1949. One Obi Asieme of Ebu Ob-  
jected that the tenants should pay rents to Obi Osenwokwu and he  
claimed that the same shall be paid to him. This claim by the said Obi  
Asieme led to the institution of Suits 57/50 and 74/50 by Obi  
Osenwokwu against him. The said Suits were in respect of portions of  
E the said land granted to the plaintiffs' ancestor, Okolo Nwagba by the  
defendants, people.

6. The said portion of land granted to the said Okolo Nwagba  
to live on and farm is described, shown and delineated on the defen-  
dants, plan No MWC/1181/80 filed in this suit and therein verged  
F GREEN and it does not extend to or include the defendants, land  
now in dispute, shown verged PINK in the said plan.

7. The defendants, land now in dispute is bounded on or to-  
wards the North by the Utor River, and the land of Inyelen people in  
G Ishan Area of Bendel State of Nigeria, to the south partly by the land  
granted by the defendants to the plaintiffs, ancestor and partly by the  
other land of the defendants, not in dispute, on the East by Iyi-  
Mkpume and the other lands of the defendants also not in dispute  
and on the West by the Iyi-Anene and the land of Ogbeofu, Ezi called  
H Ugboko Ogbeofu.

8. The said land in dispute has been the property of the defen-  
dants who have also been in possession of the same from time out of  
human memory. As owners in possession of the said land in dispute,  
the defendants have exercised maximum acts of ownership over the

same by farming thereon, cutting palm fruits from palm trees growing on the land and giving portions thereof to tenants who farmed the same, built their farm houses thereon and paid tributes to the defendants.

9. In or about the year 1951, one Okodu Anene, a member of the defendants' people planted rubber seedlings on the Western portion of the said land in dispute and these plants later grew into a big rubber plantation, which were tapped by him for many years. The defendants have two of their family shrines, the Iyi-Akpaka shrine and the Aji-Mkpume shrine, which they worship on their said land now in dispute. B C

10. The defendants also put tenants who tap raffia palm wine from raffia palms growing on the northern portion of the land in dispute.

11. At the hearing the defendants will contend that the plaintiffs whose action is speculative and vexatious are on a land grabbing adventure and that the same ought to be dismissed. D

12. The defendants will further contend that the plaintiffs are not entitled to the relief sought or to any part thereof and will pray the court to dismiss the same. E

At the trial of the consolidated suit, the plaintiffs called six witnesses. The defendants in turn called six witnesses. At the close of trial and after addresses by learned counsel for the parties, the learned trial judge reviewed the evidence before him and dismissed the case of the plaintiffs, who being dissatisfied appealed to the Court of Appeal or the court below. The court below also dismissed the appeal and again aggrieved the appellants has appealed to this court upon three grounds of appeal. F

In keeping with the Rules of this court, briefs of argument were settled and filed by each side and on the 10th day of February, 2014 date of hearing, learned counsel for the appellant, Mr. Folabi Kuti adopted their Brief of Argument settled by Osaro Eghobamien and filed on 9th day of February 2006. In the Brief were couched three issues for determination stated hereunder as follows: G H

(a) Whether in the face of the provision of Section 294 (1) & (16) of the 1999 Constitution, the judgment of the lower court is not a nullity.

(b) Whether the learned Justices of the Court of Appeal were

right in dismissing the appellants' appeal on the ground that Exhibit C constitutes *res judicata*.

(c) Whether the Court of Appeal were right in pronouncing on an issue not canvassed before the court, without inviting parties to address on it.

B For the respondents, learned counsel, Chike Onyemenam Esq. adopted their Brief of Argument filed on 31/10/12 and deemed filed on 7th day of October 2013. Learned counsel for the respondents crafted three issues for determination which are thus:

C 1. Whether by virtue of the provisions of Section 294(1), (5) and (6) of the 1999 Constitution, the judgment of the Court of Appeal amounts to a nullity.

D 2. Whether the learned justices of the Court of Appeal dismissed the appellants' appeal on the ground that Exhibit "C" constitutes *res judicata* and if so, whether same has led to a miscarriage of justice.

3. Whether the Court of Appeal pronounced on an issue not canvassed before the court without inviting parties to address on it, and if so, whether same has led to a miscarriage of justice.

E The issues as differently couched by either side are really in substance asking the same questions and so it is easy to utilise the issues as distilled and framed by the appellants.

#### ISSUE ONE

F Whether in the face of the provision of Section 294 (1) & (16) of the 1999 Constitution, the judgment of the lower court is not a nullity.

G Learned counsel for the appellant submitted that with the inordinate delay from the final address made on the 18th day of February 2002 whilst the judgment was delivered on the 30th day of July 2003, a period of well over 450 days after the conclusion of final addresses had a negative impact on the minds of the judges and leaves one of the parties with an impression that justice has been denied. That the constitutional provision of Section 294(1) of the H 1999 Constitution provides that every court established under the Constitution shall deliver its decision in writing not later than ninety days after the conclusion of evidence and final addresses which provision had been infringed upon by the Court of Appeal. He said the provision for 90 days for delivery of judgment is mandatory. He cited

Ifezue v. Mbadugha (1984) 1 SCNLR 427; Odi v. Osafire (1985) NWLR (pt 1); Owoyemi v. Adekoya (2003) 18 NWLR (pt 852) 307; Dibiamaka v. Osakwe (1989) 3 NWLR (pt. 107) 101 at 114.

For the appellant was submitted that the clear, literal and unambiguous words and interpretation of Section 294 of the Constitution reveal that the requirement of miscarriage of justice becomes evident only when subsections (1) and (5) are read together, while the community reading of subsection (1) and (6) clearly shows that the subsection was enacted to act as a check on both the trial courts and the appellate courts. He said the failure of the court as in the instant appeal in not reporting the non-compliance to the National Judicial Council would render any such decision null and void. That the employment of the word “shall” in subsection (6) when used put the position precisely and beyond speculation or conjecture. The learned counsel for the appellant further contended that well established rules of interpretation require that the meaning and intention of the framers of a constitution must be ascertained from the language of that constitution itself. He referred to *Oyeyipo v. Oyinloye* (1987) 1 NWLR (Pt. 50) 356 (SC); *A. G. Lagos State v. A. G. Federation* (2004) 18 NWLR (Pt. 904) SC 1.

For the respondents were contended that the interpretation of Section 294 (6) of the 1999 Constitution is that it is a purely administrative provision meant to enable the NJC, the body vested with the power to discipline erring Judicial Officers, to take any disciplinary measures it may deem fit to take against judges who flagrantly disobey the provisions of Section 294(1) of the 1999 Constitution. That the consequences of failure to comply with the above mandatory but administrative provisions is totally left with the NJC as provided therein, to take any action it may deem fit. That the failure of the presiding Judge to send the report of the JNC cannot form a ground of appeal against the judgment since the Report is not meant to be embodied or form part of the judgment, but is supposed to be written and sent as soon as possible after delivery of judgment.

It was further submitted that the appellants did not provide any evidence or any explanation as to how they came to the conclusion that the Presiding Justice of the Court of Appeal did not send the said Administrative Report or even show that the presiding Judge whose failure is the subject of this complaint was served with a notice

of same. That the burden was on the appellants to adduce evidence of non-compliance but they failed to do so and merely relied on the submissions of their counsel in his Brief of Argument to urge this court to declare the judgment of the Court of Appeal null and void.

The posture of the appellants is that the inordinate delay in delivering judgment has deeply impacted on the court's perception, appreciation and evaluation of the appeal, thus occasioning a severe miscarriage of justice. The respondent disagreeing stated that the failure of the presiding justice to send a report to the National Judicial Council is an administrative lapse which would not fatally affect the validity of the judgment so long as no miscarriage of justice had been occasioned.

The issue is based on Section 294 (1), (5) and (6) which provisions I shall recast hereunder viz:

*"294. (1) Every court established under this Constitution shall deliver its decision in writing not later than ninety days after the conclusion of evidence and final addresses and furnish all parties to the cause or matter determined with duly authenticated copies of the decision within seven days of the delivery thereof."*

*"(5) The decision of a Court shall not be set aside or treated as a nullity solely on the ground of non-compliance with the provisions of subsection (1) of this section, unless the court exercising jurisdiction by way of appeal or review of that decision is satisfied that the party complaining has suffered a miscarriage of justice by reason thereof."*

*"(6) As soon as possible after hearing and deciding any case in which it has been determined or observed that there was non-compliance with the provisions of subsection (1) of this section, the person presiding at the sitting of the court shall send a report on the case to the Chairman of the National Judicial Council who shall keep the council informed of such action as the Council may deem fit"*

Indeed, it is not in dispute that the final addresses in the Court of Appeal were made on the 18th day of February, 2002 and the judgment was delivered on the 30th day of July, 2003, a period of 450 days after those addresses were rendered. However by the provisions of Section 294 (1) of the 1999 Constitution of Federal Republic of Nigeria, the period for the delivery of judgment is 90 days of the final addresses. These 90 days prescribed even though man-

datory cannot be taken that the judgment is rendered a nullity after 90 days would have elapsed on account of the provisions of subsection (5) of the same Section 294 since there has to be established that a miscarriage of justice had been occasioned on account of the time lag. In this regard in deciding whether a party has suffered a miscarriage of justice as a result of the delay between the conclusion of the trial and addresses as against the delivery of the judgment, the main issue is not on the length of time but on the effect the delay has produced in the mind of the court in terms whether the delay had apparently and obviously affected the court's perception, appreciation and evaluation of the case and if the mind of the court was impaired thereof then the intervention of the Appellate Court is called for. See *Dibiamaka v. Osakwe* (1989) 3 NWLR (pt. 107) 101 at 114. In this instance, the appellants have not shown how the mind of the court below was negatively affected in the way they evaluated the documents before them on appeal and how that court showed its perception, appreciation and evaluation of the case. It has to be said that it is not enough to tout the number of days, weeks, months or years between the end of trial and the delivery of judgment as it has to be proved by the party who is aggrieved to show the impact of that delay, inordinate or not in the review of the case by the court. That appellants have failed to do except to make much of the period of the delay.

Furthermore the provision under Section 294(6) of the Constitution which provided for a report by the presiding justice on the matter of the delay to the National Judicial Council which report has not been shown to have been made, has no effect on whether or not the judgment would be declared null and void for the passage of time but for administrative purposes at which the NJC would see if there was negligence of duty on the part of the court or its justices and what sanction to be visited on the infringing justices. This is to show that there is a distinction between the non-compliance with the 90 days period for delivery of judgment and the vitiation of the judgment as against what the NJC would do with the erring judge involved. Therefore the stance of the appellants that the non-report to the NJC would have the effect of rendering the decision made outside the 90 days period null and void not the correct interpretation as envisaged by the lawmaker upon the community reading of Section

294(1), 5 on the one hand and (1) and (6) on the other. The conclusion is that the cases of *Oyeyipo v. Oyinloye* (1987) 1 NWLR (pt. 50) 356; *A. G. Lagos State v. A. G. Federation* (2004) 18 NWLR (pt. 904), cited and on which appellants are hanging their position are not available for our purpose here.

B I have no difficulty in the circumstances in resolving the issue against the appellant and in favour of the respondents.

#### ISSUES TWO AND THREE

4. Whether the learned Justices of the Court of Appeal were right in dismissing the appellant's appeal on the ground that Exhibit C constitutes *res judicata*.

5. Whether the Court of Appeal were right (sic) in pronouncing on an issue not canvassed before the court, without inviting parties to address on it.

D For the appellants was submitted that there is a long line of cases which establish that the plea of *res judicata* is always used as a defence and that it is anomalous for a plaintiff who has invoked the jurisdiction of the court to also be the one to attack the jurisdiction of the court by raising the plea of *res judicata*. That the respondents E never raised the issue of *res judicata* as it did not avail the respondents as plaintiffs to make any such claim in their statement of claim. He cited *Fadiora v. Gbadebo* (1978) 3 SC 291; *Iyayi v. Eyigebe* (1987) 3 NWLR (pt. 61) 523; *Ijade v. Ogunyemi* (1996) 9 NWLR (pt. 470) 17 at 33 - 34.

F Learned counsel for the appellant went on to state that the approach of the trial court was wrong as he ought to have sent the matter for retrial. He cited *Odofin & Ors v. Mogaji & Ors* (1978) 2 NSCC 275.

G That the Court of Appeal having failed to properly evaluate the true worth of Exhibit "C" the court below erred in dismissing the appeal on the ground that Exhibit "C" constitutes *res judicata*.

H For the appellants, it was submitted that the court below raised the issue of estoppel *suo motu* since it was not pleaded by the parties and utilizing that issue fell into grave error which occasioned a grave miscarriage of justice.

Responding, learned counsel for the respondents said the Court of Appeal did not find the judgment in Exhibit "C" was *res judicata*, but that certain facts which were accepted by the Native Court therein,

constituted Issue Estoppel and which facts consisting issue Estoppel were pleaded in paragraphs 15 - 17 of the respondents' pleadings. That the phrase "Issue Estoppel" and "Res Judicata" need not be expressly stated in a party's pleadings provided the facts constituting such a plea are stated as was done by the respondents. That the parties properly joined issue on the said plea in the Amended Statement of Claim and the Amended Statement of Defence. He referred to *D. T. T. Enterprise (Nig.) Ltd v. Busari* (2011) ALL FWLR (pt. 563) 1818 at 1846 - 1847. B

Going on, learned counsel for the respondents said assuming but not conceding that the court below found that the proceedings and judgment in Exhibit C constituted Res Judicata or Issue Estoppel, the argument that res judicata is used as a shield and not a sword cannot apply to the case in hand as there were two actions of declaration of title, one of the appellants as plaintiffs suing respondents as defendants and the other way round in the other suit and so the respondents were entitled to rely on the issue estoppel in their defence in the suit against them. That the issue estoppel was a live issue placed before Court of trial and the Court of Appeal and not a new use introduced by the trial Court and Court of Appeal suo motu requiring the said courts to specifically invite the parties for a fresh address on same. C D E

The grouse of the appellants is that the Court of Appeal fell into error in relying on Exhibit C as res judicata when they held that the judgment in Exhibit C is conclusive of the facts forming the grounds for the judgment. That the respondents as plaintiffs, res judicata would not avail them and it was wrong for them to make an issue relating thereto in their statement of claim. F

The respondents disagreed with the view as postulated by the appellants stating that the argument that res judicata is used as a shield and not as a sword cannot apply to the present case because there were two actions for declaration of title, one of the appellants as plaintiff suing the respondents as defendants, and the other by the respondent and other by the respondents as plaintiff suing the appellants as defendants and so the respondents were perfectly entitled to rely on the plea in their defence in the suit against them by the appellants claiming declaration of title over the same parcel of land adjudged to belong to the respondents by the Native Court in Exhibit G H

“C”

In order to refresh the mind I shall quote excerpts from the trial court as follows:

“There is no doubt at all that the land in dispute including all the land of the plaintiff belong to Ebu people. But the issue here is whether the said land belonged to the whole Ebu as contended by the plaintiffs or the Usebe people (sic) by the defendants. From the totality of evidence of the parties which I have seriously considered, I am firm that the lands in dispute originally belong (sic) to Ebu people not to the Usebe people alone of the defendants. I am fortified in this regard by the proceedings in Odiani Native Court in Suit 74/50 which was received in evidence as Exhibit “C”

Therein it was held that “Ogodo Bush” or Ofia Ogodo was granted the plaintiffs by the whole Ebu not by Usebe people of the defendants alone. The evidence of PW6 Bidokwu Augustine in this regard was corroborated by the said Exhibit “C”. Consequently I find as a fact and so hold that the land in dispute including all the other lands of the plaintiffs were granted to Ogodo people by Ebu People.”

The learned trial judge went on as stated hereunder, viz:  
 “Judgment for plaintiff for the declaration of title to land in view of Chief Okoda’s statements that he Chief Okoda was born at Ogodo and that this land in dispute of Ogodo was alienated by the Ebu people on the whole to the plaintiff’s fore fathers before the advent of British Government in Nigeria. And since twenty two years now of paying tax. All remunerations due to the landlord were paid to the plaintiff up to date as landlord. Which Ebu people never interfered? The plaintiff is still collecting tax in Ogodo town. It was Onicha - Olona Court that the plaintiffs father used to attend before then afterward to Odiani one. They never attended Ebu Court which shows that they are not subjected to Ebu. Therefore the land and its bush is for plaintiff” (See page 6 lines 28 - 34 and page 7 lines 1 - 5 of Exhibit “C”.

The Court of Appeal on its part stated as follows:

“The judgment in Exhibit “C” was not appealed against up to the time the consolidated Suits 0/11/75 and 0/11/76 were instituted. The judgment is therefore conclusive of the facts forming the ground for judgment for Section 54 of the Evidence Act provides as follows:

*“S. 54 Every judgment is conclusive proof, as against parties and privies, of facts directly in issue in the case, actually decided by the court, and appearing from the judgment itself to be the ground on which it was based; unless evidence was admitted in the action in which the judgment was delivered which is excluded in the action in which the judgment is intended to be proved.”* B

*By virtue of Section 54 Evidence Act, the judgment contained in Exhibit “C” is conclusive proof of the facts it decided. The plaintiffs now respondents could have pleaded estoppel of the said judgment since they remained plaintiffs in the consolidated actions in suit No. 0/11/75 and 0/11/76.”* C

Clearly evident from the judgments of the Court of trial and the appellate one and considering them in line with the record, it is clear that the concurrent findings of the two Courts below were supported by the pleadings in which the issues of Estoppel were well captured and it is not correct to say the trial or the appellate one raised the issue suo motu. Therefore there was no basis for an invitation of the parties to address court on a new issue of estoppel or res judicata well situated in the pleadings and evidence linking the plea proffered in evidence. D E

Also available from the judgment of the trial court as affirmed by the Court of Appeal is that the decision was founded on traditional history placed side by side and the stronger evidence of the plaintiffs now respondents prevailed. The point must not be shied away from, that while the plea of res judicata may not be sufficient to find in totality for the respondents, it is established that estoppel would apply in respect of the issue that the entire Ebu community including the star witness, Chief Okoda from the present appellants, Usebe Quarters or village of Ebu Community, claimed and led evidence that the land originally belonged to the entire Ebu community as one land unit, before the community sold same out rightly to the respondents’ ancestor and which fact was accepted by the Native Court in its judgment in Exhibit C. This in effect would certainly stop the appellants who are one out of the nine villages that make up Ebu Community to raise the same issue by claiming that their Usebe villages were the original owners of the said land. F G H

What I am trying to say, is that it is not for the appellants at subsequent periods after the judgment in Exhibit “C” to go against

any of the issues therein dealt with and not appealed against. They are not allowed to dance to a tune only to come later to say that dance was not theirs as they intend to dance differently at a new occasion. They must be consistent apart from being bound for all time on an issue deliberated and concluded by a tribunal or Court  
B and the matter not appealed against successfully. It is therefore to be said that the concurrent findings of fact by the two courts below in the absence of any exceptional circumstances or a miscarriage of justice cannot be disturbed by this court. See Abimbola v. Abatan (2001) FWLR (pt. 46) 989 at 1002.  
C

From the above and the better reasoning in the lead judgment, I too dismiss this appeal which lacks merit.

I affirm the judgment of the Court of Appeal which upheld the judgment of the trial High Court.

D

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### **OKORO JSC**

I read in draft the judgment of my learned brother, Suleiman Galadima, JSC, just delivered. I completely agree that this appeal is  
E devoid of merit and ought to be dismissed. My learned brother has ably resolved all the salient issues submitted for the determination of this appeal. I however propose to make a few comments in support of the judgment.

The facts of this case have been adequately stated in the lead  
F judgment and I do not intend to repeat the exercise. The issues formulated for the determination of this appeal by the Appellants are as follows:-

*“a) Whether in the face of the provision of Section 294(1) &  
G (6) of the 1999 Constitution, the judgment of the lower court is not a nullity.*

*b) Whether the learned justices of the Court of Appeal were right in dismissing the Appellants’ appeal on the ground that Exhibit C constitutes res judicata.*

*c) Whether the Court of Appeal were right in pronouncing on  
H an issue not canvassed before the court without inviting parties to address on it.”*

The Learned Counsel for the Respondents also distilled three issues which are the same as those of the Appellants though couched

different as follows:-

*“(i) Whether by virtue of the provisions of Section 294 (1), (5) and (6) of the 1999 Constitution, the judgment of the Court of Appeal amounts to a nullity.*

*(ii) Whether the learned justices of the Court of Appeal dismissed the Appellants’ appeal on the ground that Exhibit C constitutes res judicata and if so, whether same has led to a miscarriage of justice.*

*(iii) Whether the Court of Appeal pronounced on an issue not canvassed before the court without inviting parties to address on it; and if so, whether same has led to a miscarriage of justice.”*

The kernel of this appeal appears to me to be issue number one. I shall therefore limit my comments to the said issue one.

Learned Counsel for the Appellants in their brief drew the attention of this court to the inordinate delay between final addresses made on 18th February, 2002 and the judgment delivered on 30th July, 2003, a period of well over 450 days and submitted that such inordinate delay not only has a negative impact on the mind of the judges but also leaves one of the parties with an impression that justice has been denied. He submitted further that failure to deliver judgment within the time prescribed by Section 294 (1) of the 1999 Constitution makes the judgment unconstitutional. That the delivery of judgment within 90 days is mandatory and a failure renders the judgment a nullity, relying on the case of IFEZUE V. MBADUGHA (1984) 1 SCNLR 427.

According to learned counsel such inordinate delay, breeds miscarriage of justice, citing the cases of OWOYEMI V. ADEKOYA (2003) 18 NWLR (pt. 852) 307, DIBIAMAKA v. OSAKWE (1989) 3 NWLR (pt. 107) 101.

In response, the learned counsel for the Respondents, while agreeing with the submissions of learned counsel for the Appellants on the import of Section 294 (1) of the 1999 Constitution, he however opined that by Section 294 (5) of the same Constitution a judgment will not be invalidated for non-compliance unless and until the Appellate Court considering such a complaint on appeal is fully satisfied that the Appellant has shown that it had suffered a miscarriage of justice by such late delivery of judgment. He further submitted that miscarriage of justice is not really based on length of time simpliciter

but the effect it produced in the mind of the court.

Learned counsel argued that the Section applies more to judgments of trial courts where the court sees and hears the testimony of witnesses while Appellate Courts merely review documents. On the purport of Section 294 (6), learned counsel submitted that the National Judicial Council cannot nullify a judgment but can only take administrative decision against a judge for failure to make the report.

Now, Section 294 (1), (5) and (6) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) provides:

*“(1) Every court established under this Constitution shall deliver its decision in writing not later than ninety days after the conclusion of evidence and final addresses and furnish all parties to the cause or matter determined with duly authenticated copies of the decision within seven days of the delivery.*

*(5) The decision of a Court shall not be set aside or treated as a nullity solely on the ground of non-compliance with the provisions of subsection (1) of this section unless the court exercising jurisdiction by way of appeal or review of that decision is satisfied that the party complaining has suffered a miscarriage of justice by reason thereof.*

*(6) As soon as possible after hearing and deciding any case in which it has been determined or observed that there was non-compliance with the provisions of subsection (1) of this section, the person presiding at the sitting of the Court shall send a report on the case to the Chairman of the National Judicial Council who shall keep the Council informed of such action as the Council may deem fit.”*

From the above constitutional provision, a court is mandated to deliver its judgment within 90 days after final addresses. This applies to both trial and Appellate Courts. There is no doubt that the delay in the delivery of the judgment by the court below was inordinate and offends against Section 294 (1) of the 1999 Constitution of the Federal Republic of Nigeria. Ordinarily, that will render such a judgment a nullity. See *IFEZUE V. MBADUGHA* (1984) 1 SCNLR 427. However, by Section 294 (5) of the said Constitution, delay alone will not lead to setting aside the judgment unless there is evidence of miscarriage of justice.

In *DIBIAMAKA V. OSAKWE* (1989) 3 NWLR (pt. 107) 101, this court held that in deciding whether a party has suffered a miscarriage of justice as a result of inordinate delay between the conclusion

of a trial and the delivery of judgment, the emphasis is not on the length of time simpliciter but on the effect it produced in the mind of the court. That is, if this inordinate delay apparently and obviously affected the court's perception, appreciation and evaluation of the case, then the Appellate Court would intervene.

It is my view that in circumstance such as this, it is the duty of the Appellants to show how the delay has affected the perception, appreciation and evaluation of the evidence by the judge or justices as the case may be or how the delay eroded the confidence in the entire judicial process which produced the judgment. In cases where the delay involves the judgment of a trial court which is to hear and see witnesses, I will readily agree that a delay of about 17 months after final addresses was so inordinate to affect the outcome of the proceedings. However, when it concerns an Appellate Court as in this case, I will be very slow to so declare because Appellate Courts' functions are based on printed records only which involved the reading and appreciation of written briefs of argument and oral amplifications of such Briefs which are recorded by the justices. They cannot be said to have lost touch with the contents of the printed reviews placed before them such that it would affect their perception and evaluation of the Appeal which is based on printed records only. I think that this section applies more to trial Courts than Appellate Courts.

Let me make a few comments on Section 294 (6) of the Constitution of the Federal Republic of Nigeria. It was argued by the Appellants' Counsel that failure of the court below to report the delay to the National Judicial Council should ordinarily cause such judgment to be set aside regardless of whether there has been a miscarriage of justice. This position, to say the least, is erroneous. It is my view that Section 294 (6) of the Constitution of the Federal Republic of Nigeria is merely an administrative provision which is meant to enable the National Judicial Council to take disciplinary measures against erring judges and not a provision to enable the body to set aside any judgment. Any failure to make any report cannot by any stretch of imagination lead to the annulment of the judgment.

On the whole, it is my view that the Appellants failed to show that they suffered any miscarriage of justice based on the said delay. It is on this note that I agree with the judgment of my learned brother,

Galadima, JSC that this appeal lacks merit. I also dismiss the appeal.  
I abide by the order as to costs.

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