

**SUPREME COURT OF NIGERIA**  
FRIDAY 9TH MAY, 2014. SC. 185/2003  
**CORAM:- I. T. MUHAMMAD, M. S. MUNTAKA-  
COOMASSIE, N. S. NGWUTA, O. ARIWOOLA,  
C. B. OGUNBIYI, JJSC**

1. S. A. ADEYEFA  
2. J. A. BALOGUN ..... APPELLANTS  
3. JOSHUA AWOREFA  
(On behalf of themselves and  
Representing Ojaja community)  
AND  
BELLO BAMGBOYE ..... RESPONDENT

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LAND LAW - Trespass - Title - Possession - Proof - Appellants have no claim to the land in dispute - As their failure to prove title is fatal to claim for right of way - Trespass and injunction (H1)

COURTS - Findings - Validity - Despite the slight mistake made by CA in re-evaluating the evidence - Decisions of both lower courts are not perverse - As to warrant interference of Supreme Court (H2)

ACTIONS - Estoppel - Decided issues - Issues once litigated upon should be regarded as forever decided - Except set aside by competent appellate court (H3)

ACTIONS - Estoppel - Appellants' earlier suit in Customary Court cannot operate as issue estoppel - As there is material difference in evidence in that court - And the one proffered in the High Court (H4)

***FACTS***

Before the High Court of Osun State Ile-Ife, plaintiffs/appellants commenced this action against defendant/respondent, claiming for damages for unlawful obstruction of Ojaja community private road, order removing and filling up the obstructing septic tank and injunction restraining a future repetition. Appellants' contention is that they are residents of the community. The land in dispute they

claim is an access road between the Police Barracks and respondent's building. Appellants contend that the access road has been in existence from time immemorial before respondent's father purportedly purchased the land in dispute. Appellants stated further that respondent's father encroached on part of the access road and he was promptly challenged.

The town planning authority and Ife Local Government Council however intervened and settled the dispute leaving the land in dispute about ten feet wide as access road to the Appellants' community. The settlement was accepted by both parties. The small remaining access road was left for the community and respondent's father was left to continue his building in the interest of peace on both sides. Upon the death of respondent's father, his successors blocked the access road which led to court action. Pleadings were filed and exchanged between parties at the trial. At the end of hearing, the court dismissed appellants' claims in their entirety on the basis inter alia that appellants have not proved their title to the access road in dispute. Aggrieved, appellants lodged appeal in the Court of Appeal Ibadan Division. The court affirmed the judgment of the trial court and dismissed the appeal leading to the filing of the present appeal by appellants in Supreme Court.

### **ISSUES FOR DETERMINATION**

1. Whether or not obstruction of road subject of claim amounts to nuisance and how, if so held, did the torts of nuisance and injunction synonymous with the torts of trespass and injunction and thereby requiring proof of title to the access road land on which the nuisance complained of was committed.

2. Whether or not having regard to the totality of the evidence on record the Appellants were entitled to judgment on all the reliefs claimed in paragraph 39 of the statement of claim.

3. Whether or not the lower court was right to hold that the Customary Court judgment in suit No. 27/83 tendered as Exhibit P1 not capable of raising an issue estoppel and binding on the parties to this appeal.

4. Whether or not the lower court was right to hold that the conclusion arrived at by the director of Ife Area Town Planning Authority in Exhibit P7 which was a reply to Exhibit D4 letter written by the Respondent referring the dispute between the parties for arbitra-

tion before the Town Planning Authority amount to a mere advice and did not create the land in dispute an access road.

5. Whether the lower court was right to endorse the trial court's observation that there was other road other than the access-road-in-dispute which can be used as an access road by the Appellants when there was no such road adjacent to the access road-in-dispute.

## **HELD** (Unanimously dismissing the appeal per **MUNTAKA-COOMASSIE JSC**)

*LAND LAW - Trespass - Title - Possession - Proof*

**1. I have also closely analyzed the facts, evidence and the decisions of the trial court and discovered that no single evidence was adduced to support and establish the reliefs claimed namely tort and injunction. The Appellants could not prove that they are in possession of the land in dispute. My Lords, there is no even attempt for the Appellants to establish their claim by adducing evidence of title to the land in dispute. It is my considered view that whether the claims of the Appellants are nuisance and injunction or trespass and injunction, the law demands that the plaintiffs in both must be able to prove title to the land in dispute or he is in possession.**

**I think it is glaring that the land in dispute is part of the area bought by the father of the respondent and actually forms a boundary with the Nigeria Police Barracks. The Appellants had no claims whatsoever to the land in dispute. I find no difficulty therefore to hold that the trial court's decision is faultless. The judgment of the court below is correct. I resolve this issue against the Appellants. Since the Appellants herein could not establish possession or title to the land in dispute they cannot possibly be heard to cling to the right of way by claiming easement. That cannot be allowed. The plaintiff's' claims for trespass, nuisance, right of way are ruse and must fail. It is simply that the Appellants never laid cogent evidence to what they have been claiming all along.**

**My Lords, I assure you that the Appellants have no case whatsoever and their claims deserved to be dismissed from**

**the trial to the court below, and I so hold.** (p. 2061 B)

*COURTS - Findings - Validity*

- 2. This Court should not be carried away by the slight mistake done by the court below in re-evaluating or reappraising the evidence which was earlier on beautifully done by the trial court. Consistently with the true position of the facts and the law, the lower court after evaluation arrived at the same decision of the trial court. It is common knowledge that responsibility of evaluating the evidence is that of the trial court that saw and heard the witnesses and it is true that the Appellate court may not interfere or disturb a finding or conclusion in a judgment except in certain circumstances which have been stated and re-stated in many decided authorities of the apex court. The decisions of both lower courts are not perverse.** (p. 2062 B)

*ACTIONS - Estoppel - Decided issues*

- 3. The main issue is whether the previous customary court judgment in suit No. 27/83 tendered as exhibit P1 between the Appellants and the Respondent's predecessors in title which declared the land in dispute an access road was conclusive on the issue so decided and thus created an issue estoppel and binding on the parties to this appeal. Since the same access road is the subject matter of dispute in the appeal at hand which the lower court resolved negatively contrary to the decision. It goes without saying my Lords, that it is the law that issues once litigated upon should be regarded as forever decided. There are exceptions to this rule. Nwosu v. Udeago (1990) 1 NWLR (Pt.125) 188. It was held in the above cited case that issues once litigated upon should be regarded as for ever decided except set aside by the competent appellate court.** (p. 2062 G)

*ACTIONS - Estoppel*

- 4. My lords, learned counsel for the Respondent Wogu Esq., submitted that suit No. 27/83 was not and cannot operate as issue estoppel. He argued that the Appellants in the trial court,**

***initiated suit No. 27/83 in the Customary Court Grade C. Instead of taking further steps after judgment to vindicate their rights, they instituted the present action in the High Court. He further argued that the Appellants obviously knew that all the ingredients necessary to sustain the plea were absent. Again, the evidence in the said Customary Court was radically and significantly different from the one in the High Court of Justice. For example the Deed of conveyance tendered and admitted in the High court was not before the Customary Court Grade C.***

***Learned counsel referred this court to Mogaji V. Cadbury Nig. Ltd. (1985) 2 NWLR (PT. 7) 393 AND Alli V. Alesinloye (2000) 6 NWLR (Pt. 660) 177 and submitted that this type of difference in evidence is material because the production of a document of title is one of the five recognised ways of proving ownership of land under the Nigerian Legal system.***

***My lords for the foregoing analysis I resolve issue No. 3 against the Appellants and in favour of the Respondent. The court below was perfectly correct when it held that suit No 27/83 did not in any way constitute issue estoppel.***  
(p. 2063 E)

## NOTABLE POINTS OF INTEREST

### **NGWUTA JSC**

#### ***1. Appeals – Formulation of issue***

While an issue may be framed from one ground but usually and preferably, a combination of grounds of appeal, the reverse is not the case. One ground of appeal cannot give rise to more than one issue for determination. See *Labiya v. Anretiola* (1992) 10 SCNJ 1 at 2. Ground 14 of the appellants' ground of appeal and issues 1 and 2 purportedly framed therefrom are hereby struck out as incompetent. (p. 2066 F)

#### ***2. Estoppel per rem judicatam – Concept of***

Estoppel per rem judicatam is a rule of evidence whereby a party or his privy is precluded from disputing in any subsequent proceedings, matters which had been adjudicated upon previously by a Court of

competent jurisdiction between him and his opponent.

Apart from other conditions upon which the application of the doctrine is contingent, the judgment relied on as estoppels must be one delivered by a Court of competent jurisdiction. A Customary Court, irrespective of grade, has no jurisdiction over land in urban area or land subject to statutory right of occupancy. See s.39(1) of the Land Use Act 1978.

There has to be specific pleading to that effect before a party can rely on estoppel.

The plea of estoppels per rem judicatam is a shield rather than a sword. It is not available to the plaintiff in his statement of claim as raising the same will amount to impugning the jurisdiction of the Court to which he has brought his case. This is so because a successful plea of the doctrine would have the effect of ousting the jurisdiction of the Court before which the doctrine is raised.

It will amount to abuse of process for a plaintiff to raise the plea as it would dispute the jurisdiction of the Court to which he has brought his case.

In my view, appellants as plaintiffs in the trial Court, cannot plead or raise and rely on the judgment in Suit 27/83 as estoppel per rem judicatam against the respondent as defendant. (p. 2067 E )

**OGUNBIYI JSC**

***3. Exhibit P7 being advisory did not create an access road by legislation***

On the side of the appellants however, their claim to the community private road was predicated substantially on the documents, Ife town Planning Authority letter Exh. P7 and the Customary court judgment in suit No.27/83, Exh. P1.

The said document Exh. P7 - the letter emanating from the Town Planning Authority is a creation of statutes by sections 3(4), 5(6), 11(1), (3) 27(5) and 28 of the Nigeria Urban and Regional Planning Decree No. 88 of 1992. It has the control over lands within its jurisdiction and can earmark any area of land as road.

However in the case at hand, the document Exh. P7 did not of itself create an access road by legislation. In otherwords, the document is only advisory and did not establish the right of the appellants to the access road. The claim laid on Exh. P7 by the appellants in the

circumstance did not serve their interest. The said issue is also resolved against the appellants. (p. 2072 C)

### **REPRESENTATION**

T. O. Busari Esq., with Funke Yesuf (Mrs.), for the Appellants  
Mr. Sunny O. Wogu Esq., with Chingo P. Eguwati (Mrs.), for the Respondent B

### **CASES REFERRED TO**

Okorie v. Udom (1960) 5 FSC 162 C  
Makor v. Obiefuna (1974) 1 All NLR (pt. 1) 116  
Akinfosile v. Ijose (1960) 5 FSC (1960) N.S.C.C. 129  
Omoboriowo v. Ajasin (1964) 1 SC 206  
Nwosu v. Udeago (1990) 1 NWLR (pt. 125) 188  
Adigun v. A-G (1987) 2 NWLR (pt. 56) 197 D  
Mogaji v. Cadbury Nig. Ltd. (1985) 2 NWLR (pt. 7) 393  
Alli v. Alesinloye (2000) 6 NWLR (pt. 660) 177  
Labiya v. Anretiola (1992) 10 SCNJ 1  
Ugoh v. Obiekwe (1989) 2 SC (pt. 11) 14  
Omo v. JSC Delta State (2000) 2 SC (pt. 11) 1 E  
Kasumu v. Williams (1982) 7 SC 27  
Aseimo v. Abraham (1994) 8 NWLR (pt. 361) 191  
Sadiku v. Dalori (1996) 5 NWLR (pt. 447) 151  
Yoge v. Olubode (1974) 1 All NLR 118 F

### **STATUTES REFERRED TO**

Land Use Act 1978, s. 39(1)  
Nigeria Urban and Regional Planning Decree No. 88 of 1992, ss. 3(4), 5(6), 11(1), (3) 27(5) and 28 G

### **LEAD JUDGMENT BY MUNTAKA-COOMASSIE JSC**

It is clear that the Appellants were the plaintiffs in the High Court Ile-Ife who instituted the action against the Respondent herein. The plaintiffs now Appellants claimed the following reliefs in paragraph 38 of their statement of claim.

a. N500,000.00 general and aggravated damages for unlawful construction of the road situate, lying between the Nigeria Police Barrack and the defendant's building off Moore Road, Ile-Ife and

thereby denied the plaintiffs their right of way by the erection of a shed, back-house building and construction of a soak away pit and septic tank despite repeated warnings.

b. Court's order for removal and filling up the soak away pit and septic tank on the private road the shed and the part of the back house that obstructed the road.

c. Injunction restraining the defendant by herself or by her servants or agent or otherwise howsoever from the repetition or continuance of the acts above complained of or of acts similar thereto on the road-in-dispute.

Pleadings were filed and exchanged between the parties. The suit subsequently went to trial by the Ile-Ife High Court of Justice.

#### **BRIEF FACTS AS NARRATED BY THE APPELLANTS**

The Appellants were the community resident at Ojaja Quarters of Moore, Ile-Ife, Osun State. The land in dispute is an access road between the Police Barracks and the Respondent's building to Moore or Ilesa/Ife Major road.

Appellants stated that the access road had been in existence from time immemorial being used as road. First by the farmers farming around DOKUN - DOSA STREAM over sixty years before the respondent's father purportedly purchased the land in dispute. Buildings began to spring up behind the Police Barracks and other buildings around Dokun - Dosa Stream. The old road was expanded to a motor-road over 30 years ago before trouble started over the access road-in-dispute and was so used by the inhabitants.

Later, the Respondent's father, called Ganiyu Elusoji, purportedly purchased the adjacent land including the access road-in-dispute unknown to anybody. He embarked sometime in 1970 to develop the land. Thereby encroached on part of the access road in dispute and was challenged. The town planning authority and Ife Local Government Council however intervened and settled the dispute leaving the land in dispute about ten feet wide as access road to the Appellants community. The settlement was accepted by both parties. The small remaining access road was left for the community and the said Elusoji was left to continue his building in the interest of peace on both sides.

The Respondent's father died and was succeeded by the Respondent's mother and one Bello Bamgboye her uncle. Later, both



blocked the access road by creating thereon a shed and a wall fence. This led to court action.

After hearing evidence the trial court dismissed all the reliefs claimed by the plaintiffs now Appellants on the ground that:-

a. The Appellants failed to prove their title to the access road in dispute on which the nuisance was committed on the basis that the claim before the court was synonymous to Trespass and Injunction. So title to the land must be proved. B

b. The Previous judgment in suit 27/83 tendered as Exhibit P1 which declared the land-in-dispute an access road was not binding on the Respondent because issue of title was not considered in the suit since the defendant's Deed of Conveyance was not (considered by) the Customary Court and since the issues raised in Exhibit P1 suit No. 27/83 were not on all fours with the issue in the instant case before it, so it cannot be used to raise an issue estoppel against the Defendant; that is, the judgment 27/83 decided cannot be proved of what it decided in the case before the court. C D

c. that the Ife Area Town Planning Authority decision contained in its letter tendered as Exhibit P7 which also declared the land in dispute as a road was a mere advice and not effective to create the access-road land as a road. E

d. that the defendant has proved her title to the land and since the Appellants could not prove better title to the land the claim must fail and dismissed them.

The Appellants herein were aggrieved by the judgment of the trial court and unsuccessfully appealed to the Court of Appeal Ibadan Division. The court of Appeal hereinafter called the court below unanimously dismissed the Appellants, appeal. Justice Adekeye JCA, as he then was and who presided over the dismissed appeal has this to say on pp 146 - 167 of the record of the proceedings. And on page 159 - 160 Adekeye JCA as he then was stated thus:- F G

*"There is no evidence to establish that the land in dispute has been created into access road. The Exhibit P7 relied upon emanated from the Town Planning Authority. It is noteworthy that the Town Planning Authority has power acquired by statute to create roads within its area of jurisdiction. It cannot venture into creating such roads whether it has power to do so without first acquiring the land and forming same out into plots of land and layouts. H*

*It is noteworthy that though members of the community and the public have created an access road from Ojaja land into Moore road through the strip of land subject matter of dispute, it had always been met by stiff opposition from Ganiyu Elusoji and privies who had acquired ownership of the place. The lower court observed on the overall evidence and after visit to the locus that there are other roads in the neighbourhood which the community can use as access road into Moor Public road. That observation is endorsed by this court. The 4th issue is resolved in favour of the respondent.*

*This court was requested to invoke its power under section 16 of the court of Appeal Act - to re-evaluate, make findings of fact and thereafter reverse the decision of the learned trial judge. An appellate court will not likely interfere with the findings of trial court, unless it is shown that such findings were not based on the evidence before court or were the results of wrong inference from the evidence led. In the instance is (sic) the view of this court that the learned trial court properly evaluated the evidence on the question of whether an access road was actually created and whether any interference with the road by the respondent was wrongful and unlawful.*

*Consequently we regard the dismissal of the appellants' case by the trial court as a decision that cannot be faulted. In short this appeal lacks merit and it is accordingly dismissed. The judgment of the lower court is affirmed. N10,000.00 costs is awarded in favour of the Respondent".*

The appellants adopted their brief and distilled five (5) issues thus:-

1. Whether or not obstruction of road subject of claim amounts to nuisance and how if so hold did the torts of nuisance and injunction synonymous with the torts of trespass and injunction and thereby requiring proof of title to the access road land on which the nuisance complained of was committed. Grounds 1, 2, 3, 11, 12 and 14 of the grounds of appeal.

2. Whether or not having regard to the totality of the evidence on record the Appellants were entitled to Judgment on all the reliefs claimed in paragraph 38 of the statement of claim. Grounds 9, 10, 14, 15 and 17 of the grounds of appeal.

3. Whether or not the lower court was right to hold that the Customary Court judgment in suit No. 27/83 tendered as Exhibit P1

not capable of raising an issue estoppels and binding on the parties to this appeal. Grounds 4, 5, 13 and 16 of the grounds of appeal.

4. Whether or not the lower court was right to hold that the conclusion arrived at by the director of Ife Area Town Planning Authority in Exhibit P7 which was a reply to Exhibit D4 letter written by the Respondent referring the dispute between the parties for arbitration before the Town Planning Authority amount to a mere advice and did not create the land-in-dispute an access road. Grounds 6, 7 and 8 of the grounds of appeal. B

5. Whether the lower court was right to endorse the trial court's observation that there was other road other than the access-road-in-dispute which can be used as an access road by the Appellants when there was no such road adjacent to the access road-in-dispute. C

The Respondent filed its Respondent's Amended brief of argument deemed properly filed on 18/2/2014 in which it distilled two (2) issues thus:- D

1. Whether having regard to the evidence on record, the Court of Appeal was not right in upholding the judgment of the trial court that the appellants had not proved their case to entitle them to Judgment on the reliefs claimed (Grounds 1 to 3, 7 to 12, 14, 15 and 17 of the Grounds of Appeal) E

2. Whether the Court below was right when it held that suit No. 27/83 did not constitute issue estoppel. (Grounds 4, 5, 13 and 16 of the Grounds of Appeal).

The Appellants on receipt of the amended Respondent's brief filed their Appellants reply brief on 19/3/2003. He revisited the two issues submitted by the Respondent and offered his arguments. He submitted that the arguments in the respondent's brief of argument are devoid of substance and urged this court to allow the appeal, set aside the judgment of the trial court and the Court of Appeal and give judgment to the Appellants in terms of their claims as pleaded in paragraph 38 of the statement of claim. F

Before I delve into the merit of the appeal, I wish to state that the Town Planning authority and the Local Government Area Council's decisions purporting to settle the parties are not court's decision and cannot be regarded as based on the reliable evidence adduced before the court of law. For the sake of clarity I shall reproduce the appellants' issues thus: H

1. Whether or not obstruction of road subject of claim amounts to nuisance and how, if so held, did the torts of nuisance and injunction synonymous with the torts of trespass and injunction and thereby requiring proof of title to the access road land on which the nuisance complained of was committed. Grounds 1, 2, 3, 11, 12 and 14 of  
B the grounds of appeal.

2. Whether or not having regard to the totality of the evidence on record the Appellants were entitled to judgment on all the reliefs claimed in paragraph 39 of the statement of claim. Grounds 9, 10,  
C 14, 15 and 17 of the grounds of appeal.

3. Whether or not the lower court was right to hold that the Customary Court judgment in suit No. 27/83 tendered as Exhibit P1 not capable of raising an issue estoppel and binding on the parties to this appeal. Grounds 4, 5, 13 and 16 of the grounds of appeal.

D 4. Whether or not the lower court was right to hold that the conclusion arrived at by the director of Ife Area Town Planning Authority in Exhibit P7 which was a reply to Exhibit D4 letter written by the Respondent referring the dispute between the parties for arbitration before the Town Planning Authority amount to a mere advice  
E and did not create the land in dispute an access road. Grounds 6, 7 and 8 of the grounds of appeal.

5. Whether the lower court was right to endorse the trial court's observation that there was other road other than the access-road-in-dispute which can be used as an access road by the Appellants when  
F there was no such road adjacent to the access road-in-dispute.

Under issue 1, the contention of the Appellants that obstruction of road in the law of torts is nuisance and when coupled with injunction did not by that raise issue of title to the land where the  
G nuisance was created. He added that the torts of nuisance and injunction are not synonymous to the torts of trespass and injunction which raised issue of title to land and which must be proved to enable the plaintiff to succeed.

H Learned counsel for the Appellants then submitted that both trial and the Court of Appeal were in error to treat the Appellants' claims in paragraph 38 of the Statement of claim under the torts of trespass and injunction, which led to the dismissal of the Appellants case before the trial court and the appeal before the lower court, thus led to gross miscarriage of justice.

I have briefly considered the Respondent's submission under this first issue. Considering the evidence adduced in the trial court and the judgment of the trial court which was affirmed by the court below I venture to state that those two judgments cannot be in any-way faulted. Both are consistent with the law as it is. Where is the proof of the claims? B

***I have also closely analyzed the facts, evidence and the decisions of the trial court and discovered that no single evidence was adduced to support and establish the reliefs claimed namely tort and injunction. The Appellants could not prove that they are in possession of the land in dispute. My Lords, there is no even attempt for the Appellants to establish their claim by adducing evidence of title to the land in dispute. It is my considered view that whether the claims of the Appellants are nuisance and injunction or trespass and injunction, the law demands that the plaintiffs in both must be able to prove title to the land in dispute or he is in possession.*** I am fortified by the decisions of the Supreme Court OKORIE VS. UDOM (1960) 5 FSC 162 AT 165 per Fatayi-Williams, JSC as he then was (of blessed memory). Makor vs. Obiefuna (1974) 1 All NLR (Pt 1 page 116, E lines 4 to 9). D

*“Generally speaking, as a claim for trespass to land is rooted in exclusive possession, all a plaintiff need to prove is that he has exclusive possession, or he has the right to such possession of the land in dispute, but once a Defendant claims to be the owner of the land in dispute, title is put in issue, and in order to succeed, the plaintiff must show a better title than that of the Defendant”.* F

***I think it is glaring that the land in dispute is part of the area bought by the father of the respondent and actually forms a boundary with the Nigeria Police Barracks. The Appellants had no claims whatsoever to the land in dispute. I find no difficulty therefore to hold that the trial court's decision is faultless. The judgment of the court below is correct. I resolve this issue against the Appellants. Since the Appellants herein could not establish possession or title to the land in dispute they cannot possibly be heard to claim to the right of way by claiming easement. That cannot be allowed. The plaintiffs' claims for trespass, nuisance, right of way are ruse and must fail. It is*** G H

***simply that the Appellants never laid cogent evidence to what they have been claiming all along.*** See 1. Akinfosile v. Ijose (1960) 5 FSC. (1960) N.S.C.C. 129; 2. Akin Omoboriowo v. Adekunle Ajasin (1964) 1 SC 206 at 207.

***My Lords, I assure you that the Appellants have no case whatsoever and their claims deserved to be dismissed from the trial to the court below, and I so hold.***

***This Court should not be carried away by the slight mistake done by the court below in re-evaluating or reappraising the evidence which was earlier on beautifully done by the trial court. Consistently with the true position of the facts and the law, the lower court after evaluation arrived at the same decision of the trial court. It is common knowledge that responsibility of evaluating the evidence is that of the trial court that saw and heard the witnesses and it is true that the Appellate court may not interfere or disturb a finding or conclusion in a judgment except in certain circumstances which have been stated and re-stated in many decided authorities of the apex court. The decisions of both lower courts are not perverse.***

The above exposition of the law and my resolution of issue No. 1 should have been the end of the appeal but before concluding this judgment, I would touch briefly issue No. 3 where it was said whether the court below was right when it held that Suit No. 27/83 did not constitute issue estoppel.

The appellants argued that the court below was palpably wrong to hold that suit No. 27/83 did not constitute issue estoppels. The appellants' counsel to start with, contended that this issue covered grounds 4, 5, 13 and 16 of the Grounds of Appeal.

***The main issue is whether the previous customary court judgment in suit No. 27/83 tendered as exhibit P1 between the Appellants and the Respondent's predecessors in title which declared the land in dispute an access road was conclusive on the issue so decided and thus created an issue estoppel and binding on the parties to this appeal. Since the same access road is the subject matter of dispute in the appeal at hand which the lower court resolved negatively contrary to the decision. It goes without saying my Lords, that it is the law that issues once litigated upon should be regarded***

**as forever decided. There are exceptions to this rule. Nwosu v. Udeago (1990) 1 NWLR (Pt.125) 188. It was held in the above cited case that issues once litigated upon should be regarded as for ever decided except set aside by the competent appellate court.** It was the contention of the Appellants' counsel that the judgment in suit No. 27/83 in Exhibit P1 between the Appellants community and the Respondent had declared the small strip of land of ten feet (10ft) now in dispute an access road as binding on the Respondent and conclusive of what it decided and issue cannot therefore be reopened in the instant case subject of appeal before the Supreme Court as also held in Adigun v. A-G (1987) 2 NWLR (pt. 56) 197.

Learned appellants' counsel Chief Fadugba (who prepared the brief before his demise), submitted forcefully that the issue estoppels was properly raised and the judgment in Exhibit P1 suit No 27/83 is binding on the Respondent and must be obeyed. Learned counsel further urged this court to hold that the judgment in Exhibit P1 thereby had established that the land in dispute was an access road.

In the Respondent's brief, it was contended by the respondent that the lower court was perfectly right when it held that suit No. 27/83 did not constitute issue estoppel.

**My lords, learned counsel for the Respondent Wogu Esq., submitted that suit No. 27/83 was not and cannot operate as issue estoppel. He argued that the Appellants in the trial court, initiated suit No. 27/83 in the Customary Court Grade C. Instead of taking further steps after judgment to vindicate their rights, they instituted the present action in the High Court. He further argued that the Appellants obviously knew that all the ingredients necessary to sustain the plea were absent. Again, the evidence in the said Customary Court was radically and significantly different from the one in the High Court of Justice. For example the Deed of conveyance tendered and admitted in the High court was not before the Customary Court Grade C.**

**Learned counsel referred this court to Mogaji V. Cadbury Nig. Ltd. (1985) 2 NWLR (PT. 7) 393 AND Alli V. Alesinloye (2000) 6 NWLR (Pt. 660) 177 and submitted that this type of difference in evidence is material because the production of a**

**document of title is one of the five recognised ways of proving ownership of land under the Nigerian Legal system.**

**My lords for the foregoing analysis I resolve issue No. 3 against the Appellants and in favour of the Respondent. The court below was perfectly correct when it held that suit No 27/83 did not in any way constitute issue estoppel.**

That being the case, the other remaining issues formulated by the Appellants and responded to by the Respondent are of no moment. All the five (5) issues in this appeal are resolved against the Appellants. The appeal is devoid of any merit same is therefore dismissed. Parties shall bear their own respective costs.

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### **MUHAMMAD JSC**

My learned brother, Coomassie, JSC, permitted me to read in advance the judgment just delivered by him. I dismiss the appeal for lack of merit. I abide by consequential orders made in the leading judgment.

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### **NGWUTA JSC**

I read in draft the lead judgment delivered by my learned brother, Muntaka-Coomassie, JSC and I agree with the conclusion that the appeal be dismissed for want of merit.

I desire to expatiate on my agreement with the conclusion reached in the lead judgment. In doing so, I will take a slightly different approach from that taken in the lead judgment.

Appellants and Respondent were plaintiffs and defendant, respectively, in the High Court of Osun State, in the Ile-Ife Judicial Division. Appellants' Writ of Summons was endorsed with the following claims against the Respondent:

*“(a) N500,000.00 general and aggravated damages for unlawful construction of the road situate, lying between the Nigeria Police Barrack and the defendant's building off Moore Road, Ile-Ife and thereby denied the plaintiffs their right of way by the creation of a shed, back-house building and construction of a soak away pit and septic tank despite repeated warnings.*

*(b) Court's order for removal and filling up the soak away pit*



and septic tank on the private road the shed and the part of the back-house that obstructed the road.

(c) *Injunction restraining the defendant by herself, by his servants or agents or otherwise howsoever from repetition or continuance of the acts above complained of or of acts similar thereto on the road in dispute.*”

The appellants sued for themselves and as representing other members of Ojaja Community of Ojaja Quarters, Moore, Ile-Ife.

After trial on the pleadings filed and exchanged by the parties, the learned trial Judge, Ojo, J. dismissed the suit in its entirety. Appellants’ appeal to the Court of Appeal, Ibadan Judicial Division did not fare better. Still not satisfied with the concurrent judgments of the two Courts below, the appellants appealed to this Court on no less than 17 grounds from which the following five issues were distilled for determination.

Though learned Counsel for the appellants, Chief A. O. Fadugba decided to depart from the expedient and time-tested procedure of numbering the issues for determination, I have numbered them consecutively, thus:

“(1) *Whether or not construction of road subject of claim amounts to nuisance and if so how did the torts of nuisance and injunction synonymous with the torts of trespass and injunction and thereby requiring proof of title to the access road land on which the nuisance complained of was committed. (Grounds 1, 2, 3, 11, 12 and 14 of the Grounds of Appeal)*

(2) *Whether or not having regard to the totality of the evidence on record the Appellants were entitled to judgment on all the reliefs claimed in paragraph 38 of the Statement of Claim? (Grounds 9, 10, 14, 15 and 17 of the Grounds of Appeal)*

(3) *Whether or not the lower Court was right to hold that the Customary Court judgment in Suit No. 27/83 tendered as Exhibit P1 not capable of raising an issue estoppel binding on the parties to this appeal? (Grounds 4, 5, 13 and 16 of the Grounds of Appeal)*

(4) *Whether or not the lower Court was right to hold that the conclusion arrived at by the Director of Ife Area Town Planning Authority in Exhibit P7 which was a reply to Exhibit D4 letter written by the Respondent referring the dispute between the parties for arbitration before the Town Planning Authority amount to a mere advice*

*and did not create the land in dispute an access road. (Grounds 6, 7 and 8 of the Grounds of Appeal)*

(5) *Whether the lower Court was right to endorse the trial Court’s observation that there was other road than the access road in dispute which can be used as an access road by the appellants when there is no such road adjacent to the access road in dispute.”*

On the other hand, learned Counsel for the Respondent, in response, framed the following two issues from the 17 grounds of appeal filed by the appellants. The two issues were numbered 3 to 4 for reasons not clear on the record. I will reproduce them as issues 1 and 2.

*“(1) Whether having regard to the evidence on record the Court of Appeal was not right in upholding the judgment of the trial Court that the appellants had not proved their case to entitle them to judgment on the reliefs claimed. (Grounds 1 to 3, 7 to 12, 14, 15 and 17 of the grounds of appeal).*

*(2) Whether the Court below was right when it held that Suit No. 27/83 did not constitute issue estoppel. (Grounds 4, 5, 13 and 16 of the Grounds of Appeal)”*

My Lords, I will pause here to comment further on Appellants’ formulation of issues. The issues were so badly, carelessly and inelegantly drafted that some of them make little or no sense on the surface. Appellants formulated issues 1 and 2 from Ground 14, among others.

While an issue may be framed from one ground but usually and preferably, a combination of grounds of appeal, the reverse is not the case. One ground of appeal cannot give rise to more than one issue for determination. See *Labiya v. Anretiola* (1992) 10 SCNJ 1 at 2. Ground 14 of the appellants’ ground of appeal and issues 1 and 2 purportedly framed therefrom are hereby struck out as incompetent.

This type of blunder comes from unnecessary multiplicity of grounds of appeal and issues therefrom as if the success of an appeal is a function of the number of grounds of appeal and issues for determination.

Issue 5 is not married to any ground or grounds of appeal. Issues 1 to 4 were framed from combinations of grounds 1 to 17 of the appellants’ grounds of appeal. All the 17 grounds of appeal were

accounted for in issues 1 to 4 as framed by the appellants.

Issue 5 is not derived, and could not have been properly derived, from any or combination of the 17 grounds of appeal. Not having been drawn from any ground of appeal, it is incompetent and is hereby struck out. See *Ugoh v. Obiekwe* (1989) 2 SC (Pt. 11) 14; *Omo v. JSC Delta State* (2000) 2 SC (Pt. 11) 1. This leaves the appellants with issues 3 and 4. B

I have already commented on the numbering of the Respondent's issues from 3 to 4 as if learned Counsel had formulated and numbered other issues from 1 to 2. Inconsistently, he argues the issues he numbered 3 to 4 as issues 1 and 2. C

In the determination of the appeal, I intend to adopt and rely on the two issues distilled for determination by the Respondent. I will not summarize the arguments of learned Counsel for the parties though I have carefully considered them. D

I will start with the Respondent's issue two on the effect of the Customary Court judgment in Suit No. 27/83 tendered, received and marked as Exhibit P1 in the trial Court. Appellants contended, against the concurrent findings of the two Courts below, that the judgment of the Grade C Customary Court in Suit No. 27/83 constitutes estoppel per rem judicatam against the respondent. E

Estoppel per rem judicatam is a rule of evidence whereby a party or his privy is precluded from disputing in any subsequent proceedings, matters which had been adjudicated upon previously by a Court of competent jurisdiction between him and his opponent. See *Morinatu Oduka & Ors v. Kasumu & Ors v. Williams* (1982) 7 SC 27 at 52-58. F

Apart from other conditions upon which the application of the doctrine is contingent, the judgment relied on as estoppels must be one delivered by a Court of competent jurisdiction. A Customary Court, irrespective of grade, has no jurisdiction over land in urban area or land subject to statutory right of occupancy. See s.39(1) of the Land Use Act 1978; *Aseimo & Ors v. Abraham & Ors* (1994) 8 NWLR (Pt. 361) 191; *Sadiku v. Dalori* (1996) 5 NWLR (Pt. 447) H 151. There has to be specific pleading to that effect before a party can rely on estoppel.

The plea of estoppels per rem judicatam is a shield rather than a sword. It is not available to the plaintiff in his statement of claim as

raising the same will amount to impugning the jurisdiction of the Court to which he has brought his case. This is so because a successful plea of the doctrine would have the effect of ousting the jurisdiction of the Court before which the doctrine is raised.

B It will amount to abuse of process for a plaintiff to raise the plea as it would dispute the jurisdiction of the Court to which he has brought his case. See *Yoge v. Olubode* (1974) 1 All NLR 118 at 126 - 127; *Umeano Achiakpa & anor v. Josiah Nduka & Ors* (2001) 20 LRCN 2865 at 2879; *Igweogo v. Ezengo* (1992) 6 NWLR (Pt. 246) 561 at 567.

C In my view, appellants as plaintiffs in the trial Court, cannot plead or raise and rely on the judgment in Suit 27/83 as estoppel per rem judicatam against the respondent as defendant. Issue 2 is resolved against the appellants.

D Now I come to issue one. The strip of land in respect of which the appellants claimed damages and injunction is described by the appellants as a private road. See paragraphs 4 and 17 of the Statement of Claim. They did not claim ownership of the piece of land on either side of the said private road. In paragraph 29 of the Statement  
E of Claim, the appellants claimed they acquired the road over 20 years earlier even though the PW1 in his evidence claimed that: *"It has been constructed to a motorable road over 30 years ago."*

F Pleading on both sides put title of the road in issue. The appellants, in order to succeed in their claim have to prove title to the road. It is not enough to say that the road was acquired 20 years ago or to the contrary to assert that the road was built to motorable road 30 years ago.

G The appellants did not plead or prove title to the road by any of the means specified in *Idundun v. Okumagba* (1976) 10 SC 222, at 246. See also *Nwosu v. Udeaju* (1990) 3 WBRN 1 at 25; *Kyari v. Alkali* (2001) 87 LRCN 2096.

H I think that the claim is misconceived. In an appropriate case, a claim of easement could have been established, but in the case at hand, there is no dominant tenement to which the road is servient.

For the above I agree with the conclusion in the lead judgment that the appeal is devoid of merit. I also dismiss the appeal and order parties to bear their costs.

**ARIWOOLA JSC**

I had the opportunity of reading in draft the lead judgment of my learned brother, Muntaka Coomassie, JSC just delivered. Having read through the entire proceedings including the judgments of the trial court and court below, which judgments are concurrent and unassailable, I am in agreement with my learned brother that this appeal is unmeritorious and should be dismissed in its entirety. Indeed, the trial court was right to have held that the appellants failed to establish their claims against the respondent. And the court below correctly affirmed the decision of the trial court and dismissed the appeal.

It has long been resolved and has been restated over and over again by this court, that it will not interfere with concurrent findings of facts of the lower courts except the decision is obviously perverse. See; Ogiesoba Otubu & Ors Vs B.A.A. Oguobadia (1984) LPELR 2830 (SC) or, there is miscarriage of justice or violation of some principles of law or procedure by the courts. See; Ngilari Vs. Mothercat Ltd (1999) 13 NWLR (Pt. 636) 626; (1999) 12 SC (Pt.11) 1 Agbomeji Vs. Bakare & Ors (1998) 9 NWLR (Pt.564) 1; (1998) 7 SC (Pt.1) 10; Ogboboja Vs. Amida (2009) 18 NWLR (Pt.1172) 185.

I am unable to see any miscarriage of justice or violation of any principle of law or procedure or any perversion of justice in the way the two courts handled the matter.

This appeal, as I stated earlier, is liable to be dismissed. Accordingly, I dismiss same and also order that parties are to bear their respective costs.

**OGUNBIYI JSC**

Both plaintiffs and defendant are residents of Ojaja Community Ile-Ife. The only outlet to the main major road from the Community is the land in dispute which is between the Nigeria Police Barracks and the defendant's building facing Moore Road.

The plaintiffs' claims were for:

1. Unlawful obstruction of Ojaja Community private road by the defendant's digging a septic and soak-away pit, etc despite repeated warnings by the plaintiffs.

2. An order removing and filling up the septic tank etc.

3. Injunction restraining a future repetition.

The plaintiffs' major complaint was that the respondent had committed a wrong on a private property of Ojaja Community and is thus liable in general and aggravated damages to the tune of  
B N500,000,00.

The trial court dismissed all the plaintiffs' reliefs; so also did the Court of Appeal which affirmed the judgment of the trial High Court and dismissed the appeal before it. The appeal now before us is predi-  
C cated on four main issues which in my view should appropriately be formulated from the combined issues by the appellants and respon-  
dent. The issues are:-

1. Whether the trial court judge was right in law to hold that the reliefs claimed in this suit are in trespass and injunction thereby  
D raising issue of title on which he based his judgment and not nuisance and injunction which did not raise issue of title.

2. The effect of decision in Suit No. 27/83 between appellants' and the respondent's predecessors in title and whether it did constitute issue estoppel and binding on the respondent.

E 3. Whether the learned trial judge had wrongly understood the contents of Ife Area Town Planning Authority letter Exh, P7 which he interpreted as mere advice and therefore did not establish anything.

F 4. Whether or not the appellants are entitled to judgment having regard to the evidence adduced before the trial court.

On Issue No. 1 - It is apparent on the plaintiffs' claim before the trial court that same is both in trespass and injunction. Specific reference in confirmation can be made to paragraph 38 of the record  
G of appeal, wherein the appellants' reliefs are clearly specified. The said paragraph has been reproduced in the lead judgment. The law is trite and well settled that a claim of this nature, automatically puts title in issue and needs not be specifically pleaded, see the following cases of:- Olabunde V Adeyoju (2000) 10 NWLR P. 562; Akintola V  
H Lasupo (1991) 3 NWLR (Pt 180) P. 508; Okorie V Udom (1960) SCNLR P. 326; The Registered Trustees of the Apostolic Church V Olowoleni (1990) 6 NWLR (Pt 158) P. 514 and Ige V Fagbohun (2001) 10 NWLR (Pt 721) P. 468. The implication holds true therefore that there is no need to specifically plead title.

The defendant is in possession of the subject matter in issue, the onus is on the plaintiffs who claim ownership to show by evidence that they have a better title than the defendant. The trial court was therefore on the right tract in holding that the plaintiffs' claim was in trespass and injunction and which had automatically put the title in issue. The lower court in the circumstance had no option but rightly endorsed the findings by the trial judge. The said 1st issue is resolved against the appellants. B

The 2nd issue is whether the principle of issue estoppels applies to the case at hand in view of the decision in suit No. 27/83 under reference. It is expedient to state that the land in issue was the same subject matter as that before the Customary court in suit No. 27/83 i.e. exhibit P1. The Customary court declared the passage as an access road having been used from time immemorial by the local farmers. As at the time of such declaration, Exhibit D1, the conveyance was not placed before the customary court. The trial High Court did not also hold Exhibit P1, the Customary Court judgment, as constituting an estoppel. It is apt to re-echo also that under our law, one of the five ways of proving title is by deed of conveyance. See the case of *Idundun V Okumagba* (1976) 9 & 10 SC 227, also *Mogaji V Cadbury Nig. Ltd* (1985) 2 NWLR (Pt.7) 393 and *Alli V Alesinloye* (2000) 6 NWLR (Pt 660) 177. C

As rightly submitted by the learned respondent's counsel, the evidence before the trial court on the one hand and the Customary court on the other hand, were not the same. Consequently and contrary to the view poised by the appellants' counsel, issue estoppel cannot be invoked, as rightly held by the trial court and affirmed by the lower court. The said issue is also resolved against the appellants. D

Issue 3 is whether the trial court wrongly interpreted the contents of Ife Area Town Planning authority letter Exhibit P7 which the learned trial judge interpreted as mere advice and did not establish anything. E

The onus is on the Ojaja community to establish their title to the private road to which they laid claim as access road to their community. The evidence avail that the community share this road with other members of the public as access road. The relevant question to pose at this juncture is:- What special interest did the community have over and above the general interest of the other members of F

the public? This the appellants must prove against the respondent in order to sustain their claims.

It is the respondent's case that the passage was given by Chief Odofin Fadiora, his father, to both the appellants and the community. Efforts to have septic tank by the respondent's father was therefore always resisted by the community. It was also discovered that the respondent's father purchased the land in 1962 and was conveyed to him by conveyance in 1967 per Exhibit D1. An approved building plan was also given him from the Town Planning authority registered as No. ITPA 82/7/69-70.

On the side of the appellants however, their claim to the community private road was predicated substantially on the documents, Ife town Planning Authority letter Exh. P7 and the Customary court judgment in suit No.27/83, Exh. P1.

The said document Exh. P7 - the letter emanating from the Town Planning Authority is a creation of statutes by sections 3(4), 5(6), 11(1), (3) 27(5) and 28 of the Nigeria Urban and Regional Planning Decree No. 88 of 1992. It has the control over lands within its jurisdiction and can earmark any area of land as road. However in the case at hand, the document Exh. P7 did not of itself create an access road by legislation. In otherwords, the document is only advisory and did not establish the right of the appellants to the access road. The claim laid on Exh. P7 by the appellants in the circumstance did not serve their interest. The said issue is also resolved against the appellants.

The outcome of issue No. 4 is, on the totality of the foregoing obvious in view of the conclusion arrived at in issues 1, 2 and 3. In otherwords, the plaintiffs/appellants, as rightly concluded by the trial court, have failed to establish their right to the access road as laid on their claim. Therefore the concurrent judgment by the two lower courts are unassailable. In the same vein as the lead judgment of my learned brother Muntaka-Coomassie, JSC, with all the issues resolved against the appellants, the appeal is devoid of any merit and I also dismiss same. Parties are to bear their own respective costs.