

**SUPREME COURT OF NIGERIA**  
FRIDAY 24TH SEPTEMBER, 1993. SC. 320/1990  
**CORAM:- A. G. KARIBI-WHYTE, S. M. A. BELGORE,**  
**A. B. WALI, I. L. KUTIGI, S. U. MOHAMMED, JJSC**

CHIEF JOHN EHIMIGBAI OMOKHAFE ..... APPELLANT  
AND  
CHIEF JOHN ILAVBAOJE IBOYI  
ESEKHOMO ..... RESPONDENT

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RES JUDICATA - Application - Conditions - For the plea to succeed  
- Parties must be the same in the two cases - Issues and subject matter must be the same - And judgment must be valid (H1)

JURISDICTION - Issue - Time to raise - Challenge to jurisdiction of court can be raised at any stage of the trial - And even on appeal (H2)

**FACTS**

Before the then Bendel State (now Edo State) High Court Auchi Judicial Division, plaintiffs/appellant instituted suit no. HAU/4/81 against the Military Governor of the State and others, seeking inter alia for a declaration bordering on validity of an order of rotation of a chieftaincy title as contained in a chieftaincy declaration. The learned trial Judge Akpovi, J. gave judgment in favour of appellant. Thereafter, Chief John Igboei Ovie who was not a party to the suit sought and was granted leave to appeal against the judgment as an interested person. However, after filing his notice of appeal before the Court of Appeal, Chief Ovie failed to proceed with the appeal.

He rather instituted another action in suit no. HCN/8/85 against appellant before Akenzua, J. In response to the suit, appellant pleaded estoppel per rem judicatam relying on the judgment of Akpovi, J. in suit no. HAU/4/81. In his judgment, Akenzua, J. found in favour of Chief Ovie. Meanwhile, the notice of appeal filed by Chief Ovie was dismissed by the Court of Appeal for want of prosecution. The appeal was however revived and continued by respondent and one other. The appeal was eventually allowed and judgment

ment of Akpovi, J. set aside. Aggrieved, appellant has appealed to the Supreme Court. Respondent has raised preliminary objection on the ground that the judgment of Akenzua, J. in suit no. HCN/8/85 constitutes *res judicata* against appellant's appeal.

### **ISSUE FOR DETERMINATION**

*"Whether the respondent can at this stage now raise the issue of estoppel per rem judicatam, such issue not having been raised at the court of trial or in the court below and if it can now be raised, whether by the judgment of the High Court in Suit No. HCN/8/85, the appellant is barred from instituting this suit."*

**HELD** (Unanimously dismissing the application per

**KARIBI-WHYTE JSC)**

*RES JUDICATA - Application - Conditions*

**1. Thus the three essential prerequisites which constitute the pillars for the application of the principle are, first, that the parties must be the same in the two cases or their privies. Secondly, the issues and subject matter must be the same. It is not sufficient merely that the parties are the same. Thirdly, there must be a valid subsisting judgment. It is immaterial that the judgment was obtained by default.**

**For applicant to succeed in his preliminary objection, he must show that the judgment in HCN/8/85 relied upon for the objection has satisfied the preconditions stated above. Even a cursory examination of the two cases immediately discloses that the parties are not the same.**

**In this case the appeal against HAU/4/81 was still pending when the HCN/8/85 was decided. The distinction between *Nwaneri v. Oriuwa* (supra) and the appeal before us is that whereas in *Nwaneri v. Oriuwa* all the essential ingredients for the application of *res judicata* were present; the parties in the instant case are not the same, the principle is therefore not applicable.** (pp. 2790 G/2792 D)

*JURISDICTION - Issue - Time to raise*

**2. It is a well settled principle of law that a challenge to the**

***jurisdiction of the court can be raised at any stage of the trial and even on appeal. A plea of estoppel per rem judicatam is a challenge to the jurisdiction of the court. As I have already said in this ruling, a plea of res judicata is an admission that the judgment is valid and that the subject matter in the present action has been determined in the judgment relied upon.***

(p. 2791 G)

## NOTABLE POINT OF INTEREST

### **KARIBI-WHYTE JSC**

#### ***1. Res judicata – Principle of***

The plea of res judicata is based on the principle of public policy, that since the adverse party has no cause of action against him, the court lacks the requisite jurisdiction. The principle is usually referred to as estoppel by record. There are two kinds of them. There is the “cause of action” estoppel which prevents a party to an action from asserting or denying as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in a previous litigation between the parties. This referred to as the cause of action estoppel and is what concerns us in this ruling. The principle is rooted in public policy, namely, that it is for the common good that there should be an end to litigation. The principle is dressed in the Latin Maxims of “interest rei publicae ut sit finis litium, and “*nemo debet bis vexari proceadem causa.*”

The second type of estoppel per rem judicatam known as issue estoppel, does not concern us in this ruling. It is however important to state that the distinction between the two is that issue estoppel is concerned only with an issue or issues determined in the litigation, it is immaterial that the litigation has not proceeded to finality. Estoppel per rem judicatam operates only where there is a final decision on the subject matter. (p. 2789 H)

### **REPRESENTATION**

Chief O. Esemokhai, for the Appellant

Kayode Sofola, with Miss R. Odogun, for the Respondent

**CASES REFERRED TO**

- Ukaegbu v. Ugorji (1991) 6 NWLR (pt. 196) 127  
Odaje v. Okujeni (1973) 11 SC 343  
Basil v. Hanger 14 WACA 569  
Ndiribe v. Ogboga (1989) 5 NWLR (pt. 123) 599  
B Oduka v. Kasumu (1968) NMLR 28  
Olufunmise v. Falana (1987) 1 NWLR (pt. 47) 64  
A-G Oyo State v. Fair Lakes Hotel Ltd. (1988) 5 NWLR (pt. 92) 1  
Nwaneri v. Oriuwa (1959) 4 FSC 132  
C Alase v. Ilu (1965) NMLR 66  
Odua v. Nwanze (1934) 2 WACA  
Shonekan v. Smith (1964) 1 All NLR 68  
Chiekwe v. Obiora (1960) 5 FSC 258  
Eko v. Ugwuomo (1940) 6 WACA 206  
D Ogiamen v. Ogiamen (1967) 1 All NLR 191  
Bankole v. Pelu (1991) 8 NWLR (pt. 211) 523

**RULES REFERRED TO**

Supreme Court Rules 1985, O. 6 r. 5

E

**LEAD JUDGMENT BY KARIBI-WHYTE JSC**

This preliminary objection against the competence of this appeal was raised by the 5th Respondent on the 1st February, 1993 when the appeal came up for hearing. After hearing counsel for and  
F against the preliminary objection, the same day, I summarily dismissed the preliminary objection and indicated that my reasons for so will be stated later. This I now proceed to do.

The appeal from the Court of Appeal is still pending in this  
G court. The history of the case is relevant to the determination of this objection. But only so much as is necessary for this ruling will be stated. It is sufficient to say that the only surviving parties to this litigation are the 2nd plaintiff, who is now the Appellant, and the 5th Defendant, who is now the Respondent.

H The ground on which the objection to the competence of this appeal rests is clearly formulated in applicant's notice of preliminary objection which states as follows-

*“that the present appeal is incompetent and/or that the present appellant cannot pursue this appeal in view of the decision in suit*

*No.HCN/8/85; Chief John Igboei Ovie v. Chief Peter Higo Ajakaiye decided at the then Bendel State High Court Owan Judicial Division in 1986.”*

Concisely stated, the preliminary objection is found on a plea of res judicata, that the issues in the appeal before us have been decided in the High Court between appellant and another party to who respondents are privies. This is clearly borne out by the only issue formulated for determination in the brief of the applicant.

The 5th defendant/applicant formulated the question thus;

*“...can the judgment in suit No.HNC/8/85 operate as res judicata against the plaintiffs in this case? Or can the plaintiffs herein re-litigate the issue of the order of rotation of the Ovie of Otuo and the validity or otherwise of the 1979 Otuo Registered Chieftaincy declaration regulating the selection of the Traditional Ruler of the Ovie of Otuo in view of the subsisting judgment in HCN/8/85.”*

The 2nd plaintiff/respondent in his own brief of argument also formulated only one issue for determination in the following terms -

*“Whether the respondent can at this stage now raise the issue of estoppel per rem judicatam, such issue not having been raised at the court of trial or in the court below and if it can now be raised, whether by the judgment of the High Court in Suit No. HCN/8/85, the appellant is barred from instituting this suit.”*

It seems obvious from the facts before this court that there has been a series of litigation between the two families contesting the coveted title of Ovie of Otuo. At the time of this action which has come on appeal before us was decided in the High Court, suit No. HCN/8/85 now being relied upon as res judicata had not been instituted.

A short account of the genealogy of the actions is as follows- In 1981 Chief Peter Ajakaiye & Ors. in Suit No. HAU/4/81 instituted an action against the Military Governor of Bendel State and some others. Chief John Igboei Ovie was not a party to the case. Akpovi, J. gave judgment for the plaintiffs on October 7, 1985. Soon after, Chief John Igboei Ovie, who was not a party to the action, sought and was granted leave to appeal against the judgment of Akpovi, J. as a person interested. He did not proceed with the appeal. Rather he instituted another action in Suit No. HCN/8/85 against Chief Peter

Ajakaiye before Akenzua, J. Chief Peter Higo Ajakaiye pleaded estoppel per rem Judicata relying on the judgment of Akpovi, J. in HAU/4/81. Akenzua, J. gave judgment in favour of Chief John Igboei Ovie. Chief John Igboei Ovie, as I have already stated gave notice of appeal against the judgment of Akpovi J in HAU/4/81.

B The notice of appeal filed by Chief John Igboei Ovie who was granted leave to appeal as a person interested was dismissed by the Court of Appeal for want of prosecution. The appeal was continued by the 4th and 5th defendants. The Court of Appeal allowed the appeal against the judgment of Akpovi, J, and set it aside. Chief Peter C Higo Ajakaiye & Ors., in whose favour Akpovi, J. gave judgment, appealed to this court. 5th Respondent in whose favour the Court of Appeal gave judgment is now relying on the judgment of Akenzua, J. in Suit No. HCN/8/85 instituted by Chief John Igboei Ovie against D Peter Higo Ajakaiye as res judicata against the appeal before us.

The 5th respondent was not a party to HCN/8/85.

The preliminary objection is based on the submission that the judgment of Suit No. HCN/8/85 decided by Akenzua, J. now operates as res judicata against the appellant.

E It is necessary to state clearly the composition of the parties in the two cases.

In HAU/4/81, Chief John Igboei Ovie was not a party. The defendants were-

- F
1. The Governor
  2. Commissioner for Local Govt. & Chieftaincy Affairs
  3. Attorney-General.

G Chief Peter Higo Ajakaiye & Chief John Ehimigbai Omokhafe, were plaintiffs in the action in a representative capacity. They sued for themselves and on behalf of Orhirla Orake Ruling House and members of Otuo clan community, except the fourth and fifth defendants and their supporters. The 4th & 5th defendants were Chief Agbebakun Idehai and Chief John Ilavbaoje Iboyi Esekhome.

H On the other hand the parties in HCN/8/85 are Chief John Igboei Ovie as plaintiff, whilst Chief Peter Higo Ajakaiye is the defendant. The defendant here was sued alone, and in his personal capacity. He did not defend the action in a representative capacity as was the case in HAU/4/81.

I shall now refer to the preliminary objection and the submis-

sions of counsel. I have already set out the issues formulated in the briefs of argument of counsel.

I have considered the issues formulated by counsel. I regard the formulation of learned counsel to the respondent more appropriate and consistent with the facts of this case.

The submission of the applicant before us was that the deceased 1st plaintiff was a party to Suit No. HCN/8/85 as plaintiff. The order of rotation of the Ovie of Otuo, Chieftaincy title was made in favour of the Amoya-Ohigba Ruling House, to which the present applicant and respondent belong. The said judgment is subsisting and operates as *res judicata* against the respondent. It was also submitted that both applicant and the respondent are privies to the judgment in HCN/ 8/85. Learned counsel cited and relied on *Ukaegbu & Ors. v. Ugorji & Ors.* (1991) 6 NWLR (Pt. 196) 127, 145; *Odaje v. Okujeni* (1973) 11 SC 343 at 353 the West African Court of Appeal decision of *Basil v. Hanger* 14 WACA 569 at 572; *Ndiribe v. Ogboga* (1989) 5 NWLR (Pt.123) 599, at P. 609; *Oduka & Ors. v. Kasumu & anor* (1968) NMLR 28 at p. 34; *Olufunmise v. Falana* (1987) 1 NWLR. (Pt. 47) 64 at P. 70. Learned counsel urged us to dismiss or strike out the appeal.

In his reply, Mr. Kayode Sofola for the respondent submitted that the application of the doctrine of *res judicata* is predicated on the fulfillment of the following pre-conditions. These are (a) the issues and the subject-matter must be the same in the case relied upon as in the case sought to be dismissed. (b) It must be pleaded before the trial court. It was submitted that it was now too late for applicant even to seek leave of the court to raise it. Mr. Kayode Sofola, cited and relied on *Oki & anor. v. Akel* 19 NLR 94; *Ojikutu v. Feella & anor.* 14 WACA 628; *Attorney-General, Oyo State v. Fair Lakes Hotel Ltd.* (1988) 5 NWLR (pt. 92) 1 at p. 29 and other cases.

It is common ground that the preliminary objection of the applicant is founded on the fact that judgment having been decided in his favour in respect of the subject matter now being litigated in the appeal before us, it was unnecessary to continue to decide the same matter again which has already been decided between the parties in the previous action. Concisely stated, the preliminary objection is based on a plea of *res judicata*.

The plea of *res judicata* is based on the principle of public policy,

that since the adverse party has no cause of action against him, the court lacks the requisite jurisdiction. The principle is usually referred to as estoppel by record. There are two kinds of them. There is the “cause of action” estoppel which prevents a party to an action from asserting or denying as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in a previous litigation between the parties. This referred to as the cause of action estoppel and is what concerns us in this ruling. The principle is rooted in public policy, namely, that it is for the common good that there should be an end to litigation. The principle is dressed in the Latin Maxims of “*interest rei publicae ut sit finis litium*,” and “*nemo debet bis vexari proceadem causa*.”

The second type of estoppel per rem judicatam known as issue estoppel, does not concern us in this ruling. It is however important to state that the distinction between the two is that issue estoppel is concerned only with an issue or issues determined in the litigation, it is immaterial that the litigation has not proceeded to finality. Estoppel per rem judicatam operates only where there is a final decision on the subject matter.

In *Nwaneri & Ors. v. Oriuwa* (1959) 4 FSC 132; (1959) SCNLR 316, Abbot F.J. giving the conditions necessary for the operation of the doctrine of estoppel by record, put it succinctly thus

“*It is well known that before this doctrine of estoppel per rem judicatam can operate, it must be shown that the parties, issues and subject matter were the same in the previous case as those in the action in which the plea of res judicata is raised.*”

This principle has been applied in the early case of *Brobberry v. Kyere* 3 WACA 106, and the more recent decisions of this court in *Alase & Ors. v. Ilu & Ors.* (1965) NMLR 66.

**Thus the three essential prerequisites which constitute the pillars for the application of the principle are, first, that the parties must be the same in the two cases or their privies.** See *Odua & Ors. v. Nwanze* (1934) 2 WACA, 98; *Shonekan v. Smith* (1964) 1 All NLR 68. **Secondly, the issues and subject matter must be the same. It is not sufficient merely that the parties are the same.** See *Chiekwe v. Obiora* (1960) 5 FSC. 258; (1960) SCNLR 566. **Thirdly, there must be a valid subsisting judgment.**

See Eko v. Ugwuomo & Ors. (1940) 6 WACA, 206; Ogiamen v. Ogiamen (1967) 1 All NLR 191. **It is immaterial that the judgment was obtained by default.** See Odu v. John Holt & Co. Ltd. (1950) 19 NLR 127.

**For applicant to succeed in his preliminary objection, he must show that the judgment in HCN/8/85 relied upon for the objection has satisfied the preconditions stated above.** See Bankole v. Pelu (1991) 8 NWLR (Pt.211) 523. **Even a cursory examination of the two cases immediately discloses that the parties are not the same.** The plaintiff in HCN/8/85 is not a party to HAU/4/81. The defendant in HCN/8/85 was sued by the plaintiff in his personal capacity. In suit No. HCN/8/85 the defendants were sued and defended the action in their personal capacities. The action in HAU/4/81 was defended in a representative capacity. There is no doubt that the parties in the two actions are not the same - See Bankole v. Pelu (1991) 8 NWLR (Pt.211) 523.

Learned counsel to the respondent submitted that having not pleaded the estoppel at the trial, applicant is precluded from raising it on appeal. The cases of Obanye v. Chukwuma & Ijoma (1930) 10 NLR, 8; Sowa v. Amachree (1933) 11 NLR. 82; Dedeke & Ors. v. Williams & Anor. (1944) 10 WACA 164; Owonyin v. Omotosho (1961) 2 All NLR. 304, were cited and relied upon.

Learned counsel pressed heavily on the failure of applicant to raise the defence of estoppel in his pleading. I think the peculiar facts of this case are sufficient answer to the criticism. At the time of the institution of HCN/8/85 in the High Court, the judgment in HAU/4/81 had not been delivered and could not have been relied upon in the pleadings.

**It is a well settled principle of law that a challenge to the jurisdiction of the court can be raised at any stage of the trial and even on appeal.** See Ukaegbu v. Ugorji (1991) 6 NWLR (Pt.196) 127; Agu v. Ikewuibe (1991) 3 NWLR (Pt.180) 385. **A plea of estoppel per rem judicatam is a challenge to the jurisdiction of the court. As I have already said in this ruling, a plea of res judicata is an admission that the judgment is valid and that the subject matter in the present action has been determined in the judgment relied upon.**

I will adopt the statement in Smith's Leading cases (12th

Edition) 754, at p. 767, citing a passage from the notes to the Duchess of Kingston's Case (1776) where it was said:

*"An estoppel, therefore, is an admission; or something which the law treats as equivalent to an admission, of an extremely high and conclusive nature - so high and conclusive, that the party whom it affects is not permitted to aver against it or offer evidence to controvert it."*

See MacNair J. in *Bell v. Holmes* (1956) 3 All E.R. 449. In *Nwaneri v. Oriuwa* (supra) Abbot F.C.J. delivering the judgment of the Federal Supreme Court, held that the fact that judicial finding is made during the pendency of the action in which the plea of res judicata is raised does not prevent it operating as an estoppel. In *Nwaneri v. Oriuwa* (supra), as in the appeal before us, the writ was issued and proceedings begun and concluded during the pendency of the High Court proceedings, the contention that the decision could not operate as res judicata was rejected.

***In this case the appeal against HAU/4/81 was still pending when the HCN/8/85 was decided. The distinction between Nwaneri v. Oriuwa (supra) and the appeal before us is that whereas in Nwaneri v. Oriuwa all the essential ingredients for the application of res judicata were present; the parties in the instant case are not the same, the principle is therefore not applicable.***

It is for the reasons I have given above that I dismissed the preliminary objection of the respondent/applicant seeking to dismiss/strike out this appeal.

## G **BELGORE JSC**

I agree with the reasons for the judgment as given by my learned brother, Karibi-Whyte, J.S.C. for dismissing this preliminary objection. It must be emphasised that jurisdiction goes into the power of a court to adjudicate on a matter and it should be raised at any time in the journey of any suit from the first instance Court to the Court of final judicial remedy. This is because a matter tried by court lacking jurisdiction will be an exercise in nullity. *Agu vs. Ikewuibe* (1991) 3 NWLR (Pt.180) 385; *Ukaegbu v. Ugorji* (1991) 6 NWLR (Pt.196) 127. Similarly res judicata can be raised at any stage of the

proceedings, because if the issue being canvassed had been tried and decided by a court of competent or coordinate jurisdiction between the same parties or their privies, the subsequent trial will result in nullity. In the instant case the parties in the other case, still pending are not the same or privies to the present suit, thus the issue of res judicata does not arise. B

It is for the above reasons and fuller reasons of my learned brother Karibi-Whyte, J.S.C., that I also dismissed the preliminary objection.

C

### WALI JSC

On the 1st of February, 1993, after hearing learned counsel on both sides on the preliminary objection raised by the 5th respondent on the competency of the appeal, I dismissed the preliminary objection and reserved my reasons for doing so to today which I now proceed to do. D

By a Writ of Summons taken out in the Auchi Judicial Division of the then Bendel State High Court sitting at Muze, the plaintiffs seek the following reliefs against the defendants:- E

*“1. A declaration that the order of rotation of Oruo Ruling Houses as contained in the draft Otuo Chieftaincy Declaration of 23rd January, 1957 which makes the rotation of Otuo Ruling Houses to be in accordance with the order of seniority of the Otuo Ruling Houses is the correct and appropriate order of rotation of the Ruling Houses according to Otuo Customary Law regulating the succession to the Traditional Ruler Title of the Ovie of Otuo. F*

*2. A declaration that:*

*(a) the registered Otuo Chieftaincy Declaration of 1964 G*

*(b) the decisions contained in the Bendel State Government White Paper on the Report of the Ofili Commission of Inquiry into the Disturbances at Otuo, and*

*(c) the B.S.L.N. 141 of 1979 Declaration of the Customary Law regulating succession to the Traditional Ruler Title of the Ovie of Otuo are null and void in that they are contrary to the Oruo Customary Law regulating the order of rotation and the succession to the Traditional Ruler Title of the Ovie of Otuo. H*

*3. A declaration that the 17th December, 1973 appointments*

*of the incoming Otuo Traditional Ruler and Traditional Chiefs whereby the First Plaintiff was appointed the Ovie-elect of Otuo by Otuo kingmakers presided over by the outgoing Ovie of Otuo, Chief Igbauma Idehai, are correct, proper, valid and in accordance with Oruo Customary Law regulating the succession to the Traditional Ruler*

*B Title of the Ovie of Otuo.*

*4. A declaration that the appointment and approval of the Fifth Defendant as the Ovie of Otuo by the First, Second, Third, and Fourth defendants are contrary to Otuo Customary Law regulating the succession to the Traditional Ruler Title of the Ovie of Otuo and*

*C that the said appointment and approval be declared null and void.*

*5. A declaration that the said appointment and approval of the Fifth defendant as the Ovie of Otuo are also contrary to and at variance with the decisions contained in the Bendel State Government White Paper on the Report of the Ofili Commission of Inquiry into the Disturbances at Otuo and the two Bendel State Traditional Rulers and Chiefs Edicts, 1979, Extraordinary Numbers 16 and B.S.L.N. 141, and the said appointment and approval be declared*

*E 6. A perpetual injunction restraining the First, Second, Third, and Fourth defendants and their agents, servants and/or successors from appointing, approving, recognising installing and/or gazetting the Fifth defendant as the Ovie of Otuo and also restraining the Fifth*

*F The Writ of Summons was issued on 26th January, 1981 and the suit was also registered as HAU/4/81. Pleadings were filed and exchanged and parties adduced evidence in support of their respective cases. At the end of the trial, the learned trial Judge, Akpovi, G J. gave judgment in the plaintiffs' favour on 7th October, 1985.*

*Dissatisfied with the judgment of the trial court, the 4th and 5th defendants.*

*Chief Agbebaku Idehai and Chief John Ilavbaoje Iboi Esekhome, appealed to the Court of Appeal, Benin Division.*

*H In a judgment of that court delivered by Ogundare, J.C.A. (as he then was) with which Musdapher and Salami, J.J.C.A. agreed, the appeal was allowed, the judgment of the trial court was set aside and the plaintiffs claims were dismissed.*

*The plaintiffs have now appealed to this court after obtaining*

leave to do so.

In accordance with the provisions of Order 6 rule 5 of the Supreme Court Rules, 1985 (as amended), the parties to the appeal filed and exchanged briefs of arguments.

It is pertinent to state at this stage that after filing the appeal the 1st plaintiff (then the 1st appellant) died before filing brief. The 4th defendant (then the 1st respondent) also died before brief. It appears from the record in this appeal that the 2nd plaintiff (now the only appellant) and the 5th defendant (now the only respondent) proceeded with the appeal.

It should also be noted that while Suit No. HAU/4/81 was going on in the Auchi Division of the then Bendel State High Court, one Chief John Igbeoi Ovie a Chief from Amoya-Ohigba Ruling House, (the same Ruling House with the 4th and 5th defendants) sued the 1st plaintiff, Chief Peter Higo Ajakaiye in Suit No. HCN/8/85 claiming as follows:-

*“(a) A DECLARATION that in accordance with Otuo Customary Law and recommendation as accepted by the Bendel State while paper on the commission of Inquiry into the Disturbances at Otuo vide official Document No.2 of 1979, it is now the turn of Amoya-Ohigba Ruling House to produce an Ovie.*

*(b) A DECLARATION that in accordance with the order of rotation of the Oviship embodied in the 1979 Otuo Chieftaincy Declaration, CHIEF PETER HIGO AJAKAIYE of Olila-Orake Ruling House is not competent to contest the Oviship of Otuo now.*

*(c) A DECLARATION that Chief John Igbeoi Ovie of Amoya-Ohigba Ruling House is the person entitled to be appointed the Ovie of Otuo under Otuo Customary Law and in accordance with the Traditional Rulers and Chiefs Edict No. 16 of 1979.*

*(d) AN INJUNCTION restraining the defendant from parading himself as the Ovie of Otuo.*

*(e) AN INJUNCTION restraining the defendant, his servants and/or agents from performing any customary ceremonies whatsoever in connection with the Traditional Chieftaincy title of the Ovie of Otuo or connected with his installation as Ovie of Otuo.”*

It seems that the hearing of Suits Nos. HAU/4/81 and HCN/8/85 were held in different courts partly simultaneously. On 7th October, 1985 judgment in HAU/4/81 was delivered by Akpovi J, while

that in HCN/8/85 was given on 4th July, 1986 by Akenzua J. In the latter case, the plaintiffs claim against the defendant was granted.

Before the judgment on HCN/8/85 was delivered, the plaintiff in that case - Chief John Igbeoi Ovie filed a notice of appeal against the decision in HAU/4/81. The notice was filed on 19th December, 1985. The Notice of Appeal was headed:

*“BETWEEN: NO. HAU/4181*  
*CHIEF JOHN IGBEOI OVIE - APPELLANT/APPLICANT*  
*AND*  
*(1) CHIEF PETER HIGO AJAKAIYE*  
*(2) CHIEF JOHN EHIMIGBAI OMOKHAFAE) - PLAINTIFFS/*  
*(For themselves and on behalf of Orhirla) RESPONDENTS*  
*Orake Ruling House and members of Otuo*  
*Clan community except the forth and fifth*  
*defendants and their supporters.)*  
*AND*  
*(1) THE MILITARY GOVERNOR OF*  
*BENDEL STATE OF NIGERIA*  
*(2) THE ATTORNEY-GENERAL OF*  
*BENDEL STATE OF NIGERIA - DEFENDANTS/*  
*(3) THE COMMISSIONER OF LOCAL RESPONDENTS*  
*GOVERNMENT AND CHIEFTAINCY*  
*AFFAIRS OF BENDEL STATE OF NIGERIA*  
*(4) CHIEF AGBEBAKUN IDEHAI*  
*(5) CHIEF JOHN ILAVBAOJE IBOYE ESEKHOMO”*

In the Notice of Appeal (supra), Chief John Igbeoi Ovie, was described as “APPELLANT/APPLICANT”. I have gone through the record before me, and cannot trace where Chief Igbeoi Ovie applied for and was granted leave to appeal as an interested party against the judgment in HAU/4/81 delivered on 7th October, 1985.

Be that as it may, Chief Ovie did not prosecute the purported appeal. This was reflected in the proceedings of the Court of Appeal on 6th June, 1989 at page 498 lines 11 to 15 viz-

“Mr. Esemokhai says that the party who sought to be joined as an appellant in the Lower Court, that is, Mr. John Igbeoi Ovie did not file any brief even though he filed Notice of Appeal.”

It seems also due to over-sight the Court of Appeal did not make any order in respect of incompetence or non-prosecution of

the purported appeal by the applicant/appellant. Assuming that the applicant was rightly given leave to appeal as an interested party, he had abandoned it by failing to file brief. It is accordingly dismissed under Order 6 rule 10 of the Court of Appeal Rules, 1981 (as amended) under the general powers conferred on this court by Order 8 rule 12 of the Supreme Court Rules, 1985 (as amended) and Section 22 of the Supreme Court Act, 1960. B

I shall now return to the complaint before this court which has been raised by way of preliminary objection to wit

*“that the present appeal is incompetent and/or that the present appellant cannot pursue this appeal in view of the decision in Suit No. HCN/8/85: Chief John Igbeoi Ovie v. Chief Peter Higo Ajakaiye decided at the then Bendel State High Court Owan Judicial Division in 1986.”* C

In support of this preliminary objection, the 5th defendant/ applicant filed brief. The 3rd plaintiff/respondent filed a brief in answer to the brief filed by the applicant.

In the brief filed by the 5th defendant/applicant, one issue was formulated for determination to wit -

*“...can the judgment in suit No. HCN/8/85 operate as res judicata against the plaintiffs in this case? or can the plaintiffs herein relitigate the issue of the order of rotation of the Ovie of Otuo and the validity or otherwise of the 1979 Otuo Registered Chieftaincy declaration regulating the selection of the Traditional Ruler of the Ovie of Otuo in view of the subsisting judgment in HCN/8/85.”* E  
F

The 2nd plaintiff/respondent also formulated one issue in his brief for determination by this court. It reads -

*“Whether the respondent can at this stage now raise the issue of estoppel per rem judicatam, such issue not having been raised at the court of trial or in the court below and if it can now be raised, whether by the judgment of the High Court in Suit HCN/8/85, the appellant is barred from instituting this suit.”* G

For the simple understanding of the ruling to the preliminary objection, the 5th defendant/applicant would henceforth be referred to as the applicant while the 2nd plaintiff/respondent will be referred to as the respondent. H

It was the submission of learned counsel for the applicant that since the 1st plaintiff (now deceased) was a party to HCN/8/85

as defendant, and that the order of rotation of the Ovie of Otuo Chieftaincy title was pronounced upon in favour of the Amoya-Ohigba Ruling House, and to which the present applicant, and respondent belong and the said judgment is still subsisting, it operates as res judicata against the respondent. He also submitted that the applicants as well as the respondent are privies to the judgment in HCN/8/85. He cited and relied on Ukaegbu & Ors. v. Ugoji & Ors. (1991) 6 NWLR (Pt.196) 127 at 145; Odadhe v. Okujeni (1973) 11 S.C. 343 at 353; Basil v. Honger 14 WACA 569 at 572; Ndiribe v. Ogbogu (1989) 5 NWLR (Pt.123) 599 at 609; Oduka & Ors. v. Kasumu & Anor. (1968) NMLR 28 at 34 and Olufumise v. Falana (1987) 1 NWLR (Pt.47) 64 at 70. He urged this court to dismiss or strike out the appeal.

In answer to the submissions made on behalf of the applicant, learned counsel for the respondent submitted that before the doctrine of res judicata can operate it must be shown that the parties, the issues and the subject matter were the same in the previous case as those in the case to which the doctrine is being sought to apply and also that it must be pleaded before the trial court. He further submitted that it is now too late for the applicant even to ask for leave of this court to raise it. He cited several authorities to support his submissions amongst which are Oki & Anor. v. Akel 19 NLR 94; Ojikutu v. Fella & Anor. 14 WACA 628 and A.G. Oyo State v. Fairlakes Hotel Ltd (1988) 5 NWLR (Pt. 92) 1 at 29.

It is now trite law that before estoppel by res judicata can apply, the following conditions must be satisfied:-

1. Identity of the parties or their privies
2. Identity of the issues, and
3. Identity of the subject matter. See ABIODUN V. FASANYA (1974) 11 S.C. 61.

Can it be said that these conditions co-exist in Suit HAU/4/81 and Suit HCN/8/85?

In Suit No., HAU/4/81 the parties to the suit on 7th October, 1985, the date the judgment was given are:-

1. Chief Peter Higo Ajakaiye
2. Chief John Ehimigbai Omokhafe

(For themselves and on behalf of Orlila, Orake Ruling House and Members of Otuo Clan Community except the 4th and 5th Defen-

dants and their supporters) - as plaintiffs

v.

1. The Military Governor of Bendel State of Nigeria
2. The Attorney-General of Bendel State of Nigeria
3. The Commissioner for Local Government & Chieftaincy Affairs of Bendel State of Nigeria
4. Chief Agbebakun Idehai
5. Chief John Ilavbaoje Iboyi Esekhome - as Defendants.

While in the latter case, which is Suit No. HCN/8/85 the parties to the suit on 4th July, 1986, the date of judgment, are:-  
Chief John Igbeoi Ovie - as Plaintiff

V.

Chief Peter Higo Ajakaiye - as Defendant

A perusal of the parties involved in the two suits (supra) will show the following:

1. The parties are not the same. The plaintiff in HCN/8/85 is not a party to HAU/4/81.
2. The defendant in HCN/8/85 was sued by the plaintiff in his own capacity.
3. While HAU/4/81 was instituted by the defendant in a representative capacity, Suit No. HCN/8/85 was prosecuted and defended by the parties thereto in their personal capacities.

A successful plea of res judicata operates not only against the parties whom it affects, but also ousts the jurisdiction of the court by the parties and their privies on the same issues and subject matter. See *Salawu Yoye v. Lawani Olubode* (1974) 10 S.C. 209 and *Odadhe v. Okujeni* (1973) 11 S.C. 343. As demonstrated above in the case on appeal before us, that is HAU/4/81 bearing the appeal No. S.C. 320/90, the parties are not the same as in HCN/8/85. In the former case it was a representative action while in the latter, it was a personal action. The Orhala-Orake Ruling House and Members of Otuo Clan Community were not parties to HCN/8/85.

As also pointed out by the learned counsel for the respondents, the issue of res judicata now being raised was not litigated upon in both the trial court and the Court of Appeal. The applicant is now raising it for the first time in this court without seeking leave to do so. See *A.G. Oyo State v. Fairlakes Hotel Ltd.* (1988) 5 NWLR (Pt. 92) 1; *Sken Consult (Nig.) Ltd. v. Ukey* (1981) 1 S.C. 6 and

Agbaje v. Adigun (1993) 1 NWLR (Pt.269) 261.

It is for these reasons and the fuller reasons contained in the lead Reasons for Ruling of my learned brother, Karibi-Whyte JSC, that I dismissed the preliminary objection of 1st February, 1993.

B

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**KUTIGI JSC**

The 5th respondent/applicant filed a notice of preliminary objection to wit -

C *“That the present appeal is incompetent and/or that the present appellant cannot now pursue this appeal in view of the decision in suit No. HCN/8/85. CHIEF JOHN IGBOI OVIE VS. CHIEF PETER HIGO AJAKAIYE decided at the then Bendel State High Court, Owan Judicial Division in 1986”*

D The preliminary objection was dismissed with N1,000.00 costs against the applicant on 1/2/93 when it was heard and we adjourned to give full reasons for the decision today.

E It was not disputed that Suit No. HAU/4/81 (now appeal No. S.C.320/90 in this court) was instituted in the High Court on 26/1/81 and judgment delivered therein on 7/10/85. It was after that judgment that Suit No. HCN/8/85 was filed and judgment was not delivered until 4/8/86. The parties in the two cases are also clearly different. Under the circumstances it is impossible to see how the 1986 judgment could operate as a res judicata or estoppel against the earlier 1985 judgment as contended by the applicant herein.

F It is simply for this reason and for the fuller reasons, given by my learned brother Karibi-Whyte, J.S.C. that I dismissed the application.

G

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**MOHAMMED JSC**

H Hon. Justice Shehu Usman Mohammed concurred with the leading judgment at the Chambers Conference of the Justices of the Supreme Court on this case. However, unfortunately, before the date of the delivery of the judgment, he died in ghastly motor accident.

Preliminary objection dismissed.