

**SUPREME COURT OF NIGERIA**  
15TH JANUARY, 2016. SC. 142/2006  
**CORAM:- S. GALADIMA, O. ARIWOOLA,**  
**K. M. O. KEKERE-EKUN, J. I. OKORO,**  
**A. SANUSI, JJSC**

MR. AKINFELA FRANK COLE ..... APPELLANT  
AND

1. MR. ADIM JIBUNOH  
2. REV. C.I.M FAJEMIROKUN ..... RESPONDENTS  
(Practicing under the name and  
style of CHRIST FAJEMIROKUN  
and ASSOCIATES).  
3. DEPUTY SHERIFF HIGH  
COURT OF LAGOS STATE

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JUDGMENTS - Res judicata - Where court has finally settled matter in dispute - Neither party nor privy may relitigate same issue under the guise of fresh action - As the matter is said to be res judicata (H1)

COURTS - High Courts - Co ordinate jurisdiction - A court of co ordinate jurisdiction cannot sit as appellate court in another case - To review a decision made by another court of the same hierarchy (H2)

PROPERTY LAW - Sale - Reversion - Sheriff & Civil Process Law s. 47 - Failure of appellant to set aside the sale of her property within 21 days of the sale - Has exposed her as indolent party (H3)

**FACTS**

Suit no. ID/1082/90 between 2<sup>nd</sup> respondent and appellant had been previously tried in Lagos State High Court, Ikeja Division. 2<sup>nd</sup> respondent was successful in the suit and the sum of N169,000.00 was awarded in his favour against appellant. In the circumstance, a writ of *fifa* was filed to cause execution against

appellant's moveable property. That execution yielded the sum of N15, 812.50 of which 2<sup>nd</sup> respondent felt was insufficient to satisfy the judgment debt. Consequently, 2<sup>nd</sup> respondent applied to the court for issuance of a writ of attachment and sale of the immovable property of appellant for the outstanding sum of money. The court made an order for writ of attachment to be issued against the immovable property of appellant known as No. 23 Osipitan Street Bariga, Lagos. Despite the issuance of the order, appellant neglected to pay the judgment debt. Appellant rather brought a motion seeking to set aside the order. The court dismissed appellant's motion. Following this dismissal, Deputy Sheriff of the court issued a public notice of auction sale, advertising the sale of the property of appellant.

Thereafter, appellant's property was sold publicly in an auction to 1<sup>st</sup> respondent (being the highest bidder) and accordingly a certificate of purchase of the property was issued to 1<sup>st</sup> respondent, after 21 days from the date of sale. Aggrieved, appellant commenced a fresh suit no. 10/3228/94 at the Lagos State High Court, challenging the sale and seeking to declare same null and void. In reaction, 1<sup>st</sup> respondent herein filed a notice of preliminary objection challenging the jurisdiction of the court to try the suit, on grounds that the issues raised in suit no. ID/3228/94 had been raised and determined in the previous suit no. ID/1082/90 and that the Sale of appellant's property has become absolute pursuant to the provision of the Sheriff and Civil Process Law of Lagos State. The court dismissed the objection on the basis that the nature of the action brings it outside the ambit of the Sheriff and Civil Process Act. Dissatisfied, 1<sup>st</sup> respondent appealed to the Court of Appeal Lagos Division. The appeal was allowed. Aggrieved, appellant has appealed to the Supreme Court.

### **ISSUES FOR DETERMINATION**

*"1. Whether an Order for Writ of attachment and sale of immoveable property made by a High Court for the enforcement of Judgment debt obtained in previous suit No.ID/1082/90 - REV. C.L.M. FAJEMIROKUN VS MRS. TITILAYO COLE operates as a RES JUDICATA precluding the Plaintiff/Appellant from filing a fresh suit ID/3228/94 - MRS. TITILAYO COLE VS. C.L.M.*

*FAJEMIROKUN & TWO OTHER to challenge the sale of the immoveable property carried out fraudulently and illegally.*

*2. Whether the Plaintiff/Appellant herein is right to have filed a fresh writ ID/3228/94 challenging the sale of her property through fraudulent means instead of filing an application within 21 days to the same court to set aside the sale pursuant to Section 47 of Sheriff and Civil Process Act Cap 407 LFN 1990."*

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

*JUDGMENTS - Res judicata*

**1. Where a court of competent jurisdiction has finally settled a matter in dispute between parties, neither party nor privy may relitigate that issue as under the guise of bringing a fresh action, since the matter is said to be res judicata. The judgment in Suit No. ID/1082/90 is a final judgment of a competent Court, which is a judgment in rem. The finding of Martins J. in Suit No. ID/1082/90 is binding on the Appellant in this case and estops her from raising in Suit No. ID/3228/94 the issue that have been finally decided in that earlier case.**

**In view of the foregoing, the 1<sup>st</sup> Respondent can rightly raise issue estoppel to sustain plea of res judicata in the circumstances. I agree with the learned Counsel for the 1<sup>st</sup> Respondent that an order or judgment obtained to attach and sell immovable property is a judgment in rem and since it is an insolvency pronouncement it took away absolutely from the judgment debtor her legal character over the property which has been attached and sold.**

(pp. 544 A/545 A)

*COURTS - High Courts - Co ordinate jurisdiction*

**2. The learned Judges of the High Court of a State have equal powers and coordinate jurisdiction. See Section 6 of the High Court Laws of Lagos State 1990 and Section 270 of the 1999 Constitution (as amended).**

**A Court of co-ordinate jurisdiction has no constitutional power to sit as an appellate Court in another case and review and/or adjudicate on a decision or order made by another Court of the same hierarchy.** (p. 544 C)

<sup>B</sup> *PROPERTY LAW - Sale - Reversion*

**3. The failure on the part of the Appellant to set aside the sale of her property within 21 days of the sale of her property under S. 47 of the Act (supra) has exposed her as an indolent party who has, not come to Court with clean hands. Consequently, the provisions of Sections 48 and 50 of the Law reproduced above, become effectual. She lost the armour provided for in the said S. 47 of the Act. She failed to utilise same as a “saving grace and anchor” to salvage her immovable property, the subject of a writ of attachment. It is too late in the day to cry over spilt milk.** (p. 549 C)

<sup>E</sup> **NOTABLE POINT OF INTEREST**

**OKORO JSC**

**1. Words & phrases – “May” sometimes connotes mandatory act**

<sup>F</sup> It has been argued that the use of the word “may” in section 47 of the Sheriff and Civil Process Act gives a discretion on an applicant whether to apply or not. I think this is not correct as a duty is placed on the appellant herein to make the application if she wanted to save the property from being sold absolutely. This is one situation where the word “may” would connote mandatories.  
<sup>G</sup> (p. 557 H)

**REPRESENTATION**

John Odionu Esq. for the Appellant  
<sup>H</sup> M.N.O. Olapade Esq. for 1<sup>st</sup> Respondent, 2<sup>nd</sup> and 3<sup>rd</sup> Respondent absent from Court 2<sup>nd</sup> Respondent’s Brief of Argument settled by Joseph A. Oyinlola Esq. deemed filed on 11/12/2012 was deemed duly argued and considered

### **CASES REFERRED TO**

- Nkanu v. Onun (1977) 5 SC 13  
 Ibero v. Ume-Ohana (1993) 3 NWLR (pt. 277) 510  
 Faleye v. Otapo (1995) 3 NWLR (pt. 381) 1  
 K-Flow Farm Industries Ltd. v. University of Ibadan (1993) NWLR B  
 (pt. 290) 719  
 Gani v. A-G Lagos State (No. 1) (1989) 3 NWLR (pt. 112) 707  
 Oke v. Atoloye (1986) 1 NWLR (pt. 15) 241  
 Okafor v. A-G Anambra State (1991) 6 NWLR (pt. 200) 656 C  
 Bank of the North Ltd. v. Nigeria Bank of Commerce & Industry  
 Ltd. (1990) 5 NWLR (pt. 150) 263  
 Oloriode v. Oyebi (1984) 5 SC 1  
 Igbeke v. Okadigbo (2013) 12 NWLR (pt. 1368) 225  
 Igwego v. Ezeugo (1992) 6 NWLR (pt. 249) 561 D  
 Oshodi v. Eyifunrni (2000) 13 NWLR (pt. 684) 298  
 Ogboru v. Uduaghan (2011) 17 NWLR (pt. 1277) 727  
 Okpalugo v. Adeshoye (1996) 10 NWLR (pt. 476) 77  
 Adesola v. Abidoye (1999) 10-12 SC 109 E

### **STATUTES REFERRED TO**

- Sheriff & Civil Process Act LFN 1990, s. 47  
 High Court Laws of Lagos State 1990, s. 6  
 Constitution of the Federal Republic of Nigeria 1999 (as amended), F  
 s. 270  
 Evidence Act Cap 18 2011, s. 60(1)  
 Sheriffs & Civil Process Cap 127 Law of Lagos State, ss. 47- 50  
 Auction Law Cap. 126 vol. vi Laws of Lagos State 1973 G

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

This is an appeal by the Appellant against the judgment of the Court of Appeal, Lagos Division delivered on 17th day of November, 2005, wherein it held that: H

*“Issue of estoppels has been successfully raised to sustain plea of Res judicata.”*

The background facts in this appeal are briefly exposed for the better understanding of the issues involved as follows: The Suit

No. ID/1082/90- REV. CLM FAJEMIROKUN (2<sup>nd</sup> Respondent herein) v. MRS. TITILAYO COLE (Appellant herein) had been previously tried in Lagos State High Court, Ikeja Division. The 2<sup>nd</sup> Respondent herein, as plaintiff in the suit, was successful and the sum of N169,000 was awarded in his favour against the Appellant herein, as the defendant. Consequently a writ of *fifa* was filed to cause execution against Appellant's moveable property. That execution yielded sum of N15, 812.50; which the 2<sup>nd</sup> Respondent felt was insufficient to satisfy the judgment debt. Consequently, as a judgment creditor, the 2<sup>nd</sup> Respondent applied to court for issuance of a writ of attachment and sale of the immovable property of the appellant for the sum of money outstanding against the judgment debtor, the Appellant herein.

Consequently the court made an order for writ of attachment to issue against the immovable property of the judgment debtor known as No. 23 OSIPITAN STREET, BARIGA, LAGOS.

The Judgment debtor, Appellant herein after the order of writ of attachment of her immovable, property, still failed, neglected and/or refused to pay the judgment debt. However, on 24/04/94, she filed a motion seeking to set aside the order of writ of attachment by the court.

Upon the dismissal of the application of the judgment debtor, the Deputy Sheriff, Lagos State High Court issued a Public Notice of Auction Sale, advertising the sale of the property of the judgment debtor.

On 23/11/94 the sale was conducted publicly and the Appellant's property was sold for the sum of N450, 000 to the 1<sup>st</sup> Respondent herein, the highest bidder and accordingly a certificate of purchase of the property was issued to him, after 21 days from the date of sale.

Dissatisfied with the sale of her property, the Judgment debtor, Appellant herein now instituted a fresh suit No. 10/3228/94 on 23/12/94 challenging the sale and seeking to declare it null and void.

The 1<sup>st</sup> Respondent herein, in reaction to the Writ of Summons and Statement of Claim filed a Notice of Preliminary Objection challenging the jurisdiction of the court to try the suit on grounds

that the issues raised in Suit No. ID/3228/94 had been raised and determined in the previous Suit No. ID/1082/90 and that the Sale of the Appellant's property has become absolute pursuant to the provision of the Sheriff and Civil Process Law of Lagos State.

A point that has been made and our attention have been promptly drawn to by the learned counsel for the 1<sup>st</sup> Respondent in his Amended Brief is that the period between the date of sale of the property on 23/11/94 and the date of filing suit No. ID/3228/94 on 23/12/94 was 30 days. The learned trial judge had ruled that there was no merit in the preliminary objection filed by the 1<sup>st</sup> Respondent herein, as the nature of the action brings it outside the ambit of the Sheriff and Civil Process Act. He then dismissed the preliminary objection to try the suit.

Being dissatisfied with the foregoing Ruling of the learned trial judge, the 1<sup>st</sup> Respondent herein, appealed to the court below. It is further noted that in that court, while the Appellant herein filed her brief of argument on 19/09/2001, and the 2<sup>nd</sup> Respondent herein filed his brief on 18/04/2002 the 3<sup>rd</sup> Respondent did not file any brief of argument.

On 4/10/2005, the court below allowed the appeal of the 1<sup>st</sup> Respondent herein. The Appellant being dissatisfied with this judgment appealed against it to this Court by filing a Notice of Appeal containing two grounds of Appeal with their particulars, as follows:-

*"1. The learned Justices of Court of Appeal erred in law when they held as follows: "that issue of estoppel has been successfully raised to sustain the plea of Res Judicata."*

#### PARTICULARS OF ERROR

(1). A close look at Suit No. ID/1082/90 and Suit No. 10/3228/94 will reveal that the parties are not the same. Both the Deputy Sheriff of Lagos High Court and Mr. Adim Jibunoh are not parties in Suit No. 10/1082/90.

(2) The subject matter in Suit No. ID/1082/90 had to do with debt simpliciter while the subject matter in No.ID/3228/94 has to do with the sale of the property situate at No.23A, Oshipitan Street, Bariga Lagos.

(3) The issue raised in Suit No. 10/1082/90 had to do with

whether or not the Defendant therein Mrs. Titilayo Cole was owing the sum of N169, 000.00 as claimed in the Writ of Summons while the subject matter in Suit No. ID/3228/94 borders on the propriety of the sale of the Plaintiff's property situate at No.23A, Oshipitan Street Bariga Lagos by the Defendant.

B (4) The Appellant in the Lower court was unable to satisfy the conditions for a successful plea of Res Judicata.

(2) The learned Justices of Court of Appeal erred in law in holding that the Appellant did not bring suit No. ID/3228/94 within  
C 21 days as contained in Section 47 of the Sheriffs and Civil Process Law when it held as follows:

*"that if an applicant fails to set aside a Writ of attachment and sale of immovable property, he will be free to institute a fresh suit to set aside the sale but this must be done within 21 days from  
D the date of the sale of the property since a Writ of Possession is not supposed to be issued to the Purchaser for value until 21 days have elapsed following the sale."*

#### PARTICULARS OF ERROR

E 1. Section 47 of the Sheriff and Civil Process Act 1990 Laws of the Federation does not apply to the Plaintiff/Appellant's case in Suit No. ID/3228/94.

2. The Appellant's complaints in Suit No ID/3228/94 is not based on irregularity as contained in section 47 of  
F the Sheriff and Civil Process Act but on fraud and forgery.

3. Section 47 of the Sheriff and Civil process Act 1990 Laws of the Federation of Nigeria is invoked where there is irregularity in the sale of attached property.

G 4. The word "may" as appeared in Section 47 of the Sheriff and Civil Process Act 1990 Laws of the Federation of Nigeria is generally permissive and not mandatory. It does not foist on a party a legal duty which must be performed.

H 5. The particulars of fraud having been particularized by the Plaintiff/Appellant in paragraph 22 of her statement of claim brings this action clearly outside the ambit of Sheriff and Civil Process Act.

The two issues raised for determination by the Appellant in her brief of argument are as follows:-



*“1. Whether an Order for Writ of attachment and sale of immoveable property made by a High Court for the enforcement of Judgment debt obtained in previous suit No.ID/1082/90 - REV. C.L.M. FAJEMIROKUN VS MRS. TITILAYO COLE operates as a RES JUDICATA precluding the Plaintiff/Appellant from filing a fresh suit ID/3228/94 - MRS. TITILAYO COLE VS. C.L.M. FAJEMIROKUN & TWO OTHER to challenge the sale of the immoveable property carried out fraudulently and illegally.*

*2. Whether the Plaintiff/Appellant herein is right to have filed a fresh writ ID/3228/94 challenging the sale of her property through fraudulent means instead of filing an application within 21 days to the same court to set aside the sale pursuant to Section 47 of Sheriff and Civil Process Act Cap 407 LFN 1990.”*

The 1<sup>st</sup> Respondent in his brief of argument formulated two issues or determination as follows:

*“2.1 Whether the issue of the setting aside of the writ of Attachment and sale of the Appellant’s property known as No.23 Osipitan Street Bariga, Lagos raised in the present suit No. ID/3228/94 has not been raised and determined upon in suit... No.ID/1082/90 to entitle the 1<sup>st</sup> Respondent plead issue estoppels being a Judgment in rem.*

*2.2. Whether the court can by a fresh suit or otherwise set aside a sale which title has crystallized and a certificate of purchase issued thereon, after 21 days from date of sale, to a third party Bona Fide purchaser for value without notice.*

The 2nd Respondent on the other hand in his brief of argument formulated two issues for determination similar to those of the 1<sup>st</sup> Respondent, needless reproducing them.

It is note worthy that the 3<sup>rd</sup> Respondent did not file any brief of argument in this appeal.

On the 1st issue, learned counsel for the appellant submitted that to sustain a plea of Res Judicata, the party pleading it must satisfy the following conditions:- that the parties or their privies are the same in the present case as in the previous case; that the issue and the subject matter are the same in the present case as in the previous suit; that the adjudication in the previous case must have been given by a court of competent jurisdiction; and finally

- that the previous decision must have finally decided the issues between the parties. Reliance was placed on the decisions of this court in NKANU V. ONUN (1977) 5 SC. 13; IBERO v. UME-OHANA (1993) 3 NWLR (Pt.277) 510 at 513 and FALEYE v. OTAPO (1995) 3 NWLR (pt.381) page 1 at page 10. Learned
- B Counsel submitted that a close look at the two cases in question namely: 10/1082/90- REV. CLM FAJEMIROKUN v. MRS. TITILAYO COLE and ID/3228/94 \_ MRS. TITILAYO COLE V. 1 REV. CLM FAJEMIROKUN 2. THE DEPUTY SHERIFF HIGH
- C COURT, LAGOS 3. MR. ADIM JIBUNOH; will reveal that the parties are not the same. The reason being that both the Deputy Sheriff and Mr. Adim Jibunoh are not parties in suit No. ID/1082/90. Secondly, that the subject matter in suit No. ID/1082/90 had to do with debt of N169, 000.00 owed by Mrs. Cole to Rev. CLM
- D Fajemirokun, while the subject matter in Suit No. ID/3228/94 has to do with the property at No.23A Osipitan Street Bariga, Lagos. It is contended therefore that the plea of estoppel per Res Judicata cannot be sustained. It is further explained that the issue raised in
- E suit No. ID/1082/90 had to do with whether or not the Defendant therein (appellant herein) was owing the sum of N169, 000.00 as claimed in the Writ by the plaintiff therein, Rev. C.L.M Fajemirokun. That the granting of an order of attachment against the immovable property of the Appellant herein was not part of the issues
- F raised in Suit No. ID/1082/90. In the present case ID/3228/94 the issue before the court borders on the sale of the Appellant's property. It is submitted that once allegation of fraud, particulars of which are contained in the statement of claim, is proved, it vitiates the sale and takes away the right of title and interest which the 1<sup>st</sup>
- G respondent had purchased. It is urged on us to hold that the plea of Res Judicata cannot succeed in this case as to preclude the appellant herein from bringing another suit to challenge the sale of her property fraudulently by the Respondents herein.
- H On his part, the 1<sup>st</sup> Respondent has contended that the main issue in Suit No. 10/3228/1994 between MRS. TITILAYO COLE VS. REV. CLM FAJEMIROKUN AND OTHERS was a claim by the Appellant herein praying the Court to set aside the writ of attachment and sale of her property known as No. 23A Osipitan

Street Bariga, Lagos which prayer had been made in Suit No. ID/1082/90 between REV. CLM FAJEMIROKUN VS. MRS. TITILAYO COLE and was refused by Ola Martins J. That there is admission by the Appellant herein that the judgment was given against her in the previous said Suit No. ID/1082/1990 as averred in paragraph 5 of her statement of claim. That she also admitted that due to her inability to settle the judgment debt in that suit an order of attachment and sale was made against her immovable property as stated in paragraph 7 of her Statement of Claim. It is the further contention of the Appellant that she applied to the Court to set aside the order of writ of attachment and sale which the Court refused. In paragraph 9 of her statement of claim she averred that the sale of her property took place on 23/11/1994. B C

Learned Counsel for the 1<sup>st</sup> Respondent has submitted that the Appellant having admitted the foregoing set of facts no further evidential proof was required. It is accordingly submitted that all the entire set of facts and circumstances necessary for the appellant to prove and succeed in Suit No. ID/3228/94 have been adjudicated upon previously in Suit No.ID/1082/90. D E

It is submitted that if the trial Court is allowed to assume jurisdiction it will proceed with the instant Suit and possibly enter judgment in favour of the Appellant herein and this will tantamount to a review of the decision of the Court in the previous Suit No. ID/1082/90. F

In the brief of argument of the 2<sup>nd</sup> Respondent, his learned Counsel associates and aligns himself with the submissions of the learned Counsel for the 1<sup>st</sup> Respondent absolutely. However, by way of emphasis, learned Counsel has noted that 2<sup>nd</sup> Respondent was a party in Suit No. ID/1082/90 and he got judgment on 25/3/92 against the Appellant herein who was the defendant in that case. G

It is submitted that all issues raised in Suit No. 10/3228/94 had been adjudicated upon in the previous Suit No. 10/1082/90. H That the issues raised in ID/3228/94 relate and concern the sale of Appellant's property No. 23A Osipitan Street Bariga, Lagos State as a result of her failure to pay the judgment debt in Suit No. 10/1082/90 and her motion to set aside writ of attachment and sale

was dismissed by Martin J. That the fact that Appellant herein filed a Suit No. ID /3228/94 challenging the sale of her immovable property ordered by writ of attachment made in previous Suit No. ID/1082/90 and averring allegation of fraud in the conduct of sale will not confer jurisdiction on the trial Court.

B Learned Counsel has submitted further that the mere addition of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in Suit No. ID/3228/94 is misconceived and this cannot justify the institution of fresh suit.

C Learned Counsel has finally submitted that the Court sitting in Suit No. ID/3228/94 not being a court of appeal with appellate jurisdiction, conferred on it by S.240 of the Constitution of Federal Republic of Nigeria, 1999 or by any enactment cannot determine whether the order of Martins J. in Suit No. ID/1082/90 was illegal or not.

D The main contention of the Appellant in Suit No. 10/3228/94 between MRS. TITILAYO COLE VS. REV. CLM FAJEMIROKUN AND OTHERS is a claim by her praying the Court to set aside the writ of attachment and sale of her property known  
E as No. 23A Osipitan Street Bariga, Lagos which prayer has previously been made in Suit No. ID/1082/90 between REV. CLM FAJEMIROKUN vs. MRS. TITILAYO COLE determined and dismissed by OLA MARTINS J.

F Certain admissions or claims have been made by the Appellant herein requiring no evidential proof. These were the entire set of facts and circumstances necessary for her to prove and succeed in Suit No. ID/3228/94. I agree with the learned counsel for the respondents that these set of facts and circumstances have been  
G adjudicated upon in a previous Suit No. ID/1082/90 between REV. CLM FAJEMIROKUN vs. MRS. TITILAYO COLE. I shall now come to the similarities set of facts and circumstances in both Suits.

First to those admissions made by the Appellant herein. In paragraph 5 of her Statement of Claim as plaintiff she avers as  
H follows:-

*“That Plaintiff avers that on 25<sup>th</sup> March 1992 judgment was given against her in Suit No. ID/1082/90 in the sum of N169, 000.00 in favour of the 1<sup>st</sup> Defendant (2<sup>nd</sup> Respondent herein).”*

This is a clear admission by the Appellant that judgment

was obtained against her in that previous Suit No. ID/1082/90. There is also admission by the Appellant in paragraph 7 of the Appellant's statement claim that due to her inability to pay the judgment debt in that previous suit an order of attachment and sale was made against her immovable property. It is in paragraph 9 of her statement of claim that the appellant made further admission to the effect that she applied to set aside the order of Writ of attachment and sale, but the court rejected and refused same. As for the date of sale of her property, Appellant averred that it was on 23/11/94. As I have stated the foregoing set of facts and circumstances necessary for the Appellant to prove and succeed in Suit No. ID/3228/94, have formed the basis for the findings and adjudication in previous Suit No. 10/1082/90. The issue raised in Suit No. ID/3228/94 relates and concern the sale of the Appellant's property described as No. 23A Osipitan Street, Bariga, Lagos.

In paragraph 3.3 of the Appellant's brief, it is contended that the issues raised in Suit No. ID/1082/90 had to do with the judgment debt of N169, 000 owed by her to the 2<sup>nd</sup> Respondent while the subject matter of Suit No. ID/3228/94 has to do with the property situate at No. 23A Osipitan Street, Bariga, Lagos.

This contention is misconceived. The issue of the attachment and sale of the Appellant's property arose and was accordingly adjudicated upon by the learned trial Judge in Suit No. ID/1082/90. The Appellant's motion therein to set aside the writ of attachment and sale was dismissed by the said Judge.

The case of the 1<sup>st</sup> Respondent herein is that the issue of the setting aside of the writ of attachment and sale of the Appellant's immovable property has been decided in Suit No. ID/1082/90.

The fact that the Appellant had filed Suit No. ID/3228/94 which in substance is challenging the sale of her immovable property ordered by writ of attachment made in previous Suit No. ID/1082/90 alleging fraud in the conduct of sale will not confer jurisdiction on the trial Court under any guise, when in fact it has none. I agree with the learned Counsel for the Respondents that the eventual success of the Appellant in suit ID/3228/94 will fundamentally erase and indeed affect the decision already taken in Suit No. ID/1082/90.

***Where a court of competent jurisdiction has finally settled a matter in dispute between parties, neither party nor privy may relitigate that issue as under the guise of bringing a fresh action, since the matter is said to be res judicata. The judgment in Suit No. ID/1082/90 is a final judgment of a competent Court, which is a judgment in rem. The finding of Martins J. in Suit No. ID/1082/90 is binding on the Appellant in this case and estops her from raising in Suit No. ID/3228/94 the issue that have been finally decided in that earlier case.*** See: K-FLOW FARM INDUSTRIES LTD V. UNIVERSITY OF IBADAN (1993) NWLR (Pt. 290) 719 at 724.

***The learned Judges of the High Court of a State have equal powers and coordinate jurisdiction. See Section 6 of the High Court Laws of Lagos State 1990 and Section 270 of the 1999 Constitution (as amended).***

***A Court of co-ordinate jurisdiction has no constitutional power to sit as an appellate Court in another case and review and/or adjudicate on a decision or order made by another Court of the same hierarchy.*** See: CHIEF GANI V. A-G LAGOS STATE No. 1 (1989) 3 NWLR (Pt. 112) 707 at 774 where the Court held:

*“The presumption has always been that the decisions of a superior court are within jurisdiction and are correct until the contrary is proved. It seems to me that even if the decision of the superior court is a nullity, the only proper way of challenging such decision must be by an application before the very court which tried the case or by an application to the appropriate appellate court even if the judgment of Longe J. were a nullity the proper way to set it aside is by an Appeal not by a review before a court of co-ordinate jurisdiction it seems to me that, in view of the provision of the constitution, which carefully shares jurisdiction to the various courts .... Only the court vested with the particular jurisdiction can interfere with the decision of another court.”*

The ruling of the trial Court that it has jurisdiction to entertain the present suit is due to the averments of fraud contained in the statement of claim, whereas the substance or issue in the suit

is a challenge and a disguise to set aside the decision and auction carried out by virtue of an order made by a Court of coordinate jurisdiction in the earlier Suit No.ID/1082/90. This is not proper.

***In view of the foregoing, the 1<sup>st</sup> Respondent can rightly raise issue estoppel to sustain plea of res judicata in the circumstances. I agree with the learned Counsel for the 1<sup>st</sup> Respondent that an order or judgment obtained to attach and sell immovable property is a judgment in rem and since it is an insolvency pronouncement it took away absolutely from the judgment debtor her legal character over the property which has been attached and sold.*** See ADESINA OKE V. SHITTU ATOLOYE AND ORS (1986) 1 NWLR (Pt. 15) 241 See further; section 60(1) of the Evidence Act Cap 18, 2011.

The Appellant is required by law to take prompt action to have the writ of attachment and sale of the said property set aside before the writ of possession could be issued to the 1<sup>st</sup> Respondent. Be it noted that the writ of Summons was issued on 23/12/94 while the sale took place on 23/11/94 more than 21 days after the sale had taken place. I agree with the Court below when it held on page 166 of the records thus:

*“Even if the allegation contained in paragraph 22 of the Statement of Claim is proved, it cannot affect the sale of the property to the Appellant because he has acquired legal title over it by virtue of the Writ of Possession granted to him. If the application had been made timeously, and the sale was eventually set aside the Appellant would be entitled to receive back the money he paid for the purchase while the 2<sup>nd</sup> Respondent will still be left with the remedy of executing the Judgment obtained in Suit No. ID/1082/90.”*

It is on the foregoing premise that I resolve this issue in favour of the Respondents herein.

The Appellant’s stance on this second issue is that she is well within the right to have filed Suit No. 10/3228/94 as she has alleged fraud and the only way for her to be given an opportunity to table her allegation is to file a fresh suit notwithstanding that the sale was filed 21 days after the sale was concluded. Setting out copiously provisions of sections 47- 50 of the Lagos State Sheriffs

and Civil Process Law (which is in *pari materia* with the Sheriffs and Civil Process Act LFN (1990), learned Counsel for the Appellant has submitted that the law does not apply to the Appellant's case in Suit No. ID/3228/94 contrary to the contention of the 1<sup>st</sup> Respondent's Counsel. In buttressing this assertion, learned Counsel for the Appellant submitted that the learned trial Judge in Suit No. ID/1082/90 between REV. C. L. M. V. MRS. TITILAYO COLE made an order for attachment and sale of the Appellant's property while Appellant's case in Suit No. ID/3228/94 which gave rise to this appeal is challenging the fraudulent way the sale was conducted. It is submitted that section 47 of the Sheriff and Civil Process Act is involved where there is an irregularity in the sale of attached property: Reliance was placed on the cases OKAFOR V. AG ANAMBRA STATE (1991) 6 NWLR (Pt. 200) 656 at 662 and BANK OF THE NORTH LTD. V. NIGERIA BANK FOR COMMERCE AND INDUSTRY LTD AND OTHERS (1990) 5 NWLR (Pt. 150) 263 at 272. That the word "may" as appeared in section 47 of the Act (*Supra*) is generally permissive and not mandatory.

Learned Counsel for the Appellant relying on the case of OLORIODE V. OYEBI (1984) 5 SC 1 at 24 has argued that since the Appellant's case which is based on fraud has not yet been determined, the sale cannot be said to be absolute.

The contention of the learned Counsel for the 1<sup>st</sup> Respondent is that since the Appellant's action in seeking to declare the sale of her property illegal, null and void is grounded on fraud, she should have applied to set aside the sale as provided under Section 47 of the Lagos State Sheriff and Civil Process Law.

It is also submitted by the learned Counsel that the only circumstance in which a writ of attachment and/or sale of property can be set aside is by an application to Court brought within 21 days of the sale, pursuant to Section 47 of the Sheriff and Civil Process Act before the crystallization of the title and/or interest of a third party bona fide purchaser for value without notice, otherwise the sale becomes absolute by virtue of Section 48 of the Sheriff and Civil Process Act.

Learned Counsel for the 2<sup>nd</sup> Respondent submitted that the



court cannot by a fresh suit or otherwise set aside sale which title has been concluded and a Certificate of purchase issued out to a third party after 21 days. It is submitted that the failure of the Appellant to apply to set aside the sale of her property within 21 days of the sale of her property under S. 47 of the Sheriff and Civil Process Act being the enactment relating and governing the writ of attachment and sale of immovable property of a judgment debtor, has blocked her right of remedy. B

The second issue, a portion of which has been dealt with in the first issue is whether the Court can by a fresh suit or otherwise set aside a sale which title has crystallized and a Certificate of purchase issued thereon, after 21 days from the date of sale to a third party bona fide purchaser for value without notice? C

To recapitulate, the contention of the Appellant is that the Suit 10/3228/94 is outside the ambit of Section 47 of the Sheriff and Civil Process Act since her allegation is on fraud and forgery perpetrated by the Respondents during the sale of her property. That the case is not based on irregularity as contained in Section 47 of the said Act but on fraud and forgery. Besides, it is argued, the word “may” as appeared in the Act is permissive and not mandatory. D E

Section 47 of the said Law provides:

*“47. At any time within 21 days from the date of the sale of any immovable property, application may be made to the court to set aside the sale on the ground of any material irregularity in the conduct of the sale, but no sale shall be set aside on the ground of such irregularity unless the applicant shall, prove to the satisfaction of the court that he has sustained substantial injury by reason of such irregularity.” F G*

Be it noted that Sections 48 - 50 of the said Law deal with the situation when the sale of immovable property becomes absolute, the return of deposit or purchase money and the issuance of Certificate of title. These sections state as follows: H

*“48. If no such application as is mentioned in Section 47 of this law is made, the sale shall be deem absolute. If such application be made and the objection be disallowed the court shall make an order confirming the sale, and in like manner, if the objection*

*be allowed, the court shall make an order setting aside the sale for irregularity.*

49. *Wherever the sale of immovable property is set aside the purchaser shall be entitled to receive back any money deposited or paid by him on account of such sale, with or without interest, to be paid by such parties and in such manner as it may appear proper to the court to direct in each instance.*

50. *After a sale of immovable property shall have become absolute in manner aforesaid, the court shall grant a certificate to the person who may have been declared the purchaser at such sale, to the effect that he has purchased the right, title and interest of the judgment debtor in the property sold, and such certificate shall be taken and deemed to be a valid transfer of such right, title and interest."*

Learned trial Judge, after referring to S. 47 of the Sheriff and Civil Process Act stated thus:

*"The provision of Section 47 above is not as mandatory as the use of the word "may" depicts that the Plaintiff may or may not apply to the Court to set aside the said sale. She is not mandated to do so. It follows thereafter that should a Plaintiff elect not to apply to Court to set aside the order of sale he/she will not be bound by the above provision"*

Disagreeing with the foregoing interpretation of the section 47 of the said law, the Court below had this to say:

*"The application to set aside the sale must be made timeously otherwise the fraudulent party acquires good title which he can transfer to innocent Purchaser for value ... It is necessary to point out that Suit No. ID/3228/94 has not taken off the ground. The issue is whether in view of Section 47 of the Sheriff and Civil Process Law, any party who wishes to impugn the sale of immovable property must apply to Court to set aside the sale and if any other process is taken it will be defeated by the plea of res judicata."*

In *BANK OF THE NORTH LTD V. NIGERIAN BANK FOR COMMERCE AND INDUSTRY LTD* AND 3 ORS. (1990) 5 NWLR (Pt. ISO) 263, the Court considering the provisions of sections 47 and 48 of the Sheriff and Civil Process Law, Cap 123, Laws of

Northern Nigeria (which is in pari materia with the Lagos State provisions on the matter) the Court below, inter alia, held that the only statutory provision upon which one can challenge or set aside a sale under an order of Writ of Attachment is by virtue of Section 47 of the Law. See also G. C. AKUNONU V. BEKAERT OVERSEAS AND 2 ORS. (1995) 5 NWLR (Pt. 393) P 42 at 66. I agree and endorse this stance of the Court below. B

In Suit No. ID/3228/94 instituted by the Appellant in the High Court, she is challenging the attachment and sale of property conducted by the 3<sup>rd</sup> Respondent herein under the Sheriff and Civil Process Law Lagos State and Judgment Enforcement Rules which governs and regulates the enforcement of judgment and all issues related to and arising from judgment enforcement. C

***The failure on the part of the Appellant to set aside the sale of her property within 21 days of the sale of her property under S. 47 of the Act (supra) has exposed her as an indolent party who has, not come to Court with clean hands. Consequently, the provisions of Sections 48 and 50 of the Law reproduced above, become effectual. She lost the armour provided for in the said S. 47 of the Act. She failed to utilise same as a “saving grace and anchor” to salvage her immovable property, the subject of a writ of attachment. It is too late in the day to cry over spilt milk.*** It is in view of the foregoing that the Court below in its lamentation concluded at page 166 of the records thus: D  
E  
F

*“I agree with the submissions of the Appellant’s Counsel that the order of Writ of Attachment and sale of the Plaintiff’s immovable property is a judgment in rem and since it is an insolvency pronouncement it took away absolutely from the Judgment Debtor his legal character over the property which was attached and sold. See: ADESINA OKE VS. SHITTU ATOHOYE AND ORS. (1986) 1 NWLR (Pt.15) 241. That is why the Plaintiff needed to take prompt action to have the same set aside before the Writ of Possession could be issued to the Appellant. The Writ of Summons was issued on 24/12/94 while the sale took place on 23/11/94.- This is more than 21 days after the sale had taken place. Even if the allegation contained in paragraph 22 of the Statement of Claim is proved, it* G  
H

*cannot affect the sale of the property to the Appellant because he has acquired legal title over it by virtue of the Writ of possession granted to him. If the application had been made timeously and the sale eventually set aside, the Appellant would be entitled to receive back the money paid for the purchase... ”*

B In view of the foregoing I consider this appeal as lacking in merit and it is accordingly dismissed, while the decision of the Court below is affirmed. I award costs of N100,000 against the Appellant but in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents jointly.

C \_\_\_\_\_

### **ARIWOOLA JSC**

D I had the opportunity of reading in draft the leading judgment of my learned brother, Galadima, JSC, just delivered and I am in total agreement with the reasoning therein and the conclusion arrived thereat.

E There is no doubt that, by filing her action in suit No.ID/3228/940 after the expiration of the prescribed 21 days after she had failed to set aside the writ of attachment and sale of her immovable property, she had slept on her right and can no longer be heard. It was rather too late to complain by instituting a fresh action. This appeal is unmeritorious and is liable to dismissal. I too will dismiss the appeal.

F Accordingly, appeal is dismissed. I abide by the consequential order in the leading judgment, including that on costs.

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### **KEKERE-EKUN JSC**

G This is an appeal against the judgment of Court of Appeal Lagos Division, delivered on 17/1/2005 setting aside the ruling of the High Court of Lagos State delivered on 23/01/2001 per Philips, J (as she then was), which dismissed the Preliminary objection  
H raised by 3<sup>rd</sup> defendant (1<sup>st</sup> Respondent herein) seeking to strike out Suit No. ID/3228/94.

In the said suit, the appellant herein is challenging the sale of her property at No. 23A Oshipitan Street, Bariga, Lagos to the 1<sup>st</sup> respondent who bought the said property at an auction following

the issuance of a writ of attachment of the appellant's immovable property to satisfy the judgment in Suit ID/1082/90 after the court refused to set aside the writ of attachment and sale of the property. In Suit No. 10/3228/94 she seeks the following reliefs as per her writ of summons filed on 23/12/94:

1. A declaration that the purported sale of the plaintiff's property situate, lying and being at No. 23A Osipitan Street, Bariga, Lagos State by the 2<sup>nd</sup> defendant (3<sup>rd</sup> respondent in this appeal) to the 3<sup>rd</sup> defendant (1<sup>st</sup> respondent in this appeal) on 23/11/94 is unlawful, illegal, null and void. B

2. A declaration that the Auction Notice wherein contains a Statement Writ of Attachment and Sale of the Plaintiff's property was issued on the 14th day of December 1994 (a date after the sale of the said property) is null and void and not in conformity with the provisions of the Sales by Auction Law Cap. 126 Vol. VI Laws of Lagos State 1973. C

3. A declaration that the plaintiff is entitled to exercise her right, control, management and ownership of the said property.

4. An order of perpetual injunction restraining the defendants jointly and severally, whether by their servants, agents, officers and/or privies from trespassing, meddling, dealing with, parading as owners, taking possession of, selling or otherwise alienating the said property. D

The grounds of the objection to the suit were: E

(1) That issue of levy of execution by way of attachment and sale of the plaintiff/Respondent's property ordered in Suit. No. ID/1082/90: Rev. C.L.M. Fajemirokun Vs Mrs. Titilayo Cole being complained about in this present suit has become absolute pursuant to the Sheriffs and Civil Process Law Cap 127, Vol. II Laws of Lagos State. Therefore it is conclusive and constitutes Res judicata. F

(2) That Plaintiff/Respondents claim in this present suit seeking for a declaration of her entitlement to exercise right, control, management and ownership of the said property had been dealt with and affected by the ruling of 14th December 1993 in Suit No. ID/1082/90: Rev. C.L.M. Fajemirokun Vs Mrs. Titilayo Cole granting an order of attachment against the unmovable property of the G

Plaintiff/Respondent in this present suit. This issues (sic) above are thus Res Judicata and should not be re-opened by way of institution of a new suit.

(3) That this Honourable Court being a court of coordinate jurisdiction with the trial court in Suit No. 10/1082/90: Rev. C.L.M. B Fajemirokun Vs Mrs. Titilayo Cole does not have a supervisory and appellate power under the Constitution of the Federal Republic of Nigeria 1979 to seat (sic) on appeal to review an order in exercise of the authority and power of court (sic) of coordinate C jurisdiction as is being urged (upon) it by the plaintiff/respondent in her claim in this present suit.

(4) That the institution of this present suit is a flagrant abuse of the court's process since it runs counter to the procedure under the Sheriffs and Civil Process Act Cap.127 of Lagos to challenge a D sale of immovable property under the High Court Civil Procedure Rules nor was any order for extension of time sought and obtained to over-reach the expiration of the time limited by law.

The trial court rejected the plea of res judicata. It held that E the suit was competent and did not constitute an abuse of court process. The court also held that the plaintiff was not bound to come under the Sheriff and Civil Process Law of Lagos State, as the use of the word "may" in Section 47 thereof is permissive and not mandatory. On appeal to the Court of Appeal the ruling was F set aside. The court held that the plaintiff ought to have applied within 21 days from the date of auction to have the sale set aside.

It is the appellant's contention, with regard to the first issue for determination that the necessary conditions for a successful G plea of *res judicata* have not been satisfied in this case. It is his contention that the parties, subject matter and issues in the two suits are not the same. He argued that ID/1082/90 had to do with a debt owed by the appellant to the 2<sup>nd</sup> respondent, while 10/3228/94 has to do with the property at 23A Osipitan Street, Bariga, H Lagos. It is further contended that the issue in ID/3228/94 has to do with the propriety of the sale of the appellant's property wherein the appellant alleges fraud and that once fraud is established it vitiates the sale and takes away the 1<sup>st</sup> respondent's interest in the said property. It is the respondents' submission on the other hand

that the issue in both suits has to do with the attachment and sale of the appellant's property having regard to the fact that after the sale pursuant to the order of attachment in ID/1082/90, the appellant tried unsuccessfully to have the sale set aside. It is their contention that the appellant cannot institute a fresh suit under any guise. B

In a recent decision of this court in: Oleksandr & Ors. Vs Lonestar Drilling. Co. Ltd. & Anor. (2015) 4 - 5 SC (Pt.II) 1 @ 46 - 49, I had cause to examine the guiding principles for a successful plea of estoppel per rem judicatam and the distinction between C "cause of action estoppel and "issue estoppel". I reproduce the relevant portion hereunder:

*"The principle behind the doctrine of estoppel per rem judicatam was explained by this court in: Yusuf Vs Adegoke & Anor. (2007) 11 NWLR (Pt. 1045) 332 @ 361 - 362 H – A per D Adcremi, JSC thus:*

*"It has now become well entrenched in our civil jurisprudence that once a matter has been finally and judicially pronounced upon or determined by a court of competent jurisdiction, neither E the parties thereto nor their privies can subsequently be allowed to relitigate such matter in court. A judicial decision properly handed down is conclusive until reversed by a superior court and its veracity is not open to a challenge nor can it be contradicted. The term derives its force from good public policy which says there F must be an end to litigation. The maxim is interest reipublicae ut sit finis litium."*

A successful plea of estoppel per rem judicatam ousts the jurisdiction of the court before which it is raised. See: Igbeke Vs G Okadigbo (2013) 12 NWLR (pt.1368) 225 @ 254 D – E; Igwego Vs Ezeugo (1992) 6 NWLR (pt.249) 561. It is pertinent to note that although issue estoppel and estoppel per rem judicatam both come under one head of estoppel by judgment, there are subtle differences between the two. The difference was clearly illustrated H by this court in: Oshodi Vs Eyifunrni (2000) 13 NWLR (pt.684) 298 @ 326 A – D, thus:

*"This type of estoppel are of two kinds. There is the cause of action estoppel which effectively precludes a party to an action or*

*his agents or privies from disputing, as against the other party in any subsequent proceedings matters which had been adjudicated upon previously by a court of competent jurisdiction between him and his adversary and involving the same issues.*

*There is the second class of estoppel which is Issue estoppel:*

- B *within a cause of action, several issues may come into question which are necessary for the determination of the whole case. The rule is that once one or more of such issues have been distinctly raised in a cause of action and appropriately resolved or determined between the same parties in a court of competent jurisdiction, as a general rule, neither party nor his servant, agent or privy is allowed to re-open or re-litigate that or those decided issues all over again in another action between the same parties or their agents or privies on the same issues. See Lawal v. Yakubu Dawodu*  
D *(1972) 1 All NLR (Pt. 2) 270 at 272/ (1972) 8-9 SC 83; Olu Ezewani v. Nkali Onwordi and Others (1986) 4 NWLR (Pt. 33) 27 at 42 - 43 Samuel Fadiora and Another v. Festus Gbadebo and Another (1978) 3 SC 219 at 228 - 229 etc."*

- E *See also: Ito Vs Ekpe (2000) 3 NWLR (pt.650) 678. Issue estoppel may arise where a plea of res judicata could not be established because the cause of action is not the same. See: Adedayo Vs Babalola (1995) 7 NWLR (pt.40B) 383.*

- F *The conditions precedent to a successful plea of res judicata were amply set out by this Court in the case of The Honda Place Ltd. Vs Globe Motors Ltd. (2005) 14 NWLR (945) 273 at 291 B - E as follows.*

- (a) *There must be an adjudication of the issues joined by the parties.*  
G (b) *The parties or their privies as the case may be must be the same in the present case as in the previous case.*  
(c) *The issues and subject matter must be the same in the previous case as in the present case.*  
H (d) *The adjudication on the previous case must have been by a court of competent jurisdiction.*

*The previous decision must have finally decided the issue between the parties, that is the rights of the parties must have been finally determined."*



Applying the above principles to the facts of this case, there is no doubt that the issue of the attachment and sale of the appellant's property had already been conclusively dealt with by the court in ID/1082/90 when the appellant tried unsuccessfully to set it aside. The contention that the parties are different and therefore the doctrine of *res judicata* does not apply is misconceived, as the order for the attachment and sale of the appellant's property in 10/1082/90 is a judgment in rem. B

In the case of *Ogboru Vs Uduaghan* (2011) 17 NWLR (Pt.1277) 727 @ 764 -765 C-A, judgment in rem was defined C thus:

*"A judgment in rem is a judgment of a court of competent jurisdiction determining the status of a person or thing as distinct from the particular interest of a party to the litigation. Apart from the application of the term to persons, it must affect the "res" in the way of condemnation, forfeiture, declaration, status or title. D*  
*..... The feature of a judgment in rem is that it binds all person, whether party to the proceedings or not. It stops anyone from raising the issue of the status or person or persons or things, E*  
*or the rights or title to the property litigated before a competent court. It is indeed conclusive against the entire world in whatever it settles as to status of the person or property. All persons whether party to the proceedings or not are estopped from averring that the status of persons is other than the Court has by such judgment F*  
*declared or made it to be."*

See also: *Okpalugo Vs Adeshoye* (1996) 10 NWLR (Pt.476) 77; *Fointrades Ltd. Vs Uni Association Co. Ltd.* (2002) 8 NWLR (Pt.770) 669; *Olaniyan Vs Fatoki* (2003) 13 NWLR (Pt.837) 273; *Adesina Oke Vs Shittu Atoloye & Ors* (1986), NWLR (Pt. 15) 241 G

I agree with my learned brother, Suleiman Galadima, JSC, whose lead judgment I was privileged to read before now, and with which I am in full agreement, that issue estoppel applies in the circumstance of this case. I agree with him that the eventual H success of the appellant in Suit No. 1D/3228/94 would fundamentally erase and affect all the decisions already taken in Suit No. 1D/1082/90. I also agree that the order for the sale of the property by the High Court being an insolvency pronouncement took away

absolutely from the judgment debtor his legal rights over the property, which was attached and sold.

Sections 47 and 48 of the Sheriff and Civil Process Law Cap. 407 Laws of Lagos State provide the remedy available to the appellant in the circumstances, of, this case. They provide as follows:

*“47. At any time within twenty-one days from the date of the sale of immovable property, application may be made to the Court to set aside the sale on the ground of any material irregularity in the conduct of the sale, but no sale shall be set aside on the ground of such irregularity unless the applicant shall prove to the satisfaction of the court that he has sustained substantial injury by reason of such irregularity.*

*48. If no such application as is mentioned in Section 47 of this Act is made, the sale shall be deemed absolute. If such application be made and the objection be disallowed, the court shall make an order confirming the sale; and in like manner, if the objection be allowed the Court shall make an order setting aside the sale for irregularity.”*

In light of the above provisions, I am in complete agreement with the court below and my learned brother, Suleiman Galadima, JSC, that the appellant ought to have taken prompt action, within twenty-one days of the order of writ of attachment and sale of her immovable property, to have same set aside before the writ of possession could be issued to the 1<sup>st</sup> respondent. The sale took place on 23/11/94 while the writ of summons was issued on 23/12/94. Having waited for more than twenty-one days before taking action, the sale to the 1<sup>st</sup> respondent became absolute and, as rightly observed by the court below, the appellant purchased the right, title and interest, which the appellant had hitherto enjoyed before the attachment and sale of the property.

For these and the more detailed reasons advanced in the lead judgment, I also find this appeal to be lacking in merit. I dismiss it accordingly and affirm the judgment of the lower court. I abide by the award of costs made in the lead judgment.

**OKORO JSC**

I read in advance the lead judgment of my learned brother, Suleiman Galadima, JSC, just delivered with which I agree with both the reasoning and conclusion that this appeal is devoid of merit and deserves an order of dismissal. The facts have been ably set out in the lead judgment and I have no reason to repeat the exercise. I wish to however make a few comments in support of the judgment only. B

It is clear from the records that upon the dismissal of appellants' application, the Deputy Sheriff of the High Court of Lagos State issued a Public Notice of auction sale advertising the property of the judgment debtor for sale. The said sale took place on 23<sup>rd</sup> November, 1994 wherein the 1<sup>st</sup> respondent won the bid and paid the sum of N450,000.00 for the property. The records further show that between the date of order of writ of attachment on 14<sup>th</sup> December, 1993 and the date of the actual sale of the property on 23<sup>rd</sup> November, 1994 was a period of eleven months. D

Under section 47 of the Sheriff and Civil Process Act, the appellant had 21 days from the date of the sale of the property to apply for such a sale to be set aside if she had any reason to do so under the law. The section provides: E

*"At any time within 21 days from the date of the sale of any immoveable property, application may be made to the court to set aside the sale on ground of any irregularity in the conduct of sale, but no sale shall be set aside on ground of such irregularity unless the Application shall prove to the satisfaction of the court that he has sustained substantial injury by reason of such irregularity."* F

In spite of the above provision, the appellant failed to make the necessary application until after the expiration of 21 days and after the High Court, acting under sections 48, 49 and 50 of the Act, had issued a certificate of purchase to the 1<sup>st</sup> Respondent herein. I need to say that the effect of the issuance of the certificate under section 48 is to make the sale absolute. G H

It has been argued that the use of the word "may" in section 47 of the Sheriff and Civil Process Act gives a discretion on an applicant whether to apply or not. I think this is not correct as a duty is placed on the appellant herein to make the application if

she wanted to save the property from being sold absolutely. This is one situation where the word “may” would connote mandatories. See *Adesola v Abidoye* (1999) 10 - 12 SC 109 at 127 - 128.

I agree with the court below that an application to set aside the sale must be done timeously within the template prescribed in Section. 47 thereof and not until after an innocent purchaser for value has been issued a certificate of sale under Section 48 of the Act. I entirely agree that the appellant has lost the right to challenge the sale as same has been legally made absolute. The appeal is therefore unmeritorious and is also dismissed by me. I affirm the judgment of the court below and abide by the order as to costs made in the lead judgment.

D

### ***SANUSI JSC***

This appeal is against the judgment of the Court of Appeal, Lagos Division, (the Court below), delivered on 17<sup>th</sup> November, 2005 which after hearing the appeal found that the suit was caught by the doctrine of *Res Judicata* and it finally dismissed the appeal.

Briefly put, the facts of the case giving rise to this appeal are that a suit with No.ID/1082/90 namely *Rev. C.L.M Fajemirokun* (the 2<sup>nd</sup> Respondent herein) vs *Mrs. Titilayo Cole* (appellant herein, was earlier filed and tried by Lagos High court (Ikeja Division) in which the 2<sup>nd</sup> Respondent herein was successful and he obtained judgment in the sum of N169,000.00 against the present appellant, who was the defendant in that suit. Sequel to that a Writ of Attachment was filed for purpose of execution, of the judgment to cover the judgment debt against the appellant’s moveable property. After the execution, only, a sum of N15,812.50k was recovered which was obviously short of the judgment debt due to the 2<sup>nd</sup> Respondent. That being the case, the 2<sup>nd</sup> Respondent/judgment creditor applied to the trial court to issue Writ of Attachment and subsequently for the sale of the judgment debtor’s immovable property to cover the outstanding judgment debt. There upon, the trial High Court attached the landed property of the judgment debtor situate at No.23 Osipitan Street, Bariga, Lagos. Despite the order for attachment the appellant as judgment debtor, neglected or re-

fused to pay the judgment debt. Instead, the appellant/judgment debtor chose to file a motion on notice on 24/4/1994 seeking the court to set aside the Writ of Attachment. The motion on notice was heard and ultimately dismissed by the trial court.

Following the dismissal of the motion of the appellant, the Deputy Sheriff of the Lagos State High Court now 3<sup>rd</sup> Respondent herein, issued a Public Notice of Auction Sale by advertising the sale of the said landed property of the judgment debtor/appellant. On 23/11/94 the sale of the property was conducted publicly and the property was sold at a cost of N450,000 to the 1<sup>st</sup> Respondent herein, who happened to be the highest bidder and he was later issued with Certificate of Purchase after 21 days from the date of the sale.

Aggrieved by the sale of her property, the judgment debtor/appellant herein, decided to institute a fresh action as suit NO/ID/3228/94 of 13/1/1994 challenging the sale and seeking a declaration annulling the sale for same being void. In his reaction to the Writ of summons, the 1<sup>st</sup> Respondent filed a 'Notice of Preliminary Objection' challenging the jurisdiction of the trial court principally, on the ground that the issue raised in the latter suit (No/ID/3228/94) had been raised and determined earlier in the former suit i.e. No/ID/1082/90 and that the sale of the property had become absolute in the light of the provisions of Sheriff and Civil Process Act. Upon taking or hearing the Preliminary Objection, the learned trial judge dismissed the Preliminary Objection because according to him, the nature of the action did not relate to the provision of Sheriff and Civil Process Act.

Dissatisfied with the finding of the trial judge, the 1<sup>st</sup> Respondent herein, appealed to the court below. On 4/10/2005, the court below delivered its judgment allowing the appeal. The appellant thereupon became piqued by the decision of the court below, hence she appealed to this court on two grounds of appeal from which also two issues for determination were proposed by the appellant, namely:-

*(1) Whether an order for writ of attachment and sale of immovable property made by a High court for the enforcement of judgment debt obtained in previous suit ID/1082/90 – Rev. C.L.M.*

*Fajemirokun vs Mrs. Titilayo Cole operates as a Res judicata precluding the plaintiff/appellant from filing a fresh suit 10/3228/94 - Mrs. Titilayo Cole Vs C.L.M (Sic) Fajemirokun & 2 Ors to challenge the sale of immovable property carried out fraudulently and illegally.*

B (2) *Whether the Plaintiff/Appellant herein is right to have filed a fresh Writ - 10/3228/94 challenging the sale of her property through fraudulent means instead of filing an application within 21 days to the same court to set aside sale pursuant Section 47 of the Sheriff and Civil Process Act”, Cap 407 LFN 1990.*

C The 1<sup>st</sup> and 2<sup>nd</sup> Respondents also formulated two Issues for determination each which are similar to the Issues raised by the appellant, hence I do not deem it necessary to reproduce them here. It should however be noted that the 3<sup>rd</sup> Respondent did not  
D file any brief of argument.

In my view, the core and most important issue that calls for determination in this appeal is on whether the Doctrine of Res Judicata applies on the second suit instituted by the appellant,  
E namely, suit NO/ID/3228/94 - Mrs. Titilayo Cole Vs (1) Rev. C.L.M Fajemirokun 2. The Deputy Sheriff, High. Court Lagos and 3. Mr. Adim Jibunoh. It is the contention of the appellant that the Doctrine of Res Judicata does not apply because the last two parties in 10/3228/94 were not parties in the first suit No.ID/1082/90. Her  
F other contention was that the subject matter in the first suit No.ID/1082/90 dealt with recovery of debt owed by her to the tune of N169,000.00k in favour of Rev. C.L.M Fajemirokun the 2<sup>nd</sup> Respondent herein.

G She also argued that in the present suit, the issue before the court relates to the sale of appellant's property. It was also argued on her behalf that once allegation of fraud which was particularised in her Statement of Claim, was duly proved, that will vitiate the right of title and interest purchased by the 1st Respondent.  
H Therefore, the appellant argued that Res Judicata cannot operate in the instant case to preclude her from filing another action to challenge the sale of her property made fraudulently by the respondents herein.

In his reaction, the 1<sup>st</sup> Respondent argued that the main is-

sue on which the second suit was predicated, was the appellant's prayer that the trial court should set aside the Writ of attachment and Sale of her landed property in question, by the first trial court which was admitted by the appellant in which the trial court decided against her. It was submitted by the 1<sup>st</sup> respondent's counsel that the appellant admitted that she did not deny liability of the sum of N169,000 she owed the 1<sup>st</sup> respondent, which led to the attachment and later to the sale of her immovable property. He referred to Paragraph 7 of her statement of claim even though the appellant averred in paragraph 9 of her Statement of claim that the sale of her property took place on 23/11/1994. Learned counsel for the first respondent submitted that from the case the appellant, in order to succeed in second suit, (ID/3228/94), he had to prove that the issues in the second suit had not been adjudicated on in the first suit i.e. 10/1082/90. The 1<sup>st</sup> respondent's counsel also argued that if the trial court was allowed to assume jurisdiction, it will proceed with the instant suit and possibly enter judgment in favour of the appellant therein, and that will amount to a review of its decision in its earlier decision in suit No. ID/1082/90.

It was submitted that the issues raised in the 2<sup>nd</sup> suit (ID/3228/94) was adjudicated upon in the first suit (No.ID/1082/90) and the Issues raised in the 2<sup>nd</sup> suit relate to sale of the appellant's landed property as a result of the appellant's failure to pay the debt she owed and obtained judgment in the 1<sup>st</sup> suit ID/1082/90 and that the allegation of fraud in the conduct of the sale would, not clothe the trial court with jurisdiction. Also the addition of 1<sup>st</sup> and 2<sup>nd</sup> respondents as parties to the suit would not warrant the institution of fresh/new suit. Learned counsel for the 1<sup>st</sup> respondent concluded his argument by submitting that the trial court was wrong in entertaining the second suit, i.e. No.ID/3228/94, it not being a court of appeal. He said by the provisions of Section 240 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) the trial court which entertained the second suit was wrong in that only the Court of Appeal can hear appeal or adjudicate on the decision of Martins J. who decided the first suit i.e. No.ID/1082/90. The 2<sup>nd</sup> Respondent aligned with the 1<sup>st</sup> respondent's submission hence therein no need to summarise it here.

Now looking at the facts, and circumstances of this appeal, it appears to me that the main issue raised in the suit NO.ID/3228/94 was the prayer by the appellant to the court to set aside the Writ of attachment and the subsequent sale of her landed property. This same prayer was sought in the previous or first suit i.e. ID/1082/90 which said prayer was dismissed in suit No.ID/1082/90 by Martins J. The appellant had in fact alluded to some facts in her statement of claim. For instance, in Paragraph 5 of her statement of claim, wherein she admitted that on 25<sup>th</sup> March 1992 judgment was given against her to the tune of N169,000.00 in favour of the 2<sup>nd</sup> Respondent herein, then the 1<sup>st</sup> defendant. Also in other paragraphs in the statement of claim, she admitted, inter alia, that due to her failure to settle the judgment debt her landed property was attached and later sold and the subsequent challenge of the sale of her property in court proved abortive, in that the court rejected it.

Basically, the issues raised in the 2<sup>nd</sup> suit {10/3228/94} are to my mind, 'six of one half a dozen of the other' as they also border on the same facts or circumstance. However, even though the appellant argued that the first suit was on debt while the 2<sup>nd</sup> suit (ID/3228/94) had to do with the landed property, one would not lose sight to the fact that the sale of the property was dealt with in the first suit which led to or brought about the issue of debt of N169,000.00 the appellant sued the 2<sup>nd</sup> Respondent, which ultimately led to the issuance of Writ of Attachment as well as led to its ultimate sale.

Having analysed the similarity of the two suits, I am of the firm view, that this is a clear example of a case in which doctrine of Res Judicata applies. For purpose of clarity, for the defence of Res Judicata to be successfully raised, the following conditions must co-exist or be met, namely:-

(a) *That the parties in the previous action and the present one must be the same.*

(2) *That the subject matter of litigation in the previous action 'must be the same as the one in the present or new action.*

(3) *The claim in the previous action must be the same as the one in the present action.*



*(4) The judgment in the previous case must be given by a court of competent jurisdiction; and*

*(5) The decision must be final or it must have finally disposed of the rights of the parties.*

See Ihenacho Nwaneri vs Oriuwa & Ors (1959) 4 FSC 132 or (1959) SCNLR 316; William Ude & Ors Vs Josiah Agu & Ors (1961) All NLR 65, (1961) 1 SC NLR 98; Etit Alh Latifu Ajuwon & Ors Vs Madam Alimotu Adeoti (1990) 1 NWLR 2 (pt 1332) 271, (1990) 3 SC (III) 76. The general rule is that, once an issue has been raised and distinctly determined between the parties then, can a party be allowed to fight or raise that issue all over again. I am in complete agreement with the submission of the 1<sup>st</sup> respondent that the subject matter in the new suit had been settled by a court of competent jurisdiction.

The learned counsel for the appellant raised the point that there was disparity of parties in the two suits, submitting that the defence of Res Judicata could therefore not apply. Her argument is that the 1<sup>st</sup> respondent and the 3<sup>rd</sup> Respondents who are parties in the second suit No.ID/3228/94 were never parties in the first suit i.e. ID/1082/90. With due deference to the learned counsel for the appellant, the 1<sup>st</sup> respondent in the second suit is a privy in estate. Privies in estate always include vendor, purchaser, lessor and lessee. In this instant case, the 1<sup>st</sup> Respondent being an innocent purchaser of the landed property in question can not be regarded as a stranger or new party and as such his inclusion would not prevent the application of the defence of Res Judicata. See Coker v Sanyaolu (1976) NSCC 566, 575. With regard to the third respondent, his inclusion in the suit was because he is a nominal or statutory party who conducted or supervised the attachment and sale of the landed property. Similarly, his inclusion in the suit could not be regarded as fatal to the defence of res judicata in the suit too.

Perhaps it needs to be stressed here, that the doctrine of res judicata is a fundamental and important doctrine aimed at bringing an end to litigation. Even public policy demands that once a court of competent jurisdiction has settled by final decision, the matters in contention between parties, they should not bother the

courts again with relitigation. There should always be end to litigation, therefore courts should not encourage prolongation of disputes or proliferation of litigation. Once an action is brought and the merits of the questions are determined between the parties and a final judgment, is delivered, such parties should not be allowed to raise or canvass in a fresh suit, the same issues on the same subject matter.

As I said supra, to the subject matter in the new or fresh suit had been dealt with in the first or earlier suit. The appellant failed to timeously apply for the setting aside of the writ of attachment i.e. within 21 days as stipulated by the provisions of Sheriff and Civil Process Act. It, in fact amounts to abuse of court process for her to file the second suit (ID/3228/94) which relates to the same subject matter disposed of earlier in the previous suit.

Thus, for the fuller and more detailed reasons contained in the lead judgment of my learned brother Suleiman Galadima, JSC, which I entirely agree with, I also consider this appeal to be without merit.

I therefore, while dismissing this appeal, also affirm the judgment of the court below. I abide by the order on costs made in the lead judgment.

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