# In The Supreme Court of Nigeria

On Friday, the 30th day of June 1978

**Before their Lordships**

| | | |
|---|---|---|
| Anthony Nnaemezie Aniagolu | ..... | Justice, Supreme Court |
| Andrews Otutu Obaseki | ..... | Justice, Supreme Court |
| George Sodeinde Sowemimo | ..... | Justice, Supreme Court |

**SC. 193/1976**

**Between**

| | | |
|---|---|---|
| Jack Afiuwa Ekpoke<br>Okorodudu Olovba<br>*(For themselves and on behalf of Jeddo Community Okpe Clan)* | ..... | Appellants |

**And**

| | | |
|---|---|---|
| Douglas Usilo<br>Abieguaretse Okorodiden<br>Abiekuno Ododoro<br>*(For themselves and on behalf of Ogodo Family of Jeddo)* | ..... | Respondents |

**Judgement of the Court**
Delivered by
Andrews Otutu Obaseki

The appellants were plaintiffs and the respondents defendants in the High Court of Justice, Midwestern State of Nigeria (now Bendel State) in Suit No S/26/70 filed at Sapele wherein the plaintiffs claimed according to the endorsement on the Writ of Summons:

(1) A declaration of title under Okpe Native Law and Custom to that parcel of land lying along Jeddo-Ughoton Road, Okpe Clan in an area shown on the plan to be filed in this Suit. The annual rent of the land is £10 or ₦20.00.

(2) An order that the sum of £210 (Two Hundred and Ten Pounds) paid by Shell-BP Petroleum Development Company to the defendant in respect of a burrow pit on the plaintiffs' land and which the defendants refused to hand over to the plaintiffs' community in spite of persistent demands should be paid by the defendants to the use of the plaintiffs.

Pleadings were ordered and duly delivered. The issues joined later came up for trial before Oki, J. and after hearing evidence from the parties and their witnesses, he found in favour of the defendants and dismissed the plaintiffs' claim in a considered judgment, the concluding paragraphs of which read as follows:

> "In this case the plaintiffs have failed woefully to prove title either by traditional evidence or by acts of ownership. The defendants' traditional evidence appears slightly better in that it is linked with Ogodo who was accepted on all sides as one of the sons of Esezi I who went to Ughoton. Moreover, the defendants appear to me to be more in possession of the land than the plaintiffs if indeed plaintiffs are.
>
> The plaintiffs have failed to prove either of the arms of their claim. In the result their claim must be dismissed and is accordingly hereby dismissed."

Being aggrieved by this decision, the plaintiffs lodged their appeal to this court and the grounds relied on and set out in their Notice of Appeal are as follows:

(1) That the decision of the court cannot be supported having regard to the weight of evidence;

(2) The learned trial Judge erred in law when he held that the judgment of the Native Court in Case No 64/65 *Abiogweche v Ererheri & Anr* in the Okpe Native Court No 1 operates as *res judicata* against the plaintiffs/appellants in this suit when it is clear that

  (a) The parties are not the same

  (b) The subject matter is not the same

  (c) The land is not the same.

(3) The learned trial Judge misdirected himself in law when he said

> "I presume the counsel for the plaintiffs was of the same view when in his address he completely omitted saying anything about the parties and only strove to show that Ogbigho land in Exhibit "B" could not be the same as or relevant to the present land in dispute."

thus implying that counsel conceded that the parties are the same when the evidence of the plaintiffs is that the defendants in the Native Court suit did not represent the plaintiffs. This misdirection has occasioned substantial miscarriage of justice as it cast upon the plaintiffs the onus of proving that the parties are not the same instead of the defendants who pleaded that allegation.

(4) The learned trial Judge erred in law in relying on his own evidence which was not evidence before the court when he said

> "In the body of the proceedings, Ogbigho is said to be a vast land by the plaintiffs therein mentioned in relation to Ogbene (a variant for Ogbele) by the defendants therein. A look at the plan Exhibit A which is on the scale of 1 to 400 feet shows that the land now in dispute is about 800 yards from Jeddo town."

This error in law in the absence of a plan filed by the defendants to show the actual location or extent of Ogbigho land has occasioned substantial miscarriage of justice.

Chief F. R. A. Williams who appeared for the appellants dealt with the grounds of appeal together and in the course of his arguments identified three main issues in this appeal. They were

(1) The issue of *res judicata*.

(2) The issue of *de facto* possession of the land, i.e., who were in possession of the land, the appellants or respondents and

(3) The issue of composition of Jeddo community, i.e., who are Jeddo community.

Learned counsel submitted on the issue of *res judicata* that the plea was not made out. He contended that as there was clear evidence from the 2nd defendant in this case that the Jeddo community were not parties in the previous action in Suit No 64/56 tried in Okpe Native Court, the learned trial Judge was in error to hold that they, the Jeddo community, were parties. He contended then that since the parties were not the same, the plea should not have been upheld.

Secondly, learned counsel submitted that it was not established that the identity of the parcel of land in both actions (the previous one in the Native Court as evidenced by the proceedings, Exhibit B and this instant case now before us), was the same particularly as the defendant did not file a plan. The failure to establish the identity of the land was fatal to the plea also.

Thirdly, learned counsel submitted that both the appellants and the respondents gave different versions as to the composition of Jeddo community. He then observed that the learned trial Judge made no clear findings as to the identity of Jeddo community. Learned counsel then contended that the trial was unsatisfactory in that regard.

Fourthly, on the issue of possession, he observed that the respondent conceded that the stranger elements who, according to the respondent, constitute the Jeddo community, were farming on the land and this proved possession contrary to the finding of the learned trial Judge. He contended further that the respondents did not file a plan to describe the area.

Mr. G. O. K. Ajayi, who appeared for the respondents, in his reply submitted that plaintiffs/appellants' pleadings set out what they considered their root of title and their idea of Jeddo community. He contended that they traced their origin to Ogiedo and classified the respondents as strangers. The learned trial Judge, he observed, rejected the appellants' claim that Ogiedo founded Jeddo, a finding which was fatal to all the items of claim prosecuted by the appellants. He contended that there was a Jeddo community, the composition of which was as described by the respondents but predominantly stranger elements farming on land granted by the respondents and their predecessors. On the point made by appellants' counsel that 2nd defendant expressly gave evidence that Jeddo community was not a party in the previous suit, he contended that it was not as damnifying as it appears to be for the reason that although they were not originally sued, the witnesses turned the action into one between Ogodo family and Jeddo community. Still on the issue of *res judicata*, learned counsel for the respondents submitted that Exhibit B shows that plaintiffs' representative in interest contested the suit and cited the case of *Nana Ofori Atta II v. Nana Adu Bonsra II, 1958 AC 95*. The Jeddo community stood by while the defendants as shown in the record of proceedings Exhibit B, fought the case on the basis of ownership of the Jeddo community. He conceded that the respondents filed no plan but emphasised the fact that the parties knew the land physically and by name.

Before dealing with the submissions of counsel, it is necessary to set out the facts relevant to this appeal as pleaded by the parties together with the facts found by the learned trial Judge in a brief summary.

Some of the facts pleaded in paragraphs 1, 2, 3, 4, 6, 7, 9, 12, 13, 14, 15, 16, 17 and 18 of the Statement of Claim which are pertinent, read as follows:

1. The plaintiffs who are farmers are Okpe Urhobo citizens, resident in their village Jeddo in Okpe clan and together with other Okpe residents who are descendants of their ancestor the original Jeddo, constitute the Jeddo community.

2. The defendants who are strangers in Jeddo are also resident in Jeddo either by marriage or as strangers. They are natives of Ughoton village in Okpe clan and are farmers. They claim to be the descendants of Ogodo family.

3. Throughout the history of Jeddo so far, there is no family known as Ogodo family of Jeddo. .....

4. The plaintiffs took this action in a representative capacity on behalf of the Jeddo community and they were authorised by the Jeddo community at a meeting held at Jeddo not long before this action was taken. The members of the community are descendants of the original Jeddo of Okpe.

……

6. Many many years ago when the Orodje of Okpe, Esezi I was assassinated, the whole of Okpe settlement known as Orerokpe was in a state of confusion and the inhabitants had to flee the village for their own safety together with their families and took as much as they could carry into the forests to found new homes which would be safe for themselves and their families.

7. Among those who fled at the time were three brothers - Jeddo, Ughoton and Ugbokodo who were descendants of His Highness Esezi I, the Orodje of Okpe.

……

9. The three brothers Jeddo, Ughoton and Ugbokodo therefore travelled wide in the jungle and wandered far away from Orerokpe .....

……

12. Eventually the three brothers Jeddo, Ughoton and Ugbokodo crossed over to the other side of the river which was more attractive as suitable dry land was available. They decided to take advantage of the opportunity and the three brothers went with their respective families to different directions in the virgin forest to found their respective settlements. Jeddo founded the area now known as Jeddo, Ughoton founded Ughoton and Ugbokodo founded Ugbokodo land around Ugbokodo village. They met nobody in their respective areas.

13. By Okpe native law and custom, the area founded by each of the three brothers constitute the communal land belonging to the descendants of the founder where the members of the community farm by shifting cultivation but the radical title of the land vests in the descendants of the founder in common.

14. Later when the families of each of the three brothers increased considerably, thus compelling them to farm more lands, they eventually met and boundaries were fixed at Adesa where the bush paths from the different settlements met. These paths are not roads used by motor vehicles. Uhimi live tree planted at the boundary is still there up till today.

15. The land in dispute is edged pink in Plan No T. J. M. 918 prepared by a licensed surveyor Mr. Theophilous John and counter-signed by the Surveyor-General, Mid-West State of Nigeria, Benin City with the area which caused this action clearly shown and edged yellow. The plan is filed in this action.

16. The plaintiffs have been in continuous possession of this parcel of farmland and the members of the plaintiffs' family planted various crops including rubber trees on this parcel of land. The plaintiffs' community only allows some of the defendants to plant cassava or other seasonal crops on portions of this land for their livelihood without prejudice to the radical title vested in the plaintiffs' family. The 2nd defendant is married to a Jeddo man. The method of cultivation is shifting and other members of the community can plant on any part of this land lying fallow.

17. It is the practice in Jeddo that if the Government or any oil company or any other body or person finds any piece of Jeddo land suitable for their use, the owner of the crops in that piece of land claims the money both for his or her crops and for user of the land for convenience. Such a person retains the money for the crops for his or her exclusive use while the money for the land and palm trees on the land is handed over to the community, that is, the plaintiffs who own the land.

18. In 1970 when Shell BP Petroleum Company (Nigeria) Limited found two such suitable locations for earth excavation, the first plaintiff in whose farm one of the sites was located claimed the money for the crops and the land but handed over the £210 for the land to the plaintiffs' community as the money for the land since he was acting as agents of the community. The 2nd defendant in whose cassava farm the 2nd site was located refused to hand over

the £210 for the land to the community and now claims that this parcel of land is the exclusive property of the defendant over which they allege that the plaintiffs' community has no claim.

Suffice it here to say that in the Statement of Defence the defendants/respondents joined issue with the plaintiffs/appellants on the question of plaintiffs' ancestry, their claim to the founding of Jeddo, their claim to radical title of Jeddo land and their possession as of right. More importantly, paragraphs 8, 9, 10 and 14 of the Statement of Defence read:

8. The defendants deny the allegations therein contained in paragraphs (7), (8), (9), (10), (11), (12), (13) and (14) of the Statement of Claim and will put the plaintiffs to the strictest proof of the same. The defendants further assert that Jeddo, Ughoton and Ugbokodo are not names of people but names of founded villages and hamlets by Ogodo, Eneguare and their brothers. That Jeddo, Ughoton and Ugbokodo were not the children nor the descendants of His Highness Esezi I, the Orodje of Okpe. Esezi I begat four children and these are

   (a) Ozue who founded Okokporo, Okuovu Okegberode and Okwodedo

   (b) Ogodo who founded Ughoton, Jeddo Okozi Unuerhurode and Gbokodo also known as Ugbokodo with his brother

   (c) Eyerugwu the founder of Ughoton (Part) Jeddo, Gbokodo and Ojedi (Part)

   (d) Edioka; died childless

   .....

   Ogodo is the great grandfather of and great grand uncle of the defendants.

9. The defendants admit paragraph 15 of the Statement of Claim but add with variation that the piece of land called "Amuepete" land of Jeddo community is known as and called "Ogbigho" and numerous farms therein belong to the defendants and their relations.

10. .....

   Further the defendants will contend that the farmland called Amuepete by the plaintiffs in plan No TJM 918 and known as "Ogbigho" by the defendants has been adjudged as the property of Ogodo in case *No 64/56. Abiogweche v Ererheri & Anr* in the former Okpe No 1 Native Court. In this suit the 2nd defendant for Ogodo family successfully obtained a declaration of title to the aforesaid farmland against the assertion by the Jeddo community that all Jeddo land is communal. The defendants will found on the aforesaid judgment at the trial.

   ……

14. The defendants at the hearing will plead *res judicata,* laches, acquiescence and long possession and will contend that the plaintiffs' action is misconceived in law and should be dismissed with costs.

At the hearing, the evidence adduced by both sides followed the lines of their respective pleadings very closely. At the close of the hearing, the learned trial Judge in a considered judgment made the following findings of fact and in his own words:

(1) I am unable to accept that Jeddo was the son of Esezi I (if indeed that was ever the name of a person) or that he was the founder of Jeddo town. All I accept as supported by the evidence on either side is that aspect of the story which goes on to say that after the death of Esezi I certain persons including, possibly, some children of Esezi 1 fled from Orerokpe and founded various villages including Jeddo, Ugbokodo and Ughoton ...

(2) But much as 1st plaintiff's lied shamelessly that no other members of Ogodo family other than these defendants farm in the area for which they were paid compensation for crops, there is abundant evidence by the defendants (which I accept) that many other members of Ogodo family including Nesianeghe Odjegbe (f) also had farms in the area. Exhibits D-D14 show these persons and many others who were paid compensation for crops in the area of Burrow Pit No 5 which is the cause of action.

(3) I am also in doubt whether 2nd plaintiff really allocated farmlands in the area in question to 4th and 5th plaintiffs' witnesses. I am more inclined to believe the 2nd defendant's assertion that plaintiffs' people have no farms in the area shown in Exhibit A the indications to the contrary notwithstanding. ..... I do not believe that 2nd plaintiff ever allocated lands in the area shown in Exhibit A. I am inclined to believe that the members of Ogodo family who farmed in the area of Burrow Pit No 5 and who were paid compensation went to farm there in their own right and not as a result of allocation by the 2nd plaintiff.

(4) As regards the entire area shown in Exhibit A, much as I accept that it is within Jeddo territory, I am not satisfied that Jeddo community as such (whom the plaintiffs represent) has exercised any acts of ownership over it to warrant that the community is in exclusive possession and therefore owner.

(5) It is clear from the totality of the evidence (and particularly from Exhibits D-D4) that defendants' people had far more farms and therefore more acts of possession, within the land than the plaintiffs.

(6) The defendants' traditional evidence is slightly better in that it is linked with Ogodo who was accepted by all sides as one of the sons of Esezi 1 who went to Ughoton. Moreover, the defendants appear to me to be more in possession of the land than the plaintiffs, if indeed plaintiffs are.

The above findings of the learned trial Judge, in our opinion, severely laid the case the plaintiffs set out in their pleadings to rest. Learned counsel for the appellants, was unable to satisfy us that the findings were erroneous and not justified by the evidence accepted as credible. Indeed it was an uphill task for learned counsel since, the learned trial Judge

(a) found that the 1st plaintiff lied shamelessly and

(b) rejected the testimony of the 2nd plaintiff that he allocated land for farming in the area shown in Exhibit A.

The learned trial Judge was therefore perfectly justified in dismissing the plaintiffs'/appellants' claim. To upset a finding of fact, an appellant has to show that the finding did not flow from the credible evidence accepted by the learned trial Judge or that the learned trial Judge did not make proper use of his having seen and heard the witnesses. This, the appellants have failed to do before us.

On the issue of *res judicata*, the respondent relied on the judgment in the Okpe No 1 Native Court Case No 64/56 between Abiogweche for and on behalf of her family at Ughoton now at Jeddo and (1) Ereherheri and (2) Joluliagho all of Jeddo tendered as Exhibit B in these proceedings. The claim before the Native Court was for a declaration of title to piece of land known as Ogbigho near Jeddo town.

To found a plea of estoppel *per rem judicatam*, the defendants/ respondents had to satisfy the court that

(1) the parties were the same;

(2) that the land was the same; and

(3) that the subject matter of the claim was the same.

Counsel for the appellants contended that although the 1st item of claim in Exhibit B was the same as the 1st item of claim, i.e., declaration of title, neither the identity of the parties nor the identity of the land was established or proved to be the same.

This item of claim and parties before the Native Court and the High Court call for a close examination. The 1st item of claim in 64/56 reads:

> "Declaration of title to that piece or parcel of land situate and lying in the neighbourhood of Jeddo town known as "Ogbigho" property of plaintiffs' family."

In considering a plea of *res judicata*, one of the criteria of the identity of the two actions is the inquiry whether the same evidence would support both (*Madukolu & Ors. v Nkemdilim (1962) 1 All NLR 587*).

To determine a question of *res judicata*, where the judgment relied upon is that of a Native Court, a court in which no pleadings are filed, the facts directly in issue in the action and determined by that judgment, are to be discovered from the substance as disclosed in the record of proceedings. (*Madukolu & Ors. v. Nkemdilim* (supra) *Godfrey Ojo Aiwerioba v. Ogieva Bello (1968) NMLR 257 at 264*). The contention of learned counsel for the appellant that the absence of a plan was fatal to the plea even though the learned trial Judge held that the land which the plaintiffs have referred to as Amuepete is the same land as Okeghigho which was the subject matter of the litigation in Exhibit B is untenable. So long as a whole parcel of land is described by name in a judgment every inch of the land named is bound by the judgment.

The learned trial Judge commenting on the evidence of the plaintiff in this regard held:

> I would hold and do hold that the land which the present plaintiffs have referred to throughout in the present proceedings as Amuepete is the same land as Okeghigho which was the subject matter of litigation in Exhibit B.
>
> I am of the view that the plaintiffs have only coined the new name of Amuepete as a shield against the defensive weapon of *estoppel per rem judicatam*.

Exhibit A the plan filed and tendered by plaintiffs/appellants had described the land in dispute as Amuepete. This finding that Amuepete is the same land as Okeghigho although without linear dimensions, identifies the land in dispute in this case with the one previously litigated upon and we are unable to accept counsel's contention that the lack of a plan was fatal to the plea.

On the issue of identity of parties, the evidence of 2nd defendant that Jeddo community was not sued in the previous suit in the Native Court was a statement of fact as regards the parties that physically appeared before the court but a scrutiny of the evidence and the judgment of the Native Court discloses that the defendants therein defended the action in the same interest as the present plaintiffs.

In the case of *Madukolu & Ors. v. Nkemdilim (1962) 1 All NLR 587* at 593 Bairamian, FJ., dealing with the issue of *res judicata* observed:

> "The rule of *res judicata* is derived from the maxim of *nemo debet bis vexari pro eadem causa*. It is the *causa* that matters; and a plaintiff cannot by formulating a fresh claim, relitigate the same cause. That is why Section 53 of the Evidence Act does not speak of the claim but of the facts directly in issue in the previous case. The previous case was in the Native Court, and as there are no pleadings, one must go by the substance as disclosed in the proceedings. The dispute was on title, and the ultimate decision was against the plaintiffs on their basic cause of action that they were the owners and grantors of the land occupied by the defendant; nor is it true that he raised the issue of title too late.
>
> The plaintiffs were debarred by that decision from claiming a declaration of title in a fresh case based on the same cause of action."

With regard to the issue of identity of parties, we find that Exhibit B contains sufficient facts to establish that the defendants in that suit fought the issue on the basis that the land Ogbigho or Okeghigho was the communal property of the people of Jeddo. The 1st defendant in that suit 64/56 (see Exhibit B) said:

> "We do not claim title to the said land of Ogbigho besides the right of the town people."

The 1st witness for defence, Mr. B. R. Abiade in the same case said in his testimony:

> "The land in question is the accredited property of Jeddo people and even the 1st and 2nd defendants exclusively."

Also the 2nd witness for the defence, Mr. Towone Bayaghon of Jeddo said

> "..... plaintiff instead of issuing an action against us the principal parties ignored us and issued this summons against 1st and 2nd defendants claiming a title to the land in question."

The general rule of law undoubtedly is that no person is to be adversely affected by a judgment in an action to which he was not a party, because of the injustice in deciding an issue against him in his absence. But this general rule admits of two exceptions, one is that a person who is in privity with the parties, a "privy" as he is called is bound equally with the parties, in which case, he is estopped by *res judicata*; the other is that a person may have so acted as to preclude himself from challenging the judgment in which case he is estopped by his conduct. Nigerian Law recognises that the conduct of a person may be such that he is estopped from relitigating the issues all over again. This conduct sometimes consists of active participation in the proceedings, as for instance, when a tenant is sued for trespassing on his neighbour's land and he defends it on the strength of the landlord's title and does so by the direction and authority of the landlord. On other occasions, the conduct consists of taking actual benefit from the judgment in the previous proceedings such as happened in *Re: Lord Wilkinson v. Blades (1896) 2 Ch 788*. These two instances cover the case now on appeal before us. It may also be regarded as a case of standing by and watching them fight out or at most giving evidence in support of one side. To determine this question, the principle of law stated by Lord Penzance, in *Wytcherlay v. Andrews (1971) LR 2 P & M 327*, affords a useful guide. The full passage is in these words:

> "There is a practice in this court by which any person having an interest may make himself a party to the suit by intervening, and it was because of the existence of that practice that the Judges of the Prerogative Court held that if a person knowing what was passing, was content to stand by and see his battle fought by somebody else in the same interest, he should be bound by the result and not be allowed to re-open the case. That principle is founded on justice and common sense and is acted upon in courts of equity where, if the persons interested are too numerous to be all made parties to the suit, one or two of the class are allowed to represent them and if it appears to the court that everything has been done *bona fide* in the interest of the party seeking to disturb the arrangement, it will not allow the matter to be re-opened."

Lord Denning, delivering the judgment of the Board of Privy Council in the case of *Nana Ofori Atta II v. Nana Abu Bonsra II (1958) AC 95 at 103* observed:

> "But there is no reason why in West Africa it should not be applied to conditions which are found appropriate for it there but which have no parallel in England. It seems to be the recognised thing in this part of West Africa for all persons with the same interest in a land dispute to range themselves on one side or the other. Sometimes they apply to be joined as parties. On other occasions they regard the named party as their champion and support him by giving evidence. If he wins they reap the fruit of victory. If he fails, they fall with him and must take the consequences."

Learned counsel contended that there was a failure on the part of the learned trial Judge to identify the composition of Jeddo community. We can see no difficulty in ascertaining the identity of the Jeddo community from the evidence and the

pleadings filed by the appellants. Paragraph 1 sufficiently describes the composition of Jeddo community whom the plaintiffs/appellants represent and against whom the plea was raised. Parties are bound by their pleadings and the appellants cannot now before us pretend ignorance of the Jeddo community whose interests they represent. They described the respondents in paragraph 2 of the Statement of Claim as strangers so as to exclude them from the Jeddo community who are prosecuting their claim against them. The defendants/respondents have also been described as natives of Ughoton. Thus, it is clear that the Jeddo community in these proceedings are the same people as the people of Jeddo town in the Native Court Suit No 64/56. We therefore, are unable to accept appellants' contention that the parties and the land in this case are different from the parties and land in the Native Court Suit No 64/56, so as to defeat the plea of *res judicata*. Even if the plea had failed, the findings of facts against the appellants which have not been upset by any argument before us sufficiently dispose of this appeal in respondents' favour. The appeal therefore fails and is hereby dismissed.

The appellants shall pay the respondents costs in this appeal assessed at ₦353.00 (Three Hundred and Fifty Three Naira).

**Counsel**

| | | |
|---|---|---|
| Chief F. R. A. Williams<br>*with him*<br>Professor A. Kasunmu<br>Chief A. Ororho | ….. | For the Appellants |
| G. O. K. Ajayi<br>*with him*<br>B. O. N. Omonuwa | ….. | For the Respondents |