In the Supreme Court of Nigeria

On Friday, the 15th Day of April 2011

Before their Lordships

Aloma Mariam Mukhtar	……	Justice, Supreme Court
Walter Samuel Nkanu Onnoghen	……	Justice, Supreme Court
John Afolabi Fabiyi	……	Justice, Supreme Court
Suleiman Galadima	……	Justice, Supreme Court
Bode Rhodes-Vivour	……	Justice, Supreme Court

SC.24/2002

Between

Bosinde Ayuya	……	Appellants/Cross Respondents
Akimis Akemeyai Zuokumor	……	
Yonnbai Ogbe	……	
Humphrey Tebe-Owei Pullah	……	
Egena Brisibe	……	
(For themselves and on behalf of Ojobo Community)		

And

Chife Naghan Yonrin	……	Respondents/Cross Appellants
Amadu Odogha Ayabeke	……	
Chief Palmer Ekpefa	……	
Prince Kerema Peretubo	……	
(For themselves and on behalf of Torugbene Community)		

Judgment of the Court

Delivered by

Walter Samuel Nkanu Onnoghen. JSC

This is an appeal against the judgment of the Court of Appeal, Holden at Benin City in appeal No CA/B/66/96 delivered on the 19th day of July, 1998 in which the court allowed the appeal of the present respondents against the judgment of the Delta State High Court Holden at Warri in suit No W/135/71 delivered on the 25th day of August, 1995 in favour of the present appellants who were the plaintiffs before the court.

The appellants, then plaintiffs instituted the suit against the respondents as defendants claiming the following reliefs in paragraph 24(2) of the still Further Amended Statement of Claim:

"(a) A declaration of title to all those pieces of land lying and situate at and known as Ayiboubou (Ayebo) land, Kriseibou (Krise) land, Oruamabou land on the right (north) bank of Buloutoru Creek and collectively known and called Ojohodo - Ogbo land in the neighhourhood of Ojoho Village in the then Western Ijaw Division within the Bomadi Judicial Division, the exact extent of which is as shown in the Survey Plan No KP 631A and verged Green.

(b) The sum of ₦5,000.00 (Five Thousand Naira) being general damages for trespass committed by the 6th - 9th defendants who sometime in 1967 without the consent of the plaintiffs first obtained, broke and entered the plaintiffs said parcels of land, fished the creeks therein, cleared parts thereof and planted cassava, yams, and other crops therein, as well as illegal construction of buildings on parts of the land.

(c) Perpetual injunction to restrain the 6th - 9th defendants, their agents and/or servants from further entering and trespassing on the plaintiffs' said pieces or parcels of land."

The facts giving rise to the case include the following:

It is the case of the appellants that the Ojobo Community located in Burutu Local Government Area of the present Delta state were the original owners in possession of the land verged green in exhibit J. and was founded by their ancestor known as Gbesa; that the respondents began to trespass on the pieces of land in or about the year 1912, which resulted in a series of court actions between the communities; that as a means of maintaining peace between the two communities, the then District Commissioner of Forcados District, Mr. J. Davidson suggested a boundary between the parties in 1912 by drawing a line from the junction of Krisei and Ayibosu creeks to the water front of Bulotoru creek which later became know as Davidson boundary; that following renewed acts of trespass by the respondents in 1967, the appellants instituted this action

against the respondents.

On the other hand, it is the case of the respondents that the land in dispute shown in survey plan No AA/Rv95/909-LD which is exhibit "N", is part of a continuous and unbroken mass of land belonging to and in the peaceful possession of their Torugbene community of Tuomo clan; that it is the respondent who have tenants on the land in dispute and that they also have farms, fishing ponds, economic trees, cash crops and burial ground on the said disputed land; that the only fishing rights exercised by the appellants was over a small portion of the Ayegbon and Krisei creeks which were all within Torugbene territory; that Mr. J. Davidson never fixed a land boundary between the appellants' Ojobo Community and the respondents Torugbene Community but that what Mr. Davidson did was to mark a boundary at the junction of Kresei and Ayebou creeks to demarcate the fishing rights of the two communities.

It should be noted that the appellant pleaded and tendered some proceedings and judgment in previous cases between the communities as constituting estoppel.

At the conclusion of the trial, the learned trial judge found for the plaintiff/appellants and granted all the reliefs claimed. The learned trial judge also added a relief not claimed by either party into the bargain resulting in an appeal and a cross appeal against the said judgment which appeals were allowed by the lower court in the judgment delivered on the 15th day of July, 1998 thereby giving rise to the instant appeal, the issues for the determination which have been identified by learned Senior Counsel for the appellants Dafe Akpedeeye ESQ, SAN in the appellants brief of argument filed on 24/11/05 are as follows:-

> "i. Whether the learned Justice of the Court of Appeal were right when they held that the learned trial judge was wrong to have found that Mr. Davidson fixed a recognizable and legally enforceable boundary between the Ojobo and Torugbene Communities.
>
> ii. Whether the learned Justice of the Court of Appeal were right when they held that the learned Trial Judge was wrong in holding that the previous judgments tendered by the Appellants operates as estoppel against the Respondents in favour of the Appellants.
>
> iii. Whether the learned Justice of the Court of Appeal were right when they held that the learned trial Judge was definitely wrong to have held that the Appellants had proved the extent and identity of the land in dispute.
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> iv. Whether the learned Justice of the Court of Appeal were right when they held that the learned trial judge did not properly evaluate the evidence adduced at the lower court before entering judgment for the appellants.
>
> v. Whether the learned Justice of the Court of appeal were right when they held that the appellants cannot be said to have proved their case."

There is however, no appeal against the judgment of the lower court allowing the cross appeal against the decision of the trial court made on 15th August, 1995. The order which was set aside by the lower court was as follows:

> "In the interest of good neighbourliness, it is hereby ordered that the occupiers/owners of the buildings now standing from the Grammar School to the Davidson line shall continue to occupy same without any hindrance, harassment, molestation, disturbance and interference whatsoever from any member of the plaintiffs community with their occupation of those buildings. For the avoidance of doubt, this order shall apply to only existing buildings."

The defendants/respondents who were beneficiaries of that order did not counter claim against the claims of the plaintiffs/appellants at the trial court!

Turning to the issue for determination, it should be noted that the learned counsel for the respondent/cross appellant, S. Larry Esq has, in the respondents brief of argument deemed filed and served on 29/11/09 adopted the five issue formulated by learned Senior Counsel for the appellants earlier reproduced in this judgment.

However, with respect to the cross appeal, the issue formulated by learned Counsel for the cross appellant is as follows:-

> "Whether the Court of Appeal was right in ordering a retrial and remittal of this suit back to the High Court of Delta State for re-assignment."

In arguing issue 1, learned senior counsel for the appellants submitted that from the state of the pleadings and evidence, there was no dispute that Mr. J. Davidson fixed a boundary following series of litigation between the communities though the respondents contended that the boundary was limited to the Ayebou and Krisei creeks; that what was in issue is whether the boundary was limited to the Ayebou and Krisel creeks; that the existence and extent of the boundary so fixed is evidenced in exhibit C, K, J and H; that it was not disputed in the pleadings that Mr. Davidson had no capacity to fix or create a legally enforceable boundary between the parties and that it was consequently not the duty of the trial judge to make pronouncements on the enforceability and recognisability of the Davidson boundary.

It is the further contention of learned senior counsel for the appellants, that the question as to whether the Davidson

boundary was recognisable in law was never raised in the pleadings of the parties, which the court is bound by, but by learned Counsel for the respondents in address to the court on the ground that the provisions of the Inter-Tribal Boundary Settlement Ordinance, Cap 95, Laws of the Federation, 1933 were not complied with; that the said submission cannot take the place of evidence, relying on *Ishola v Ajiboye (1998) I NWLR (pt. 532) 71;* that the above notwithstanding, the learned Trial Judge went ahead to consider the submission in the judgment and overruled same.

Learned Senior Counsel then urged the court to resolve the issue in favour of the appellants.

It is, however, the contention of learned Counsel for the respondents that Mr. Davidson did not and could not have fixed a recognisable and enforceable land boundary between the Ojobo Community and Torugbene Community; that what Mr. Davidson did was to mark a boundary at the junction of Kresei and Ayebou creeks to demarcate the fishing rights of the two communities in the said creeks which boundary marks had nothing to do with the surrounding lands and bushes which were owned and in possession of the respondents; that it was the duty of the appellants to establish the existence of the boundary in relation to the surrounding lands on the preponderance of evidence, relying on *UBN Ltd v Nnoli (1990) 4 NWLR (pt. 145) 530, 544; Sanusi v Ameyogun (1992) 4 NWLR (pt. 237) 527, 553, Amaeze v Anyaso (1993) 5 NWLR (pt.291) 20, 25, 33 at 41;* that of the exhibits C, K and J tendered by the appellants in proof of Mr. Davidson's boundary, exhibit K reflects the truth that the dispute was limited to fishing rights between the two communities in the Ayebo and Krisei creeks; that the boundary mark shown in the said exhibit K did not extend to the water front at Bluetoru creeks neither did it traverse the land mass from the Krisei/Ayebo/Fonkoro creeks to the bluetoru creek; that

> "the evidence of the appellants as to the so-called Davidson Boundary is unreliable …"

and finally that there is no pleading of facts indicating how the appellants came to own the lands surrounding the Ayebo and Krise creeks and urged the court to resolve the issue against the appellants.

In the reply brief filed 20/1/2010, the learned Senior Counsel for the appellants submitted that there are facts as to how the appellants came to own the said lands pleaded in the still Further Amended Statement of Claim and testified to by the witness for the appellants. Learned Senior Counsel particularly referred to paragraphs 6, 7, 8, 11 and 12 of the Still Further Amended Statement of Claim at pages 25 to 27 of the record and the evidence of PW2, PW4 and PW5.

To resolve the issue under consideration, it is my intention to begin the exercise from the pleading of the parties and proceed to consider the evidence thereon.

In paragraphs 14 and 15(3) of the Still Further Amended Statement of Claim, the appellants pleaded as follows:-

> "14. When the 6th-9th Defendants were firmly established, they trespassed upon the land of the plaintiff in the area Tungbokorobri, Krisei (Krise) and Ayibou (Ayebo) creeks in 1912 and committed various acts of trespass. These ensured series of court actions both criminal and civil between the plaintiffs and the 6th-9th Defendants. The then District Commissioner of Forcados District, Mr. J. Davidson, fixed a boundary for the two communities by drawing a line from the junction of Krisei and Ayibou creeks to the waterfront of Buloutoru creek now know as Davidson Boundary as clearly shown in the survey plan number KP 6316A as aforesaid. The plaintiffs aver that this is the boundary between them and the 6th-9th Defendants and will rely on it at the trial of this action.
>
> 15. (3) Notwithstanding the fixing of the Davidson's Boundary between the two communities and subsequent actions and judgments against the Defendants, Torugbene people, continuously disregarded the said boundary as finally settled and trespassed on the creeks and lands which by that settlement were given to the plaintiffs. As a result of the constant friction between the two communities, the then District Officer Forcados referred the matter to the Resident, Warri Province, Mr. J. Davidson who had previously dealt with the issue while as the District Commissioner of Forcados District and accordingly, in 1921, confirmed the Sketch as the true boundary, he fixed for the two communities. The Sketch will be founded upon at the trial of this action. "

In reaction to the pleadings of the plaintiffs, the defendants pleaded in paragraph 20 of their 4th Further Amended Statement of Defence as follows:-

> "20. In still further answer to the said paragraph 14 of the Further, further amended Statement of Claim, 1st-4th Defendants aver that Davidson fixed no land boundary between the plaintiffs and the 1st-4th Defendants and their Torugbene people. During the dispute of the Davidson Boundary, the plaintiffs predecessor conceded or did not contest or challenge the 1st - 4th Defendant's title, possession to and user of the land in dispute and other lands and houses surrounding the Ayebou and Kresei Creek.
>
> What Davidson did was to mark a boundary at the junction of Kresei and Ayebou creeks to demarcate the fishing rights of the two communities in the said creeks over which there was dispute and the said Davidson Boundary was therefore confined to the two tiny creeks which boundary mark had nothing to do with the surrounding lands and bushes which had been in undisputed and continuous possession and effective control of the 6th - 9th Defendants and their people ever since Torugbene was founded. "

From the pleadings reproduced above, it is very clear, and I agree with learned Senior Counsel for the appellants, that the issue as joined between the parties with regards to the Davidson Boundary is as to whether the said boundary, which both parties agree was fixed by Mr. Davidson and therefore not disputed, is limited to the fishing rights of the parties in the creeks in question or extends over the surrounding lands and buses to the waterfront of Boloutoru creek. There is nothing in the pleadings of the defendants/respondents suggesting that the Davidson Boundary was not recognisable and legally enforceable.

The passage in the judgement of the lower court giving rise to the issue under consideration can be found at pages 307-308 of the record where the court stated *inter-alia* that

> " …. While the lower court made a finding on the right of Mr. Davidson to fix the said Davidson Boundary between the parties, there was no finding at all as to where the boundary is located and its relation to the land in dispute between the parties. The findings on the actual location of the boundary on the ground, is actually more relevant for the resolution of the dispute between the parties and the failure of the lower court to make such finding, after properly evaluating the relevant and credible evidence in support of such finding, is in my view a clear manifestation of the failure of the lower court to properly evaluate the evidence before it prior to the entering of judgment in favour of the respondents."

The issue is, whether the lower court is correct in finding/holding as above? I had earlier stated that there is no dispute as to whether Mr. Davidson fixed a boundary between the two communities by which it means that both parties agreed that there exist a Davidson Boundary them. What is however in dispute is whether the said boundary extends over the surrounding land and bushes from the creeks in question to the water front of Boloutoru creek. The burden of proving that the said boundary extends over the surrounding land and bushes as pleaded by the plaintiffs/appellants lies on the appellants and it is settled law that the standard of proof required is on the preponderance of evidence.

To prove the existence and extent of the boundary in question, the appellants tendered exhibits C, K, J and H with exhibit C being the sketch of the boundary made by Mr. Davidson in 1912 creating the boundary which said boundary is clearly indicated in the litigation survey plan of the appellants. It is also instructive to note that exhibit K is a certified true copy of Plan No BUC3 made by the Department of Lands and Survey dated the 5th day of August, 1927 showing the boundary between the communities.

The question is, what was the relevant issue put before the trial court relevant to the instant issue under consideration? At page 110 of the record, the learned trial judge stated in his judgment as follows:-

> "Learned Counsel for the defendants in his address submitted that for the plaintiffs to succeed, they must prove three issues; and they are:-
>
> (a) Whether in the light of the pleadings and the evidence, whether Davidson fixed a boundary between Ojobo and Torugbene recognizable in Law. If the answer is yes, then in respect of what area of the subject matter was the boundary fixed."……….
>
> Submitted that Davidson did not fix any boundary recognizable in law because the provisions of the Inter-tribal Boundaries Settlement Ordinance Cap 95, Laws of the Federation of Nigeria, 1933, sections 2, 3 and 10 were not complied with. Submits that exhibit C was a mere suggestion and that there is nothing to show that the suggestion was adopted Submitted that no boundary was therefore fixed by Davidson ....."

It is in the light of the above issue and the submission of learned Counsel for the respondents thereon that the trial court made the finding at pages 115- 116 of the record. The finding was clearly within the issue as formulated by learned counsel. Learned Counsel for the respondents had argued that Mr. Davidson did not fix a boundary between the parties recognisable in law because he did not comply with the provisions of the inter-tribal Boundary settlement Ordinance, 933 to which the trial court held that Mr. Davidson had the administrative capacity to do what he did and that the Ordinance of 1933 had no retrospective effect over the acts of Mr. Davidson which took place in 1912 and concluded firmly thus:

> "I therefore find as a fact that the boundary so created as shown in exhibit C is a recognisable boundary between Ojobo Community and Torugbene Community."

I hold the considered view that the learned trial Judge was correct in so finding/holding in relation to the issue before the court.

The above notwithstanding exhibit J is a survey plan of the appellants showing the land in dispute and the Davidson boundary as constituting the boundary between the parties and the extent of the land in dispute in respect of which the learned trial Judge had this to say at page 116 of the record:

> " With regard to the submission that the plaintiffs have failed to prove the extent and identity of the land in dispute, with due respect to learned Counsel for the defendants, I hold that the submission lacks merit and this is in view of Exhibit J, the survey plan of the plaintiffs. The identity and area of the land in dispute were clearly shown in Exhibit J .... "

I had earlier stated that the Davidson boundary of 1912 is clearly shown/indicated in exhibit J which the trial court rightly found as clearly showing the extent and identity of the land in dispute. I have examined exhibit C, the sketch made by Mr. J. Davidson in 1912 and it is very clear thereon that the boundary extends beyond the creeks into the surrounding lands and bushes contrary to the contention of the respondents. In fact, the learned trial Judge at page 116 of the record also found that the boundary extends beyond the creeks and that the land in dispute and abutting the creeks fall within the side of the boundary of the appellants as shown in exhibit 'C'. I therefore find merit in the issue and resolve same in favour of the appellants.

On issue 2 on *estoppel*, learned Senior Counsel restated the law that a claim for declaration of title is provable by one of five recognizable ways/methods as laid down in the case of *Idundun v Okumagba ,(1976) 10 NSCC 445.* Learned Senior Counsel further submitted that though a plea of *res judicata* is not one of the five ways listed in *Idundun v Okumagba supra*, a successful plea of same is a relevant facts for the proof of title, relying on *Ibero v Ume-Ohana (1993) 2 NWLR (pt. 277) 510;* that appellants tendered exhibit A, D, E, F, G and H being previous judgments between the parties which were not denied by the respondents; that in paragraph 22 of the 4th Further Amended Statement of Defence, the respondents specifically averred that Suit No W/36/52 and suit No W/44/52 were in respect of the land in dispute in the instant case and that the evidence in the said suits revealed that the respondents and their tenants were in possession of the lands but did not contend that the suits ended in their favour nor that the parties and issue were not the same with those in the instant suit; that the pleadings and evidence before the trial court being as they were, the learned trial Judge had no issue to determine on *res judicata* and that the trial judge was therefore right in holding that the previous judgments being judgments between the same parties and in respect of the same subject matter, they operated as *estoppel* in favour of the appellants and that lower court was in error in holding that the trial Court did not properly evaluate the previous judgments before finding that they constitute *estoppel* against the respondents and urged the court to resolve the issue in favour of the appellants.

On his part, learned counsel for the respondents submitted that the previous judgment pleaded and tendered as exhibit by the appellants could not in any way be deemed to have created *estoppel* against the respondents particularly as *estoppel* is used as a defence not as means of attack and is not usually pleaded in a Statement of claim, as a successful plea of *res judicata* ousts the jurisdiction of the court, relying on *Igwego v Ezeugo (1992) 6 NWLR (pt. 249) 561, 587; Ike v Ugboaja (1993) 6 NWLR (pt. 301) 539, 565-566;* that the pre-conditions for the application of *res judicata* are stated in *Igwego v Ezwugo supra, Omokhafe v Esekhomo (1993) 8 NWLR (pt. 309) 58, 66 & 73*; *Ibero v Ume-Ohana Supra; Ntuks v NPA (2007) 13 NWLR (pt. 1051) 392 at 410*; that every judgment relied upon as establishing *res judicata* must be looked at in detail; that an examination of all the exhibits (judgments) show clearly that they deal with fishing rights in the Ayebo and Krisei Creeks and not title or trespass to land; that the only case that had anything to do with land abutting the Ayebo and Krisei Creeks was the consolidated suit Nos. W/36/1956 and W/44/1952 - exhibit H - in which no finding was made on trespass to land against the respondents and their two tenants on the land who were put there to tap palm wine.

Finally, learned Counsel submitted that the cases cannot ground a plea of *res judicata* as they were not final decision on the merit by court of competent jurisdiction and that the lower court was right in holding that the trial court failed to evaluate the evidence on *res judicata* before arriving at its decision and urged the court to resolve the issue against the appellants.

In the reply brief of the appellants, learned Senior Counsel submitted that learned Counsel for the respondents is in error in submitting that the appellants were wrong in pleading facts raising a plea of *res judicata*. It is the contention of learned senior Counsel that a plaintiff is not precluded in pleading *res judicata* in the Statement of Claim and relied on the case of *Ukaegbu v Ugoji (1991) 6 NWLR (pt.196)127 at 159* and *Chinwendu v Mbamodi(1980) 12 NSCC 127 at 137.*

In a paragraphs 20 and 21 of the Still Further Amended Statement of Claim, the appellants pleaded as follows:-

> "20. The plaintiff will contend at the trial of this action that the 6th - 9th defendants are *estopped* by the various judgments against them from disputing the plaintiff's title to and possession of the land in dispute.
>
> 21. The plaintiffs will rely on the above judgments as constituting *res-judicata* between them and the 6th - 9th Defendants at the trial this action."

The various judgments alleged to constitute estoppel had been pleaded in paragraph 15- 19 of the Still Further Amended Statement of Claim and were duly tendered and admitted in evidence as exhibits.

It is settled law that for a plea of *estoppel* by *res judicata* to succeed the party relying on it must plead and establish the following:-

(a) that the parties or their privies involved in both the previous and present proceedings are the same.

(b) that the claim or issue in dispute in both proceedings are the same;

(c) that the *res judicata* or the subject matter of the litigation in the two cases is the same;

(d) that the decision relied upon to support the plea is valid, subsisting and final; and,

(e) that the court that gave the previous decision relied upon to sustain the plea is a court of competent jurisdiction- *see Oke v Atoloye (No.2) (1986) 1 NWLR (pt. 15) 241; Yoye v Olubode (1974) 1 All NLR (pt. 2)*

118; Fadiora v Gbadebo (1978) 3 S.C 219.

It is also settled law that a plea of *estoppel per res judicata* is a shield rather than a sword and is accordingly not available to a plaintiff in his statement of claim because if allowed, the plaintiff would in reality be impugning the jurisdiction of the court to entertain his matter since a successful plea of res judicata means that the court is without jurisdiction to hear the new matter - *see Yoye v Olubode supra; Igwego vs Ezeogo* also *supra* etc.

The above statement of the law notwithstanding, a plaintiff in an action for declaration of title may plead and rely on a previous judgment in his favour not as *res judicata* but simply as an *estoppel* in the sense that it constitutes a relevant fact to the issue in the present action and the judgment will be conclusive of the facts which it decided. See *Ukaegbu v Ugoji (1991) 6 NWLR (pt. 196) 127; Esan v Olowu (1974) 3 S.C 125*.

In the instant case, the appellants pleaded the judgments as constituting *estoppel* in paragraph 20 of the still Further Amended Statement of Claim though in addition to the said paragraph 20, they pleaded in paragraph 21 thereof that the said judgments also constitute *res judicata*.

At page 115 of the record, the trial judge found as follows:-

> " The previous judgments being judgments between the same parties and in respect of the same subject matter operated as *estoppel* in favour of the plaintiffs and I so hold."

From the above, it is clear that the learned trial judge did not hold that the previous judgment constitute *res judicata* but *estoppel* as pleaded in paragraph 20 *supra*. In any event it was not the respondent's case on the pleadings and evidence that the appellants' pleading was erroneous thereby joining issues thereon with the appellants.

However, is there any difference between *estoppel* and *res judicata*, one may ask? The answer is in the positive. If a party pleads a judgment as *estoppel*, what he is telling the court is simply that the court should take the judgment into consideration in considering the totality of the evidence in the present case.

When the plea is *res judicata* on the other hand, the party is saying that although he has already gotten judgment on the piece or parcel of land, he wants the court to adjudicate on the matter that had already been adjudicated upon in his favour which would be contradictory in terms since he would be asking the court to judge what had already been judged, that is why *res judicata* is a shield, not a sword particularly as the effect of its being sustained is that the court has no jurisdiction to entertain the present action over the same subject matter between the same parties or their privies etc, etc. *See Ukaegbu v Ugoji supra*.

In the instant case and as stated earlier in this judgment, the trial court relied on paragraph 20 of the still Further Amended Statement of Claim to find that the respondents are estopped by the judgments in the previous cases and I am of the considered view that the court is right.

However, the decision of the lower court on the issue is at page 309 of the record and is inter alia, as follows:-

> "The learned trial Judge apart from listing the previous judgments by their exhibit numbers in the present case, their case or suit numbers and the years of filing with dates of judgment and one being a criminal case, other necessary and relevant contents of these judgments were not reviewed at all to show how they are related to the present action in the respondents claim to title to the parcels of land specified in their Survey Plan Exhibit 'J', damages for trespass and a perpetual injunction against the appellants. In other words, there was no proper evaluation of the contents of these judgments between 1920 to 1953 to support the finding of the learned trial judge that the judgments were between in the same parties as in the present case. Therefore even here in respect of the previous judgments relied upon by the respondents, the fact that there was no proper appraisal of the evidence before the lower court found in favour of the respondents is quite obvious."

The above clearly shows the reason why the lower court is of the view that the trial court was in error in holding that the respondents in this appeal were estopped. There was nothing about the pleadings relevant to the plea of *estoppel* etc.

In any event, it is settled law that it is the primary duty of the trial court to evaluated the evidence produced by the contending parties in support of their contentions before arriving at its decision one way or the other. It does so by putting the totality of the acceptable testimony adduced by both parties on an imaginary scale with the evidence of the plaintiff on one side while that of the defendant is put on the other side. The court then weighs them together to see which is heavier, not by the number of witnesses called by each party but by the quality or probative value of the testimony of those witnesses - see *Sha Jnr v Kwan (2000) 8 NWLR (pt. 670) 685.*

Where, however the trial court abdicates this sacred duty or when it demonstrates that it had not taken proper advantage of haven heard and seen the witnesses testify, the matter Le evaluation of evidence, becomes at large for the appellate court to carry out, *see Romaine v Romaine (1992) 4 NVVLR (pt. 238) 650; Akinola v Oluwo (1962) 1 SCNLR 352; Ebba v Ogodo (1984) 1SCNLR 372.*

Where however the trial court abdicates this sacred duty or when it demonstrates that it had not taken proper advantage of

having heard and seen the witnesses testify, the matter, i.e. evaluation of evidence becomes at large for the appellate court to carry out. See *Romine v Romaine (1922) 4 NWLR (part 238) 650; Akinola v Oluwo (1962) 1 SCNLR 352; Ebba v Ogodo (1984) 1 SCNLR 372*.

Where however the evidence which the trial judge failed or neglected to evaluate is a document tendered as exhibit which does not involve the demeanour of the witnesses then it is settled law that an appellate court is in as good a position to evaluate the evidence and come to its own decision.

Did the trial fail in its primary duty to evaluate the exhibit tendered in support of the plea of estoppel and if the did, was the lower court not in as good a position to have evaluated the exhibit to do justice between the parties? The exhibit in question are A, D, F, G, and H.

The trial judge, at page 103 of the record stated thus:-

> " In 1920 Adamagu of Ojobo sued Depebor and Ande both of Torugbene to the District Court at Forcados for declaration of title over Ayebou Creek within Ojobo land and judgment was given in favour of Adamagu who was my grand father. The certified True Copy of the judgment in that case is Exhibit "A". When the Torugbene people still persisted in fishing in the creeks, a policeman and some other persons were sent there but the Torugbene people beat up the policeman and the people sent them with him. As a result the following Torugbene people were arrested: Cosen, Ayajio, Kulu Sinkuma, Warri and Thomas. All of them were tried and convicted. The certified True Copy of the proceedings in that case is Exhibit "B".
>
> In 1929, some Torugbene people went to the Creek again. As a result, his father sued Torugbene people who were Iteme, Gbeghede, Egbele, Bemba and Ige for trespass and judgment was given in favour of my family. The certified True Copy of the judgment is Exhibit "D". Also in 1929 Eteme for himself and on behalf of Torugbene village council sued Gbedeke and Suokumor of Ojobo challenging the Davidson Boundary of 1912. After the trial, the Torugbene people lost the case. The certified True Copy of the judgment is Exhibit "E".
>
> The Torugbene people appealed against the judgment and they lost, The certified True Copy of the Supreme Court judgment is Exhibit "F".
>
> In 1931, my late father sued Torugbene people over the Ayibou (Ayebo) and Krisei creeks (crise) in suit No 11/1931 for declaration of title and won. The certified True Copy of that judgment is Exhibit "G".
>
> In 1952, Chiefs Ekereke, Zipude and Adamagu sued Odokobafa, Lou, London, Opuakpo, Odigben and Obi all from Torugbene for trespass on Ayebou and Krisei creeks in suit No 35/43/52 in the Magistrate Court, Warri. The case was later transferred to the Supreme Court, Warri in Suit No W. 36/52.
>
> In the same year, 1952 Egbalakame Benifegha of Torugbene for himself and on behalf of Torugbene Community sued one Brisbe Adamagu of Ojobo in the Magistrate Court, Warri for trespass to the Ayebou and Krisei creeks in suit No 1/1952 and it was also later transferred to the Supreme Court, Warri and numbered W/44/52. Both cases were consolidated and tried together. The Ojobo people in suit No W/36/52 won while the Torugbene people lost in suit No W/44/52. The judgment in the consolidated suits is Exhibit "H".

At page 114 to 115 of the record, the trial court then held as follows:-

> "These judgments relied on by the plaintiffs dated as far back as 1920. They are as follows:- Exhibit "A" dated 28/1/20; Exhibit "B" which was a criminal case arising out of the breach by the Defendants of the judgment in Exhibit "A" dated 21/7/20; Exhibit "D" is dated 13/7/29; Exhibit '"E" is dated 12/11/29; Exhibit "F" was suit No SC/10/30; Exhibit "G" was suit No W/l1/3l and Exhibit "H" were suits Nos W/36/52 and W/44/52. Both suits were consolidated and were decided by Mbanefo J, as he then was, on 4/9/53 ......
>
> In all the foregoing judgments, the community of the Defendants in the present case lost .... The previous judgments being judgments between the same parties and in respect of the same subject - matter operated as *estoppels* in favour of the plaintiffs and I so hold"
>
> Emphasis supplied by me.

Is the above not sufficient evaluation of the evidence in relation to the plea of *estoppel* by the appellants? I hold the considered view that it is and that the lower court is in error when it held that it did not.

Still in resolving the issue of estoppel particularly the question whether the said judgments relate only to fishing rights in the creeks, the learned trial Judge held at page 116 of the record as follows:-

> It was also submitted that the previous judgments related only to the creeks and not to land. I am unable to agree with this submission because the creeks are surrounded by land and I do not see how the creeks can be owned by one party while the other owns the land abutting them. Be that as it may, both creeks and the land abutting them as shown in Exhibit C are on the side of the plaintiffs .. "

Underlining mine for emphasis.

From the underlined sentence in the passage *supra*, it is clear that the trial Judge's finding on the matter that the judgments relate both to the creeks and the abutting land is based on exhibit C, the sketch of Mr. Davidson made in 1912 based on exhibit C, the sketch of Mr. Davidson made in 1912 which shows clearly that the land in dispute and the creeks involved fall on the side of Mr. Davidson's boundary belonging to the appellants. This is not speculative at all. It follows therefore that the finding of the trial court that the previous judgments relate both to the creeks and land abutting same is supported by evidence and that the lower court was in error when it set same aside.

In the first place, there is no dispute as to the existence of these suits between the parties both in the pleadings and testimony before the court. All the exhibits clearly show that the suits were between the communities of Ojobo and Torugbene as represented by the parties therein stated and the trial court specifically found that the said judgments were between the same parties and in respect of the same subject matter.

That apart, the evidence being documentary, it is the duty of the lower court to have evaluated same if it saw that they were not evaluated as it was in as good a position as the trial court in that respect but it failed to do so. I therefore hold that issue 2 be and is hereby resolved in favour of the appellants.

On issue 3, learned Senior Counsel for the appellants submitted that issues are joined in the pleadings and not in address of counsel, relying on *Fakuade v Onwoamanam (1990) 2 NWLR (pt. 132) 322;* that from the state of the pleadings the identity and extent of the land in dispute was not in issue; that both parties pleaded ownership of the land in dispute as delineated in their respective survey plans which were tendered in evidence as exhibit 'J' and 'N' respectively; that where a party fails to raise an issue relevant to the determination of its case, such issue would be deemed irrelevant, relying on *Bamgboye v Olarewaju (1994) 4 NWLR (pt. 184) 132;* that the duty on a plaintiff to establish the extent and identity of the land claimed exists only where the identity and extent of the land in dispute is in issue, otherwise no such burden or duty arises. Referring to the testimony of the 2nd plaintiff, PW4, DW2 and the 4th defendant, learned Senior Counsel submitted that the parties were clear as to the identity and extent of the land in dispute though appellants, in addition tendered exhibits C, E, K and J in proof of same and urged the court to resolve the issue in favour of the appellants.

On his part, learned Counsel for the· respondents referred to the findings on the issue by the trial Judge at page 116 of the record and submitted that the findings on the identity and extent of the disputed land was erroneous and that the lower court was therefore correct in so holding and setting same aside; that it is the duty of a claimant of title to land to identify the area of land with certainty and prove the boundaries of the land particularly in this case where the respondents did not admit the identity of the land, relying on *Udeze v Chidebe (1990) 1 NWLR (pt. 125) 141 at 159; Dabup v Kolo (1993) 9 NWLR (pt. 317) 254 at 269;* that the mere tendering of a survey plan does not necessarily prove the correctness of the boundary features and extent of the land in dispute without oral evidence to prove the contents of the survey plan, relying on *Ekpengong v Etim (1990) 3 NWLR (pt. 140) 594 at 602;* that appellant ought to have filed a composite plan to identify the portions of the land determine in the previous judgments; that the contents of exhibit 'N' is completely different from that of exhibit 'J' as regards the land in dispute; that the several judgments tendered by the appellants had nothing to do with the lands in dispute herein as they relate to fishing rights in creeks; that appellants failed to prove the extent and identity of the land and that the lower court was right in so holding and urge the court to resolve the issue against the appellants.

In the reply brief learned Senior Counsel submitted that the appellants did not give contradictory evidence as regards the boundaries of the land as contended by learned Counsel for the respondents neither has learned Counsel pointed out the alleged conflicts to this Court.

Both parties filed pleadings in this action in which they claimed ownership of the land in dispute; they engaged the service of licensed surveyors who went on the land and carried out a survey indicating the essential features thereon including the boundaries of same which plans were duly tendered and admitted in evidence as exhibit 'J' and 'N' respectively. It is common occurrence in land matters for parties to refer to the same piece or parcel of land by different names and also to indicate in their respectively plans different features but the bottom line remains the fact that the parties know the land in dispute otherwise there would be no dispute at all; what is usually in dispute is the ownership of the particular land being claimed by the plaintiff.

It follows therefore that where a plaintiff claims ownership of a piece or parcel of land against his neighbor and describes the boundaries of the said land in survey plan which is tendered and admitted in evidence, that survey plan clearly refers to the particular piece or parcel of land in dispute and it cannot be said that the identity and extent of the said land is unknown. What the plaintiff/claimant now needs to do is to prove/establish his title to the said disputed land by one of the five ways/methods of proving ownership or declaration of title to land and to also testify as to the features e.t.c on the land in issue.

Where the court agrees with him, then he wins and is awarded title to the land in issue irrespective of the contrary case presented by the defendant as to the mode of acquisition of the title, the identity and extent of the disputed land. In the instant case both parties filed survey plans and called evidence as to the features and extent of the disputed land. There is also the evidence to the effect that the communities have been disputing the land in question. The land is not in the imagination of the claimant as it has been brought into focus and reality by exhibits 'J' and 'N' respectively. From the

records, both communities are neighbours and share a common boundary and it is clear that they exist on either side of Davidson's boundary, so none of them can pretend not to know the land in dispute being claimed by the appellants.

However, both parties agree that the burden of proving clearly and unequivocally the area to which the plaintiff claims title is on the plaintiff except where the identity and extent of the disputed land is not put in issue by the parties, see *Fakuade v Onwoamanam (1990) 2NWLR, (pt. 132) 322; Hayaki v Dogara (1993) 8 NWLR (pt. 313) 586 at 594.*

What did the trial court find on the issue? At page 116 of the record, the trial judge had this to say:

> " With regard to the submission that the plaintiffs have failed to prove the extent and identity of the land in dispute,. With due respect to the learned Counsel for the defendants, I hold that this submission lacks merit and this is in view of Exhibit 'J', they survey plan of the plaintiffs. The identity and area of the land in dispute were clearly shown in Exhibit 'J'. The onus on the plaintiffs is an onus to prove an issue. The identity and extent of the land in dispute was not made an issue. This, in my view, was because these facts are well known to the parties especially in view of the previous cases between them over the land in dispute. See the case of *Nwobodo Ezendu & Ors v Isaac Obiagwu (1986) 2 NWLR (pt. 21) 208 at 209 - 210."*

It is the above finding that the lower court held to be erroneous and consequently set aside.

What are the pleadings of the parties on the issue? In paragraphs 6 and 7 of the Still Further Amended Statement of Claim, the appellants pleaded as follows:-

> "6. The plaintiff are the owners - in - possession of parcel of:
>
> (a) Land called Beimobou - Ogbe or Ojobodo - Ogbe lying and situate between Tabagha creek and Akposeiye creek on the left (south) bank of Buloutoru (bluetoro) in the neighbourhood of Ojobo Town in Burutu Local Government Area which is verged Green on the survey plan number KP 6316A prepared by T.K. Kpeji, a licensed surveyor of 1, Ofunmwegbe Lane, Benin City.
>
> (b) Land lying and situate at and known as Ayiboubou (Ayebo) Land, Kriseibou (krise) land, Druamabou land on the right (north) bank of Buloutoru creek and collectively called and known as Ojobodo - Ogbe land in the neighbourhood of Ojobo Town of the then Western Ijaw Division now in Burutu Local Government Area within the Bomadi Judicial Division whose jurisdiction for the time being is exercised by the High Court of Warri, which parcels of land are verged Green on the survey plan number KP 6316A prepared by T.K. Kpeji, a licensed Surveyor of 1, Ofunmwegbe Lane, Benin City and filed in support of this action.
>
> 7. The lands of the plaintiffs were originally founded by their ancestors who came from Operemot town in Eastern Ijaw (Brass Division) now Rivers State of Nigeria and at a time beyond human memory first settled at Amabulon in the then Western Ijaw Division now in Ekeremor Local Government Area of Rivers State and from there they settled on the banks of the Krisei Creek. From Bulou Ojobo, a section moved and settled in the present Ojobo site, properly called Toru-Ojobo on the bank of the Buloutoru Creek (now known and called Bomadi creek) as shown on the Survey Plan filed with the Statement of Claim."

The respondents/defendants reacted to the above paragraphs in their paragraphs 5, 6, 7 and 8 of the 4th Further Amended Statement of Defence of 1st - 4th Defendants as follows:-

> "5. Paragraphs 6 to 12 inclusive of the further, Further Amended Statement of Claim are denied and plaintiffs are put to the strictest proof thereof.
>
> 6. In further answer to paragraph 6(a) of the further amended Statement of Claim 1st - 4th defendants aver that plaintiffs own no land on the left south bank of Tuomo Creek, also called Buloutoro Creek, within the area in dispute.
>
> 7. Institute further answer to paragraph 6(a) of the further, further amended statement of claim, 1st - 4th defendants aver that plaintiffs own no land on the right North bank of Tuomo Creek, also called Buloutoro creek, within the area in dispute as clearly and correctly verged red in the amended survey plan No ONC/83/R053 - LD dated 15th December, 1983 prepared by C.N. Onwunume, Licensed Surveyor earlier filed with the further amended Statement of Defence and now survey plan No AA/RV95/090 - LD dated 6th January, 1995 prepared by Albert A. Alhaji, Licensed Surveyor on which plan the 1st - 4th defendants shall rely at the trial of this case.
>
> 8. In further answer to paragraph 7 of the Further, further amended statement of claim, 1st - 4th defendants aver that the ancestral home of the plaintiffs is Oukpoto in Ogbia, Brass Local Government Area of Rivers State. It was from there that the plaintiffs later joined the rest of Operemor clan at Amabulou and still later migrated to Bulou Ojobo where they finally settled in their present site long after 1st - 4th defendants had settled in the area in dispute."

Though the reaction of the respondents to the pleadings is a general denial, there is no dispute as to the fact that the respondents know the identity of the land in dispute and its extents as can be gleamed from their pleadings. What they dispute is ownership of the disputed land by the appellants.

However is there evidence to show to show that the parties know the land in dispute apart form the pleadings?

The 2nd plaintiff in his evidence in chief testified thus:

> " I know the land which is the subject matter of this action, it is called Beimobou - Ogbe or Ojobodo - Ogbe and is situated at the Southern part of Bulou - Tora Creek or Bomadi Creek."

PW 4 stated thus:

> "I know the land called Beimobou-Ogbe or Ojobo-Ogbe. It situates on the right hand south of Bulou Tora Creek. "

On behalf of the respondents, DW2 testified as follows:-

> " I know the land in dispute"

While the 4th defendants stated emphatically that:

> " I know the land in dispute .... the land in dispute is called Torugbene/Ruomo-Ogbo land. Bulon-Ojobo land do not exist."

From the above, it is very clear that the parties know the land in dispute though they gave it different names and claim ownership of same. Apart form the above facts, the appellants also tendered exhibit "C" – the sketch of the Davidson boundary made by Mr. Davidson in 1912 and exhibit "K", the Burutu Cadestral Survey from the Archives. The respondent admitted the existence of the Davidson Boundary though they contend that it does not extend over the surrounding lands and bushes between the parties, which, as seen earlier in the judgment during the consideration of issue 2, the trial judge rejected, which rejection is supported by exhibit "C", the sketch of 1912.

It is therefore my considered view that from the totality of the pleadings and the evidence on record, the trial court was right in the conclusion it reached on the issue and that the lower court was in error in holding otherwise. I therefore resolve the issue in favour of the appellants.

On issues 4 and 5, I hold the considered view that haven resolved the earlier issues in favour of the appellants which issues are sufficient to sustain the judgment of the trial court, a resolution of the above issues become superfluous particularly as the trial judge did not base his decision on the evidence of traditional history adduced by the parties, having come to the conclusion that the traditional history of the people conflict, but on *estoppel* arising from the previous judgments between the parties. I had earlier in this judgement demonstrated how the trial court was right in coming to the conclusion that the previous judgments tendered by the appellants operated as *estoppel* against the respondents in favour of the appellants. The trial court, on the case presented by the respondents outside traditional history, examined the acts of recent possession pleaded and relied upon by the respondent to establish their claim of ownership of the disputed land and came to the following conclusion:

> "Apart from the traditional evidence, the plaintiffs also relied on a series of pervious judgment between them and the Defendants over the land in dispute. The judgements are exhibits A, D, E, F, G and H. They also called some of their tenants put on the land in dispute.
>
> The Defendants, apart from the traditional evidence, relied on acts of ownership and possession of the land in dispute. These acts include building cemetery, and farms on the land in dispute.
>
> As there is a conflict between the sets of traditional evidence, I shall now resort to facts or events in recent times to determine which of the two sets ought to be preferred".

The learned trial judge went further at page 115 of the record to say:

> " It was also earlier stated in this judgment that the defendants also relied on acts of possession and ownership apart from their traditional evidence. The nature of the acts of possession and ownership as stated earlier were buildings, farms, tenants and a cemetery ...... The defendants admitted that the buildings on the land in dispute were put up during the pendency of this case. The previous judgment being judgments between the same parties and in respect of the same subject matter operates as *estoppel* in favour of the plaintiffs and I so hold .... the defendants cannot rely on unlawful acts to prove possession and acts of ownership of the land dispute. The weight of evidence tilts heavily in favour of the plaintiffs and I so hold".

I do not see what else the learned trial judge should have done in the name of evaluation of evidence relevant to the determination of the matter before him. I must repeat that the learned trial judge restricted himself to resolving the issue as to whether the previous judgments constituted *estoppel* against the respondents and whether the respondents had proved

their possession of the land in dispute by acts of recent possession both of which issues he considered appropriately by evaluating the evidence before him resoling them in favour of the appellants as reproduced *supra*.

On the cross appeal, it is the submission of learned Counsel for the respondents/cross appellants that the lower court erred in ordering a retrial of the case allegedly based on the conflict in traditional evidence of the parties as the resolution of the said conflict does not involve a consideration of the credibility of the witnesses who testify to such facts, relying on *Edoade v Atomesin 5 NWLR (pt. 506) 490 at 501*; that the lower court was in as good a position as trial court to evaluate the evidence on record as same is predominantly documentary and come to the conclusion that the cross respondents failed to establish their claim and consequently dismiss same; that the cross respondents did not prove the Davidson boundary, the identity and extent of the land in dispute e.t.c as found by the lower court and that the same was enough for that court to have dismissed the claim of the cross respondents, and urged the court to resolve the issue in favour of the cross appellants and allow the cross appeal.

On his part, learned Senior Counsel for the cross respondents adopted all arguments in the main appeal in support of the issues formulated in addition to those in the reply brief and submitted that the reason for ordering a retrial by the lower court did not flow from the record before that court; that a proper evaluation and appraisal of evidence by a trial court is not dependent on the length of the judgment at the end of trial; that the parties submitted specific issues to the court for determination which the court duly determined and urged the court to allow the cross appeal, set aside the order of retrial made by the lower court and restore the judgment of the trial court.

I had, while considering the issues in the main appeal resolved all of them in favour of the appellants, which action automatically means the judgment of the lower court is set aside in its entirety while that of the trial judge is restored.

The above being the position, a consideration of the merit of the cross appeal which challenges the order of retrial made by the lower court in a judgment which has been set aside by this Court becomes clearly, an exercise in futility apart from being hypothetical and/or academic. Either way, it will be a colossal waste of time to consider same. It is therefore my considered view that the cross appeal be and is hereby dismissed.

On the whole and in conclusion, I find merit in the main appeal which is hereby allowed by me. The judgment of the lower court delivered on the 15th day of July, 1998 in appeal No CA/B/66/96 is hereby set aside while the judgment of the Delta State High Court in suit No W/137/71 delivered on the 25th day of August, 1995 is hereby restored with costs assessed and fixed at ₦50,000 against the respondents/cross appellants/cross respondents. It is further ordered that the cross appeal be and is hereby dismissed with no order as to costs.

Main appeal allowed, Cross appeal dismissed.

Judgment delivered by
Aloma Mariam Mukhtar, JSC

I have had the advantage of reading in advance the lead judgment delivered by my learned brother Onnoghen JSC. I fully agree with him that the appeal deserves to be allowed, as there was proper evaluation by the learned trial judge. I also allow the appeal and dismiss the cross-appeal. I abide by the consequential orders made in respect of the main appeal, and the cross-appeal. I agree with the order as to costs.

Judgment delivered by
John Afolabi Fabiyi, JSC

I have read in draft the judgment just handed out by my learned brother - Onnoghen, JSC. I agree with the reasons therein advanced to arrive at the conclusion that the main appeal should be allowed while the cross appeal warrants to be dismissed. I adopt same and order accordingly.

Judgment Delivered by
Suleiman Galadima JSC

This appeal by the Appellants/Respondents herein is against the judgment of the Court of Appeal holden at Benin City in CA/B/66/96 delivered on the 19th day of July 1998 in which the Court allowed the appeal of the Respondents/Cross-Appellants, and ordered that the case be remitted to the High Court, Warri for retrial.

By writ of summons dated the 22nd day of November 1971, the Appellants claimed against the Respondents for declaration of title to several pieces or parcels of land, general damages for trespass and perpetual injunctions.

Relevant pleadings filed and exchanged by both parties are the "Still Further Amended Statement of Claim" of the Plaintiffs and the 4th Further Amended Statement of Defence of the Defendants.

In a considered judgment the learned trial judge granted the reliefs sought by the Plaintiffs. He however in spite of the orders of declaration and injunction granted in favour of the Plaintiffs, ordered that the Defendants be allowed to retain the portions of the Plaintiff's land wherein they built their houses, "in the interest of good neighbourliness".

Dissatisfied with this judgment, the Defendants appealed against the same by Notice of Appeal dated and filed on 21/11/1995. Upon receipt of the Notice of Appeal, the Plaintiffs also Cross-appealed on 23/11/1995 against the portion of the judgment of the trial court ordering that the defendants as the occupiers/owners of the buildings now standing from the Grammar School to the Davidson Line, shall continue to occupy same without any disturbance from any member of the plaintiffs' community.

The Appellants' brief dated the 30th day of October, 1996, was filed on the 25th day of November 1996. The Respondents' thereafter filed a Respondents'/Cross-Appellants Brief of Appeal on 26/03/97. The Appellants on receipt of the Respondents'/Cross-Appellants' Brief of Argument filed their Appellants' Reply brief on 11/11/97. The Defendants/Appellants submitted 5 issues for determination at the court below.

After hearing argument from the learned counsel to the parties the Court of Appeal allowed the appeal and set aside the judgment of the trial court delivered on 15/8/1995. After allowing the appeal, the learned Justices of the Court of Appeal made an order remitting the case to the Warri High Court for retrial.

The issues formulated by the Appellants for determination in this appeal are similar to those formulated by the Respondents for determination of the Court of Appeal, except for their order. These issues are:

> "1. Whether the learned Justice of the Court of Appeal were right when they held that the learned trial judge was wrong to have found that Mr. Davidson fixed a recognizable and legally enforceable boundary between the Ojobo and Torugbene Communities.
>
> 2. Whether the learned Justice of the Court of Appeal were right when they held that the learned Trial Judge was wrong in holding that the previous judgments tendered by the Appellants operates as estoppel against the Respondents in favour of the Appellants.
>
> 3. Whether the learned Justice of the Court of Appeal were right when they held that the learned trial Judge was definitely wrong to have held that the Appellants had proved the extent and identity of the land in dispute.
>
> 4. Whether the learned Justice of the Court of Appeal were right when they held that the learned trial judge did not properly evaluate the evidence adduced at the lower court before entering judgment for the appellants.
>
> 5. Whether the learned Justice of the Court of appeal were right when they held that the appellants cannot be said to have proved their case."

With respect to the cross-appeal, the sole issue identified by the Learned Counsel for the Cross-Appellant is as follows:

> "Whether the Court of Appeal was right in ordering a retrial and remittal of this suit back to the High Court of Delta State for re-assignment?"

The facts of this case leading to the appeal as could be gathered from the pleadings of the parties are aptly summarised by my learned brother Onnoghen JSC. It seems to me too that the arguments canvassed and submissions on the issues raised by the respective counsel for the parties have been ably set out in the lead judgment.

I have been obliged well in advance with the draft of the lead judgment of my learned brother. He has determined the appeal in favour of the appellants. I am in agreement with him that there is merit in the main appeal it succeeds; it is allowed whilst the cross-appeal fails and it is dismissed. However, I feel most compelled by the circumstances of this matter to expatiate on the all-important Exhibit C, the document containing the controversial Mr. Davidson Boundary. The appellants plead in paragraphs 14 and 15 (3) of their Still Further Amended Statement of Claim.

> "14. When the 6th-9th Defendants were firmly established, they trespassed upon the land of the plaintiff in the area Tungbokorobri, Krisei (Krise) and Ayibou (Ayebo) creeks in 1912 and committed various acts of trespass. These ensured series of court actions both criminal and civil between the plaintiffs and the 6th-9th Defendants. The then District Commissioner of Forcados District, Mr. J. Davidson, fixed a boundary for the two communities by drawing a line from the junction of Krisei and Ayibou creeks to the waterfront of Buloutoru creek now know as Davidson Boundary as clearly shown in the survey plan number KP 6316A as aforesaid. The plaintiffs aver that this is the boundary between them and the 6th-9th Defendants and will rely on it at the trial of this action.
>
> 15. (3) Notwithstanding the fixing of the Davidson's Boundary between the two communities and subsequent actions and judgments against the Defendants, Torugbene people, continuously disregarded the said boundary as finally settled and trespassed on the creeks and lands which by that settlement were given to the plaintiffs. As a result of the constant friction between the two communities, the then District Officer Forcados referred the matter to the Resident, Warri Province, Mr. J. Davidson who had previously dealt with the issue

while as the District Commissioner of Forcados District and accordingly, in 1921, confirmed the Sketch as the true boundary, he fixed for the two communities. The Sketch will be founded upon at the trial of this action. "

Naturally, the (Defendants/Respondents) reacted to the pleadings of the plaintiff (Appellants) in paragraph 20 of their 4th Further Amended Statement of Defence thus:

> "20. In still further answer to the said paragraph 14 of the Further, further amended Statement of Claim, 1st-4th Defendants aver that Davidson fixed no land boundary between the plaintiffs and the 1st-4th Defendants and their Torugbene people. During the dispute of the Davidson Boundary, the plaintiffs predecessor conceded or did not contest or challenge the 1st - 4th Defendant's title, possession to and user of the land in dispute and other lands and houses surrounding the Ayebou and Kresei Creek.
>
> What Davidson did was to mark a boundary at the junction of Kresei and Ayebou creeks to demarcate the fishing rights of the two communities in the said creeks over which there was dispute and the said Davidson Boundary was therefore confined to the two tiny creeks which boundary mark had nothing to do with the surrounding lands and bushes which had been in undisputed and continuous possession and effective control of the 6th - 9th Defendants and their people ever since Torugbene was founded. "

No doubt from the pleadings of the parties set out herein, the issue between the Appellants and the Respondents is whether the Davidson Boundary is limited for the fishing rights of the parties in the creeks or it extends over the surrounding lands and bushes to the waterfront of Buloutoru creek. The passage in the judgment of the lower court and pp. 307 - 308 of the record is relevant to the issues under consideration. The lower court stated thus:

> " …. While the lower court made a finding on the right of Mr. Davidson to fix the said Davidson Boundary between the parties, there was no finding at all as to where the boundary is located and its relation to the land in dispute between the parties. The findings on the actual location of the boundary on the ground, is actually more relevant for the resolution of the dispute between the parties and the failure of the lower court to make such finding, after properly evaluating the relevant and credible evidence in support of such finding, is in my view a clear manifestation of the failure of the lower court to properly evaluate the evidence before it prior to the entering of judgment in favour of the respondents."

The question in this issue No 1 is whether the Appellants, on the preponderance of evidence, met the standard of proving that the boundary between the parties (the two communities) extends over the surrounding land and bushes as pleaded by the Appellants. To prove this, the Appellants tendered Exhibits 'C', 'K' 'J' and 'H' and equally important, Exhibit C - the sketch of the Boundary made by Mr. J. Davidson, the Administrative Officer for Forcados Division in 1912. Exhibit. 'K' is the Burutu Cadestral Survey. It is the certified true copy of Plan No B U C 3 drawn by the Department of Lands, and Survey dated 5/8/1927, showing the boundary between the two communities. Both Exhibits 'C' and 'K' were retrieved from the Government Archives. It is instructive to note that the Respondents admitted in Exhibit 'E' existence of the "J. Davidson Boundary."

Learned counsel for the Respondents had argued that the Administrative Officer for Forcados Mr. Davidson did not fix a boundary between Ojobo Community and Torugbene Community. "recognisable and enforceable in Law" because he did not comply with the provisions of the Inter Tribal Boundary Settlement Ordinance, 1933. The trial judge rightly held that Mr. J. Davidson had the administrative capacity to have decided the boundary in 1912. The ordinance proclaimed 21 years after in 1933 should have had no retrospective effect over the Administrative Officer's official acts in that capacity done in 1912. I do not find that the J. Davidson boundary is totally unreliable and unrecognisable. From the facts pleaded by the Appellants and testified by the witnesses, I had to take a hard look at the boundary in Exhibits 'C' 'K' and 'J'.

It is in the light of this that I also form the opinion that from the state of the pleadings, the identity and extent of the land in dispute was not put in issue. It is also the finding of the trial court that the identity and extent of the land in dispute was not made an issue. The Appellants in paragraph 6 of their Still Further Amended Statement of Claim stated that they are the owners of the land in dispute which dimension and description is verged on Survey Plan No KP 6316 A. They then tendered the said Survey Plan, Exhibit 'J' in proof of this claim. The Respondents on their own part averred in paragraphs 6 and 7 of their 4th Further Amended Statement of Defence that the Appellants own no land within the area in dispute which is more particularly described in their Survey Plan No AA/RV.95/090/LD. This was tendered and admitted as Exhibit 'N'.

In law, the proving clearly and unequivocally the area to which his claim relates lies on the plaintiff seeking a declaration of title to land. It is however trite law that the burden of proof is obviated where the identity and, extent of the land in dispute was never in issue. See *Magaji Mayakl v Alhaji Safianu Dogara (1993) 8 NWLR (pt. 318) 586 at 594.* The evidence of PW2, PW4 is clear on this issue. That the land which is the subject matter of this action "is called Beimbou-Ogbe or Ojobo-Ogbo and it is situated at the southern part of Bulou - Toru Creek." DW2 simply testified that "I know the land in dispute". However the 4th Defendant further identified the land in dispute and described it as "Torugbene/Ruomo-Ogbe land, Bulou-Ojobo land does not exist". The parties are clear as to the identity of the land in dispute. The mere fact that the 4th Defendant gave the disputed land a slightly different name is not sufficient to give rise to any question or issue of identity. See *Magaji Mayaki v Alhaji Safianu Dogara (supra).*

Where the extent and identity of the land in dispute is not in issue, what is required of the Plaintiff is the establishment of

such features and boundaries which a surveyor can pick on the ground and produce a plan thereon. See *Etim and Ors v Oyo 7 Ors (1975) 6 -7. Sc; Udeze v Chidebe (1990) 1 NWLR (pt.125) 141 at 159.*

It is from the totality of the evidence before the learned trial Judge that led to his conclusion at page 116 of the record thus:

> "…….. With regard to the submission that the plaintiffs have failed to prove the extent and identity of the land in dispute with due respect to the learned counsel for defendants, I hold that the submission lacks merit and this is in view of Exhibit 'J' the survey Plan of the plaintiffs. The identity and area of the land in dispute were clearly shown in Exhibit J. It was also submitted that the previous judgments related to only to the creeks and not to land. I am unable to agree with this submission because the creeks are surrounded by land and I do not see how the creeks can be owned by one partly while the other owns the land abutting them"

These findings are crucial. This leads me to painstakingly examine Exhibit 'C'. It is clear from my examination that the boundary thereon extends beyond the creeks and into the surrounding lands. It would appear though, to the Respondents this boundary had taken a large chunk of the land and ceded same to the Ojobo (Appellants' Community). The Appellants' case squarely rests on a question of fact. Their evidence establishing their title to me is credible, convincing and unequivocal.

Appellants also formulated another issue No.2 (on issue of *estoppel*). I have carefully considered the submissions of the respective counsel for the parties on the issue. A claim for declaration of title to land is provable by one of 5 different ways as laid down in the case's of *Idundun v Okumagba (1976) 9 -10 SC.227, Alli v Alesinloye (2006) 6 NWLR (pt.600) p.177* and *Magaji v Cadbury (Nigeria) Ltd. (1985) 2 NWLR (pt.7) P.393*. Though a plea of *res judicata* may not be one of the five different ways of proving title to land, a successful plea of same is a relevant fact for proof of title. *See Igwego v Ezeugo (1992) 6 NWLR (PT.249) PT. 561 Achiakpa v Nduka (2001) 19 NWlR (pt.734) 623* and *Ibero v Ume-Ohana (1993) 2 NWLR (pt.277) 510.* Appellants tendered Exhibits A, D, E, F, G and H being previous judgments between the parties.

Learned Counsel for the appellants submitted that the Appellants were wrong in pleading facts raising a plea of *res judicata*. The learned senior counsel was right in his submission that a plaintiff is not precluded in pleading *res judicata* in the Statement of Claim. Although it is well settled law that a plea of *res judicata* is a shield for protection of the defendant and generally pleaded by the defendant, as a bar to subsequent proceedings by the plaintiff on the same issue and between the same parties or their privies, the modern trend is that the plea can also be validly employed as a sword by a plaintiff: See *Ezekpelechi Ukaegbu v Ononanwa Ugoji (1991) 6 NWLR (PT. 196) 127 AT 158 Inwendu v Mbamali (1980) 3-4 SC.31 AT 48; And Ezewani v Nwordi (1986) 4 NWLR (pt.33) 27.*

Section 54 of the Evidence Act enables any party to a proceeding to plead previous judgment in his favour.

In the case at hand in paragraphs 20 and 2l of the appellants' Still Further Amended Statement of Claim, they pleaded as follows:

> "20. The Plaintiff will contend at the trial of this action that the 6th - 9th defendants are estopped by the various judgments against them from disputing the plaintiffs' title to and possession of the land in dispute.
>
> 21. The Plaintiffs will rely on the above judgment as constituting *res judicata* between them and the 6th - 9th Defendants at the trial of this action …."

It has since been settled that for the doctrine of *res judicata* to succeed the following must be established.

(i) that the parties or their privies and the claim/issue in dispute in both proceedings are the same.

(ii) that the *res judicata* or the subject matter of the litigation in the two cases is the same.

(iii) that the decision relied upon, to support the plea is valid subsisting and final; and

(iv) that the court that gave the previous decision relied upon to sustain the plea is a court of competent jurisdiction. *See Salawu Yoye v Olubode 7 0RS. (1974) 1 ALL NLR (pt.2) 118; Odadhe v Okujeni (1973) 11 SC. 343 p.353.*

The various judgments alleged to constitute estoppel had been pleaded in paragraphs 15 - 19 of the appellant Still Further Amended Statement of Claim and were duly tendered and admitted in evidence as Exhibits A, D, F, G, and H.

At page 115 of the Record the Learned Trial Judge held that those judgments constitute "*estoppel*" as pleaded in paragraph 20 *supra* not "*res judicata*". The respondents cared not a hoot on this distinction. It is not their case on the pleadings and evidence that the appellants pleaded erroneous facts; issues were duly joined on this. But the distinction is that *estoppel* prohibits a party from proving anything which contradicts his previous acts or declarations to the prejudice of a party, who relying upon them has altered his position. It shuts the mouth of the party. But the plea of *res judicata* prohibits the court from enquiring into a matter already adjudicated upon. It completely ousts the jurisdiction of the court. In the circumstance, this distinction is of no moment. In my respectful view, having found that the appellants pleaded *estoppel* and the Learned Trial Judge made use of those judgments pleaded, the mere use of the word, albeit inappropriately, which is a technicality

should not be allowed to "becloud the justice" of his case so ably ex-rayed by the trial court: *See Ukaegbu v Ugoji (Supra) and Atoyebi v Odudu (1990) 6 NWlR (pt.157) 384*.

The Learned Trial Judge had relied on paragraph 20 Appellants Amended Statement of Claim (*supra*) to conclude that the Respondents were estopped by the judgments in the previous cases between the parties. I have read the decision of the Court of Appeal on this issue at page 30 of the record; essentially the reason why the Court is of the view that the trial court was in error in holding that the respondents were *estopped* was because of the following findings:

- that there were no proper contents of previous judgments between 1920 to 1953 to support the finding of the learned trial judge;

- that the said judgments were between the same parties as in the case at hand. It is settled that this court will not interfere with the finding of the trial court which is supported by evidence. The parties are in agreement that in the event of this court having found that there was no proper evaluation of evidence at the end of this case, then it should do so. In the circumstance of this case it will only be necessary to do so, especially in this case where the evidence which the trial court failed or neglected to evaluate are documents (Exhibits A, D, F, G and H).

The question is whether the trial court evaluated these Exhibit tendered in support of the plea of *estoppel* and where he failed, was the Court of Appeal not in as good a position to have evaluated the Exhibits? I shall now consider the relevant findings of the Learned Trial Judge on this issue. Firstly, at page 103 of the record, he found as follows:

> "In 1920 Adamagu of Ojibo sued Depebor and Ande both of Torugbene to the District Court at Facados for declaration of title over Ayebou Creek within Ojobo land and judgment was given in favour of Adamagu who was my grand father. The certified True Copy of the judgment in that case is Exhibit "A".
>
> When the Torugene people still persisted in fishing in the creeks, a policeman and some other persons were sent there but the Torugbene people beat up the policeman and the people sent there with him. As a result, the following Torugbene people were arrested: Cosen, Ayaio, Kulu sinkuma, Warri and Thomas. All of them were tried and convicted. The certified True Copy of the proceedings in that case is Exhibit "B".
>
> In 1929, some Torugbene people went to the creek again. As a result, his father sued Torugbene people who were Iteme, Gbeghede, Egbele, Bamba and Ige for trespass and judgment was given in favour of my family. The Certified True Copy of the judgement is Exhibit "D". Also in 1929, Eteme for himself and on behalf of Torugbene village council sued Gbedeke and Soukumor of Ojobo challenging the Davidson Boundary of 1921. After the trial, the Torughene people lost the case. The certified True Copy of the judgment is Exhibit "E".
>
> The Torugbene people appealed against the judgment and they lost. The certified True Copy of the Supreme Court judgment is Exhibit "F".
>
> In 1931, my late father sued Torugbene people over the Ayibou (Ayebo) and Krisei creeks (crisei) in suit No 11/1931 for declaration of title and won. The certified True Copy of that judgment is Exhibit "G".
>
> In 1952, Chiefs Ekereke, Zipude and Adamagu sued Odokobafa, Lou, London, Opuakpo, Odigben and Obi all from Torugbene for trespass on Ayebou and Krisei creeks in suit No 35/43/52 in the Magistrate Court, Warri. The case was later transferred to the Supreme Court, Warri in suit No W. 36/52.
>
> In the same year, 1952 Egbalakame Benifegha of Torugbene for himself and on behalf of Torugbene Community sued one Brisbe Adamagu of Ojobo in the Magistrate Court Warri for trespass to the Ayebogu and Krisei creeks in suit No 1/1952 and it was also later transferred to the Supreme Court, Warri and numbered W/44/52. Both cases were consolidated and tried together. The Ojobo people in suit No W/36/52 won while the Torugbene people lost in suit No W/44/52.The judgment in the consolidated suits is Exhibit "H".

Again at page 114 to 115 of the Records the Learned Trial Judge held as follows:

> "These judgments relied on by the plaintiffs dated as far back as 1920. They are as follows:- Exhibit "A" dated 28/1/20; Exhibit "B which was a criminal case arising out of the breach by the Defendants of the judgment in Exhibit "A" dated 21/7/20 Exhibit "D" is dated 13/7/29; Exhibit "E" is dated 12/11/29; Exhibit "F" was suit No SC/10/30; Exhibit "G" was suit No W/11/31 and exhibit "H" were Nos. W/36/52 and W/44/52. Both suits were consolidated and were decided by Mbanefo J. as he then was on 4/9/53."
>
> In all the foregoing judgments, the community of the Defendants in the present case lost .. .. The Previous judgments being judgments between the same parties and in respect of the same subject-matter operated as *estoppels* in favour of the plaintiffs and I so hold.
>
> Emphasis supplied by me".

At page 116 in relating the issue of *estoppel* to the issue whether the previous judgment relates only to fishing rights in the

creeks, the learned trial Judge held as follows:

> "It was also submitted that the previous judgment related to the creeks and not to land. I am unable to agree with this submission because the creeks are surrounded by land and I do not see how the creeks can be owned by one party while the other owns the land abutting them. Be that as it may, both creeks and the land abutting them as shown in Exhibit C are on the side of the plaintiffs ....."
>
> (Underlining for emphasis in the reasoning).

In my view the findings on pages 103, 114-115, the passages set out above, are sufficient evaluation of the evidence in relation to the plea of *estoppel* by the appellants. The Court of Appeal is in error when it held otherwise.

From the underlined passage at page 16 of the record, reproduced above, it is clear to me that the finding of the learned trial Judge on the matter that the previous judgments pleaded by the appellants, relate both to the creeks and the abutting land is based on exhibit 'C' the boundary drawn by Mr. J. Davidson in 1912, cannot be faulted.

Having resolved issues No 1 and 2 in favour of the Appellants these are sufficient to sustain the judgment of the trial court. It is not necessary to go into issues, 3, 4 and 5. These are repetitive and superfluous. The trial judge did not base his decision on the evidence of traditional history adduced by the parties, having come to the conclusion that the traditional history of the parties conflict. He relied mostly on *estoppel* arising from the previous judgments between the parties.

From the reasons I have given in this judgment, in addition to the judgment given by my learned brother Onnoghen. JSC allowing this appeal, I also hereby allow the appeal. The judgment of the lower court is set aside and that of the trial court is affirmed and restored. This being so a consideration of the cross-appeal which challenges the order of retrial made by the lower court in a judgment which has just been set aside by this Court, becomes mere academic exercise. The cross-appeal is also dismissed. I abide by the order made as to costs.

Judgment delivered by
Bode Rhodes-Vivour. JSC

I have had the privilege of reading in draft the leading judgment prepared by my learned brother, Onnoghen. JSC. I am in full agreement with his Lordship's reasoning and conclusions. I propose to add a few observations on issue No 2 in this appeal. It reads:

> Whether the learned Justices of the Court of Appeal were right when they held that the learned trial Judge was wrong in holding that the previous judgments tendered by the appellants operates as *estoppel* against the respondents in favour of the appellants.

The doctrine of *estoppel per rem judicatam* is one founded on considerations of justice and good sense. If an issue has been distinctly raised and decided in an action, in which the parties are represented, it is unjust and unreasonable to permit the same issue to be litigated afresh between the same parties or persons claiming under them. *See New Brunswick Rly Co v British and French Trust Corp ltd 1939AC p 1.*

Once a judgment is delivered, and it is a final judgment, or there is no appeal, it would no longer be necessary to prove that the judgment is correct in law or fact. If it is a judgment on the same question, between the same parties and by a court of competent jurisdiction it is binding on the parties until upset on appeal. This is so because it is the policy of the law that parties to a judgment are not allowed after a judgment is delivered to re-litigate the same question even though the decision may be wrong. This is premised on the fact that a court of competent jurisdiction has jurisdiction to decide wrongly as well as correctly, and if it decides wrongly the wrong decision is binding unless corrected on appeal. The appellants tendered exhibits A, D, E, F, G and H, previous judgments between the parties. This was not denied by the respondents. In paragraph 22 of the respondents' pleadings it was averred that suit No W/36/52 and suit No W/44/52 were in respect of the same land in dispute in this case.

The learned trial judge found as follows:

> "The previous judgments being judgments between the same parties and in respect of the same subject matter operated as *estoppel* in favour of the plaintiffs and I so hold"

The learned trial judge came to this conclusion by examining documentary evidence to wit: Exhibits A, D, E, F, G, and H. This is what his Lordship had to say:

> "In 1920 Adamagu of Ojibo sued Depebor and Ande both of Torugbene to the District Court at Facados for declaration of title over Ayebou Creek within Ojobo land and judgment was given in favour of Adamagu who was my grand father. The certified True Copy of the judgment in that case is Exhibit "A".
>
> When the Torugene people still persisted in fishing in the creeks, a policeman and some other persons were sent there but the Torugbene people beat up the policeman and the people sent there with him. As a result, the following

Torugbene people were arrested: Cosen, Ayaio, Kulu sinkuma, Warri and Thomas. All of them were tried and convicted. The certified True Copy of the proceedings in that case is Exhibit "B".

In 1929, some Torugbene people went to the creek again. As a result, his father sued Torugbene people who were Iteme, Gbeghede, Egbele, Bamba and Ige for trespass and judgment was given in favour of my family. The Certified True Copy of the judgement is Exhibit "D". Also in 1929, Eteme for himself and on behalf of Torugbene village council sued Gbedeke and Soukumor of Ojobo challenging the Davidson Boundary of 1921. After the trial, the Torughene people lost the case. The certified True Copy of the judgment is Exhibit "E".

The Torugbene people appealed against the judgment and they lost. The certified True Copy of the Supreme Court judgment is Exhibit "F".

In 1931, my late father sued Torugbene people over the Ayibou (Ayebo) and Krisei creeks (crisei) in suit No 11/1931 for declaration of title and won. The certified True Copy of that judgment is Exhibit "G".

In 1952, Chiefs Ekereke, Zipude and Adamagu sued Odokobafa, Lou, London, Opuakpo, Odigben and Obi all from Torugbene for trespass on Ayebou and Krisei creeks in suit No 35/43/52 in the Magistrate Court, Warri. The case was later transferred to the Supreme Court, Warri in suit No W. 36/52.

In the same year, 1952 Egbalakame Benifegha of Torugbene for himself and on behalf of Torugbene Community sued one Brisbe Adamagu of Ojobo in the Magistrate Court Warri for trespass to the Ayebogu and Krisei creeks in suit No 1/1952 and it was also later transferred to the Supreme Court, Warri and numbered W/44/52. Both cases were consolidated and tried together. The Ojobo people in suit No W/36/52 won while the Torugbene people lost in suit No W/44/52. The judgment in the consolidated suits is Exhibit "H".

My Lords, these judgments relied on by the appellants' are from 1920. They are:

(a) Exhibit A dated 28/1/20.

(b) Exhibit B, a criminal case arising out of the breach by the Torugbene people of the judgment in Exhibit A dated 21/7/20.

(c) Exhibit D is dated 13/7/29

(d) Exhibit E is dated 12/11/29

(e) Exhibit F is suit No. Se/10/30

(f) Exhibit G is suit No W/11/31

(g) Exhibit H are suit Nos. W/36/52 and W/44/52 decided by Mbanefo J (as he then was) in 1953.

In all these judgments whether at first instance or on appeal the Torugbene people (the respondents) lost. The judgments are between the same people and the same questions as in this case, "Land." They were all decided by competent courts. These judgments are conclusive and create *estoppel* in favour of the appellants. The issue of ownership of the land was correctly resolved and put to rest in these judgments. The suits (*supra*) operated as estoppels in favour of the appellants.

For this and the much fuller reasoning in the leading judgment the main appeal is allowed. The judgment of the Court of Appeal in Suit No CA/B/66/96 delivered on 15/7/98 is hereby set aside, and the judgment of the High Court in Suit No W/135/71 delivered on 25/8/95 is hereby restored with costs of ₦50,000.00 in favour of the appellants.

The cross-appeal is dismissed. For the avoidance of doubt the main appeal is allowed, and the cross-appeal is dismissed.

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