In the Federal Supreme Court

On Wednesday, the 23rd day of December 1964

Before Their Lordships

Vahe Robert Bairmian ..... Justice of supreme court
Charles Dadi Onyeama ..... Justice of supreme court
Micheal Oguejiojo Adegbo ..... Justice of supreme court

FSC 329/63

Between

Idowu Alashe & Ors ..... Appellants

And

Sanya Olori Ilu & Ors ..... Respondents

Judgment of the Court
Delivered by
Charles Dadi Onyeama. JSC

The appellants were the plaintiffs and the respondents the defendants in the court below. The claim was for a declaration of title to the farmland known as Iganke and situated in Imota, Epe District; there was a further claim for an injunction. The plaintiffs brought the claim on their own behalf and as representing "the entire members of Rowuyo family" and the defendants were sued for "themselves and the entire members of Ogungbala's family."

The plaintiffs' case on the pleadings was that the land in question was first occupied by their ancestor Mawogbe from whom it had descended to them. A son of Mawogbe named Okusi married a woman of the defendants' people and she had a son Ewesanya. As a result of the relationship which developed between the two families out of this marriage and a subsequent marriage between Salawu Anjorin of Ogungbala family and Olayemi Abudu of Rowuyo family, Salawu Anjorin was allowed to farm on Rowuyo family land; other members of Ogungbala family married women from Rowuyo family and were allowed to farm on Rowuyo family land; one of such member was Enigbokan Anjorin whose brothers Oke and Tiamiyu joined him and farmed on Rowuyo family`s land. Tiamiyu Anjorin, however, went outside the area allowed to Enigbokan and farmed on land occupied by Taiwo Sunmogejo, a member of Rowuyo family; this led to a dispute which was referred to the head Chief, who warned Tiamiyu to desist from further interfering with the land, other members of Ogungbala family, however, came on the land and commenced cultivation without the consent of the plaintiffs' family.

The defendant's case was that the land in question was called "Egan Emuren" and belonged to their ancestors before them, it was Taiwo Sunmogejo who went into Tiamiyu Anjorin's land wrongfully and Tiamiyu Anjorin who complained to the head Chief and took action in the lkosi Native Court at Imota in Suit No 22/1950, judgement went against Taiwo Sunmogejo and it was ordered that he should vacate the land in question. The defendants pleaded that,

> "in view of the foregoing defendant say that the present plaintiffs are estopped *per rem judicata* from bringing this action as the land, the subject-matter of this action is the same land as in Suit No 20/50 Native Court Ikosi referred to above."

There are other allegations of fact in the defence but it is not necessary to set them out.

The case came before Doherty, J in the High Court at Ijebu Ode for hearing on the 17th of April, 1962, the learned judge decided to hear the plea of *res judicata* as a preliminary point. The defendants called evidence that in 1951 they instructed a surveyor to survey and map an area of land near Imota which measured 848.72 acres, that the area claimed in the suit and shown on the plan filed in court as Exhibit B was within the area surveyed and mapped by the surveyor, that the judgment in the native court related to the area of land near Imota which was surveyed and shown on a plan which was in evidence as "Exhibit A", That was the extent of the evidence.

It was submitted to the learned judge on behalf of the defendants that the parties in the native court case and the suit before him were the same and that they were sued and defended in the same capacity. In support of this submission attention was called to the fact that in the native court case Jole Anjorin had described himself as the head of his family, and with the evidence of Olupitan Ajanaku. Mr Solanke who appeared for the plaintiffs, submitted to the trial judge that there was nothing in the native court judgment to show that the case was fought in a representative capacity; and that the identity of the land in dispute with that to which the native court suit relates was not proved.

.

The learned trial judge decided in favour of the defendants' plea of *res judicata;* he, therefore, dismissed the claim. In

dealing with the submissions of Mr Solanke he said:

> "With regard to the first objection, although the writ of summons did not say in what capacity the plaintiff sued or the defendant was sued, it is abundantly clear from the evidence in the case and also from the judgment that each party represented his family in the 1950 action. In the course of his evidence Tiamiyu Anjorin (the plaintiff in that action) deposed as follows;
>
> > "All the farms that are situated at the said Egan Emuren belonged to my family and no one else".
>
> Again, Jole Anjorin, plaintiff's first witness testified thus:
>
> > 'Plaintiff is my young brother of the same father. We have many members of the family who owned the farm in question. I am now in the position of the head of the family. I can say much of this farm, I am the real person who asked the plaintiff to go and sue the defendant to court for this action, because he defendant has no portion of land or farm at Emuren and he did not allow my people to make use of the farm as they like.'
>
> Finally, Bakare Alashe, plaintiff's 3rd witness who appeared on behalf of the community of Imota spoke of "plaintiff's family" and "defendant's family" right through his evidence, thus confirming that the 1950 dispute was between the two families. With regard to the identity of the land, it is obvious from the combined evidence of Mr Pitan and Tiamiyu Anjorin in this court that this has been amply proved."

Thus, the learned trial judge found that the defendant in the native court case was defending on behalf of his family from the references in the evidence of Bakare Alashe in the native court hearing to the "defendant's family" right. The defendant in the native court had not claimed to represent anybody but himself and, indeed, he was not sued in any but a personal capacity.

On the hearing of this appeal by the plaintiffs, the judgment was attacked on two main grounds, namely:

1. that the parties and the subject matter in Suit No 22/50 are different from the parties and subject matter in the present suit - J/3/61;

2. and that the plan Exhibit A was inadmissible in evidence and had been wrongly admitted.

The argument is that a plea of *res judicata* cannot be upheld unless it is shown that the parties, issues and subject matter in the case forming the foundation of the plea are identical with the parties, issues and subject matter in the later case in which the plea is raised, that the parties in the native court case (No 22 of 1950) were different from those in the suit J/3/61 before Doherty J, that in the native court suit the defendant was not sued in a representative capacity nor did he claim to defend in that capacity; that the copy of proceedings (Exhibit D) made this clear and throughout the native court proceedings the defendant was referred to in the singular; that the incidental references to his family made by the plaintiff's witness in the native court suit did not constitute the defendant the champion of his family in that case; and that his family was not privy to the case and the principle of the decision in *Nana Ofori Atta II v Nana Abu Bonsra II [1958] A.C. 95* did not apply; and the observations of Lord Radcliffe on the principle of "standing by" in *Nwakobi* v. *Nzekwu* [1964] I W.L.R. 1019 were referred to. Regarding the plan Exhibit A, it was submitted that since it was not countersigned by the Regional Director of Surveys as required by section 23 (1) (b) (ii) of the Survey Act it was inadmissible in evidence.

Mr Alakija for the defendants, now the respondents, has, on the other hand, argued to the following effect: strict adherence to form should not be observed in dealing with native court cases; the substance of the claim should be given effect to; it is conceded that the plaintiff in the native court case (No 20 of 1950) sued in a representative capacity; the representative capacity in which the defendant defended appears from the plaintiff's evidence in that case, that

> "Defendant is a native of Ode and as such he has no farm at the said place at all. All the farms that are situated at the said Egan Emuren belonged to my family and no one else. Sometimes ago the matter as to who was the owner of the lands over there had come before the community who decided that defendant and his family should be paying annual rent for us but they paid nothing".

Mr Alakija has argued that the present plaintiffs belong to one family and therefore anyone of them suing or being sued must be taken to be representing his family since the land is family land; that since the defendant raised the title of his family to the land in the native court hearing his family must be bound by the outcome; and that it must be assumed that a case of the importance of the native court case was known to the then defendant's family but they chose not to join in. Mr Alakija conceded that the plan Exhibit A was wrongly admitted in evidence but he contended that the proper time to object to its admission was when it was tendered in evidence.

It is not in doubt that before the doctrine of estoppel *per rem judicatam* can operate it must be shown that the parties, issues, and subject matter were the same in the previous action as those in the action in which the plea is raised.

In the native court case the claim against the defendant was "to quit the plaintiff's farm situated at Egan Emuren", and it was complained that the defendant had, ten days before, "c1eared a farm" on the land; this meant that the defendant brushed an area of the land in question on which he proposed to farm, and complains of the isolated act of an individual.

Before the judgement in that case can bind the family of that defendant it must be shown that the family knew of the case and participated in it in such a way that they can truly be regarded as parties.

In the case of *Ofori Atta II v Bonsra II*, which both parties cited, there was a claim to an area of land the title to which had been the subject of previous litigation between the stool of Muronam and the Banka stool; the Banka stool won; Ofori Atta II, the plaintiff in the later case, was the paramount Chief of Akim Abuakwa, to whom the Muronam stool, the second plaintiff in the case, was subject; Bonsra II, the representative of the stool of Adanse, asked that his master, the Banka stool, be joined as defendants; and this was done. The defendants denied the plaintiffs' claim and pleaded the former judgement as *estoppel*; the plea was upheld against the stool of Muronam; in respect of its paramount Chief, Of on Atta II, it was decided that he was also estopped from questioning a judgement obtained against a stool claiming under him, as the issue in the previous action was about the title itself to the land and he knew of that action and had a right to intervene but did not: (see 14 W.A.C.A. 149). It was established by evidence that the paramount chief was aware of the proceedings in the previous litigation and supported his subordinate stool unit, and on appeal to the West African Court of Appeal from the finding of *estoppel* against the paramount chief that court decided that if being cognisant of the proceedings he was "content to stand by and see his battle fought by somebody else in the same interest" to the defeat of his champion, he could not reopen the question of title to the land which had been determined in the former action; he was clearly estopped from so doing. On further appeal to the Privy Council [1958] A.C. 95, the Board was satisfied that Akim Abuakwa and Adansi were not parties to the former proceedings, but they undoubtedly knew of them and of the disputes that had been going on for years before.

In speaking upon the question how far there was an estoppel between persons who were not parties to previous litigation, the Board said:

> "The general rule of law undoubtedly is that no person is to be adversely affected by a judgement in an action to which he was not a party, because of the injustice of 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 judgement, in which case he is estopped by his conduct. Their Lordships propose in this case to consider first estoppel by conduct."

Their Lordships were of opinion that the principle stated by Lord Penzance should be applied to the case; this principle was stated in *Wytcherley* v. *Andrews* (1871) LR. 2 P & D 327, 328, and is as follows:

> "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 reopen 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 interests of the parties seeking to disturb the arrangement, it will not allow the matter to be reopened".

It is clear that this principle can only apply in cases where the party sought to be estopped knew what was passing and was content to stand by and let someone else in the same interest champion his cause and fight his battle. As Lord Radcliffe observed in *Anachuna Nwakobi and Others* v. *Eugene Nzekwu and Another [1964J* 1 W.LR. 1019:

> "the principle of 'standing by', while certainly a valuable one for application when circumstances demand it, does need to be confined to cases in which participation in 'the battle' is proved up to the hilt. Otherwise, the distinction between suits in which plaintiffs have chosen to sue a defendant individually, though a community title may be brought in question, and those suits in which they set out to and do challenge a community title as such will be in danger of being obscured; and even a measure of assistance to a defendant from other community members may give plaintiffs an advantage in all future litigation which, in fairness, there is no reason for them to enjoy."

That observation is a valuable footnote to the principle of standing by stated in *Wycherley's* case and applied in *Ofori Atta's* case, and a reminder of the danger of extending it outside its scope to cases to which it does not properly apply.

On the face of the record the parties before the native court were not the same as before the High Court; the family of the defendant in the native court, who are now the plaintiffs in the High Court can, therefore, only be estopped by their conduct in standing by. It is perhaps possible to say that the plaintiff before the native court represented his family; the defendant, on the other hand, did not claim to represent his family; there was no participation in the contest by his family, and there was nothing to show that his family was even aware of the proceedings. We do not agree that in the circumstances of this case it can be urged with good reason that the present plaintiffs had stood by during the native court case or had made the then defendant their champion so as to be estopped by their conduct from reopening the matter.

For these reasons we think the plea of estoppel *per rem judicatam* should have been rejected.

Regarding the plan Exhibit A, Mr Alakija for the respondents concedes that it was wrongly admitted in evidence; his contention is that the objection should have been taken before the trial judge.

The prohibition against the admission of the plan in evidence is a statutory one; the plan was not countersigned by the Regional Director of Surveys and so is caught by section 23 (l)(b) of the Survey Act. It is the duty of all courts to give effect to legislation and the parties cannot by consent or acquiescence or failure to object nullify the effect of a statute. This court in *Owonyin* v. *Omotosho* [1961] All N.L.R. Part II 304, 308, called attention to the impropriety of relying on inadmissible evidence in arriving at a decision. It was there said, on the authority of *Jacker v. International Cable Co. Ltd.*, (1888) 5 T.L.R. 13:

> "When matter has been improperly received in evidence in the Court below, even when no objection has been raised, it is the duty of the Court of Appeal to reject it and to decide the case on legal evidence."

When that rule is applied to the case under examination there is no evidence of the extent of the area which was in issue in the native court case. In fact the plan was made after the native court case.

This appeal is allowed and it is ordered that the judgement of the High Court at Ijebu Ode dated the 7th June, 1962 in Suit No. J/3/1961 including the order as to costs be, and is hereby set aside, and that the suit be remitted to the High Court for hearing on the merits. The respondents shall pay the appellants as costs of this appeal the sum of fifty guineas, and twenty-five guineas as costs of the hearing in the court below of the plea of *res judicata.*

Counsel

M.A. Odesanya ..... For the Appellants

O.O. Alakija ..... For the Respondents