

1. ALHAJI YAKEEN OWONIKOKO
2. MR.RAIMI OYEBODE
3. MADAM REB B EGA ADEM OLA
(FOR THEMSELVES AND ON BEHALF OF ARO
FAMILY)

V.

ALHAJI ALIMI AROWOSAIYE
COURT OF APPEAL
(KADUNA DIVISION)

UMARU AUDULLAHI, J.C.A. (Presided)

MAHMUD MOHAMMHU..J.CA. {Read the Leading judgement)

IBRAHIM TANKO MUHAMMAD J.C.A.

APPEAL - Evaluation of evidence by trial court - Where trial court failed to evaluate oral evidence involving credibility of witnesses - Whether appellate court can evaluate - Course open to appellate court.

APPEAL - Findings of fact - Trial court failing to make findings of fact on material issues - Course open to appellate court.

APPEAL - Respondent's Notice - Respondent seeking to vary a fundamental finding by the trial court on appeal - Whether can do so by way of Respondent's Notice - Proper course open thereto.

APPEAL -Retrial order - Principles guiding - When it will be ordered by appellate court - Relevant considerations.

COURT - Abuse of court process - Duty on court to see that its process is not abused.

COURT - "Abuse of court process" - Meaning of- What amounts to - Relevant considerations.

COURT - Abuse of court process - Where court finds that its process has been abused - Proper order to make.

COURT - Findings of fact - Trial court failing to make findings of fact on material issues - Course open to appellate court.

COURT - Issues raised by parties - Duty on court to pronounce thereon.

ESTOPPEL - Res judicata - Onus on party raising it - Need to plead material facts of judgment sought to be relied upon.

ESTOPPEL - Res judicata - Plea of- Requirements of - Basis and scope of.

ESTOPPEL - Res judicata - Whether can be founded on judgment appealed against.

EVIDENCE - Estoppel - Res judicata - Onus on party raising it - Need to plead material facts of judgment sought to be relied upon.

EVIDENCE - Estoppel - Resjudicala - Plea of-Requirements of- Basis and scope,

EVIDENCE - Estoppel - Res judicata - Whether can be founded on judgment appealed against.

JUDGMENT AND ORDER - Abuse of court process - Where court finds that its process has been abused - Proper order to make.

JUDGMENT AND ORDER - Retrial order - Principles guiding - When it will be made by appellate court - Relevant considerations.

LEGAL PRACTITIONER - Duty and role of counsel in the administration of justice -Duty on counsel not to misrepresent facts of case relied on.

PRACTICE AND PROCEDURE - Abuse of court process - Duty on court to see that its process is not abused.

PRACTICE AND PROCEDURE - "Abuse of court process" - Meaning of- What amounts to - Relevant considerations.

PRACTICE AND PROCEDURE - Abuse of court process - Where court finds that its process has been abused - Proper order to make.

PRACTICE AND PROCEDURE - Evaluation of evidence by trial court - Where trial court failed to evaluate oral evidence involving credibility of witnesses - Whether appellate court can evaluate - Course open to appellate court.

PRACTICE AND PROCEDURE - Findings of fact - Trial court failing to make findings of fact on material issues - Course open to appellate court.

PRACTICE AND PROCEDURE - Pleadings - Estoppel per remjudicatam - How pleaded - Need to plead material particulars of judgment sought to be relied upon.

PRACTICE AND PROCEDURE - Respondent's Notice -Respondent seeking to vary a fundamental finding by the lower court on appeal - Whether can do so by way of Respondent's Notice.

WORDS AND PHRASES - "Abuse of court process" -Meaning of- What amounts to.

Issues:

1. Whether having regard to the capacities of the parties, the claim, the facts and other circumstances of this case it can be said that the decision encompassed in Exhibit D1 was resjudicala of the present case.
2. Whether the trial court was right having regard to the fact that the parties have fully led evidence on the case, to have refused to review, make findings of fact and pronounce on the merit of the case presented before it .
3. Whether the suit can be said to be an abuse of court process and whether the trial court was right in dismissing appellant's claim.

Facts:

The appellants claimed against the respondent in their writ of summons the following reliefs; declaration of title to the parcel of land in dispute, damages for trespass and injunction.

After the exchange of pleadings between the parties, the case went into full trial in the course of which the appellants called 6 witnesses while the respondent testified in his own defence and also called in one other witness. In its pleading, the respondent pleaded the judgment of an Area Court given in his favour in respect of the said land although the nature of

the claim therein and other descriptions of the land in dispute were not given. The respondent also pleaded that the appellants had appealed against the said decision.

In a considered judgment, the trial court dismissed the appellants' claim in its entirety.

The appellants were dissatisfied with the decision of the trial court and appealed to the Court of Appeal.

Held (Unanimously allowing the appeal):

1. On Estoppel per rein judicatiam-

A judgment of court of competent jurisdiction can be relied upon in a subsequent litigation as per remjudicatam or to found issue estoppel or cause of action estoppel or estoppel by standing by. (P. 73, paras. D-E).

2. On Need and how w plead estoppel per rem judicatiam-

Any party relying on estoppel as a defence in a trial must specifically plead relevant facts clear supporting that defence. The parties to an action and the court must know for which purpose proceeding and previous judgment pleaded and tendered in evidence are meant to serve. In the present case, the respondent did not sufficiently plead estopped per rem judicatiam in his statement of defence. [Odadhe v. Okujeni (1973) 11 SC 343 referred to]. (Pp. 73, paras. E-F; 74, para C-D).

3. On Raising estoppel as fresh point on appeal -

Where a plain tiff or defendant did not set up estoppel in the court of first instance as part of his case it would be wrong for the appellate court to allow such an issue to be raised as one of the issues in the case for the first time in the appellate court. [Odadhe v. Okujeni(1973) 11 SC 343 at 353; Abisi v. Ekwealor (1993)(NWLR (Pt. 302) 643 at 672 referred to] (P. 74, paras. C-D)

4. On Requirements for successful plea of estoppel per rem judicatiam-

For a party to sustain a plea of resjudicata, the party pleading it must satisfy, amongst others,;

- (a) that the parties or their privies, as the case may be, are the same in the present case as in the previous one;
- (b) that the issues and the subject matter are the same in the previous suit as in the present suit.

In the instant case, these essential ingredients of the defence of estoppel per rem judicatiatn were neither pleaded nor established by evidence to justify it being applied by the trial court in dismissing the claims of the appellants, [ojiako v. Ewuru (1995) 9 NWLR (Pt. 420) 460; Adomba v. Odiese (1990) 1 NWLR (Pt. 125) 165; Olukoga v. Fatunde (1996) 1 NWLR (Pt. 462) 516 at 531 referred to](P. 74, paras. D-E)

Per MOHAMMED, J.C.A. at page 74, paras. E-G:

In the present case, the appellants have filed their claims in a representative capacity after obtaining the leave of the lower court, while in Exhibit D1 the proceeding was between the respondent and the 3rd appellant in their individual capacities. Also while in Exhibit D1 the claim was one for trespass, in the

present case the issues of title to the land in dispute and injunction are clearly involved. Further more, in the absence of clear boundaries of the land-involved in Exhibit D1, it cannot be said that the land in dispute in Exhibit D1 is the same as the land in the present case. The fact that the land in Exhibit D1 and the present case are described as being located at Magbon is not enough to satisfy the requirement that the subject matter in the two suits are the same. This is because the previous litigation bears the same name with the parcel of land in later litigation does not necessarily mean that they are the same."

5. On Whether a judgment appealed against can ground a plea of estoppel per remjudicalam -

A judgment which is already on appeal is no longer final as it is liable to be set aside or nullified on appeal thereby rendering it inoperative as a basis for the defence of estoppel. In the instant case, the respondent's pleading of estoppel per rem judicatam is inapplicable. The fact that the respondent pleaded in paragraph 28 of the amended statement of defence that the judgment of the Ibolu Area Court he was relying upon in support of his defence was on appeal to the Upper Area Court but that the result of the appeal, if any, had not been disclosed is no longer final as it is liable to be set aside or nullified. [Olukoga v. Fatunde (1996) 7 NWLR (Pt. 462) 516 at 532 re-ferred to]. (P. 75, paras. B-D).

6. On When a Respondent's Notice is inappropriate -

A respondent seeking to set aside or vary a finding which is crucial or fundamental to a case, can only do so through substantive cross-appeal and not through a Respondent's Notice to affirm or vary the judgment on other grounds. In other words, where a respondent wants a complete reversal of the decision of the lower court, he ought to file a cross-appeal instead of a Respondent's Notice. In the instant case, although the trial court heard witnesses from both sides and took the final addresses and without going into the merits of the case simply dismissed the appellant's claim on the ground that the action is an abuse of court process, what the respondent is asking the Court of Appeal through his Respondent's Notice is to appraise the evidence on record and enter judgment for the respondent by dismissing all the claims of the appellant. That shows that even the respondents do not agree with the decision of the trial court and that is not what can be done through Respondent's Notice but by a substantive cross-appeal. [Eliochin (Nig) Ltd. v. Mbadiwe (1986) 1 NWLR (Pt. 14) 47; Williams v. Daily Times of Nig. (1990) 1 NWLR (Pt. 124) 1 at 21-22; Eze v. Obiefuna (1995) 6 NWLR (Pt. 404) 639 at 652 referred to] (Pp. 78-79, paras. G-C).

7. On Meaning of "abuse of court process" -

An abuse of process of court means that the process of the court has not been used bonafide and properly. In other words, an abuse of court process is not in

the specie of sins commonly called an irregularity. It is a more fundamental vice which is deserving of dismissal. (P. 78, para.C)

8. On What amounts to abuse of process of court –

An abuse of the process of the court may occur when a party improperly uses judicial process to the harassment, irritation and annoyance of his opponent, and to interfere with the administration of justice, for example, where two similar processes are used against the same party in respect of the exercise of the same right and subject matter. [Okafor v. Attorney-General, Anambra State (1991) 6 NWLR (Pt. 200) 659; Saraki v. Kotoye(1992) 9 NWLR (Pt. 264) 156 referred to] (P. 76, paras. D-E).

Per MOHAMMED, J.C.A. at page 77, paras. A-F:

"In the instant case, the only ground upon which the learned trial Judge found the appellants' action before her as being an abuse of court process was the fact that the contents of Exhibits D1 & D2 show that there was an earlier case between the respondent as plaintiff and the 3rd appellant as defendant before the Ibolu Area Court which decided the case in favour of the respondent that the 3rd appellant had encroached on his land. That the 3rd appellant -was not happy with that decision of the Ibolu Area Court and had appealed against it to the Offa Upper Area Court as pleaded. For this reason the learned trial Judge felt that the appeal in the Upper Area Court should have been pursued rather than instituting a fresh action before her court which exercises appellate jurisdiction over the Upper Area Court. The filing of the present action by the appellants in the court below therefore was regarded as an abuse of the court process by the learned trial Judge who proceeded to dismiss the action. With the greatest respect to the learned trial Judge, she could have been right if the present case before her was between the same parties involving the same subject matter and on the same issues as the case decided by the Ibolu Area Court in Exhibit D1 which is on appeal to the Upper Area Court Offa and not Ilorin as found by the trial Judge. However, I have already found earlier in this Judgment that the parties in the present case are not the same as the parties in Exhibit D1. It was not also shown that the subject matter in the two cases were the same or that the issues arising from the two cases were the same. There was therefore no basis at all for the learned trial Judge to regard the appellants' action before her as an abuse of court process which will only arise in instituting a multiplicity of actions on the same subject matter against the same opponent and on the same issues. In this respect by filing the present action at the lower court the appellants in my view, cannot be accused of improperly using the issue of judicial process to irritate and annoy the respondent, their opponent or affect the efficient and effective administration of justice. Therefore the conduct of the appellants in exercising their constitutional right of access to the court to have

their dispute resolved, was not an abuse of the court process as found by the learned trial Judge."

9. On Inherent power of a court to see that its process is not abused -

Every superior court of record in Nigeria is conferred with all the inherent powers and sanctions by virtue of section 6(6) (a) of the 1979 Constitution and these inherent powers are a necessary adjunct of the powers conferred by the rules of court, and they are invoked by the courts to ensure the due application and proper lubrication of the machinery of justice, and to ensure its protection from abuse. (P. 78, paras. C-D)

10. On Proper order for court to make where it finds an action in abuse of its process-

Once a court is satisfied that the proceedings before it is an abuse of its process, that court has the right, and in fact a duty, to invoke its coercive powers under Section 6(6)(a) of the 1979 Constitution to dismiss the action. In the instant case, the order of dismissal made by the trial court rather than an order striking out the action was quite in order. [Arubo v. Aiyele (1993) 3 NWLR (Pt. 280) 126 at 142 referred to] (P. 78, paras. E-F).

11. On Propriety of trial court using its own personal observation or knowledge against evidence on record -

It is wrong for a trial court to place itself in the position of a witness and arrive at a conclusion based on its personal observation or knowledge of which there is no evidence on record to support it because the court cannot resolve conflict in cases presented by parties by substituting the result of its own observation in the absence of evidence. In the instant case, contrary to the finding of the trial court, there is no evidence on record that the boundaries of the land in dispute in Exhibit D1 and the land in dispute in the present case are the same. [Ejidike v. Obiora (1951) 13 WACA 270; Chubvuogor v. Obiora (1987) 3 NWLR (Pt. 61) 454; Ojiako v. Ewuru (1995) 9NWLR (Pt. 420) 460 at 476 referred to]. (P. 75, paras. A-B).

Per MOHAMMED, J.C.A. at pages 74-75, paras. H-A:

"As for the conduct of the learned trial Judge in reading Exhibit D1 on her own and relying on it to make her findings in dismissing the appellant's claims, it is quite clear that the ingredients necessary to support the defendant of estoppel per rein judicatum were neither pleaded nor established by evidence. It was therefore wrong for the learned trial Judge to have based her findings on Exhibit D1 that the land in dispute in the proceedings in the Ibolu Area Court and the land in the present case are the same having regard to the boundaries."

12. On Attitude of appellate court to evaluation of evidence in trial court based on credibility of witnesses -

Where the bulk of the evidence led by the parties is oral evidence in which credibility of witnesses would have to play a vital role in the determination of which party's evidence is heavier on the imaginary scale of justice, the appellate court cannot embark on evaluation of evidence. This is because, the appellate court did not have the benefit of hearing and seeing the witnesses give evidence and is thus not in a position to determine their credibility. The responsibility is therefore primarily that of the trial court (P. 79, par as. C-D)

13. On When a re-trial order will be made -

Where there has been such an error in law or an irregularity in procedure which neither renders the trial a nullity nor makes it possible for the appellate court to determine whether there has been no miscarriage of justice, a retrial will be ordered. [Duru v. Nwosu (1989) 4 NWLR (Pt. 113) 24 referred to]. (P. 79, paras. D- E).

14. On When a retrial order will be made -

Where an appeal is allowed because of the failure of the trial court to make findings on material issues and the determination of such issues depends on the credibility of the witnesses, as is the case in the instant appeal, a retrial will be ordered. [Karibo v. Grend (1992) 3 NWLR (Pt. 230) 426; Okedare v. Adebara (1994) 6 NWLR (Pt. 349) 157 referred to] (P. 79, paras. E-F).

15. On When a retrial order will be made -

A retrial will be ordered where the other party is not being wronged to such an extent that would lead to a miscarriage of justice. Then the plaintiff, as in the instant case, is afforded another opportunity to relitigate the case all over again. [Duru v. Nwosu (1989) 4 NWLR (Pt. 113) 24; Bakare v. Apena (1986) 4 NWLR (Pt. 33) 1; Okedare v. Adebara (1994) 6 NWLR (Pt. 349) 157 referred to] (P. 97, paras. F-G).

Per MOHAMMED, J.C.A. at pages 79-80, paras. G-A:

"There is no doubt that in the present case the learned trial Judge applied the principles of estoppel per remjudicatam wrongly and came to the conclusion also wrongly that the appellants' case before her was an abuse of court process before dismissing the same without pronouncing on the merits of the case although the case went through a full trial. Indeed the irregularity did not render the trial a nullity but

at the same time I cannot say that there was no miscarriage of justice. Furthermore, there was a failure on the part of the learned trial Judge to make findings on all material issues raised before her which cannot now be determined by this court because the determination of the issues depends on the credibility of the witnesses. Having regard to the circumstances of this case, therefore, I do not think an order of retrial would occasion any miscarriage of justice to the

respondent who in any case was also not happy by the failure of the learned trial Judge to pronounce on the merit of the case."

16. On Duty and role of counsel in the administration of justice –

The role of counsel in guiding the courts to reach the correct decision is a very vital role in the administration of justice. If this vital role of counsel is not properly played in the course of proceedings in the courts, the obvious result would be the failure of justice with unpleasant consequences. (P. 78, para. B).

Nigerian Cases Referred to in the Judgment:

- Abisi v. Ekwealor (1993) 6 NWLR (Pt. 302) 643
- Adebayo v. Babalola (1995) 7 NWLR (Pt. 408) 383
- Adomba v. Odiese (1990) 1 NWLR (Pt. 125) 165
- Aduba v. Registry Trustees Living Christ Mission (1994) 4 NWLR (Pt. 339) 476
- Arubo v. Aiyeleru (1993) 3 NWLR (Pt. 33) 1
- Bakare v. Apena (1986) 4 NWLR (Pt. 33) 1
- Chukwunta v. Chukwu (1953) 14 WACA 341
- Chuhwuogor v. Obuora (1987) 3 NWLR (Pt. 61) 454
- Dina v. New Nigerian Newspapers Ltd. (1986) 2 NWLR (Pt. 22) 353
- Dwu v. Nwosu (1989) 4 NWLR (Pt. 113) 24
- Duruminiya v. Commissioner of Police (1961) NNLR 70
- Ejidike v. Obiora (1951) 13 WACA 270
- Eliochin (Nig) Ltd. v. Mbadiwe (1986) 1 NWLR (Pt. 14) 47
- Eze v. Obiefma (1995) 6 NWLR (Pt. 404) 639
- Karibo v. Grend (1992) 3 NWLR (Pt. 230) 426.
- Odadhe v. Okujeni (1973) 11 SC 343
- Odife v. Aniemeka (1992) 7 NWLR (Pt. 25) 25
- Ojiako v. Ewuru (1995) 9 NWLR (Pt. 420) 460
- Okafor v. Attorney-General, Anambra State. (1991) 6 NWLR (Pt. 200) 659
- Okedare v. Adebara (1994) 6 NWLR (Pt. 349) 157
- Olukoga v. Fatunde (1996) 7 NWLR (Pt. 462) 516
- Pavexlm. Co. Ltd. v. IBWA (1994) 5 NWLR (Pt. 347) 685
- Saraki v. Kotoye (1992) 9 NWLR (Pt. 264) 156
- Toft v. Uba (1987) 3 NWLR (Pt. 62) 707
- U.B.A Ltd. v. Achoru (1990) 6 NWLR (Pt. 156) 254
- Udo v. Obot (1989) 1 NWLR (Pt. 95) 59
- Union Bank of Nig. Ltd. v. Nwaokolo (1995) 6 NWLR (Pt. 400) 127
- Williams v. Daily Times of Nig. Ltd (1990) 1 NWLR (Pt. 124) 1

Appeal:

This was an appeal against the judgment of the High Court dismissing the appellants' case on the ground of res judicata/abuse of court process. The Court of Appeal, in a unanimous decision, allowed the appeal and ordered a retrial.

History of the Case:

Court of Appeal:

Division of the Court of Appeal to which the appeal was brought; Court of Appeal, Kaduna.

Names of Justices that sat on the appeal: Umaru Abdullahi, J.C.A. (Presided); Mahmud Mohammed, J.C.A. (Read the Leading Judgment); Ibrahim Tanko Muhammad, J.C.A. Appeal No:CA/K/23/96 Date of Judgment: Wednesday, 12th March, 1997

Names of Counsel: Yusuf Alli (with him, Sikiru U. Solagberu) -for the Appellants

Chief O.A. Ogundeji -for the Respondent.

High Court:

Name of the High Court: High Court Offa Name of the Judge: Elelu-Habeeb, J. Date of Judgment .-Tuesday,..21st December, 1993

Counsel:

Yusuf Alli (with him, Sikiru U. Solagberu) -for the Appellants -

Chief O.A. Ogundeji -for- the Respondent.

MOHAMMED, J.C.A. (Delivering the Leading Judgment): The parties in this appeal were before Elelu-Habeeb J. of the Kwara State High Court of Justice sitting at Offa where the appellants as plaintiffs claimed in their writ of summons the following reliefs –

- "(a) Declaration that the plaintiffs are the persons entitled to a customary/ statutory Right of Occupancy over and above all that piece or parcel of land being, lying and situate at MAGBON AREA ERINILE, particularly the land called Aro Family land,
- (b) The sum of N2.000.00 being damages for trespass and waste committed on the land by the defendant
- (C) An Order of perpetual injunction restraining the defendant by himself, agents, servants, privies and others deriving title under him howsoever from disturbing/trespassing, dealing with or in any other way tamper with the plaintiffs peaceable possession of the parcel of land."

After the exchange of pleadings between the parties, the case went into full trial in the course of which the appellants called 6 witnesses while the respondent testified in his own defence and also called one other witness who testified for him. Learned counsel on both sides submitted written addresses to the trial court before the case was adjourned for judgment. In her judgment delivered on 21/12/93, the learned trial Judge without going into the merit of the case dismissed the claims of the appellants/plaintiffs in the following words-

"I therefore hold that i cannot entertain this action as a court of first instance because the matter had been adjudicated upon by the Ibolu Grade 1 Area Court and an appeal has been filed to the Upper Area Court, Ilorin in respect of the same matter.

Accordingly the claims of the plaintiffs are hereby dismissed in its entirety for constituting an abuse of court process."

The appellants as plaintiffs who were not happy with this decision of the learned trial Judge decided to appeal against it by filing their Notice of Appeal containing 10 grounds of appeal. The grounds without their particulars are as follows:-

1. The learned trial Judge erred in law by holding that Exhibit D1 constituted *esploppel per rem judicatam* in the circumstances of this case and this led her to dismiss the case of the appellants and this has occasioned a grave miscarriage of justice against the plaintiffs/appellants.
2. The learned trial Judge erred in law when she held as follows:-
'In essence therefore I cannot rule that the subject matter and the parties in Exhibit D1 and in the case at hand are not the same.
3. The learned trial Judge misdirected herself on the facts when she held as follows:-
'I therefore hold that i cannot entertain this action as a court of first instance because the matter had been adjudicated upon by Ibolu Grade I Area Court and an appeal has been filed to the Upper Area Court, Ilorin in respect of the same matter."
4. The learned trial Judge erred in law when she held that the present , suit is an abuse of the process of the court and she thereby dismissed the entire suit of the appellants thereby shutting the gate of justice against the appellants forever.
5. The learned trial Judge erred in law by her total failure to consider and pronounce upon the merits of the case when from the evidence led by the appellants and their witnesses they are entitled to all the reliefs claimed.
6. The learned trial Judge erred in law by dismissing the claims of the plaintiffs in liinine without considering at all or making findings on the merits of the claims as placed before her.
7. The learned trial Judge erred in la w and caused a grave miscarriage of justice to the appellants when she suo motu without evidence led on the contents of Exh. D1 went to look at the contents and drew inferences therefrom when the respondents only dumped the document on the court and same was not read or taken as read at the trial.
8. The learned trial Judge erred in law when she held as follows:-
'.....I have taken time to go through the record of proceedings in the Ibolu Grade 1 Area Court and the Notice'of Appeal filed at the Upper Area Court, Ilorin contents being tested in open court and applying the same in her findings against the appellants had occasioned a miscarriage of justice to justify setting aside the decision of the trial court.

The learned counsel to the respondent in the respondent's brief however contended that the respondent had pleaded in paragraphs 27, 28, 29, 30 & 31 of his amended statement of defence that he had sued the 3rd appellant/plaintiff before Ibolu Area Court in Offa for encroaching on this land at Magbon and the said Area Court gave judgment in favour of the respondent. That the respondent duly testified in support of these pleaded facts which justified the finding of the learned trial Judge that the appellants' claims in the present action were an abuse of court process having regard to the decision in the case of *Chukwunta v. Nwalu Chukwu & ors* (1953) 14 WACA 341. That having regard to the case of *Tofi v. Uba*(1987) 3 NWLR (Pt. 62) 707, learned counsel to the respondent observed that the lower court had inherent jurisdiction to prevent the abuse of its process. On the conduct of the learned trial Judge in examining Exhibits D1 & D2 while writing her judgment, the learned counsel to the respondent pointed out that the documents having been duly admitted in evidence, the learned trial Judge on the authority of *Dina v. New Nigerian News Papers Ltd.* (1986) 2 NWLR (Pt. 22) 353 at 362, was justified in relying on the documents in her judgment in sustaining the defence of estoppel in favour of the respondent. That by considering the entire proceedings in Exhibit D1 including the judgment of the Ibolu Area Court, the learned trial Judge was right in upholding the respondent's defence of estoppel per rem-judicium.

It is now settled that a judgment of court of competent jurisdiction can be relied upon in a subsequent litigation as per rem-judicium or to found issue estoppel or cause of action estoppel or estoppel by standing by. Our law in this respect requires that both the parties to an action and the court must know for which purpose proceedings and previous judgments pleaded and tendered in evidence are meant to serve. In the present case, the respondent said he had pleaded Exhibits D1 & D2 in paragraphs 27, 28, 29, 30 & 31 of his amended statement of defence in order to plead estoppel per rem-judicium. The said paragraphs at page 25 of the record read -

- "27. The defendant avers he sued the 3rd plaintiff before Ibolu Area Court holding at Offa for encroaching on his land at Magbon and the said court gave judgment to the defendant on the 29th day of December 1989 in Suit No. 26/89 and case No. 37/89.
- 28 The defendant avers the 3rd plaintiff was dissatisfied with the judgment of Ibolu Area Court Grade 1, Offa and appealed to Upper Area Court, Offa in Suit UACI/3/90.
29. The defendant says the land at Magbon belonged to his family, and will rely on all the documents he pleaded.
30. The defendant will rely at the hearing of this case on all oral and documentary evidence he pleaded in this case.

31 Whereof the defendant says the plaintiffs claim before this honourable (sic) is an abuse of court's process and and absolutely be dismissed with costs."

It is quite clear from paragraph 27 of the respondent's 'amended statement of defence above, that his claim against the 3rd appellant at the Ibolu Area Court was for trespass and what was decided by the Area Court in favour of the respondent was not even pleaded. Paragraph 28 on the other hand only pleaded the fact that there had been an appeal by the 3rd appellant to the Upper Area Court Offa against the judgment of the trial Ibolu Area Court and no more, while paragraphs 29 & 30 have nothing to do with the issue of the defence of res-judicatum. However paragraph 31 has clearly raised the issue of abuse of court process on which the learned trial Judge dismissed the appellants' claims.

It is trite law that any party relying on estoppel as a defence in a trial in the High - Court must specifically plead it by pleading relevant facts clearly supporting that defence, *Sec Odadhe v. Okujeni* (1973) 11 SC 343 at 353 where *Ibekwe J.S.C.* (as he then was) observed:-

"It is relevant to observe that the plaintiff did not plead estoppel. It was therefore not open to him to raise it, either in the court below or before us. Moreover this point was never taken before the learned trial Judge. This court has said over and over again that where a plaintiff did not set up estoppel in the court below as part of his case, it would, in our opinion, be wrong for this court to allow such an issue to be raised as one of the issues in the case for the first time in this court."

This statement of the law applied equally to a defendant. See *Abisi v. Ekwealor* (1993) 6 NWLR (Pt. 302) 643 at 672. It is also settled that for a party to sustain a plea of res judicatum, the party pleading it must satisfy amongst others, not only that the parties or their privies as the case may be are the same in the present case as in the previous one, but also that the issues and the subject matter are the same in the previous suit as in the present suit. See *Ojiako v. Ewuru* (2995) 9 NWLR (Pt. 420) 460 at 468-469. These essential ingredients of the defence of estoppel per rem judicatum were neither pleaded nor established by evidence in the present case to justify it being applied by the learned trial Judge in dismissing the claims of the appellants. In the present case, the appellants have filed their claims in a representative capacity after obtaining the leave of the lower court, while in Exhibit D1 the proceeding was between the respondent and the 3rd appellant in their individual capacities. Also while in Exhibit D1 the claim was one for trespass, in the present case the issues of title to the land in dispute and injunction are clearly involved. Further more in the absence of clear boundaries of the land involved in Exhibit D1, it cannot be said that the land in dispute in Exhibit D1 is the same as the land in the present case. The fact that the land in Exhibit D1 and the present case are described as being located at Magbon is not enough to satisfy the requirement that the subject

matter in the two suits are the same. This is because the fact that the parcel of land in previous litigation bears the same name with the parcel of land in later litigation does not necessarily mean that they are the same. See *Adomba v. Odiesc* (1990) 1 NWLR (Pt. 125) 165 and *Olukoga v. Fatunde* (1996) 7 NWLR (Pt. 462) 516 at 531.

As for the conduct of the learned trial Judge in reading Exhibit D1 on her own and relying on it to make her findings in dismissing the appellants' claims, it is quite clear that the ingredients necessary to support the defence of estoppel per rem judicatam were neither pleaded nor established by evidence. It was therefore wrong for the learned trial Judge to have based her findings on Exhibit D1 that the land in dispute in the proceedings in the Ibolu Area Court and the land in the present case are the same having regard to the boundaries. In other words it is indeed wrong in law for a trial Judge to place himself in the position of a witness and arrive at a conclusion based on his personal observation or knowledge of which there is no evidence on record to support it because the court cannot resolve conflicts in cases presented by parties by substituting the result of its own observation in the absence of evidence. See *Ejidike v. Obiora* (1951) 13 WACA 270, *Chukwuogor v. Obuora* (1957) 3 NWLR (Pt. 61) 454; and *Ojiako v. Ewuru* (1995) 9 NWLR (Pt. 420) 460 at 476. In the instant case, contrary to the findings of the trial court, there is no evidence on record that the boundaries of the land in dispute in Exhibit D1 and the land in dispute in the present case are the same.

Another factor which rendered the respondent's plea of estoppel per rem judicatam inapplicable in this case is the fact that the respondent himself had pleaded in paragraph 28 of the amended statement of defence that the judgment of the Ibolu Area Court he was relying upon in support of this defence was on appeal to the Upper Area Court but the result of the appeal if any had not been disclosed. The law is that a judgment which is already on appeal is no longer final as it is liable to be set aside or nullified on appeal thereby rendering it inoperative as a basis for the defence of estoppel. See *Olukoga v. Fatunde* (1996) 7 NWLR (Pt. 462) 516 at 532. From the foregoing therefore, it is not difficult to see that the defence of estoppel in any of its forms was not available to the respondent at the court below to justify applying it in his favour.

The second issue is whether the learned trial Judge was right in dismissing the appellants' claim on the ground that their action was an abuse of the process of the court. It was argued for the appellants that the learned trial Judge was in error in not going into the evidence adduced by the parties to pronounce on the merits of the case. That it is settled that where a preliminary point that can dispose of a matter was left till the end of a full trial, the trial court has a duty even if it finds in favour of the preliminary matter to still decide the merit of the matter in the alternative, just in case an appellate court rules that its decision on the preliminary point is wrong. That in this case the matter having gone on full trial, notwithstanding her opinion on the issue of abuse of court process, the learned trial Judge ought to have pronounced on the merit of the case on the authority of *Nwagbogu v. Abadom* (1994) 7 NWLR (Pt. 356) 351 at 369. Learned counsel for the

appellants therefore observed that since the case cannot now be decided otherwise than by resolving the conflicting evidence of witnesses for the parties, this court should order a retrial of the action on the authority of a number of cases including Okedare v. Adebara (1994) 6 NWLR (Pt. 349) 157 at 174. According to the learned counsel, the failure of the lower court to pronounce on the merit of the case amounted to failure of justice against the appellants on the authority of Union Bank of Nig. Ltd. v. Nwaokolo (1995) NWLR (Pt. 400) 127 at 150.

On the issue of the abuse of the process of court, it was contended for the appellants that the present action was not an abuse of court process. That even if it was, at most their action could only have been struck out and not dismissed. The case of Pavex Int. Co. Ltd. v. IBWA (1994) 5 NWLR (Pt. 347) 685 at 699 was cited in support of this submission. That having regard to the nature of the claims in the present suit, it cannot be said that the issues are the same as those in Exhibit D1. Also the fact that the action in Exhibit D1 was contested between the parties in their individual capacities while the present suit was instituted in a representative

Capacity by the appellants, the parties, on the authority of Odife v. Aniemeka (1992) 7 NWLR (Pt. 251) 25, cannot be said to be the same. Therefore, relying on the case of Saraki v. Kotoye (1992) 9 NWLR (Pt. 264) 156 at 190, learned counsel urged this court to hold that the appellants' action in the present case was not an abuse of the process of court.

It was however contended for the respondent that even if the learned trial Judge was in error in dismissing the case before on the ground of abuse of court process, it was not enough to reverse the judgment as the error did not occasion any miscarriage of justice. That since both parties have agreed that there were sufficient facts before the learned trial Judge to have decided the case on the merits, this court should proceed to consider these facts and hold that the case was fit for dismissal. Learned counsel to the respondent relying on the respondent's Notice filed to urge this court to uphold the judgment of the lower court on grounds other than those relied by the trial court, went into the details of the evidence led by the parties at the trial court and urged this court to consider the evidence on record and uphold the dismissal of the appellants' case. A number of cases was cited and relied upon in support of this submission notable of which is the case of U.B.A Ltd v. Achoru (1990) 6 NWLR (Pt. 156) 254.

In the determination of issues No.2 in this appeal, the first question to be answered is whether the action filed by the appellants against the respondent at the lower court was an abuse of the process of the court as found by the learned trial judge. An abuse of the process of the court may occur when a party improperly uses judicial process to the harassment, irritation and annoyance of his opponent, and to interfere with the administration of justice. A clear example is where two similar processes are used against the same party in respect of the exercise of the same right and subject matter. See Okafor v. Attorney-General, Anaiubra State (1991) 6 NWLR (Pt. 200) 659 at 681 and

Saraki v. Kotoye (1992) 9 NWLR (Pt. 04) 156 at 188-189 where Karibi Whyte J.S.C. said –

"The concept of abuse of judicial process is imprecise. it involves circumstances and situations of infinite variety of conditions. Its one common feature is the improper use of the judicial process by a party in litigation to interfere with the due administration of justice.

It is recognised that the abuse of the process may lie in both a proper or improper use of the judicial processes in litigation. But the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. This will arise in instituting a multiplicity of actions on the same subject matter against the same opponent on the same issues. See Okorodudu v. Okorodudu(1911) 3 SC21 ; Oyebola v. Esso West African Inc. (1966) 1 All NLR 170. Thus, the multiplicity of actions on the same matter between the parties even where there exists a right to bring the action is regarded as an abuse. The abuse lies in the multiplicity and manner of the exercise of the right rather than the exercise of the right per se.

The abuse consists of the intention, purpose and aim of the person exercising the right to harass, irritate and annoy the adversary, and interfere with the administration justice; such as instituting different actions between the same parties simultaneously in different courts, even though on different grounds. See Harriman v. Harriman (1989) 5 NWLR (Pt. 119) 6." (Italics mine)

In the instant case, the only ground upon which the learned trial Judge found the appellants' action before her as being an abuse of court process was the fact that the contents of Exhibits D1 & D2 show that there was an earlier case between the respondent as plaintiff and the 3rd appellants as defendant before the Ibolu Area Court which decided the case in favour of the respondent that the 3rd appellant had encroached on his land. That the 3rd appellant was not happy with that decision of the Ibolu Area Court and had appealed against it to the Ilorin and not Offa Upper Area Court as pleaded. For this reason the learned trial Judge felt that the appeal in the Upper Area Court should have been pursued rather than instituting a fresh action before her court which exercises appellate jurisdiction over the Upper Area Court. The filing of the present action by the appellants in the court below therefore was regarded as an abuse of the court process by the learned trial Judge who proceeded to dismiss the action. With the greatest respect to the learned trial Judge, she could have been right if the present case before her was between the same parties involving the same subject matter and on the same issues as the case decided by the Ibolu Area Court in Exhibit D1 which is on appeal to the Upper Area Court Offa and not Ilorin as found by the trial Judge. However, I have already found

earlier in this Judgment that the parties in the present case are not the same as the parties in Exhibit D1. It was not also shown that the subject matter in the two cases were the same or that the issues arising from the two cases were the same. There was therefore no basis at all for the learned trial Judge to regard the appellants' action before her as an abuse of court process which will only arise in instituting a multiplicity of actions on the same subject matter against the same opponent and on the same issues. In this respect by filing the present action at the lower court the appellants in my view, cannot be accused of improperly using the issue of judicial process to irritate and annoy the respondent, their opponent or affect the efficient and effective administration of justice. Therefore the conduct of the appellants in exercising their constitutional right of access to the court to have their dispute resolved, was not an abuse of the court process as found by the learned trial Judge.

The next question for determination in this issue is whether the learned trial Judge on finding the appellants' action constituting an abuse of court process ought to have simply struck out the same rather than dismissing the action. The appellants have submitted in paragraph 5.07 of their brief of argument that even if the lower court had found their action an abuse of court process, the most severe sanction they would have suffered was an order striking it out and not an order of dismissal. The cases of *Adtba v. Registered Trustees Living Chris! Mission* (1994) 4 NWLR (Pt. 339) 476 at 486 and *Pavexlni. Co. Ltd. v. I.B.IV.A.* (1994) 5 NWLR (Pt. 347) 685 at 699 were cited in support of this submission. However, having carefully examined the two cases cited and relied upon by the learned counsel to the appellant on this point, I regret to say with the greatest concern that the two cases did not decide the point for which they were cited and relied upon. Both cases were decided by this court. In the first case, there was no finding **that there was an abuse of court process at page 486 of the talk of any order striking out such**

action found to have been an abuse of court process. Similarly in the second case, while it is correct that this court found that the filing of motions at the lower court after this court had been seized of the matter where similar applications were pending was an abuse of court process, there was no specific finding that where an action is found to be an abuse of court process, it should be struck out rather than being dismissed. This conduct of the learned counsel for the appellants in quoting the judgment of this court out of context in support of his clients' case could be very serious if it was done deliberately to mislead this court. This is because the role of counsel in guiding the courts to reach the correct decision is a very vital role in our system of administering justice in this country. If this vital role of counsel is not properly played in the course of proceedings in our courts, the obvious result is of course failure of justice with no doubt unpleasant consequences.

As to the proper order to be made where a court of law has found a matter before it to be an abuse of its process, it has to be stressed that an abuse of court process simply

means that the process of the court has not been used bonafide and properly. In other words an abuse of court process is not in the specie of sins commonly called an irregularity. It is a more fundamental vice which is deserving of dismissal, Every superior court of record in Nigeria is conferred with all the inherent powers and sanctions of a court. Section 6(6) (a) of the 1999 Constitution of the Federal Republic Nigeria inherent powers are a necessary adjunct of the powers of a court, and they are invoked by the courts to ensure the due lubrication of the machinery of justice, and to ensure its protection. Therefore, because it is an abuse of court process for a suitor or litigant to litigate again over an identical question which has already been decided against him, even if the matter is not strictly res-judicata, once a court is satisfied that the proceedings before it is an abuse of its process, that court has the right, and in fact a duty lies upon it to invoke its coercive powers under S.6(6)(a) of the 1979 Constitution to punish the party in abuse of its process. This power is exercisable and the duty dischargeable all superior courts of record in this country of which the Kwara State High Court of Justice is certainly one, by dismissing the abusive action. *S&e Arubo v. Aiyeleru* (1993) 3 NWLR (Pt. 280) 126 at 142. In the instant case therefore, the order of dismissal made by the learned trial Judge rather than an order striking out the action was quite in order.

Now with the two issues arising for determination in this appeal having been resolved in favour of the appellants, what I have to determine now is the appropriate order to make in the circumstances. While the appellants are asking for an order of retrial, the respondent is relying on his Respondent's Notice in urging this court to affirm the order of dismissal of the appellants' action on grounds other than those relied upon by the learned trial Judge. In several decisions of the Supreme Court *Ellochir. (Nig) Ltd. v. Mbadiwe* (1986,) 1 NWLR (Pt. 14) 47; *Williams v. Daily Times of Nig.* (1990) 1 NWLR (Pt. 124) 1 at 21-22; and *Eze v. Obiefuna* (1995) 6 NWLR (Pt. 404,) 639 at 652, to mention but a few, the principle has invariably been laid down that a respondent seeking to set aside or vary a finding which is crucial or fundamental to a case, can only do so through a substantive cross-appeal and not through a Respondent's Notice to affirm or vary the judgment on other grounds. In other words where a respondent wants a complete reversal of the decision of the lower court, he ought to file a cross-appeal instead of a respondent's Notice. In the present case, although the learned trial Judge heard witnesses from both sides and looked at the final addresses of the learned counsel to the plaintiffs now appellants and the defendant now respondent, the learned trial Judge without going into the merits of the case simply dismissed the appellant's claims on the grounds that their action was an abuse of court process. What the respondent is asking this court to do through his Respondent's Notice, is to appraise the evidence on record and enter judgment for the respondent by dismissing all the claims of the appellants against him. This shows quite clearly that even the respondent did not agree with the decision of the lower court for dismissing the appellants' claims for being an abuse of court process without going into the merits of the case. I am afraid the respondent cannot challenge this decision by the

Respondent's Notice. The only way for the respondent to have the decision of the lower court reversed is by cross-appealing against it in the absence of which his relief in this respect cannot now be heard and granted by this court. In any case the exercise of the appraisal of evidence which the respondent is asking this court to embark upon for the failure of the learned trial Judge to do so, and pronounce on the merits of the case, cannot be done in the instant case where the bulk of the evidence led by the parties is oral evidence in which credibility of the witnesses would have to play a vital role in the determination of which party's evidence is heavier on the imaginary scale of justice. It is trite that this court being an appellate court which did not have the benefit of hearing and seeing the witnesses give evidence, shall not be in a position to determine their credibility. This responsibility is primarily that of the trial court. See *Karibo v. Grend* (1992) 3 NWLR (pt. 230) 426.

On whether or not a retrial should be ordered in this case, it is the law that where there has been such an error in law or an irregularity in procedure which neither renders the trial a nullity nor makes it possible for the appellate court to determine whether there has been no miscarriage of justice, a retrial is ordered. See *Duru v. Nwosu* (1989) 4 NWLR (Pt. 113) 24. Also where an appeal is allowed because of the failure of the trial court to make findings on material issues and the determination of such issues depends on the credibility of the witnesses as precisely is the case in the instant appeal, a retrial is ordered. See *Karibo v. Grend* (supra); and *Okedare. v. Adebara* (1994) 6 NWLR (Pt. 349) 157. A retrial is also ordered where the other party is not being wronged to such an extent that would lead to a miscarriage of justice when the plaintiff as in the present case is afforded an other opportunity to relitigate the same matter all over again. See *Bakare v. Apena* (1986) 4 NWLR (Pt. 33) 1; *Duru v. Nwosu* (supra); and *Okedare v. Adebara* (1994) 6 NWLR (Pt. 349) 157.

There is no doubt that in the present case the learned trial Judge applied the principles of estoppel per remjudicatain wrongly end came to the conclusion also wrongly that the appellants' case before her was an abuse of court process before dismissing the same without pronouncing on the merits of the case although the case went through a full trial. Indeed the irregularity did not render the trial a nullity but at the same time I cannot say that there was no miscarriage of justice. Further more, there was a failure on the part of the learned trial Judge to make findings on all material issues raised before her which cannot now be determined by this court because the determination of the issues depends on the credibility of the witnesses. Having regard to the circumstances of this case therefore, I do not think an order of retrial would occasion any miscarriage of justice to the respondent who in any case was also not happy by the failure of the learned trial Judge to pronounce on the merit of the case.

In the result this appeal SUCCEEDS AND IT IS HEREBY ALLOWED. The judgment of the lower court of 21/12/93 IS HEREBY SET ASIDE. The case, is remitted

to the Honourable Chief Judge of Kwara State for re-assignment to another Judge to hear afresh, the appellants' claims contained in their writ of summons.

The appellants are entitled to costs which I assess at N 1,500.00 (one thousand, five hundred naira only).

ABDULLAHI, J.C.A.: I read in advance the judgment just delivered by my learned brother Mohammed J.C.A.

My learned brother had painstakingly treated and dealt with all the relevant; issues that arose for determination in this appeal.

I entirely agree with all the reasons given and the conclusion reached in this appeal. I adopt them as mine.

I shall also allow the appeal and set aside the judgment of the lower court dated 21/12/93. I make an order remitting the case to the Chief Judge of Kwara State to reassign it to another Judge for hearing afresh.

I award N 1,500 costs in favour of the appellants.

MUHAMMAD, J.C.A.: I read in advance the lead judgment just delivered by my learned brother Mohammed, J.C.A. I agree with his reasoning and conclusion. I abide by all the consequential orders made therein including order as to costs.

Appeal allowed.