

1. MALLAM YUSUF JIMOH
2. MALLAM RAIMIALAPARUN
3. MALLAM YISA ALAPARUN

v.

1. MALLAM KARIMU AKANDE
2. ALHAJI ISHOLA AREOGELE

**SUPREME COURT OF NIGERIA**

SC..159/2002

ALOYSIUS IYORGYER KATSINA-ALIU, J.S.C. (PRESIDED)

ALOMA MARIAM MUKHTAR, J.S.C.

MAHMUD MOAHMED, J.S.C.

FRANCIS FEDODE TABAI, J.S.C.

CHRISTOPHER MITCHELL CHUKWUMA-ENEH, J.S.C. (READ THE LEADING JUDGMENT)

FRIDAY, 30TH JANUARY, 2009

ACTION- Abuse of court process - What constitutes - Relationship with doctrine of res judicata.

APPEAL- concurrent findings of facts – Attitude of the supreme court thereto – When will interfere therewith.

APPEAL- Evaluation of evidence - Document evidence – Power of court of appeal to evaluate and draw its conclusions therefrom.

APPEAL- Finding of facts – How treated.

APPEAL. - Leave to appeal - Appeal from Court of Appeal to the Supreme Court - When leave required therefor Win n /r.,ir will he granted.

APPEAL- Leave to appeal - Leave to appeal to the supreme court - Power of Supreme Court to entertain - Extent of.

APPEAL- Supreme Court - Whether can entertain appeal from decision of High court.

COURT – Abuse of the process - What constitutes - Relationship with doctrine of 'res judicaia.

COURT - Evidence admitted by court - Duty on court to give due consideration thereto.

DOCUMENT - Documentary evidence - Purpose for tendering of- Need to indicate.

DOCUMENT - Suvey plan - When not necessary- in land ease.

ESTOPPEL - Res jltdicata - Pre-conditions for application of- Need to prove the requirements - Where not completely proved -Effect.

ESTOPPEL - Res judicaia - Principle of - Application of - Effect where successfully raised,

ESTOPPEL - Res judicata - Where raised - Need to hear timeously.

ESTOPPEL -Res judicata - Plea of- Party relying thereon - Duty on to plead relevant facts.

EVIDENCE - Proof- Survey plan - When not necessary in land case.

EVIDENCE - Documentary evidence - Purpose for tendering of -Need to indicate.  
EVIDENCE- Evaluation of evidence-Document evidence – Power of Court of Appeal to evaluate and draw its own conclusions therefrom.  
LAND LAW - Partition - Where claimants allege partition of land – Need to prove common to prove common boundary with others.  
LAND LAW - Survey plan - When not necessary in land case.  
PRACTICE AND PROCEDURE - Abuse of court process - What constitutes - Relationship with doctrine of res judicata  
PRACTICE AND PROCEDURE - Appeal - Concurrent findings of facts - Altitude of the Supreme Court thereto - When will interfere therewith.  
PRACTICE AND PROCEDURE - Appeal - Finding of facts - Where not appealed against - How treated.  
PRACTICE AND PROCEDURE - Appeal - Grounds of appeal -Grounds of law - Need to particularize - Order 8 rule 2(2), Supreme Court Rules.  
PRACTICE AND PROCEDURE - Appeal - Leave to appeal - Appeal from Court of Appeal to the Supreme Court - When leave required therefor - When will be granted.  
PRACTICE AND PROCEDURE - Appeal - Leave to appeal Leave to appeal lo the Supreme Court - Power of Supreme Court to entertain - Extent of.  
PRACTICE AND PROCEDURE - Documentary evidence - Purpose for tendering of- Need to indicate.  
PRACTICE AND PROCEDURE - Evaluation of evidence -Documentary evidence - Power of Court of Appeal to evaluate and draw its own conclusions therefrom.  
PRACTICE AND PROCEDURE - Pleadings - Res judicata - Plea of- Party relying thereon - Duty on to plead relevant facts.  
RES JUDICATA - Plea of res judicata - Application of- Effect where successfully raised.  
RES JUDICATA - Plea of res judicata - Parry relying on thereon -Duty on to plead relevant facts.  
RES JUDICATA - Plea of res judicala - Principle of- Connotation of- Rationale and effect of.  
RES JUDICATA - Plea of res judicata - Principle of- Pre-conditions for application of- Need to prove the requirements - Where not proved - Effect.  
RES JUDICATA - Plea of res judicata - Where raised-Need to hear timeously.

**Issue:**

Whether the Court of Appeal was right having regard to exhibits PI, D1 and D2 to have agreed with the High Court that the respondents invocation of *res judicata* should succeed based on exhibits D5 and D6, when the land adjudicated upon in the latter exhibits was distinct from the land in dispute as adjudged in exhibit PI.

**Facts:**

The case from which the instant appeal emanated started at the Upper Area Court, Ilorin. The appellants and the respondents were the plaintiffs and the defendant respectively in that Court. The appellants' claim was for trespass. They also wanted the court to give them

their land. The respondents did not only deny liability to the appellants' claims, they counter-claimed ownership of the land in dispute. They urged the court to evict the appellants from the land since the latter had refused to pay tributes to the respondents.

At the trial court, the appellants in their claim identified the land in dispute as Jaaju Olosunde on which their great ancestor one Olosunde was settled by one Oba Seberu (an Emir of Ilorin) many years ago for his part in fighting off the warriors of some Yoruba troops threatening the said Oba. The appellants alleged that Olosunde had two children, namely Momoh Jimoh and Ajani and that he partitioned his land between them. The appellants' claim was that the land in dispute was that part of the Olosunde's land given to Momoh Jimoh. The land in dispute according to the appellants stretched from Oko Olode to Odo Jaagu Olosunde to Kukute Ogun inhere it had boundary with Magaji Baboko. It also stretched to Igbo efon, Ori Odi to Alaja and then to Akpata Ofunfun. They alleged that they had exercised maximum acts of ownership and possession including farming and letting portions of the land to customary tenants. They tendered exhibits PI, DI and D2 as evidence that the and did not form part of the land of the respondents and further to show that in official circle the said land was known as Jaaju Olosunde and was a distinct parcel of land to the land called Jaaju Gbagede which title it was claimed was decided in favour of the respondents exhibits D5 and D6.

The respondents, on the other hand, denied the appellants' claim over the land in dispute and counter-claimed that their progenitors had been settled on the land in dispute by another Emir of Ilorin many years before and that they exercised dominion to the exclusion if the appellants and their privies for many years by acts of ownership and possession including farming and letting portions to customary tenants to farm for tributes. The respondents tendered exhibits D3 and D11 and particularly relied on exhibits D5 and D6 to plead the defence of *res judicata*. They identified the land in dispute as covering a wide area from Odo Omoto to Odo Eleran to Olofe, Apata Funfun. odo Alaja and Oke Jaaju.

The Upper Area Court carried out a visit to the *locus in quo* and made valuable notes. It was evident from the visit that the parties knew the land in dispute notwithstanding its being differently described as to its name and boundaries by the parties in their testimonies before the Upper Area Court. At the end of the trial, the upper Area Court gave judgment in favour of the appellants. The respondents appealed to the High Court and their appeal was allowed.

The appellants, in turn, appealed to the Court of Appeal but their appeal was dismissed. Still dissatisfied, the appellants appealed to the Supreme Court.

**Held** (Unanimously dismissing the appeal):

1. On Essence of doctrine of *res judicata* and effect where successfully raised

**Where the principle of *res judicata* applies to conclude** the plaintiff's case it would serve no useful purpose for the plaintiff to continue to lead further evidence in the case. It is not an uncommon practice in that instance for the defendant, relying on the principle of *res judicata* to move the court to have the plaintiff's claim dismissed peremptorily on the ground of *res judicata* even without the court having to hear oral evidence at all from the defendant. [*Nwajitebo v. Alubua* (1974) 12 SC 21 referred to.] (*P. 575, paras. A-C*)

2. On Essence of doctrine of *res judicata* and effect where successfully raised -

There must be an end to litigation. This necessarily evokes the principle of *res judicata* which connotes that once the rights of the parties and their privies have, in a previous case, been fairly and conclusively decided by a judgment of a court of competent jurisdiction, there is a bar to any further action over the same subject matter involving the same parties or their privies. It is a fundamental principle in our adjudicative jurisprudence. If this were not so, there would be no end to litigation. Thus, where the principle of *res judicata* has been pleaded in a case, its full effect is to oust the jurisdiction of the court to hear the present matter before it as it is predicated on issue(s) or subject matter that had been adjudicated upon previously. In such cases, it is permissible where the cases or parties are as clear as in the instant case that the issue of *res judicata* ought to be disposed of first as it would save valuable time of the court as it touches on the jurisdiction of the court. This is moreso where it disposes of the entire matter and, as in the instant case, the appeal completely. Where the plea of *resjudicata* is proved, it ousts the jurisdiction of the court to go into the question already decided again and it leads to striking out the present case. It also raises collaterally an abuse of process. [*Egbe v. Adefarasin* (1987) 1 NWLR (Pt. 47) 1 referred to.] (Pp. 575, paras. D-F; 577, paras. C-D; 578, paras. B-D)

3. On Preconditions for application of doctrine of *res judicata* -

A party relying on the doctrine of *res judicata* has to show the following:

- (a) that the identity of the parties and/or their privies in the previous case and the present case in which it is invoked are the same; the issues and the subject-matter (i.e. the identity of the cause of action) litigated upon in the previous case and the case in which it is invoked are the same;
- (b) there must be a valid judgment of a court of competent jurisdiction on the point or subject matter;
- (c) if the action concerns land, there must be evidence that the land in the previous case is the same as in the case in which it is invoked.

Each of these requirements must be proved and it is not a matter to be drawn by inferences. Once any of the requirements is not proved, the defence of *res judicata* may be at large and is inapplicable. [*Ibero v. Ume-Ohana* (1993) 2 NWLR (Pt. 277) 510; *Ijale v. A. G. Leventis Co. Ltd.* (1961) 2 SCNLR 255; *Agbusi v. Obi* (1998) 2 NWLR (Pt. 536) 1; *Ike v. Ugboaja* (1993) 6 NWLR (Pt. 301) 539; *Oloriegbe v. Omotesho* (1993) 1 NWLR (Pt. 270) 386 referred to.] (Pp. 577-578, paras. F-B)

4. On Relationship between abuse of process and plea of *res judicata* -

It constitutes an abuse of process for the plaintiff or his privies to raise a suit against the same defendant or his privies on the same subject-matter and issues which have been previously decided between him and the defendant by a court of competent jurisdiction. In this regard, the principle of *res judicata* could be raised many a time *in limine* by the defendant to show that the plaintiff is relitigating an issue or issues in the present suit, which have been finally and conclusively

decided on the merits in a previous suit (which), between the same parties and their privies by a court of competent jurisdiction. The defendant is enjoined to plead these facts if the principle of *res judicata* is to be relied upon. (p.577, paras. D-F)

5. On When a survey plan unnecessary in a land dispute -Although a survey plan puts more precision and saves posterity much headache as to the identity of a piece of land in dispute and its boundaries, the identity of a piece of land in dispute suffices where the parties know the land in dispute and have in addition visited the *locus in quo* with the trial court which took notes and made a sketch of the land and the parties are *ad idem* on it. In the instant case, both parties knew the land in dispute and therefore its identity was settled. There was therefore no justification for requiring a plan here. In any event, in the instant case, the appellants, the plaintiffs at trial court did not file any plan in the case nor did they raise any irregularity in the conduct of the *locus in quo* or otherwise challenge it, that is, as regards the identity of the land in dispute. Nor did the appellants cross-appeal the decision of the Upper Area Court on this issue. That issue could not then be raised as an issue at the Supreme Court. [*Odofin v. Oni* (2001) 3 NWLR (Pt. 701) 488 referred to.] (P. 579, paras. C-H)
6. On Need to indicate the purpose of tendering documentary evidence before the court – Documents are not simply dumped on the court through a witness. There must be evidence before the court connecting the documents to the matter before the court. In the instant case, exhibits "D1" and "D2" related to the tax receipts of one Akano who was not a party to the matter. Akano did not testify and was not cross-examined on the exhibits before the court. There was no evidence before the court connecting the exhibits to the instant matter. They were simply dumped on the court through 1)W3. Therefore, the purpose of the tendering the exhibits was at large. [*Onibudo v. Akibu* (1982) 7 SC 60; *Queen v. Wilcox* (1961) 1 SCNLR 296 referred to.] (P. 585, paras. C-E)
7. On Duty on court to give due consideration to evidence admitted by it - The court is enjoined to give due consideration to any evidence admitted by it. [*Nnamani v. Nnamani* (1996) 3 NWLR (Pt. 438) 591 referred to.] (P. 583, para. H)
8. On Power of Court of Appeal to evaluate and draw conclusions from documentary evidence -In construing a document, the Court of Appeal is in as a good vantage position as the trial court to evaluate and to draw its own conclusions from it. In the instant case, the Court of Appeal was right to find that the judgment in exhibit D5 and D6 could not be altered in any way by the ruling in exhibit PI and moreso as exhibit D6 is the judgment of the Supreme Court, which constituted the final decision on the issues canvassed by the parties in exhibit D5. [*Fashamt v. Adekoye* (1974) 6 SC 83 referred to.] (P. 584, paras. D-F)
9. On Whether Supreme Court can hear appeal from decision of High Court - The Supreme Court has no jurisdiction to entertain appeals directly from the decision of the High Court. (P. 572, paras. B-C)
10. On When leave required to appeal from the Court of Appeal to the Supreme Court - In an appeal to the Supreme Court on questions of mixed law and facts or on facts alone, prior leave has to be obtained from

the Court of Appeal or the Supreme Court. Where, however, in addition there have been concurrent findings of facts by the lower courts, based on the age-long principle of the court, the court would not otherwise interfere with such findings of the facts except as stated in order 2 ruler 32 of the supreme Court Rules, in exceptional circumstances.(Pp.570-571,paras. H-C)

11. On extent of power of the supreme Court to grant leave to appeal-  
Leave is a condition precedent to appealing under section 233(3) of the 1999 constitution. As far as leave to appeal to the supreme Court is concerned, the general power of the court to entertain it is as contained in section 233(3). This power cannot be superseded, Whittled down or otherwise enlarge by the provision of Order 2 rule 32 of the Supreme Court Rules(P.571, paras. E-F)
12. On When the Supreme Court will interfere with concurrent findings of facts-  
It is the principle of the supreme court not to disturb concurrent findings of facts of two lower courts except under “special circumstances”; that is, unless special circumstances would include perverse findings; that where the finding runs counter to evidence or the court has taken into account extraneous matters that’s should not be taken into account; and also errors in procedure and substantive law and where they have occasioned a miscarriage of justice. It is import to note in this connection that section 233(3) of the 1999 Constitution has provided for leave to appeal on mixed law and facts or facts alone as pre-condition for filing appeal on such grounds.[Adimora v. Ajufo(1988)3NWLR(Pt.80)1; Atolagbe v. Shorun(1985)1 NWLR(Pt. 2)360; Okulate v.Awosanya(2000)2 NWLR(Pt. 646)530 referred to.](Pp. 576-577, paras. F-A)
13. On Treatment of findings of facts not appealed against-  
**-Where there is no ground of appeal upon which a challenge (as in the instant case against exhibits D1 and D2) can be based, the issue is regarded as closed and so any question raised in respect thereof cannot stand. Without a formal complaint by a ground of appeal regarding such points, the appellants would be taken as having accepted the finding of the lower court. In this case, since there was no ground of appeal to justify revisiting the issues relating to exhibits PI, D1 and D2, discussing or applying them in the circumstances of section 227(2) of the Evidence Act became otiose. [Ejowhonniv. Edok-EterLtd. (1986) 5 NWLR (Pt. 39) 132; Undenvater Engineering Co. Ltd. v. Dubefon (1995) 6 NWLR (Pt. 400) 156 referred to.] (P. 585, paras. E-G)**

#### **Nigerian Cases Referred to in the Judgment:**

- A.R.C.O.N. (No. 4) v. Fassassi* (1987) 3 NWLR (Pt. 59) 42
- Adimora v. Ajufo* (1988) 3 NWLR (Pt. 80) 1
- Adomba v. Odiese* (1990) 1 NWLR (Pt. 125) 165
- Agbasi v. Obi* (1998) 2 NWLR (Pt. 536) 1
- Aina v. U.B.A. Ltd.* (1997) 4 NWLR (Pt. 498) 181
- Ajayi v. Pabiekun* (1970) All NLR 142
- Akere v. Adesanya* (1993) 4 NWLR (Pt. 288) 484
- Akinfolarin v. Akinnola* (1994) 3 NWLR (Pt. 335) 659

*Made v. Olukade* (1976) 6 SC 183  
*Allen v. Odubeko* (1997) 5 NWLR (Pt. 506) 638  
*Atolagbe v. Shonm* (1985) 1 NWLR (Pt. 2) 360  
*Bank of the North Ltd. v. Sale*, (1999) 9 NWLR (Pt. 618) 331  
*C.S.T.W.U. v. A & A.W.U.N.* (1993) 2 NWLR (Pt. 273) 63  
*Clay Industries (Nig.) Ltd. v. Aina* (1997) 8 NWLR (Pt. 516)  
208  
*Dawodn v. Danmole* (1962) 2 SCNLR 215  
*Eboade v. Atomexin* (1997) 5 NWLR (Pt. 506) 490  
*Egbe v. Adefarasin* (1987) 1 NWLR (Pt. 47) 1  
*Ejowhonnt v. Edok-EterLtd.* (1986) 5 NWLR (Pt. 39) 1  
*Einariern v. Ovine* (1977) 2 SC 31  
*Fashann v. Adekoya* (1974) 6 SC 83  
*Ibero v. Ume-Ohana* (1993) 2 NWLR (Pt. 277) 510  
*Idundun v. Oknmagba* (1976) 9-10 SC 227  
*Igwego v. Ezeugo* (1992) 6 NWLR (Pt. 249) 561  
*Ijale v. A.-G., Leventix Co. Ltd.* (1961) 2 SCNLR 255  
*Ike v. Ugboaja* (1993) 6 NWLR (Pt. 301) 539  
*Kimdey v. Military Governor ofGongola State* (1988) 2 NWLR (Pt. 77) 445  
*Ladimeji v. Salami* (1998) 5 NWLR (Pt. 548) 1  
*Lipede v. Shonekan* (1995) 1 NWLR (Pt. 374) 668  
*Nkoko v. Akpaka* (2000) 7 NWLR (Pi. 664) 225  
*Nnamani v. Nnamani* (1996) 3 NWLR (Pt. 438) 591  
*Nwajuebo v. Alubua* (1974) 12 SC 21  
*Odofin v. Oni* (2001) 3 NWLR (Pt. 701) 488  
*Ojemen v. H.R.H. Momodii II* (1983) 1 SCNLR 188  
*Oko v. Ntukidem* (1993) 2 NWLR (Pt. 274) 124  
*Okulate v. Awosanva* (2000) 2 NWLR (Pt. 646) 530  
*Oloriegbe v. Omotesho* (1993) 1 NWLR (Pt. 270) 386  
*Olujinle v. Adeagbo* (1988) 2 NWLR (Pt. 75) 238  
*Ohtkoga r. Fatunde* (1996) 7 NWLR (Pt. 462) 516  
*Onibudo v. Akibu* (1982) 7 SC 60  
*Osho v. Ape* (1998) 8 NWLR (Pt. 562) 492

*Queen v. Wilcox (1961) 2 SCNLR 296*

*Ukaegbit v. Ugoji (1991) 6 NWLR (Pt. 196) 127*

*Undenvater Engineering Co. Ltd. v. Dubefon (1995) 6 NWLR (Pt. 400) 156*

*Vanderpuje v. Gbadebo (1998) 3 NWLR (Pt. 541) 271*

**Nigerian Statutes Referred to in the Judgment:**

Constitution of the Federal Republic of Nigeria, 1999, S. 233(0(2) & (3)

Evidence Act. Cap. 112, Laws of the Federation of Nigeria, 1990. Ss. 54, 55 and 227(2)

Limitation Law, Laws of Lagos State, 1973, S. 10

**Nigerian Rules of Court Referred to in the Judgment:**

Supreme Court Rules, 1999. O. 2 r. 32; O. 8 r. 2(2)(3) & (4), 3(1) and 12(1)

**Appeal:**

This was an appeal against the judgment of the Court of Appeal. The Supreme Court, in a unanimous decision, dismissed the appeal.

**History of the Case:**

Supreme Court:

Names of Justices that sat on the appeal: Aloysius Iyorgyer

Katsina-Alu, J.S.C. (Presided); Aloma Mariam Mukhtar,

J.S.C.; Mahmud Mohammed, J.S.C.; Francis Fedode

Tabai, J.S.C.; Christopher Mitchell Chukwuma-Eneh,

J.S.C. (Read the Leading Judgment)

Appeal No.: SC. 159/2002

Date of Judgment: Friday, 30th January, 2009

Names of Counsel: Yusuf Ali, Esq, SAN (with him, J. S.

Bamigboye; V. O. Awomolo [Mrs.]; J. O. Bayode) –for the Appellants

Dayo Akinlaja (with him, R. Baiyeshea and O. Moses Ore)

-for the Respondents

Court of Appeal:

Division of the Court of Appeal from which the appeal was brought: Court of Appeal, Ilorin

Names of Justices that sat on the appeal: Muritala Aremu

Okunola, J.C.A. (Presided); Patrick Ibe Amaizu. J.C.A.

(Read the Leading Judgment); Walter Samuel Nkanu Onnoghen, J.C.A.

Appeal No.: CA/IL/30/2000

Date of Judgment: Monday, 19th November, 2001

Names of Counsel: Yusuf O. Ali, SAN, (with him, S. A.

Okey, Esq.) -for the Appellants  
Ayodele Ogundele. Esq. (with him, S. B. Basamto and  
Lawal Victor Jimoh) -for the Respondents

**High Court:**

Name of the High Court: High Court of Kwara State, Ilorin Names of the Judges: Oyeyipo, C.J.: Orilonise, J. (Read the Judgment of the Court); Folayan, J. Suit No.: KWS/9A/98

Date of Judgment: Tuesday, 27th October, 1998

Names of Counsel. Chief Wole Olampekun, SAN (with him, Waheed Gbadamosi) -for the Appellants  
J. S. Bamigboye (with him, Mr. Kabir Azeez) -for the Respondents

**Upper Area Court:**

Name of the. Upper Area Court. Upper Area Court, Ilorin

Date of Judgment: Thursday, 19th March 1998

**Counsel:**

Yusuf All, Esq, SAN (with him, J. S. Bamigboye; V. O. Awomolo [Mrs.]; J. O. Bayode) - for the Appellants  
Dayo Akinlaja (with him. R. Baiyeshea and O. Moses Ore) -for the Respondents

**CHUKWUMA-ENEH, J.S.C. (Delivering the Leading Judgment):** This appeal is against the decision of the Court of Appeal, Ilorin Division (i.e. court below) delivered on 19/11/2001 upholding the decision of the Kwara State High Court of Justice, sitting at Ilorin in its appellate jurisdiction delivered on 27/10/1998, which in turn has allowed the appeal against the decision of the Upper Area Court delivered on 19/3/1998 giving judgment in favour of the plaintiffs (appellants in this court). The appellants and the respondents in this court are the plaintiffs and the defendants respectively at the trial Upper Area Court.

Aggrieved by the decision of the court below, the appellants (plaintiffs) by a notice of appeal dated 15/1/2002 and filed on 17/1/ 2002 with leave of the court below have raised six grounds of appeal therein.

The appellants and the respondents have filed and exchanged their respective briefs of argument. The appellants in their brief of argument, have distilled two issues for determination and they are as follows:

1. Whether the court below was right having regard to exhibits PI. D1 and D2 to have agreed with the High Court that the respondent's invocation of res judicata should succeed based on exhibits D5 and D6, when the land adjudicated upon in the latter exhibits is distinct from the land in dispute as adjudged in exhibit P1.
2. Whether the court below was right to have agreed with the High Court that the judgment of the trial Upper Area Court was not sustainable having regard to the totality of the cases of the parties and the various material contradictions contained in the case of the respondents."

The respondents have all said, distilled a lone issue for determination as follows:

"Whether shorn of all pretensions the evidence adduced on which the germane findings of the lower court were based by both parties, the judgment of the lower court was sound and unassailable".

The facts of this matter as gleaned from the record of the Upper area Court and as given by both parties in their testimonies as would be expected in a land matter of this nature have diverged in major particulars. This case having been started in a native court i.e. the upper Area Court Holden at Ilorin, as the trial court, this court has to look at the entire proceedings before the Upper Area Court in order to ascertain the nature of the case adjudicated upon by the said trial upper Area Court. The plaintiffs' claim as presented by one of them is that:

"My claim before the court is that of trespass on my land lying at Jaju Olosunde against the defendant".

The 1st defendant before the joinder of the 2nd and 3rd defendant's respondents) has answered the plaintiffs' claim thus:

"I deny liability to the plaintiffs' claim".

The 1st plaintiff has concluded his evidence before the Upper area Court thus:

"I want the court to drive the defendant away from my land and collect the cost of my locust bean (sic) which he plucked".

The 3rd plaintiff in like manner has concluded his evidence thus:

"I want the court to restrain the defendant and his people from trespassing on our land. I also want the court to give us our land"

The 2nd defendant who with the 3rd defendant have been joined after the conclusion of the 3rd plaintiff's evidence has in his testimony claimed that:

"The land of Jaaju Ogbagede belongs to Are Ogele who gave Olosunde the land for farming purposes."

In concluding his evidence the 2<sup>nd</sup> defendant has contended that:

"Since the plaintiffs have refused to pay tributes to us I urge the court to evict them from our land and later, I have told the truth, Are Ogele is the owner of the land where the plaintiffs are staying."

The foregoing abstracts of the proceedings before the trial court, have put in perspective the plaintiffs' claim and the defendants' counter-claim in this matter on the front burner. I may subjoin further facts to the effect that the plaintiffs in their claim have identified the land in dispute as Jaaju Olosunde on which their great ancestor one Olosunde was settled by one Oba Seberu (an Emir of Ilorin) many years ago for his part for having fought off the warriors of some Yoruba troops threatening the said Oba. Olosunde it is alleged had 2 children namely- Mornoh Jimoh and Ajani and that he partitioned his land between them. The plaintiffs' claim is that the land in dispute is that part of the Olosunde's land given to Momoh Jimoh. The land in dispute according to the plaintiffs has stretched from Oke Olode to Odo Jaaju Olosunde to Kukute Ogun where it has boundary with Magaji Baboko. It has also stretched to Igbo Efon, On Odi to Alaja and then to Apata Ofunfun. It is alleged that they have exercised maximum acts of ownership and possession including farming and letting portions of the said land to customary tenants. They have tendered exhibits P1, D1 and D2 as evidence that the said land does not form part of the land of the respondents and further to show that in official circle the said land is known as Jaaju Olosunde and is a distinct parcel of land to the land Jaaju Gbagede as claimed was decided in favour of the defendants (respondents) in exhibits D5 and D6.

The respondents on the other hand, while denying the plaintiffs' claim over the land in dispute have counter-claimed that the land in dispute on which their progenitors have been settled by the leave of another Emir of Ilorin many years ago is their land over which they have exercised dominion to the exclusion of the plaintiffs and their privies for many years by exercising acts of ownership and possession including farming and letting portions to customary tenants to farm for tributes.

The defendants have tendered exhibits D3 to D11 and have particularly relied on D5 and D6 to plead the defence of *res judicata*. They have identified the land in dispute as covering a wide area from Odo Omoto to Odo Eleran to Olofe, Apata Funfun, Odo Alaja and Oke Jaaju. As the main thrust in this appeal is on the perspective of whether or not the plea of *res judicata* raised on exhibits D5 and D6 by the respondents is sustainable on the backdrop of the legal evidence before the court: I think the facts as adumbrated herein will suffice to decide this appeal in that context. It is important, however, to note that the Upper Area Court also earned out a visit to the locus in quo and made valuable notes of the same. It is evident from the visit that the parties know the land in dispute notwithstanding its being differently described as to its name and boundaries by the parties in their testimonies before the Upper Area court.

The plaintiff's (the appellants) as I said above have filed a brief of argument and they have therein strongly contended that the import of exhibit P1, which is the decision of a contempt proceeding initiated against the 2nd and 3rd appellants by the 2nd respondent decided in the appellants' favour has been ignored by the two lower courts hence the misconception of the appellants' case resulting in upholding the respondents' case on the availability of *res judicata* to defeat the appellants' claim. This has been exacerbated they contend by also not having taken exhibits D1 and D2 into account by the lower court. These two exhibits it is alleged have been tendered to show that the land in dispute that is, Jaaju Olosunde is so known and called in official circle. It is their case that exhibit P1 has showed that Jaaju olosunde is also differently situated to the land Jaaju Gbagede adjudged in exhibits D5 and D6 in favour of the respondents to clearly make the principle of *res judicata* inapplicable to this case. They rely on *Alade v. Ohtkade* (1976) 6 SC 1 & 3; *Akere v. Ademnya* (1993) 4 NWLR (Pt. 288) 484 at 497. *Kimley v. Military Governor of Gongola Suite* (1988) 3 SCNJ 28 at 57: (1988) 2 NWLR (Pt. 77)445; und *Allen v. Odubeko* (1997)) 5 NWLR (Pt. 506) 638 at 648 for also submitting. They have also allege want of fair hearing in addition to saying that section 227 (2) of the Evidence Act should not have been invoked by the court below in the circumstances as it is Inapplicable to negative the impact of the challenge of failing by the fewer court to consider exhibits P1, D1 and D2 tendered by the appellants to boost their case against *res judicata*. They refer to the cases of *Nnamam v, Nnamani* (1996) 3 NWLR (Pt. 438) 591 at 597 and *Jimoh Akinfolarin & Ors. v. Solomon Oluwale Akinnola* (1994) 4 SCNJ 30 at 46; (1994) 3 NWLR (Pt. 335) 659 to lay emphasis on the binding effect of exhibit P1 on both parties to this suit regardless of the status of the court that has given the decision and further to contend that flowing from it the respondents are estopped from raising the issue of *res judicata* even as they have not appealed against the decision in exhibit P1. They rely on *Asuquo Oko v. Chief James Ntukidem & Ors.* (1993) 2 SCNJ 33 at 42; (1993) 2 NWLR (Pt. 274) 124 again, to contend even then that as the boundaries of the land in dispute in exhibits D5 and D6 have not be clearly defined by available evidence and that in the absence of a plan that the plea of *res judicata* cannot avail the respondents. And more so. as the findings based on the visit to the locus in quo by the Upper Area Court in the instant case and as per exhibit P1 have conclusively showed that the land -Jaaju Olosunde is differently situated to the land Jaaju Gbagede which is the land

in dispute as found even by exhibit P1, hence the rejection of the plea of res judicata by the Upper Area Court. And so, they have relied on *Ike v. Ugboaja* (1993) 6 NWLR (Pt. 301) 539 at 554-556 and *Oloriegbe v. Omotesho* (1993) 1 NWLR (Pt. 270) 386 at 397-397 to outline the conditions for the application of the principle of res judicata to include that:

1. The parties in the previous suit and the present one must be the same as well as the issues litigated upon and settled in both suits.
2. There must be a judgment of a court of competent jurisdiction on the matter.
3. As the instant action concerns land-that the land here and in the previous suit must be the same.

They submit that the defendants (respondents) have not discharged this burden on them to sustain the plea of res judicata.

They further submit that neither the parties nor the land in dispute are the same in both suits in this matter and that the land in exhibit P1 is not the same as the land in dispute in, exhibits D4 and D6 which evidence, they contend is clearly supported by exhibits D1 and D2. And that further to the cases of *Igwego v. Ezeugo* (1992) 6 NWLR (Pt. 249) 561: and *C.S.T.W.U. v. A & A.W.U.N.* (1993) 2 NWLR (Pt. 273) 63 at 72 relied on by the respondents that the principle of res judicata strenuously canvassed by the defendants (respondents) is inapplicable here.

The appellants have also canvassed that in principle the findings of facts of a customary court as by the instant Upper Area Court and as encompassed in exhibit PI should not be hastily railroaded over and have in this regard referred to *Emarieru v. Ovirie* (1977) 2 SC;31 at 42 per Udoma, JSC and has also relied on *Nkoko v. Akpaka* (2000) 7 NWLR (Pt. 664) 225 at 241 to highlight of the consequences for breaching of this common principle by the two lower courts.

On issue 2, the appellants have raised the issue of exhibits D1 and D2 although excluded by the lower court as being extraneous to this case, have been tendered as contended by the appellants, to show that the land in dispute is known in official circle as Jaaju Olosunde in contract to Jaaju Gbagede as the respondents have seemed to be contending here. The said exhibits are therefore material. And these exhibits being tax receipts of one Akano bearing Olosunde, it is submitted by appellants are not extraneous that is irrelevant to the appellants' case and that it is perverse to so hold by the lower court. See: *Aina v. U.B.A. Plc.* (1997) 4 NWLR (Pt. 498) 181 at 289. They further submit that as there has been a clear conflict in oral evidence of the parties as to the correct name by which the land in dispute is otherwise known, that exhibits D1 and D2 ought to have been used to assess the veracity of the oral testimonies of the parties in this regard. They have therefore opined that on the authorities of *Alade v. Ohikade* (supra); *Kimdey v. Military Governor, Gongola State* (supra); *Olujinle v. Adeagbo* (1988) 2 NWLR (Pt. 75) 238 at 254; and *Allen v. Odubeko* (1997) 5 NWLR (Pt. 506) 638 at 648 that the lower courts erred to have ignored exhibits D1 and D2; their effect would otherwise have put to rest the issue of res judicata as inapplicable to this case.

The appellants on their case on the five methods of proving ownership of land as enunciated in the case of *Idundun v. Okumagba* (1976) 9-10 SC 227 have contended that on the evidence of the appellants and their witnesses and the findings of the trial court thereupon that the holdings of the lower courts setting aside of the decision of the trial Upper Area Court which saw heard and watched the witnesses is perverse and ought to be reversed.

The appellants have therefore urged the court to allow the appeal, restore the findings of fact of the trial Upper Area Court which

is submitted is unassailable in the circumstances and so resolve issues 1 and 2 in the appellants' favour.

The respondents have filed a joint brief of argument in this matter and therein, firstly, have raised a preliminary objection, indeed as rightly identified by the appellants in their reply brief of argument on the following grounds:

- (1) That the appeal itself is incompetent by virtue of Order 2 rule 32 of the Supreme Court Rules;
- (2) That grounds 3 and 5 are incompetent having been directed against an admixture of the decisions of the High Court and the Court of Appeal; and
- (3) That ground 1, 2 and 4 are argumentative or narrative an vague and contrary to Order 8 rule 2(3) and (4) of the rules of this court.

The appellants in their joint reply brief have dealt in full with the questions raised in the objection. They have out rightly condemned and denounced the objection, on the whole, as most unwarranted, devoid of merit and I see no reason not to agree with them as I proceed to state my observations. However, the nature of the questions raised in the objection dictate that the said grounds be set out even if without their particulars excepting grounds 3 and 5 for ease of reference and for further reason appearing hereinafter and they are as follows:

"The Court of Appeal misdirected itself in fact in holding that:

1. "As I stated earlier, the claim in the present suit is for trespass on a piece of land lying at Jaaju Olosunde. The defence claimed that the land in dispute is called Jaaju Gbagede. From all I have said hereinbefore, it is evidence that the claim in the present case is in respect of the same parcel of land which was the subject of litigation in exhibit D5, The appellants in the present case claim on behalf of the descendants of Olosunde and the respondents' claim on behalf of the descendants of Are Ogele."
2. The Court of Appeal erred in law in upholding the High Court's view that the defence of res judicata was applicable to the case thereby affirming the judgment of the High Court. Particulars:
  - (1) The parties in exhibits D5 and D6 were not the same with the parties in this case.
  - (2) The subject matter in the said exhibits is different from the subject matter of this case
  - (3) The appellants were not privies to the parties on the said exhibits.
  - (4) The land in dispute in this case is distinct from the land covered by exhibits D5 and D6.
  - (5) The Court of Appeal erroneously upheld the defence of res judicata in the circumstances.
3. The learned Justices of the Court of Appeal erred in law in holding that:

I agree with the learned SAN's contention that it is the duty of a trial court to consider every evidence led in support of an issue. In this case even if the High Court had considered the exhibits, the respondent's case for the reasons I have given above would have been strengthened the more. In any case, by virtue of section 227(2) of the Evidence Act. the wrongful exclusion of evidence shall not of itself be a ground for the reversal of any decision in any case if it shall appear to the appellate court that had the evidence so excluded been admitted it may reasonable be held that the decision would have been the same Bank of the North

Ltd. v. AlhajiAbba Satonmi SaleJi (1999) 9 NWLR (Pt. 618) 331.

In the light of all these, in my considered view, there is no miscarriage of justice. Particulars:

- (1) Exhibits P1, D1 and D2 did not any way strengthen the respondent's case.
  - (2) The Court of Appeal did not place the correct construction on exhibits PI, D1 and D2.
  - (3) The court misapplied the provisions of section 227(2) of the Evidence Act in the Circumstances.
  - (4) The holding of the Court of Appeal has occasioned a grave miscarriage of justice on the appellants.
4. The Court of Appeal erred in law in failing to pronounce on the appellants' complaint of contradictions in the respondents' case thereby abdicating its judicial responsibility.
  5. The Court of Appeal erred in law by confirming the views of the High Court when it tampered with the various sound findings of fact made by the trial Upper Area Court without any justifiable reason thereby occasioning a miscarriage of justice against the appellants.

Particulars:

1. The findings of the Upper Area Court that were tampered with were sound and impeccable.
2. There was no legal or factual basis to have upturned the findings of fact of the trial court nor confirm the tampering by the High Court.
3. An appellate court does not make a practice of disturbing findings of fact of a trial court."

I now return to the first ground of the 3 grounds of the preliminary objection as set out above in this matter. On the broad question of the incompetence of the appeal itself, this point is taken by the respondents under Order 2 rule 32 of the Supreme Court Rules, there can be no doubt, however, that the respondents have totally misconceived not only the import but also the purport of the rule itself, that is, as vis-a-vis the provision of section 233(2) of the 1999 Constitution and as regards decisions of the court below that have to be appealed from as of right as against decisions appealable from with leave of the court below or the court. See section 233(2) of the 1999 Constitution; and I may observe that the provision of rule 32 of Order 2 of the rules of this court applies:

"Where, in an appeal to the court from the court below, the court below has affirmed the findings of fact of the court of first instance an}' application to the court in pursuance of its jurisdiction shall be granted only in exceptional circumstances."  
(Italics mine for emphasis).

The provision of the above rule couldn't be clearer and unequivocal and literally construed is to further facilitate the application in practice of the provision of section 233(3) of the 1999 Constitution. This means that appeals to the court on questions of mixed law and facts or facts alone in which case, leave is a pre-condition, have to be predicated on a prior leave obtained from the court below or the court. Where, however, in addition there have been concurrent findings of facts by the two lower courts, based on the age long principle of the court, the court would not otherwise interfere with such findings of facts of both lower courts except as stated in the said rule "in exceptional circumstances". This principle has to be and been exercised judicially based on the peculiar facts of each case that is to say, with regard to what constitutes exceptional circumstance. There is no doubt that this is clearly the case (as

in the instant case as rightly held by the two lower courts) where the decision appealed from has occasioned a miscarriage of justice or otherwise has been made in error including want of jurisdiction. Respectfully, there is also a clear misapprehension of the working relationship between the said rule 32 of Order 2 of the rule of this court dealing with practice and procedure and the provisions of section 233 of the 1999 Constitution dealing with the substantive law.

The court in *Ojeinen v. Momodu II & Ors.* (1983) NSCC 135; (1983) 1 SCNLR 188 has put it beyond peradventure that leave is a condition precedent to appealing under section 233(3) of the Constitution. As far as leave to appeal to the court is concerned the general power of the court to entertain it is as per the constitutional provision as contained in section 233(3). This power cannot be superseded, whittled down or otherwise enlarged by the provision of Order 2 rule 32 of the rules of this court.

The respondents appear to have missed this crucial point; even then, I agree with the appellants that construing the said rule literally again, as rightly urged by the appellants and even so as the said provision is not ambiguous, the meaning of "the court of first instance." that is, the court that first heard the matter in the hierarchy of the courts is in this context the Upper Area Court; it cannot be the instant High Court sitting in its appellate jurisdiction (as the respondents appear to be contending) in which case, the said rule is inapplicable to the instant High Court on the face of the facts and circumstance peculiar to this case. This ground of objection must therefore fail. And 1 so hold.

The objection against grounds 3 and 5 of the grounds of appeal respectfully is again misconceived I have set out grounds 1 to 5 of the grounds of appeal above (leaving out ground 6) that is to say. without their respective particulars as regards grounds 1, 2 and 4. The two grounds of 3 and 4 are grounds of law and under Order 8 rule 2(2) of the rules of this court have to be particularized. It is a total misconception by the respondents that the two grounds which have not been otherwise challenged as grounds of law to ever contend that the grounds are severally *ex facie* predicated on the decisions of the High Court and not the Court of Appeal. Respectfully, this is far from being correct. This misapprehension is not evident from reading these grounds. It is clearly provided that the court has no jurisdiction to entertain appeals directly from the decisions of the High Court. See section 233(1) of the 1999 Constitution. And it is so in this instance. These grounds and their particulars are set out above and are clear and unequivocal. Even more so the respective particulars of error to grounds 3 and 5 have spelt out as clearly the decision being appealed from and they are challenging the decision of the court below.

Furthermore, the combined reading of grounds 3 and 5 with their respective particulars of error is further conclusive of the fact that it is the decision of the Court of Appeal and not that of the High Court sitting as an appellate court that grounds 3 and 5 are impugning. This objection also fails.

Finally, on the third point taken in the objection, I have read the said grounds 1, 2 and 4 of the grounds of appeal, and I hold that in my view, they have been couched in conformity with Order 8 rule 2(2) of the rules of the court requiring that misdirection or error in law must be particularized. I do not find the grounds vague or at large; they are competent grounds for that matter. In the result, I overrule the preliminary objection as most frivolous in the circumstances and should otherwise be mulcted in costs for its frivolity.

The respondents in their brief have also presented a case in the alternative in event of their objection being overruled. In it they

have traced the devolution of the land in dispute from their forebears to the 2nd respondent the Are Ogele who has been putting in caretakers (Baale) on the land in dispute to collect tributes. It is contended that although the appellants know the land in dispute as Jaaju Olosunde, the respondents on the other hand, have known it as Jaaju Gbagede which has devolved to them from their forebears. They contend that the 3rd appellant under cross-examination has conceded the point that the land in dispute is known as Jaaju Gbagede. The 2nd respondent the incumbent Are Ogele has not only denied the appellants' claim here but also has counter-claimed on behalf of the respondents the land in dispute against the appellants. It is their case that number of civil litigation as per in exhibits D3 and D11 which have upheld their ownership of the land in dispute and that the present suit is caught by the principle of *res judicata* as per exhibits D5 and D6 as the land in dispute has been previously litigated upon as per these exhibits. As regards exhibits D1 and D2 tendered through DW3, they are personal tax receipts of one Akano for the year 1970/71; they submit they have no bearing on this case even though these exhibits D1 and D2 bear Jaaju Olosunde. The respondents in this regard have submitted that these exhibits have been rightly treated by the lower court as irrelevant evidence to this case. They have, in support of their case and claim i.e. the respondents erred to exhibits D3 – D11 to establish that the land in dispute from years back has been adjudicated upon in several court actions and that their judgments have always upheld the land in dispute in the respondents' favour.

The respondents have gone at length to use exhibits D3 – D11 to show that the land in dispute, in the instant case, the parties and issues in both the suit as per the exhibits D5 and D6 are the same as in the present suit. The point is made that there is no credible evidence of the boundary between Ajani and Momoh Jimoh to establish the appellants' case that the land in dispute is that part given to him by Olosunde and thereby establish the partition of Olosunde's land between Ajani and Momoh Jimoh, his two sons; not have Ajani's children showed their lack of interest in the subject matter of this suit. And so, they strongly contend that there has not been any partitioning of the land in dispute between the two children of Olosunde. See *Clay Industries (Nig.) Limited v. Aina* (1997) 8 NWLR (Pt. 516) 208. And on the burden of proof in this regard (i.e. of the partition) they rely *Ajayi v. Pabiekun* (1970) All NLR 146 at 149 to contend it rests squarely on the appellants who have alleged it but have failed to prove it. They have therefore submitted that the appellants having failed in this regard have failed to disprove the respondents' claim that the land in dispute as per exhibits D5 and D6 decided in the respondents' favour is the same land being relitigated upon in the present suit as well as the parties thereto, and that the land in dispute belongs to the respondents as per exhibits D5 and D6.

On the lower court's failure to consider exhibits D1, D2 and D3 as has been contended by the appellants, the respondents contend that admitting exhibits D1 and D2 in evidence does not ipso facto prevent an appellate court as the lower court from discountenancing that evidence and refers to Order 8 rule 3(1) and 12(1) of the Supreme Court Rules (as amended) as to the power of the lower court to do so and *Sho v. Ape* (1998) 8 NWLR (Pt. 562) 492 at 505 and further has opined that these exhibits have been introduced in the case simply to confuse the court, a disposition condemned in *Odofin v. Oni* (2001) FWLR (Pt.36) 807 at 818; (2001) 3 NWLR (Pt. 701) 488; and *Eboade v. Atomesin* (1997) 5 NWLR (Pt. 506) 590 at 605.

They also submit that some very crucial holdings binding on the appellants to the effect that exhibit P1 cannot alter nor vary crucial holdings binding on the appellants to the effect that exhibit P1 cannot alter nor vary in anyway the contents of exhibits D4 and D6 and that exhibits D1 and D2 have no nexus with exhibits D5 not having been appealed specifically still stand against the appellants

notwithstanding whether or not the appellants have succeeded in this appeal. See: Lipede v. Shonekan (1995) 1 NWLR (Pt. 374) 668 at 685; and Olnkoga v. Fatunde (1996) 7 NWLR (Pt. 462) 516 at 528C.

In conclusion, they reiterate that the respondents have made out a case for the principle of res judicata to apply to this case and have therefore, urged the court to rely on section 54 of the Evidence Act to uphold the respondents' case here as the appellants have not otherwise established their case on a preponderance of evidence and, more particularly on the partitioning of the land in dispute between Olosunde's two sons which the appellants have woefully failed to establish, and this has done great damage to the appellants' case. See: Vanderpuje v. Gbudebo (1998) 3 NWLR (Pt. 541) 271 at 279; Ladimeji v. Salami (1998) 5 NWLR (Pt. 548) 1 at 45; and Ukaegbu v. Ugoji (1991) 6 NWLR (Pt. 196) 27.

The court is urged to resolve the one issue in the respondents' favour and dismiss the appeal.

I have now rounded off the review of the cases of both parties to this appeal. Respectfully, I think this appeal is poised to be resolved on determining the sole issue of res judicata without more and I go on to do so here. The issue of res judicata as can be seen from the foregoing proceedings has pervaded the entire cases of the parties as presented in this matter. It is on the front burner so to speak. I seem to agree with the respondents that there is enough material so enable the court pronounce effectively on the issue. It is established in the case of Nwajuebo v. Aliibua & Anor. (1974) NSCC (Vol. 9) 617; (1974) 12 SC 21 and, if I may restate, that where the principle of res judicata applies to conclude the plaintiff's case that it would serve no useful purpose for the plaintiff to continue to lead further evidence in the case. It is not an uncommon practice in that instance for the defendant relying on the principle of res judicata to move the court to have the plaintiff's claim dismissed peremptorily on the ground of res judicata even without the court having to hear oral evidence at all from the defendants. In this matter, I have in addition to the record of appeal the advantage of both the briefs of the parties and their oral submissions in court.

Again, I think it would be correct to say here that where the principle of res judicata has been pleaded in a case that its full effect is to oust the jurisdiction of the court to hear the present matter before it as it is predicated on issue(s) or subject matter that has been adjudicated upon previously. In such cases, it is permissible where the cases of parties are as clear as here that the issue of res judicata ought to be disposed of first as it would save valuable time of the court as it touches on the jurisdiction of the court. And this is more so where it disposes of the entire matter and even as here, the appeal completely.

This has been pointed out per Aniagolu, JSC in Egbe v. Adefarasin (1987) 1 WSCC (Vol. 18) 1 at 9 para. 45; (1987) 1 NWLR (Pt. 47) 1 on the issue of limitation under section 10 of the 1973 Laws of Lagos State raised by the defence that no useful purpose will be served in dealing with other issues in the appeal on the merits if the action is indeed statute barred. The cited case has no bearing on the instant case except that it affords a striking example of the wisdom in dealing with here the issue of res judicata first as it disposes of the appeal if upheld. Over and above any other sub-issues in this appeal, the appeal is more or less challenging the concurrent findings of facts by the two lower courts: (if only to underscore the odds stacked against the appellants in this appeal, so to speak). See: Dawodu & Ors. v. Danmole & Ors. (1962) 1 All NLR 702; (1962) 2 SCNLR 215.

The appellants have contended that the two lower courts in disturbing the meticulous findings of facts of the Upper Area Court have not heeded the warning per Udoma, JSC in Emariem v. Ovirie (1977) 2 SC 31 at 42B as to what should be their attitude to

findings of facts of customary courts. His Lordship in the cited case at p. 42-43 said:

"Suffice it to say that in our view; the customary court showed proper and sufficient appreciation of the issues in controversy between the parties which issues may accurately be described as particularly within its knowledge and its judgment in such matters should not have been disturbed. Indeed that was the view long ago expressed by the Privy Council in *Abakeh v. Nihau Benin* 2 WACA 1, where their Lordships said at P3: -

"It appears to their Lordships that decisions of native tribunal on such matters which are peculiarly within their knowledge arrived at after fair hearing of relevant evidence should not be disturbed without clear proof that they are wrong'." See: also *Nkoko v. Akpata* (2000) 7 NWLR (Pt. 664)225 at 241.

Before the import of this citation is lost on us it is important to make the point that the cited case, in that instance concerned disturbing the findings of fact of the Uzere customary court on questions of inheritance, succession to property and membership founded on custom. In this case, the subject-matter is title/ownership of the land in dispute.

The indictment levelled against the respondents by the appellants vis-a-vis the decisions of the two lower courts is serious enough and it has, however, to be examined within the context of another principle of this court not to disturb concurrent findings of facts of two lower courts except under "special circumstances" i.e. unless special circumstances exist to necessitate such interference. In this regard, special circumstances, would include perverse findings i.e. where the finding runs counter to evidence or the court, has taken into account extraneous matters that should not be so taken into account: and also errors in procedure and substantive law and where they have occasioned a miscarriage of justice. See: *Adimora v. Ajufo* (1988) 3 NWLR (Pi. 80) 1 and *Atolagbe v. Shorun* (1985) 1 NWLR (Pi. 2) 360; and *Okulate v. Awosanya* (2000) 1 SC 107: (2000) 2 NWLR (Pi. 646) 530.

It is an important point in this connection in that section 233(3) of the 1999 Constitution has provided for leave of appeal on mixed law and facts or facts alone as pre-condition for filing appeals on such grounds.

I should now proceed to examine the case of the parties as presented on the issues of res judicata. The crux of this matter is whether the plea of res judicata predicated on exhibits D5 and D6 as found by the two lower courts can be sustained on the totality of the evidence before the court.

It must, however, be noted that there must be an end to litigation. This necessarily evokes the principle of res judicata and which connotes that the rights of the parties and their privies having in a previous case been fairly and conclusively decided by a judgment of a court of competent jurisdiction, it constitutes a bar to any future action over the same subject matter involving the same parties or their privies. And it is a fundamental principle in our adjudicative jurisprudence; if this were not so, there would be no end to litigation.

Besides, it constitutes an abuse of process for the plaintiff or his privies to raise a suit against the same defendant or his privies on the same subject matter and issues which have been previously decided between him and the defendant by a court of competent jurisdiction. In this regard the principle of res judicata could be raised many a time in limned by the defendant to show that the plaintiff is relitigating an issue or issues in the present suit, which have been finally and conclusively decided on the merits in a previous suit (which is earlier in time), between the same parties and their privies by a court of competent jurisdiction. The defendant

is enjoined to plead these facts if the principle of *res judicata* is to be relied upon. See sections 54 and 55 of the Evidence Act. The pre-conditions for its application are settled as a party relying on it has to show inter alia:

1. That the identity of the parties and/or heir privies in the previous case and the present case are the same;
2. The issues and subject matter (i.e. identity of cause of action) litigated upon in the previous case and the present case are the same;
3. There must be a valid judgment of a court of competent jurisdiction on the point or subject matter;
4. If the action concerns land (as here) there must be evidence that the land in the previous case is the same as in the present case.

Each of these requirements must be proved and it is not a matter to be drawn by inferences. Once any of the requirements is not proved the defence of *res judicata* may be at large and is inapplicable. See: *Innocent Ibero and Anor. v. Ume-Ohana* (1993) 2 NWLR (Pt. 211) 510; *Ijale v. A.-G., Leventis Co. Ltd.* (1961) 2 SCNI 255; *Agbasi v. Obi* (1998) 2 NWLR (Pt. 536) 1; *Ike v. Ugboaja* (1993) 4 NWLR (Pt. 301) 539 at 554-556; and *Oloriegbe v. Omoteslio* (1973) 1 NWLR (Pt. 270) 386 at 396-397.

Emerging from the above cases include, that, where the plea of *res judicata* is proved it ousts the jurisdiction of the court to go into the question already decided again and it leads to striking out the present case; also raises collaterally an abuse of process. The respondents here have raised the principle of *res judicata* by relying on exhibits D5 and D6 as their plank in this matter for so contending, in other words, that the instant suit filed by the appellants claiming title to the land in dispute known as Jaaju Gbagede by the respondents as against Jaaja Olosunde by the appellants has been the subject matter as litigated upon in a previous suit as per exhibits D5 and D6 giving rise to the judgment in the respondents' favour. The respondents (defendants) further contend that as the parties, the subject and issues decided in exhibit D5 and confirmed by the Supreme Court in exhibit D6 are the same as in the present suit that the court should in the circumstances, uphold their case *res judicata* as the two lower courts. The appellants have challenged these submissions in their brief on the issue of *res judicata*.

At great pains I have waded through the copious record of the testimonies of the parties and then exhibits in this case at the Upper Area Court. The factual terrain of the matter as set out in the record of proceedings of the Upper Area Court to say the least has showed many topographical and avoidable mistakes nonetheless they can be followed and I have done the same here.

On the issue of the instant land in dispute being the same as in the previous suit, an issue which must be satisfied, the

appellants have raised the absence of a plan for a clearer identity of the land in dispute and its boundaries. I agree, in this respect, with the court below that the record have showed that the parties at the *locus in quo* have been *ad idem* on the identity of the land in dispute even though differently called Jaaju Olosunde by the appellants and Jaaju Gbagede by the respondents. The parties visited the *locus* with the trial court which observed thus:

"Plaintiff conveyed us round the whole land. We saw the farms lands the economic trees and the villages mentioned in evidence. Witnesses showed us all they spoke about. We then returned to write our findings."

The above remark is a clear pointer that both sides to this matter *are ad idem* as to the land in dispute and its boundaries inspite of the different names given by the parties to the land in dispute and its boundaries. The question in this instance is whether this issue should still stir up such a storm in this matter and in this court as the appellants are urging. I have dealt with the question later on.

And, I think the dictum per Achike, JSC in *Odofin v. Oni* (2001) FWLR (Pt. 36) 807 at 818; (2001) 3 NWLR (Pt, 701) 488 at 502 paras. C-D has summarized the attitude of the cut in circumstances in this case. He said and I agree with him that:

"...Of course, where both parties are familiar with, or know the land in dispute, the question of its identity or its certainly will cease to perplex the trial court so also the appellate court and neither party will be allowed to place a clog in the wheel of justice by mischievously raising the issue of identity in order to becloud what is otherwise a piece of land that is well-known to both parties."

This admonition could not have come at a belter time considering its aptness to the circumstances in this mailer. The land in dispute here as far as demonstrated in the evidence before the trial court has been showed to be certain in its identity.

I agree with the lower court that although a plan would have put more precision and save posterity much headache as to the Subject-matter and its boundaries, the identity of the said land suffices is in this matter where the parties know the land in dispute and have in addition visited the *locus in quo* with the trial court which took notes and made a sketch of the land and the parties have been *ad idem* on it. The identity of the land in dispute is in my opinion certain, it is duly settled. I have therefore not seen any

justification for requiring a plan here. After all, the appellants, the plaintiffs at trial court have not filed any plan in this case, nor have they raised any irregularities in the conduct of the *locus in quo* or otherwise challenged or faulted it i.e. as regards the identity of the land in dispute. Nor have the appellants cross-appealed the decision of the upper Area Court on this issue. It cannot now be raised as an issue; it does not lie in their mouth to do so. It is belated.

On the issue of whether the subject matter, the issues, the parties and their privies are the same as in this case as in exhibits D5 and D6, I also agree with the lower court that it requires in the circumstances of this case of tracing the devolution of the land in dispute through the forebears of the parties and in that case resort has to be had to the evidence adduced before the Upper Area Court as no pleadings are used or allowed in the Upper Area Court. In this regard, the evidence of both parties to this matter has been eloquently set out at page 224 of the record in the body of the judgment of the lower court i.e. as culled from the judgment of the High Court and I quote:

"The evidence of the appellants is that the land in dispute is called Jaaju Olosunde. It is owned by their family through their ancestor Olosunde. The said Olosunde migrated from Olofun near Oyo. He succeeded in capturing two warriors who had been terrorizing the inhabitants of the area during the Aganigan war. As a mark of appreciation, the reigning Oba gave the entire land to Olosunde. The land is called Jaaju Olosunde.

Before his death Olosunde partitioned the land between his two children, Momo Jimoh and Ajani. When Momoh Jimoh died, the land devolved on Jinadu, then Atiku and Yusuf Jimoh (the 1st appellant). The parcel of land starts from Odo Olofo to Jaaju Olosunde to Kukute Ogun where it shares boundary with Mgaji Baboko. It stretches to Igho Efon to Efiri Odi river to Odo Alaja and finally to Apata Fuufu.

Ajani Bale Jaaju for refusal to pay the customary tributes for the use of the land. The respondents tendered many court judgments as exhibits in support of the above claim." The foregoing account of the evidence of the parties before the Upper Area Court for purposes of invoking the principle of *res judicata* has to be read along side the account of the evidence in the Judgment as per exhibit D5. In the said exhibit, the parties have been designated as Bello Akani Are Ogele, and Ajani Bale Jaaju gbagede. The part of that decision as culled from the judgment of the lower court (also as per the High Court) is at p. 225 of the record which as I have examined, starts from the last two

lines of the last paragraph; it reads as follows:

The brother of Bello Akanbi, Busari Akanbi with the leave of the Upper Area Court represented him. When the defendant Ajani Bale died, Mamudu Alao his son stepped into his shoes. It is to be noted that the plaintiffs' claim in that suit is for the ownership of land that situates at Jaaju Gbagede.

One Mahmud Olosunde gave evidence for the defence in the case. He claimed that his great grand father Olosunde fought a war for the Emir of Ilorin. The Emir gave him the land in dispute which stretched from Oke Pandoro down to Jaaju river and then to Oloja river, and Alaja river and to Odo Omo. The witness called the land Jaaju of Olosunde. One Busari Ayinla gave evidence as DW4. It is his evidence that Olosunde was the founder of Jaaju. In answer to a question he said that 'Jaaju Olosunde otherwise called Jaaju Gbagede was first settled before Ogele'."

The answer given above by DW4 has dispelled all doubts that it is the same land in dispute in exhibit D5 that is in dispute here. Even clearer is that the plaintiffs in exhibit D5 are of the lineage of Are Ogele while the defendants therein are of lineage and privies of Ajani Bale Jaaju Gbagede.

I think, all the same, that before rounding off further matters arising from the foregoing I should also advert-my mine to a critical passage of the High Court on the issue of res judicata and its findings of facts therein which are as stated at p. 154 of the record and I quote:

Now through exhibits D5 and D6 the land at Jaju Gbagede had been awarded to the 2nd defendant. The present land in dispute is also at Jaju Gbagede. Even though the 1st respondent claimed to be from Morno Jimoh family through which he claimed title to the land which Olosunde shared between his two children namely Momo Jimoh and Ajani, we find that in his evidence he did not indicate that he had a common boundary with Ajani. If the respondents' case was that before his death, their progenitor Olosunde partitioned his land between his two children, and that the land in dispute forms one half thereof, then it is common sense that the two beneficiaries will have a common boundary. Without any evidence of a common boundary between the respondents from Momo Jimoh lineage and Ajani in respect of the land in dispute, expected to form one half of a land mass divided between them, then

the only inference to draw is that the respondents were claiming the whole of the land. They cannot do that. This is because even from their own evidence the entire Jaaju Gbagede land does not belong to them or their lineage alone.

On the other hand, the 2nd appellant has proved that the entire Jaaju Gbagede land has been awarded to him in exhibit D5 and D6. On that score the respondents' claim should have been dismissed. Exhibit D6 was a decision of the Supreme Court. It enjoys unquestionable finality for ever notwithstanding any error either of procedure or jurisdiction: See *Architects Registration Council of Nigeria (No. 4) v. Prof. M.A. Fassassi* (1987) 3NWLR (Pt.59)42:

'We agree with the principle of law that the fact that the parcel of land in a previous suit or litigation bears the same name as the parcel of land in a later litigation does not necessarily mean that they are the same. See *Adomba v. Odiese* (1990) 1 NWLR (Pt. 125) 165. We are however satisfied that in the instant appeals the parcel of land in dispute is the same as the land litigated upon in exhibits D5 and D6.

The lower courts have acted on the foregoing facts-situation in reaching their respective conclusions in applying *res judicata* in the present case. The High Court in no uncertain terms has made the immediate above findings of facts and law and they are rightly made. Once the appellants have failed to prove that the land in dispute is only as to a part of the land allegedly shared between the two sons of Olosunde, their case is bound to fail in this case as it is the entire land known as Jaaju Gbagede as contended by the respondents that is in dispute i.e. inclusive of the part given to Ajani See *Ajayi v. Pabiekun* (supra). If I have understood the appellant's case correctly they are saying that exhibit P1 encompasses only to the extent of that part of the land given to Momo Jimoh i.e. their progenitor that is the land in dispute here. This goes to compound their case the more.

There can be no mincing of words that deriving from the abstracts above are that the issue, the land in dispute and the parties in this suit are the same as per in exhibit D5 which has declared judgment in favour of the respondents.

The decision in exhibit D5 has been confirmed on appeal by the Supreme Court in exhibit D6. In the end, the lower court and the High Court before it rightly in my view have held that the defence of *res judicata* is applicable in the present case. It seems to me that it is the only conclusion open to them on the peculiar facts of this case. Exhibits D5 and D6, I must emphasize, are judgments

of courts of competent jurisdiction; it goes without argument that the requirements for the application of the defence of *res judicata* have been met in this case. And I so hold.

The next question is whether the appellants have showed exceptional circumstances to warrant interfering with this decision in this case before the court. I very much doubt it and my reasons are given hereinafter. The appellants have an uphill task in order to upset the concurrent findings of facts in this matter. See *Okulate v. Awosanya* (2000) 1 SC 107; (2000) 2 NWLR (Pt. 646) 530 and in this court they have more or less repeated the very grounds they have relied upon in opposing the defence of *res judicata* as those raised in the court below. They hinge mainly on non-consideration of exhibits PI, Di and D2 by both lower courts and they have opined on the backdrop of the decision in *Nnamani v. Nnamani* (*supra*) to the effect that the court is enjoined to give due consideration to any evidence admitted by it and I couldn't agree more in this regard. It is on this premise that they have raised their allegation of miscarriage of justice. See: *Nnamani v. Nnamani* (*supra*); *Alade v. Olukade* (*supra*); and *Akere v. Adesanya* (*supra*); in other words, whether on the totality of the cases as presented by both sides, the decision of the court below is sustainable.

Coming to the issue of exhibits PI i.e. the contempt proceeding initiated against the 2nd and 3rd appellants, in exhibit P1 of the Upper Area Court, the respondents here have prayed for an order committing the appellants here to prison for contempt and/or an order directing the appellants to remove the structure being built by the appellants on the respondents' adjudged land situate, lying and being between Ondo Omo and Odo Eleram. The Upper Area Court found that the respondents' land claimed in exhibit P. has not been adjudged in favour of the respondents in 1986. The appellants have seriously contended that the lower court has not properly construed exhibit PI otherwise the lower court would have rejected the plea of *res judicata* in so far as the land in dispute in exhibits PI and D5 is not the same. The lower court, I must say in construing a document as exhibit PI it is in as a good vantage position as the trial court to evaluate and to draw its own conclusions from it *Fashanu v. Adekoya* (1974) 1 ANLR (Pt. 1) 35; (1974) 6 SC S3. The lower court has found that the judgment in exhibits D5 and D6 cannot be altered in any way by the ruling in exhibit PI and moreso as exhibit D6 is the judgment of the Supreme Court, which constitutes the final decision on the issues canvassed by the parties in exhibit D5 and, again, I couldn't agree more. This is a

specific finding by the lower court. This conclusion cannot be faulted particularly in the face of the finding that the land in dispute in this suit is the same as the land in dispute as per exhibits D5 and D6. That exhibit D6 is final and conclusive of the matter is unquestionable. The scenario playing out here has no semblance to a case of conflicting judgments of courts whether or not of equal jurisdictions and the priority of their respective judgments vis-a-vis this case. Exhibit D6 the judgment of this court is final and conclusive of the matters decided in it; it cannot be questioned nor varied by the decision of any lower court in any subsequent actions by the same parties or their privies under any guise.

Mindful that exhibit P1 is not on appeal before the court, respectfully, it will be improper, indeed, incompetent of this court in this case even though of the same parties and on apparently the same questions as in this case to descend heavily on exhibit P1 vis-a-vis exhibits D5 and D6 and proceed, that is to say, to review it (i.e. exhibit P1) when not on appeal before this court. This is because exhibit P1 is still open to be appealed from; beyond the comments I have made above on it; but save perhaps to note that the appellants have not specifically appealed this specific finding of the lower court on exhibit P1. And surely, it ought not to have been raised as an issue in this appeal before the court as it is not founded on a ground of appeal. See the cited case below.

The next question raised by the appellants relates to exhibits D1 and D2 i.e. as to the Tax Receipts of the Akano not a party in this matter. In my opinion, these exhibits are neither here or there. Together they are no confirmation that the land in dispute between the parties here is otherwise known as Jaaju Olosunde and not Jaaju Gbagede. Even then there is no evidence before the court connecting these exhibits to this matter; they are simply dumped on the court through DW3. I doubt if the trial court rightly made use of these exhibits the way they have been use in this case. In this case, Akano has not testified or been cross-examined on these exhibits. See: *Onibitdo v. Akibu* (1982) 13 NSCC 199 at 207 and *The Queen v. JWilcox* (1961) ANLR 631 at 634; (1961) 1 SCNLR 296. All the same, the lower court has adverted its mind to them as per the record and found that the purpose for tendering the exhibits is at large and I so find. This finding as in the case of exhibit P1 and it must be said, has not been specifically challenged on appeal to the court and so the appellants should be taken as satisfied with the lower courts' pronouncements on them. On the principle clearly laid down in *Ejowhomu v. Edok-Eter Ltd.* (1986) 5 NWLR (Pt. 39) 132; and *Underwater Engineering Co. Ltd. v. Dubefon* (1995) 6 SCNJ 55; 1(1995) 6 NWLR (Pt. 400) 156

to the effect that where there is no ground of appeal upon which a challenge (as in this case against exhibits D1 and D2) can be based, the issue is regarded as closed and so the question now being raised on the said exhibits by the appellants cannot stand. I do not see any basis without a formal complaint as per a ground of appeal for taking these points as the appellants would have otherwise been taken as having accepted the findings of the lower court on the said exhibits.

And so, if I must emphasize the point, since there is no ground of appeal to justify revisiting the issues relating to exhibits P1, D1 and D2 here it makes discussing even more so applying or not in the circumstances of section 227(2) of the Evidence Act otiose. The findings of facts here are supported by the evidence proved before the court.

My reasoning above boils down to the fact that the appellants have not made out a case of exceptional circumstance to warrant the court interfering with the concurrent findings of facts of the two lower courts so as to defeat the plea of *res judicata* as pleaded by the respondents in this case. Indeed, now that all the evidence in this matter is in, the verdict of the Upper Area Court on this issue seems to me completely askewed.

The respondents' case in this matter on the issue of *res judicata* has proved satisfactorily that the appellants are relitigating in the present case issues and subject matter again, completely determined between the parties in exhibit D5 as confirmed by the Supreme Court in exhibit D6. And I so hold. And so, [ find no use discussing the other issues raised in this case; this appeal having been completely disposed of by the decision on this point.

By this decision, the age long running battle between the parties over the land in dispute is finally put to rest and may it so lie.

For all I have said above, this appeal is unmeritorious, it should be dismissed and I dismiss it; and I affirm the decision of the lower court. The appellants must be mulcted in costs of N50, 000 in favour of the respondents.

KATSINA-ALU, J.S.C.: My Lords, I have had the advantage of reading in draft the judgment delivered by my learned brother, Chukwurna-Eneh, J.S.C. I agree with it and, for the reasons which he gives, I, too, would dismiss this appeal with N50,000.00 costs in favour of the respondents.

MUKHTAR, J.S.C.: I have had the opportunity of reading in advance the lead judgment delivered by my learned brother, Chukwuma-Eneh, J.S.C., I agree that the appeal lacks merit and ought to be dismissed. I hereby dismiss it, and abide by the consequential order in the lead judgment.

MOHAMMED, J.S.C.: I have the opportunity of reading in draft the judgment just delivered by my learned brother, Chukwuma-Eneh, J.S.C. I agree with his reasoning and conclusion in dismissing this appeal. Accordingly, I also dismiss the appeal and abide by the orders in the lead judgment including the order on costs.

TABAI, J.S.C.: I have had a preview of the judgment of my learned brother, C. M. Chukwuma-Eneh, J.S.C. The facts of the case are clearly set out and the various legal issues very ably discussed. I agree entirely with the reasoning and conclusions reached thereat and which I also adopt as mine. I also abide by the costs as awarded in the said lead judgment.

*Appeal dismissed.*