

IN THE SUPREME COURT OF NIGERIA

Suit No: SC190/2003

Petitioner: S.O. Ntuks, C.I. Nwopugu, E. Okocha, A. Adube, A. Asheki, C. Akukam, J. Oni Ikujore, C. C. Ofoha, S. Aba

And

Respondent: Nigerian Ports Authority

Date Delivered: 2007-05-11

Judge(s): Aloysius Iyorgyer Katsina-Alu, Niki Tobi, Ikechi Francis Ogbuagu, Francis Fededo Tabai, Ibrahim Tanko Muhamma

Judgment Delivered

This is an appeal against the decision of the Court of Appeal, Lagos Division, (hereinafter called "the court below"), delivered on 9th January, 2003, allowing the appeal of the Respondent and setting aside the Ruling of Akinsanya, J. of the Lagos State High Court sitting in Lagos delivered on 7th December 2001 dismissing the suit of the Plaintiff/Respondent on the ground of Estoppel per rem judicatam and remitting the matter to the High Court of Lagos for trial by another Judge.

Dissatisfied with the said decision, the Defendants/Appellants, have appealed to this Court on four (4) grounds of appeal which without their particulars, read as follows:

- "1. The learned Justices of the Court of Appeal erred in law when they held that the subject matter in both suits is not the same.
2. The Court below misdirected itself in law when it held that the Respondents were right to have commenced the process of setting aside the judgment in suit No. LD/1827/92 by way of a substantive action in suit No. LD/1021/99.
3. The learned Justices of the Court below erred in law then (sic) (meaning when) they adopted the issues as formulated by the Respondents but failed to address the issues raised therein.
4. The learned Justices of the court below erred in law ' when they held that the plea of estoppel per rem judicatam did not apply to the suit"

The facts of the case leading to the instant appeal briefly stated are that sometime in 1992, the Appellants sued the Respondent at the Lagos High Court, sitting in Lagos in Suit No LD/1827/92 and in their Amended Statement of Claim, claimed the following reliefs:

- "1. A declaration that all the staff particularly those plaintiffs who put in a service period of between 5 to 9 1/2 years with the Defendant Corporation are entitled to gratuity.
2. A declaration that those Plaintiffs who have served the Defendant for a period of 10 to 14 1/2 qualify for pension and redundancy benefits under the pensions act (sic) 1990 as amended by circular ref. No. B632-16/S1/X/618 of 13th September, 1991 and the Plaintiffs condition of service.
3. A declaration that each of the staff is entitled to productivity bonus which was approved when the Plaintiffs were in service.
4. A declaration that all the Plaintiffs are each entitled to 28 loads as contained in their condition of service.
5. An order compelling Defendant to comply with the Circular"

In his Judgment delivered on 12th July, 1996, Sahid, J, noted that the Plaintiffs are ten (10) in numbers and at page 19 of the Records, the following appear inter alia:

'In the result only the 1st and 2nd reliefs claimed succeed. The 3rd and 4th are dismissed. Accordingly it is hereby declared:

1. That all the those plaintiffs and the persons they ,represent who served the defendant up to 5 years but less than 10 years are entitled to gratuity.
2. That all those, plaintiffs and the persons they represent who served the defendant for a period of 10 years and above are entitled to pension and redundancy benefits under the Pensions Act 1990 as amended by Circular Ref No. 63216/S1/X/618 of 13th September, 1991 and the Plaintiffs' conditions of service.

And it is hereby ordered that the defendant do comply with Federal Government Circular Ref. No. 63216/S1/X/618 of 13th September, 1991 in accordance with the foregoing declaratory judgment.'

The defendant appealed to the Court of Appeal, Lagos, in Appeal No CA/L/425/97, I note that at page 20 of the Records, the drawn order of 16th February, 1998, shows that the appeal was dismissed for want of diligent prosecution and the failure of the Appellant, to file its Brief of Argument within the prescribed time/period. I also note that there was no appeal to this Court against the said decision of the Court of Appeal. Now, in Suit No. LP/1021/99 the Respondent sought as plaintiff, in the said Lagos High Court, to set aside the said Judgment in Suit No. LD/1827/92 on the ground of an alleged fraud. The Writ of Summons endorsements appear as follows:

'Whereas the Plaintiff claims against the defendants jointly and severally for an Order setting aside wholly the Judgment of the Lagos High Court in Suit No.LD/1827/92 delivered on the 12th July, 1998 as the Judgment was obtained by fraud.'

In its Statement of Claim at page 33 of the Records, the Particulars of fraud, were stated. At page 35 thereof, I note that the Defendants filed a Statement of Defence where they stated/averred inter alia, that the suit was/is an abuse of court process and pleaded and relied on the doctrine of Res Judicata. They also averred the dismissal of the Respondent's said appeal and that the Respondent's suit is tantamount to asking the court, to sit on appeal on the first instance on the Judgment of the court with coordinate jurisdiction.

The Defendants had filed an application/motion seeking/praying for the following:

- '1. An Order dismissing the Plaintiff's suit as being caught by the doctrine of Res Judicata in relitigating the issues already decided between the same parties in Suit No. LD/1827/92.
2. An order that this Court lacks jurisdiction to hear and determine this suit.
3. An order that this action is an abuse of Court process and
4. For further or other orders as this Court may deem fit to make in the circumstance.'

In a considered Ruling delivered on 7th December, 2001, Adesanya, J, upheld the plea and dismissed the said Suit. Dissatisfied with the said decision, the Respondent appealed to the court below that allowed the appeal and set aside the said Ruling. It then remitted the matter to the said High Court for hearing by another Judge. It is against the said decision that the Appellants, have appealed to this Court. The Appellants, have formulated four (4) issues for determination, namely,

- '1. Whether the Court below was right in holding that the issues in Suit No. LD/1827/92 and LD/1021/99 were not the same.

2. Whether the allegation of fraud in relation to admitted document now raised by the Respondent in Suit No. LD/1021/92 is not an after thought in the light of the decision of the Court below in Suit No. CA/L/425/97 to defeat a successful plea of Res Judicata and entitle the Respondent to file this new suit.

3. Whether the Court below having adopted the, issues formulated by the appellants ought to have pronounced on the effect of its earlier decision in Suit No. CA/L/425/97 vis-a-vis this appeal in Suit No. CA/L/99/2002 relating to same judgment.

4. Whether the court below was right to have provided a new platform for the Respondent to challenge the, decision of the trial court in Suit No.LD/1827/92 in Suit No. LD/1021/99 on an issue which was not challenged in its earlier appeal dismissed in suit No. CA/L/425/97."

On its part, the Respondent, formulated three (3) issues for determination, namely,

"2.1 Whether a Judgment that was obtained by fraud could create an estoppel particularly against a suit filed to set aside the same judgment.

2.2 Whether the subject matter in Suit Nos. LD/1827/92 and LD/1021/99 are the same, for the purpose of, creating a record for estoppel.

2.3 Whether the court can summarily dismiss a case founded on fraud without investigating, the allegation of fraud."

I will deal firstly with Issue 1 of the Appellants and Issue 2.2 of the Respondent. In a line of decided authorities, it is now firmly settled that where a court of competent jurisdiction, has settled by a final decision, the matters in dispute between the parties, none of the parties or his privy, may re-litigate that issue again by bringing a fresh action. The matter is said to be res judicata. The estoppel created, is one by record inter parties. Thus, a successful plea of res judicata ousts the jurisdiction of the court in the proceedings in which it is raised. See the case of Ukaegbu & 7 ors. v. Ugorji & 3 ors. (1991) 6 NWLR (Pt. 196) 127; (1991) 7SCNJ. (Pt. II) 244 (a), 254, 256; Osurinde & 7 ors. v. Ajomogun & 5 ors. (1992) 6 NWLR (Pt.246) 156 (a), 183-184; (1992) 7 SCNJ. (Pt.I) 79 @ 106 and Alhaji Ladimeji & Anor. v. Salami & 2 ors. (1998) 5 NWLR (Pt, 548) 1 @ 13; (1998) 4 SCNJ. 1 - per Ogundare, JSC. (of blessed memory).

The principle of res judicata, applies where a final judicial decision has been pronounced by a judicial tribunal/court, having competent jurisdiction over the cause or matter in litigation and over the parties thereto, disposes once for all, of the matters decided so that they cannot afterwards, be raised for re-litigation between the same parties or their privies. See Asu v. Ikemba (1991) 4 SCNJ. 56. This is why it is firmly established that Estoppel per rem judicatam or estoppel of record, is said to arise, where an issue of fact, has been judicially determined in a final manner, between the parties or their privies by a court or tribunal of competent jurisdiction in the matter and the same issue, comes directly in question in a subsequent proceeding between the parties or their privies. See recently, the cases of Ebba &3 ors, v. Chief Ogodo& 2 ors. (2000} 6 SCNJ. 100 @ 117,121 - per Ogundare, JSC. and Ajiboye v. Alhaji Ishola (2006) 6 SCNJ. 180 @ 190 -per Onnoghen, JSC.

In order to satisfy such a plea of res judicata, the parties or their privies as the case may be, are the same in the present case as the previous case; the issues and subject-matter, are the same in the previous case as in the present case; the adjudication in the previous case, must have been given by a court of competent jurisdiction and the previous decision, must have finally, decided the issues between the parties. See the cases of Fadiora v. Gbadebo (1978) 3 S.C. 219; (1978) 1 LRN. 106: Ekpese v. Osito (1978) 6-7 S.C 187; Ezenwa v. Kareem (1990) 3 NWLR (Pt.138) 258; (1990) 5 SCNJ. 165 @ 169-170; Chief Adomba A 3 ors. v. Odiese & 3 ors. 1 NWLR (Pt.125) 165 (a), 178; (1990) 1 SCNJ. 135 and recently, Chief Blakk & 2 ors, v. Long John v. Chief Iboroma & anor. (vice versa) (2005) 10 SCNJ.1@ 8-9; (2005) 10S.C. 1 - per Oguntade, JSC; Ajiboye v. Alhaji Ishola (supra) and many others including the cases of Omidokun Owoniyin v. Omotosho (1961) 1 All NLR 304 and Omeaju Chukwuarah v, A.J. Ofochebe (1972) 12 S.C. 189 (a). 195 cited and relied on in the Respondent's Brief. It is said to be an application of public policy that no man shall be vexed twice for one and the same cause on the same issue. See the case of Ekennia v. Nkpakara & 7 ors. (1997) 5 SCNJ. 70 (3), 83. This is why, once the issue has been raised and distinctly decided between the parties, then as a general rule,

neither party, can be allowed to fight the issue all over again. See the cases of Fidelites Skipping Co. Ltd. v. Exportchild (1966) 1 Q.B. 630; Lawal v. Chief Dawodu & anor. (1972) 1 ANLR (Pt.2) 270 @ 280; Fadiora v. Gbadebo (supra) and Cardoso v. Daniel & ors. (1986) 2 NWLR (Pt.20) 1 (a), 17.

Having regard to the above firmly established principles, in the present case, it is stated in the Respondent's Brief in paragraph 1.7, that it is pertinent to note that the Judgment upon which the Defendants based their plea of Res Judicata, LD/1827/92 delivered on 12th July, 1996, "is the same Judgment the Plaintiffs seek to set aside in this suit".

Again in paragraph 3.3 of the said Brief, it is stated as follows:

"In the present suit, the plaintiffs/Respondent's claim against the Defendant/Appellant jointly and severally, is for an Order setting aside wholly the Judgment, of the Lagos High Court in Suit No. LD/1827/92 delivered on the 12th of July 1998 as the Judgment was obtained by fraud."

(The underlining mine)

Which Judgment I or one may ask.

It must be stressed and of course borne in mind that the Judgment is that of Sahid, J., which was a well, considered Judgment which the Respondent, appealed against and the appeal was dismissed. There was no further appeal by the Respondent, to this Court. The effect in law, is that the said Judgment of the High Court by Sahid, J. was final and remained valid and subsisting. The said Judgment became binding on all the parties including the Respondent.

The next question by one, or me is what was the subject matter that gave rise to the said Judgment' In other words, what was the issue in controversy' The answer is that it was about the payment of gratuity and Pension to the Appellants and those they represented. The trial court found in favour of the Appellants. The Respondent has not challenged the jurisdiction or the competency of that court or the learned trial Judge, to entertain and determine the case.

The third question is, who are/were the parties in that suit and the present suit of the Respondent' The answer is that the parties are the same. In effect, all the ingredients for the defence of res judicata to succeed are present in this case leading to this appeal. I have shown above, the statement in the Respondent's Brief and it is bound by it.

The Respondent, concedes that it is pertinent to note that the Judgment upon which the Appellants based their plea of Res Judicata - Suit No. LD/1827/92 delivered on 12th July 1996, is the same Judgment the Respondent, seek an order of the same court with coordinate jurisdiction, to set aside.

I note that at page 135 paragraphs 1.6 of the Appellant/Respondent's brief in the court below, this same statement appears i.e.

"1.6 It is pertinent to note at this point that the Judgment upon which the Defendants based their plea of Res Judicata, LD/1827/92 delivered on their July, 1996, is the same Judgment the Plaintiffs seek to set aside in this suit."

By these admissions both at the court below and in this Court, I am bound, to rest this appeal in favour of the Appellants. What is admitted, it is settled, need no further proof. For the avoidance of doubt, let me emphasize the point. In Suit No. LD/1827/92, the Appellants, were the plaintiffs while the Respondent, was the Defendant. In Suit No. LD/1021/99, the position, was reversed. While the plaintiff was/is the Respondent, the Appellants were/are the Defendants. Both the Writ of Summons and the Statement of Claim and the Statement of Defence in Suit No. LD/1827/92 speaks eloquently about this fact. In the appeal of the Respondent, the Suit No. is CA/L/425/97.

In Suit No. LD/1021/99. the order sought, is for the setting aside of the decision/judgment of Sahid, J. for the payment of pension and gratuity in favour of the Appellants. The issue is the result of a subsisting Judgment. As noted by Adesanya, J, in his/her said Ruling at page 41 of the Records, rather than the Respondent appeal against the said decision of the Court of Appeal dismissing its appeal, it filed the said suit which she rightly held in my respectful view, is

an abuse of the process of his/her court. The application to set aside the said Judgment should have come/filed before the said appeal. The effect of the dismissal of the appeal, is that the Judgment of the trial court, subsists.

To conclude these issues, in the case of *Ord v. Ord* (1923) 2 K.B. 432, the following appear inter alia:

"If the res thing actually and directly in dispute has been already adjudicated, of course by a competent court, it cannot be litigated upon."

See also the cases of *Bell v. Holmes* (1956) 3 All E.R. 449 @ 454 and *Hunter v. Stewart* (1861) 45 De G.F.& J. 165 (a), 138; 45 E.R. 1148 @ 1152 where in the later case, the following appear, inter alia:

"One of the criteria of the identity of two suits, in considering a plea of res judicata, is the inquiry whether the same evidence would support both."

The rule of res judicata, is derived from the maxim of nemo debet bis vexari pro eadem causa (No one should be twice troubled for the same cause). Of course, it is the causa that matters and therefore, a plaintiff cannot, be formulating a fresh action/claim, re-litigate the same cause.

I think I have "flogged" the point. I therefore, resolve Issues 1 and 4 of the Appellants, and Issue 2.2 of the Respondent, in favour of the Appellants.

Now, coming to the alleged issue of fraud, Great! All the decided authorities cited and relied on in the Respondent's Brief in respect thereof are firmly settled. See also the cases of *Flower v. Lloyd* (1877) 6 Ch. 1 297 and *Talabi v. Adeseye* (1973) NMLR 9@17 per Coker, JSC, just to mention but a few. But I will add briefly, on the issue of plea of fraud. But before that, the issue is founded on Exhibits P4 and D1, which were tendered, admitted into evidence without any objection by any of the parties. The said exhibits were issued by the Ministry of Establishment and Management Services for the implementation by the Respondent.

I note that on 13th February 2007 when this appeal came up for hearing, the learned leading counsel for the Respondent Balogun (Mrs.) stated that the Schedule or Act cannot be a fraud. She stated inter alia, as follows:

"I admit that the Exhibit was tendered and that we did not object but we thought it will go for trial. We thought that fraud was the substratum of the case."

I also note that this issue of fraud, was raised many years i.e. three (3) years after the documents, were tendered and admitted in evidence without objection as I noted before in this Judgment and, it was after the said Judgment of the trial court. In respect of what Mrs. Balogun told the court, I observe that he/she did not state and even in their Brief, that the documents, were inadmissible in evidence. In any case, it is now firmly settled that where in the trial court, a document or evidence, was not strictly admissible and not being that on which the court can properly act, if the person against whom it is read, does not object, but treats it as admissible then, before the Court of Appeal, he is not at liberty to complain of the order on the ground that the evidence or document, was not admissible. See the cases of *Akunna v. Ekwuno & ors.* (1952) 14 WACA 59 (a), 60 referring to the case of *Gilbert v. Emleam* (1878) 9 C.L. D. 259 (a), 269 - per Cotton, L.J; *Chief Brano Etim & ors. v. Chief OkonUdo Ekpe & anor.* (1983) 3 S.C. 12 (a), 36-37.

I will add quickly, that it is also settled that if a document, is however, wrongly admitted/received in evidence before a trial court, an Appellate Court, has the inherent jurisdiction, to exclude it although counsel at the lower court, did not object to its going in. See the cases of *Alashe v. Ilu* (1961) 1 ANLR 390; *Mallam Yaya v. Mogoga* 12 WACA 132 (a). 133; and *Kale v. Colber* (1982) 12 S.C 352. Also settled, is that where a document is wrongly admitted in evidence, its wrong admission, per se is not sufficient to vitiate the judgment. See Section 227 (1) of the Evidence Act and the cases of *Ajayi v. Fisher* (1956) 1 FSC 90 (a), 92. (1956) SCNLR 279; *Ugbalav. Okorie & ors.* (1975) 9 NSCC. 429 and *Idundu v. Okumaeba* (1976) 9-10 S.C. 227, 245 just to mention but a few.

I have deliberately, gone this far, because of the reliance of the Respondent on the said exhibits as a basis for the plea

of an alleged fraud.

I will now deal with Issue 2 of the Appellants and issue 2.3 of the Respondent which was the same issue and arguments raised in the court below. The same arguments proffered in its Brief in the court; below, are substantially if not in fact the same arguments as in its Brief 1 in this Court.

I observe and as also conceded at page 4 in the Respondent's Brief, that the Respondent filed a Statement of Claim averring fraud in respect of the said Exhibit 4. The Appellants after service of same, filed a motion on Notice dated and filed on 29th January, 2001, praying for an Order dismissing the Respondent's suit as being caught by the doctrine of Res Judicata and that the court lacked jurisdiction to hear and determine the said suit and therefore, sought an order that the action is an abuse of court process. The trial court, struck out the motion on the ground that it amounted to a demurer. The Appellants then filed a Statement of Defence wherein they raised the same plea of res judicata and averring that the action was an abuse of court process. It was a special defence or pursuant to Order 42 (1) of the High Court of Lagos State (Civil Procedure) Law, 1994, challenging the competence of the suit and the jurisdiction of the trial court to entertain it. The Appellants followed their said Statement of Defence with a motion on Notice dated 13 March, 2001 and raised the same objection to the Respondent's suit.

I note that the Respondent filed a Notice of Preliminary Objection dated 21st March, 2001 praying for the dismissal of the application on the ground that the court had "dismissed" (sic) a similar application and therefore, that the court lacked jurisdiction to entertain same. That if the Appellants were not satisfied with the said Ruling, that the only option open to them, was to appeal and that the court could not act as an Appellate Court on its own Ruling. (See pages 90 to 92, 107 to 108 of the Records), (supplementary). I have noted earlier in this Judgment, that in the Respondent's Brief, it is conceded that the earlier application of the appellants, was struck out, contrary to the averment in paragraph (b) of its affidavit in support of its own said motion, that it was dismissed.

As I also noted herein above, the trial Judge - Akinsanya, J, in a considered Ruling, upheld the plea or objection, and dismissed the Respondent's said suit. It is therefore, with respect, misleading to say the least, to state as has appeared under this issue and to submit that the learned trial Judge,

"Summarily dismissed a case founded on fraud without investigating the allegation of fraud."

I also note that the court below, with respect, on this misleading and misconceived statement, gave its decision setting aside the decision of the trial court. Certainly, the said Ruling dealt with the objection(s) and came to a final decision.

Now, it is firmly settled in a number of decided authorities, that a point of law, can be raised on a Preliminary Objection by a party to a suit, if the point of law, will be decisive of the whole litigation. Since demurer has been abolished by the Rules/Law of the Lagos State High Court, any defence to a suit, raised in the Statement of Defence, can be disposed off. Under Order 23 Rule 2, any party, shall be entitled to raise by his pleading, any point of law and any point so raised, shall be disposed of by the trial Judge. Rule 3, provides that if in the opinion of the court, the decision of such point of law, substantially dispose of the whole action, or of any distinct cause of action, ground of defence, the court or Judge may thereupon dismiss the action. These Rules are clear and unambiguous.

Therefore, where there is a point of law which if decided one way, is going to be decisive of the whole litigation (as in the instant case leading to this appeal), it is settled that advantage ought to be taken of the facilities afforded by the Rules of Court, to have disposed of at the close of pleadings or very shortly afterwards the said point of law. See the case of Messrs NV. Sahaep & anor. v. The MV "Saraz" & anor. (2000) 12 SCNJ. 24 (a), 50 - per Karibi-Whyte, JSC, citing the cases of Everett v. Ribbards (1952) 2 Q.B. 198 (a), 206. Addis v. Cracker (1961) 1 Q.B. 11; and Kingsley Maude v. Victoria Inning & anor. (1986) 3 NWLR 23 just to mention but a few. See also the case of Yeorman Credit Ltd, v. Latter (1961) 2 All E.R. 281 (a), 299. This is what happened in this case. The learned trial court was, in my respectful view, right in his/her approach to the objection and in his/her final decision. I agree with him/her that the present action of the Respondent, was/is, an abuse of the court's process. Raising of the issue of fraud, with respect, was an after thought, a fluke or ruse by the Respondent realizing or knowing fully well years after, that its appeal, had been dismissed. Since he did not challenge the said decision in Suit ID/1827/92 by filing an application to set it aside on the ground of alleged

fraud and voluntarily decided or opted to appeal against it, having lost the appeal and it did not further appeal to this Court, the Respondent, is estopped from challenging the said decision through his said suit. Let me emphasize that a defendant like the Appellants, who conceives that ex facie, he has a good ground of law which if raised, will determine the action even in limine, is entitled to raise such ground of law. See the case of Martins v. Administrator-General of the Federation & anor. (1962) 1ANLR 120. The Appellants did exactly this and won. The court below, with profound humility and respect, was wrong to start considering any imagined fraud, which ought to be investigated. It is with respect, really a misconception. There was no need to go into that issue having regard to the state of the law about raising an objection as to the competence of the Respondent's suit which objection, was upheld by the trial court. I therefore, resolve this issue against the Respondent. I agree with the Appellants that the said allegation of fraud is an after-thought and in fact, a gimmick to say the least.

Having dealt with the relevant issues in this appeal, it will serve no useful purpose in my dealing with Issue 3 of the Appellants and Issue 2.1 of the Respondent. They are non-issues from all that I have said above in this Judgment.

In conclusion, this appeal is meritorious and it succeeds. I allow it and hereby set aside the said decision of the court below. I affirm said decision of the said trial court.

Costs follow the event. The Appellants are entitled to costs in the court below which I assess and fix at N5, 000.00 (five thousand naira) and N10,000.00 (Ten thousand naira) costs in this Court payable to the Respondent.

Note:

I note that in the Respondent's Brief, the Plaintiffs/Appellants are erroneously described as "Defendants/Appellants" while the Respondent, is described as "Plaintiff/Respondent".

Judgment delivered by
Niki Tobi, J.S.C.

I have read in draft the judgment of my learned brother, Ogbuagu, JSC that this appeal should be allowed. I will deal briefly with two issues: res judicata and abuse of court process.

Res judicata, a Latinism, means a matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment. The rule is that a final judgment, rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action. See Black's Law Dictionary Sixth edition, page 1305. The expression, which is now the modern variant of the original expression, res adjudicate, means a "thing adjudicated."

The earlier Latinism of res adjudicata is now regarded as an anachronism and therefore a needless variant in modernism.

For the doctrine or principle of res judicata to apply in litigation, the parties, issues and subject matter of the two cases must be the same. The decision must also be final and given by a court of competent jurisdiction. See generally Nwaneri v. Oriuwa (1959) 4 FSC 132; Alase v. Ilu (1964) 1 All NLR 390; Shonekan v. Smith (1964) 1 All NLR 168; Okorie v. Akurunma (1972) 8-9 SC 210; Ekpoke v. Usilo (1978) 6-7 SC 187; Aro v. Fabolude (1983) 1 SCNLR 58.

The principle of res judicata applies only where there is a lis inter parties to preclude a party from raising again the facts directly in issue, which were the basis for the judgment in an earlier final proceeding by a competent court between the same parties or their privies. The doctrine or principle is based not on the principle of law enunciated in a case but upon the finding of fact made in that case; predicated on the law. See Cardoso v. Daniel (1986) 2 NWLR (Pt. 20) 1. In other words, resjudicata cannot be considered in vacuo and without or outside the surrounding background facts of the case. See Iyaji v. Eyigebe (1987) 3 NWLR (Pt. 61) 523.

The two cases involved, in their chronological arrangement are Suit No. LD/1827/92 and Suit No. LD/1021/99. In Suit No. LD/1021/99, the learned trial Judge, in her Ruling held that the suit was an abuse of the process of the court. She said at page 41 of the Record:

"The appellant therein (plaintiff herein) did not file a further appeal to the Supreme Court. Rather than do that they filed this new action against the Defendants/Applicants. I hold that it is an abuse of the process of this court."

On appeal, the Court of Appeal allowed the appeal, essentially on the issue of non-investigation of fraud by oral evidence. The court said at page 170 of the Record:

"On the over view of the appellant's case I think the least the court below should have done in the circumstances was to have investigated and by abduction of oral evidence resolve the question of fraud and not to peremptorily dismiss the claim. I therefore agree with the appellants that the court below erroneously dismissed the Suit No. LD/1021/99 summarily, as it were, that is, without investigating and ruling on the issue of fraud."

Although the relief in Suit No. LD/1021/99 was based on fraud; the issue which ought to have been resolved first was that of res judicata as averred to in paragraph 7 of the Statement of Defence. In order to get the whole picture, I reproduce paragraphs 4 to 9 of the Statement of Defence:

"4. The Defendants aver that this Suit is an abuse of court process.

5. The Defendants aver that judgment in Suit. No. LD/1872/92 was appealed against by the present plaintiff which appeal was dismissed on 16th February, 1998.

6. The Defendants aver that there was no further appeal on the matter. The Defendants shall rely on the ruling of the Court of Appeal dismissing the plaintiffs appeal at the trial.

7. The Defendants plead and shall rely on the doctrine of Res Judicata at the hearing of the suit.

8. The Defendants aver that by this suit the plaintiffs' action is tantamount to asking this Court to sit on Appeal in the first instance on the judgment of coordinate jurisdiction and on the second instance on the decision of the Court of Appeal.

9. The Defendants aver that this court lacks jurisdiction to hear this suit."

It is elementary law that where a party raises an objection on jurisdiction, the court must take the objection first and that is what the learned trial Judge did in her Ruling of 7th December 2001. I cannot fault the learned trial Judge.

On appeal, the appellant in this court who was the respondent in the Court of Appeal raised the issue of res judicata as the first issue and the issue of fraud came second. Unfortunately, the Court of Appeal did not see much on the issue of res judicata and was carried away by the offence of fraud and resolved the appeal essentially on the issue of fraud. That is the way I capture the mind of the Court of Appeal in the light of what the court said at pages 165 and 166 of the Record.

"Let me expatiate, there can be no doubt that the plea of estoppel per rem judicatam may apply in certain circumstances to points or issues which properly are related to the subject matter of the earlier suit as here and which with a little bit of diligence on the part of a party as the Appellants as here and as challenged by the Respondents should have been brought out at the hearing of the earlier suit that is LD/1827/92, This may also agitate the doctrine of standing by. The question is whether such a situation as is being contended can forestall impeaching a judgment by taking a point as insidious as fraud; I strongly doubt it. This is so because fraud vitiates everything into which it enters be it judgments, contracts, even instruments"

With the greatest respect, I do not agree with the Court of Appeal: While I am conscious of the heinousness and the depth of criminality in fraud as an offence, it has not the legal status or position that the Court of Appeal has raised it. This is not a situation where criminal law and the law of contract or tort for example, are seeking for hegemony or superiority. This is not a situation where the law of contract should give way to criminal law. After all, the two laws operate in different apartments in the judicial process in their recognised different jurisprudences and there cannot be any case of superiority or afortori inferiority on the part of the law of contract. I think the Court of Appeal was clearly in error when that court downgraded the doctrine or principle of res judicata and unusually lifted or upgraded the crime of fraud to the extent that the court dismissed the Ruling of the learned trial Judge. In my view, the learned trial Judge was right in her Ruling. The Court of Appeal was wrong in dismissing the Ruling.

And that takes me to the issue of abuse of court process. Abuse of court process generally means that a party in litigation takes a most irregular, unusual and precipitate action in the judicial process for the sake of action qua litigation, merely to waste valuable litigation time. It is an action which is one (or more) too many; an action which could be avoided by the party without doing any harm to the matter in dispute. The process of the court is used mala fide to overreach the adversary to the direct annoyance of the court. The court process is initiated with malice or in some premeditated or organised vendetta, aimed at frustrating either the quick disposal of the matter or the abatement of the matter for no good cause. The court process could also be said to be abused where there is no iota of law supporting it. In other words, the court process is premised or founded on frivolity or recklessness.

In this case, the learned trial Judge held that the filing of the new action instead of an appeal to the Supreme Court was an abuse of the process of the court. The abuse of process of the court arose as a result of filing two actions on the same subject matter affecting the same parties and the same issues. As correctly pointed out by my learned brother, this was admitted in the brief of the appellant/respondent in the Court of Appeal. Admission is the best evidence because it dispenses with proof on the part of the party alleging the affirmative.

In sum, the appeal is meritorious and it is allowed. I abide by the order as to costs in the judgment of my learned brother, Ogbuagu, JSC.

Judgment delivered by
Francis Fededo Tabai, J.S.C.

Sometime in 1992 at the Lagos Division of the High Court of Lagos State the Appellants herein who were the Plaintiffs sued the Respondent herein who was the Defendant claiming five reliefs. Pleadings were filed and exchanged and the matter was tried. On the 12/7/1996 judgment were given for the Appellants with three of the five reliefs granted. This was in Suit No. LD/1827/92. Aggrieved, the Defendants went on appeal. The appeal was dismissed for want of diligent prosecution on or about the 16/12/98. There was no further appeal to this court.

However in Suit No. LD/1021/99 the Respondents herein who were Defendants/Appellants in the previous suit filed another action and claimed as follows:

"Whereas the Plaintiff claims against the Defendants Jointly and severally for an order setting aside wholly the judgment of the Lagos High Court in Suit No. LD/1827/92 delivered on the 12th July 1996 as the Judgment was obtained by fraud."

In their reaction the Appellants herein filed a motion, which prayed for:

1. An order dismissing the Plaintiffs suit as being caught by the doctrine of Res Judicata in relitigating the issues already decided between the same parties in Suit No. LD/1827/92.
2. An Order that this Court lacks the jurisdiction to hear and determine this suit; and

3. An Order that this action is an abuse of Court Process.

In a ruling on the 7/12/2001 the learned trial judge P.P. Akinsanya J granted the application and dismissed the suit. The learned trial judge referred to the previous suit, the appeal to the Court of Appeal, which was dismissed and concluded at page 114 of the record thus:

"The Appellant therein (Plaintiff herein) did not file a further appeal to the Supreme Court. Rather than do that they filed this new action against the Defendants/Applicants I hold that it an abuse of the process of this Court."

The suit was dismissed with N5, 000.00 costs against the Defendants. Their appeal to the Court of Appeal was allowed and the suit was remitted back to the High Court for trial. The Defendants were not satisfied and have therefore come on appeal.

My learned brother Ogbuagu JSC has very ably dealt with and articulated the issues raised in this appeal and I entirely agree with his reasoning and conclusions. The document upon which the Respondent relied to raise the issue of fraud is Exhibit P4. It is a Federal Ministry of Establishment and Management Services Circular dated 13th September 1991. Attached to the said Exhibit is Schedule Table A to the Pension (Amendment) Act 1982. This document was specifically pleaded in paragraphs 2 and 7 of the Statement of Claim. See pages 5 and 6 of the record. At the trial the document was admitted without objection. Vet the issue of fraud based on this same document was raised in the fresh suit some 7 years after the first suit.

It is clear and not disputed that the parties in the previous suit LD/1827/92 mid LD/1021/99 are the same. Also the same in the two suits are the subject matter and the issues.

There are four conditions precedent to the successful plea of the doctrine of Res Judicata:

- (1) That the parties or their privies in the previous case and the present one arc the same.
- (2) that the issues and subject matter in the two cases are the same.
- (3) that the adjudication in the previous case was given by a court of competent jurisdiction; and
- (4) that the previous suit finally decided the issues between the parties or their privies.

See Afolabi v. Gov. Of Osun State (2003) 13 N.W.L.R (Part 836) 119 And 130-132; Nkanu Onun (1977) 5 Sc 13 Udo v Obot (1989) 1 N.W.L.R. (Part 95) 59.

All these conditions are present in this case and I hold that the doctrine of Res Judicata applies to defeat this suit. I also have no difficulty in coming to me conclusion this suit is an abuse of the process of the court. It is my conclusion therefore that the court below was, with respect wrong to disturb the ruling of the learned trial judge dismissing the suit. The learned trial judge Akinsanya J (Mrs) was properly on course when she dismissed the suit.

For these and the fuller reasons contained in the Judgment of Ogbuagu JSC, I also allow the appeal. The judgment of the court below is accordingly set aside. The ruling of the learned trial judge of the 7/12/2001 dismissing the present suit be and is hereby restored.

Judgment delivered by
Ibrahim Tanko Muhammad, J.S.C.

The suit before the High Court of Lagos State was pursued plaintiffs/appellants in a representative capacity against defendant/respondent. The case of the plaintiffs was that sometime in June, or thereabout, they and the other staff they

represented, had their various appointments with the defendant determined by letters; written to each of them to that effect. Those staff that had served up to 5-9 1/2 years was only paid salaries in lieu of Notice and Part of their allowances but not Productivity bonus and 28 loads Provided for in the condition of service of the respondent. They alleged as well that they were not paid their gratuity as they were entitled to since they were in employment in December 1990, when increases took effect.

The plaintiffs stated further that at the time of their mass retrenchment, in June, 1991, those of them who served for less than 10 years were paid only one month's salary in lieu of Notice while those who served for between 10 years and 14 years were paid only their gratuity and no pension contrary to the circular which provided for payment of gratuity to those who served up to 10 years and pension and gratuity for those who served for over 10 years. Payments to the two categories of workers were made in September 1991. The plaintiffs averred farther that they made representation to the defendant on the effect of the circular as a result of which they were all paid their emoluments that is transport and housing allowances in December 1991, but still without pension.

Further settlement of plaintiffs' entitlement i.e. balance of their emolument were made in March, 1992. The plaintiffs stated further that contrary to the provisions of the Pension's Circular, the staff that had put in between 9 and 14 1/2 years, who were also retrenched were not afforded the opportunity of enjoying pension benefits and also Redundancy benefits contrary to the conditions of service whereas as at the time they were in service, i.e. December 1990, when the circular of September, 13th, 1991, was to take effect, they were all entitled to the benefits of the circular. As the defendant failed to respond to the plaintiffs requests, the latter sued the former, praying for the following declaratory reliefs.

1. A declaration that all the staff particularly those plaintiffs who put in a service period of between 5-9 1/2 years with the defendant; Corporation are entitled to gratuity.
2. A declaration that those plaintiffs who have served the defendant for a period of 10-14 1/2 years qualify for pension and redundancy benefits under the pension Act 1990 as amended by Circular Ref No. B. 63216/SI/X/618 of 13th September, 1991 and the plaintiffs' condition of service.
3. A declaration that each of the staff is entitled to productivity bonus which was approved when the plaintiffs were in service.
4. A declaration that all the plaintiffs are each entitled to 28 loads as contained in their condition of service.
5. An order compelling the defendant to comply with the circular.

Except where clear admissions were made, all the averments made by the plaintiffs were denied by the defendant in its statement of defence.

The trial court gave its judgment on the 12th day of July, 1996 to the plaintiffs that they were entitled to pension and gratuity under the Federal Government Circular and Pension's Amendment Act, 1982 (contained in gazette No. 58 vol. 69 of 18th November, 1982). The suit under which this action was tried is No LD/1827/92, presided over by Sahid, J.

On the 14th day of April, 1999, a suit was now filed by the plaintiff (defendant in suit No. LD/1827/92). A writ of summons was taken from a Lagos State High Court, now presided by Akinsanya, J. A Statement of Claim was attached to the writ of summons. The claim of the plaintiff therein reads as follows:-

"13. Whereas the plaintiff claims against the defendants jointly and severally for an order setting aside wholly the judgment of the Lagos High Courts in suit No. LD/1827/92 delivered on the 12th of July, 1998 as the judgment was obtained by fraud."

The defendants (plaintiffs in suit No. LD 1827/92) filed their Statement of Defence in which they deposed as follows:-

1. The Defendants deny paragraphs 2,5,6,7,8,9,10,11,12 and 13 of the Statement of Claim.
2. The Defendants aver that the claim in LD/1827/92 was a representative action and the court so held the Defendants shall rely on the judgment at the trial.
3. The Defendants aver that suit No. LD/1827/92 was on behalf of all retrenched staff numbering about 7000 persons and evidence to the effect was given at the trial which was not rebutted by the Defendant now plaintiff. The Defendants shall rely on the piece of evidence at the trial.
4. The Defendants aver that this Suit is an abuse of court process.
5. The Defendants aver that judgment in Suit No. LD/1827/92 was appealed against by the present plaintiff which appeal was dismissed on 16th February, 1998.
6. The Defendants aver that there was no further appeal on the matter. The Defendants shall rely on the ruling of the Court of Appeal dismissing the plaintiffs appeal at the trial.
7. The Defendants plead and shall rely on the doctrine of Res Judicata at the hearing of the suit.
8. The Defendants aver that by this suit the plaintiff's action is tantamount to asking this court to sit on appeal in the first instance on the judgment, of coordinate jurisdiction and on the second instance on the decision of the Court of Appeal.
9. The Defendants aver that this court lacks jurisdiction to hear this suit.
10. The Defendants aver that this suit be dismissed with substantial costs to the Defendants."

Further, the defendants filed a motion pursuant to Order 42 R 1 of the High Court of Lagos State Civil Procedure Law, 1994, asking that court for the following:-

1. An order dismissing the Plaintiffs suit as being caught by the doctrine of Res Judicata in relitigating the issues already decided between the same parties in suit No. LD/1827/92.
2. An order that this court lacks jurisdiction to hear and determine this suit.
3. An order that this action is an abuse of court process and
4. For further or other orders as this court may deem fit to make in the circumstances."

The learned trial Judge considered the affidavit evidence placed before him and came to the conclusion on 7th December, 2001, that the suit filed by the plaintiff/respondent was an abuse of court process. He granted the application of the defendants/applicants and dismissed the plaintiffs/respondent's suit with costs.

Dissatisfied with the ruling of the High Court of Lagos of 7th December, 2001, as indicated above, the plaintiff/respondent appealed against the said ruling to the Court of Appeal, Lagos, on three Grounds of Appeal as contained in the Notice of Appeal filed.

The Court of Appeal, Lagos (court below) reviewed the proceedings of the trial court, considered the submissions of learned counsel for the respective parties and on the 9th of January, 2003, it allowed the appeal by reversing the decision of the trial court. That judgment of the court below is the subject of this appeal.

Parties before this court filed and exchanged briefs of argument as required by the court's Rules. Learned Counsel for the appellants distilled four issues for determination by this Court from the four Grounds of Appeal filed.

The issues are as follows:-

1. Whether the court below was right in holding that the issues in Suit No. LD/1827/92 and LD/1021/99 were not the same.
2. Whether the allegation of fraud in relation to admitted document now raised by the Respondent in Suit No. LD/1021/92 is not in after thought in the light of the decision of the court below in Suit No. CA/L/425/97 to defeat a successful plea of Res Judicata and entitle the Respondent to file this new suit.
3. Whether the Court below having adopted the: issues formulated by the appellants ought to have pronounced on the effect of its earlier decision in Suit No. CA/L/425/97 vis-a-vis this appeal in Suit No. CA/L/99/2002 relating to same judgment.
4. Whether the Court below was right to have provided a new platform for the Respondent to challenge the decision, of the trial court in Suit No.LD/1827/92 in Suit No. LD/1021/99 on an issue which was not challenged in its earlier appeal dismissed in suit No. CA/L/425/97."

Learned Counsel for the respondent formulated three issues. They are as follows:-

- 2.1 Whether a judgment that was obtained by fraud could create an estoppel particularly against a suit filed to set aside the same judgment.
- 2.2 Whether the subject matter in Suit Nos. LD/1827/92 and LD/1021/99 are the same, for the purpose of creating a record for estoppel.
- 2.3 Whether the court can summarily dismiss a case founded on fraud without investigating the allegation of fraud."

I think there is need to clarify that a Judgment and a Ruling by two High Courts of the Lagos State differently constituted shall be my focal point of reference in this appeal. These two decisions are:-

1. The Judgment delivered by Sahid J; on 12/7/1996 in suit No LD/1827/92. This judgment was appealed against to Court of Appeal, Lagos Division, in Appeal No. CA/L/425/97 (pages 9 and 10 of the Record).
2. The Ruling delivered by Akinsanya J; on 7/12/2001, which was appealed against to the Lagos Division, Court of Appeal, No CA/L/99/2002.

As for Appeal No.CA/L/425/97, a motion for an order dismissing the appeal for want of diligent prosecution and failure to file brief of argument was heard by the Court of Appeal, Lagos and the appeal was dismissed on 16th February, 1998. I have noticed that there was no further appeal against the decision to this Court. This means that the appellants in that court were satisfied with the decision of the High Court presided by Sahid, J. in Suit No LD/1827/92. This also means that the judgment on that suit by Sahid, J. stands valid and subsisting as there is no order of any Higher Court that set it aside. As for the Ruling by Akinsanya, J. delivered on 7thDecember, 2001, that was the one which the court below set aside which decision gave rise to the present appeal before this Court.

I have also found that appellant's issues Nos. 2 and 4 correspond with respondent's issue No. 2.3. They are all or Fraud. I shall treat them together. Appellants' issues 1 and 3 and respondents' issue Nos 2.1 and 2.2 are the same in my view. They are on estoppel per Res judicata.

I have noted also, happily, that the learned Counsel for the argued issues 2 and 4 together. Learned Counsel for the respondent argued together, issues 2.1 and 2.2.

It was submitted for the appellants on issues 2 and 4 that the respondent never at any time raised the issue of fraud until it lost the appeal against the judgment of Sahid, J. in CA/L/425/97. Learned Counsel for the appellants submitted that the reasoning of the Court below that the plea of fraud not raised in the previous proceeding and on appeal against the judgment can now be raised in a new suit, is wrong in law and cannot be supported by decided authorities on the subject. He argued further that nowhere did the respondent raise or plead fraud. There must be an end to litigation. He cited the *Ayim Mba v. Agu* (1999) 9 SC 73 at 81.

Learned Counsel for the respondent submitted on issue No. 2.3 that a judgment of a Court may be set aside by a substantive suit taken out for that purpose on the account of fraud. He supported his submission by authorities which include, inter alia: *ACB Plc v. Losade (Nig.) Ltd.* (1995) 7 N.W.L.R. (Pt. 405) 26; *Finnih v. Imade*(1992) 1 N.W.L.R. (Pt. 219) 511.

It is said that fraud is an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. It is a false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations or by concealment of that which should have been disclosed which deceives and is intended to deceive another so that he shall act upon it to his legal injury. Fraud is a cankerworm and indeed an insidious disease. It is a strong vitiating factor. But whether it can be likened to issue of jurisdiction which can be raised at any stage of the proceedings is where I have my reservation. It is quite clear from the records that the attention of Sahid J. was never drawn to the issue of fraud in the matter before him in suit No. LD/1827/92. It will not only be unfair to Sahid J; who was not afforded opportunity to comment on the issue of fraud, but would occasion stupendous injustice on his decision should the issue of fraud be allowed to surreptitiously rear its ugly head to upset that judgment, long after delivery. I think the law will not allow a sleeping party to wake-up abruptly to lay a claim on a thing that he stood by to watch another person take it away. The law assist only those who are vigilant. The Latin maxim has it: *vigilantibus et non dormientibus jura subveniunt* i.e. the laws aid those who are vigilant, not those who sleep upon their rights.

Although a judgment having some elements of fraud in it can be set aside by a fresh and separate suit that of course has to be done timeously. *ACB .v. Losade* (1995) 7 N.W.L.R. (Pt. 405) 26.

It is my view therefore, that the raising of fraud in relation to the judgment of Sahid, J., five years after its delivery is an after thought. Issues 2 and 4 of the appellants' issues and respondent's issue No. 2.3 are resolved in favour of the appellants.

Appellants' issue No. 1 and respondent's issue No 2 are basically the same. They are on the plea of *Res judicata*.

The defendants at the trial court, in objection to the suit filed by the plaintiff raised the issue of estoppel per rem *judicata*. The trial court in considered ruling upheld the plea and dismissed suit No. LD/1021/99 which was before it. The Court below however, was of the view that the trial court erroneously dismissed that suit summarily, without investigating and ruling of the issue of fraud. In view of my holding on the issue of fraud above, I find it difficult to agree with the court below.

The grant of the motion on notice, where the learned trial Judge upheld the plea of *Res judicata* and dismissed the suit before him summarily, in my view was rightly done by the trial court. I am contented with the trial court's upholding of the plea of *res judicata* and dismissing the Suit No. LD/1021/99 as abuse of the court's process.

In agreeing with the fuller reasons given by my learned brother Ogbuagu, JSC, in his leading judgment I too allow the appeal and set aside the judgement of the Court below. I abide by all the consequential orders made by my learned brother, including order as to costs.