DZUNGWE V GBISHE, (1985) 2 NWLR (PT 8) P 528

BETWEEN

PETER PAV DZUNGWE **APPELLANT(S)**

AND

1. ORAM GBISHE

2. IGUDU GAVAR **RESPONDENT(S)**

O. KAZEEM, J.S.C. (Delivering the Leading Judgment):

This is an appeal against the decision of the Court of Appeal, Kaduna delivered on 21st April, 1983 which reversed the judgment of the High Court, Makurdi of 18th November, 1980. At the High Court, the plaintiff, one Peter Par Dzungwe was granted perpetual injunction against the two defendants, (Ornam Gbishe and Igudu Gavar), their servants and or agents restraining them from further trespassing on his land situate in Ute Clan in the Vandeikya Local Government Council Area of Makurdi in Benue State.

Because of the issue of law raised in this appeal, it is important to give the background antecedent to the whole action. Prior to this High Court Case, the plaintiff originally instituted an action on the 6th of May, 1976 against the 1st defendant at the Grade II Area Court in Tse-mker claiming his own portion of his father's farmland; but that action was withdrawn to enable the 2nd defendant to be

joined as a party to the suit. However, in a new Suit No. CV.241/77 brought at Grade 1 Area Court Vandeikya, the plaintiffs claim was for re-possession of the same parcel of land from both defendants; and the trial commenced on 26th August, 1977. The plaintiffs testimony at that trial was that he was forced to leave his parcel of land for Gboko during the Tiv riot of 1964; and when he returned in 1968, he found both defendants occupying it. When he asked them to quit, they refused. On the other hand, the 1st defendant claimed ownership of the land and he said that his grandfather and one Gavar farmed on the land before him. Throughout the trial, plaintiff said nothing about any Certificate of Occupancy in respect of the land which he applied for or obtained. At the end of the trial, the Area Court having considered the evidence adduced by the parties and their witnesses, decided the matter in favour of the defendants and dismissed the plaintiffs claim on 17th September, 1977 – See Exh. C.

Against that judgment, of the Area Court 1 in Vandeikya, the plaintiff appealed to the High Court of Justice, Makurdi but that appeal was dismissed on 20th May, 1978 (See Exh. 0). While the proceedings in the Area Court 1 and the appeal therefrom at the High Court were in progress, a Certificate of Occupancy had in the meantime been issued in favour of the plaintiff on 28th May, 1977 – See Exh. B. It is relevant to note here that shortly before the action was first instituted against the 1st defendant on May, 6th 1976, the plaintiff applied to the Ministry of Lands and Survey, Benue State, on 3rd February, 1976for a Certificate of Occupancy in respect of the same piece or parcel of land; but he did not disclose to the Ministry that there was any dispute over the land. However, on 5th November, 1976, he received a letter – Exh.A from the Ministry informing him that approval of a grant of a right of occupancy in respect of a plot of 44.08 Acres in Obudu Topo Sheet had been made in his favour subject to certain conditions.

It is also pertinent to mention that while the appeal was pending before the High Court the plaintiff did not disclose to that court that he had already obtained a Certificate of Occupancy in respect of the land. Moreover, shortly before the appeal was dismissed at the High Court, the plaintiff again instituted a fresh action against the defendants founded on the Certificate of Occupancy as follows:-

"1. The Plaintiff is and was at all material times the, owner and occupier of a piece and parcel of land covered by the Right of Occupancy No. BN 611 dated 30th May, 1977 and registered as No. 157 at page 157 in volume 1 of the C of 0 of the Land Registry in the Office at Makurdi, See Sketch Plan Annexure 'A' attached.

2. The defendants have wrongfully entered and remained on the said land, and notwithstanding repeated requests to vacate and deliver up the same, all the defendants have wrongfully failed and refused to do so.

3. The defendants threaten and intend unless restrained by this Honourable Court, to continue to remain in wrongful occupation of the said land and to trespass thereon.

AND the plaintiff claim jointly and severally:-

(a) a perpetual injunction to restrain ‘the defendants (by themselves, their servants or agent or otherwise however) from remaining on or continuing to remain in occupation of the said land;

(b) the sum of N3,000.00 as special damages for the destruction of 20 fruiting citrus trees and 30 pinepaw stands;

(c) the sum of N1,000.00 as general damages;

(d) An order for possession.

In his Amended Statement of Claim, the plaintiff merely referred to how he applied for and obtained the Certificate of Occupancy on which he founded his claims without disclosing the fact that he had lost two legal proceedings to the defendants in respect of the same land.

However, in their Amended Statement of Defence and Counterclaim, the defendants pleaded the judgment in the two previous proceedings with the plaintiff as constituting estoppel per rem judicatam. They also averred therein that they were not aware that the plaintiff had a statutory Right of 6ccupancy in respect of the land, until they were served with his statement of claim in the action; and that the Certificate of Occupancy must have been obtained by fraud. The plaintiff did not file any Reply or Defence to those averments.

At the trial, both parties testified in support of their pleadings; and having considered those testimonies, the learned trial Judge made the following findings:

(a) that having regard to the time the plaintiff embarked upon the litigations which terminated against him as shown in Exhs. C & D, vis-a-vis the time he obtained the Certificate of Occupancy Exh, B, no plea of resjudicata could operate to dispossess him of the grant under Exh, B;

(b) that the plaintiff obtained the Certificate of Occupancy – Exh, B legitimately and that it conferred title paramount in him as opposed to the inferior claim at the defendants;

(c) that the evidence before him did not impute fraud.

(d) that were the cases in Exhs C & D decided before Exh. B was granted, the plea of res judicata would have operated to bar the plaintiff from bringing the action for a declaration.

An appeal against the decision of the trial Judge was allowed by the Court of Appeal; and in its lead judgment, with which Wali and Maidama JJ.CA. concurred, Akpata J.CA. held thus:-

“In my view, regardless of its apparent validity, the Certificate of occupancy exhibit B has become a worthless document to the extent to which it relates to the parcel of land the subject matter of litigation in exhibits C and D. It no longer confers any title on the respondent sufficient to dislodge Ornam, the 1st appellant from the land. It follows therefore that the learned trial Judge was obviously in error in granting the order of perpetual injunction against the appellants in favour of the respondent.”

appellant from the land. It follows therefore that the learned trial Judge was obviously in error in

granting the order of perpetual injunction against the appellants in favour of the respondent."
The plaintiff (hereinafter referred to as the Appellant) has appealed against the decision of the Court of Appeal and the passage noted above was the gravamen of the only ground of appeal, which complained that the Court of Appeal erred in holding that view. To that ground of appeal, the following particulars were given:
"1. The judgment in Exhibits 'C' and 'D' are nullities and therefore cannot ground the plea of res judicata.
2. The existence of the certificate of occupancy Exhibit 'B' No. BN611 dated 30th May, 1977 and registered as No. 157 at page 157 in Volume 1 in the Land Registry at Makurdi before decisions in Exhibits 'C' and 'D' rendered those decisions void.
3. Decisions in Exhibits 'C' and 'D' are incapable of rendering nugatory the rights conferred on the Appellant under Section 20 of the Land Tenure Law of Benue State.
4. Exhibits 'C' and 'D' could not bar the Appellant from initiating the present suit.
5. The ingredients of res judicata were not satisfied to bar the suit instituted by the Appellant."
In his brief of arguments, and oral submissions before this court, learned counsel for the Appellant, Chief Gani Fawehinmi, made these points:-
(1) First, that the existence of the Certificate of Occupancy – Exh.B before the decisions of the Area Court and the High Court – Exhs C & D, respectively. rendered those latc decisions void.
(2) Secondly, that the decision of the Court of Appeal was delivered without taking cognizance of the effect of a grant of certificate of Occupancy; and that Sec.20 of the Land Tenure Law Cap. 59 of Laws of Northern Nigeria (applicable in Benue State) provides that during the term of a statutory right of occupancy, the holder shall have the sole right to, and absolute possession of all the improvements on the land.
(3) Thirdly, that the ingredients of res judicata were not satisfied to bar the suit instituted by the appellant;
(4) Fourthly, that the issues adjudicated upon in the earlier suits are not the same as the issues being adjudicated upon in the present suit; and
(5) Fifthly, that by virtue of the provisions of sections 6, 10 & 41 of the Land Tenure Law Cap. 59 of the Laws of Northern Nigeria; and sections 14, 15 & 38 of the Land Use Act 1978, a Military Governor can grant a right of occupancy to any person and issue a Certificate therefor; that a holder of such a right of occupancy has exclusive right to the land to which the right of occupancy relates until such right is revoked; that it is only the High Court that has jurisdiction to determine matters relating to the certificate of occupancy; and that in so far as the appellant was a holder of the right of occupancy over. the land as evidenced by Exh B, the judgments in Exhs C and D could not bar such a right.

Mr. Vemheh, learned counsel for the defendants/respondents was not called upon to reply to those submissions; but he made reference to certain provisions of the Land Tenure Law, which are not considered relevant to this matter.

It may well be that by virtue of some provisions of the Land Tenure Law of Northern Nigeria which was then applicable to the matter, a holder of a right of occupancy properly obtained from the appropriate authority in respect of a parcel of land in Benue State, might have sole right to, and enjoy absolute possession over the said land and the improvements thereon; it is however extremely doubtful, to say the least, that the Certificate of Occupancy – Exh B – in this case was properly obtained for the following reasons:

(i) The appellant purported to have applied for the Certificate of Occupancy on 3rd February, 1976 knowing fully well that there was a dispute between him and the defendants on the same parcel of land. Yet he did not disclose those facts to the Ministry of Lands in his application.

(ii) Without waiting for the outcome of his application, the appellant proceeded to institute an action for re-possession of the land from the 1st respondent in the Area Court at Tse-mker on 6th May, 1976 which was withdrawn and struck-out. Later he brought another one against both respondents at the Area Court 1 in Vaindeikya, the trial of which commenced on 26th August, 1977 – See Exh. C. In his judgment at page 57 of the Record, the trial judge gave as one of his reasons for granting the appellants claim thus: "Plaintiffs assertion that he got some recommendation for the issuance of Exh. B from Vandeikya Local Government (and this is exemplified at page 1 of Exh. C by being brought to the notice of that trial court) reinforces his case rather than diminishing its potency, in my view".

But there is nothing at page 1 of Exh. C (see page 63 of the record) to confirm that learned trial Judge's assertion that he did. As a matter of fact, the appellant when cross-examined at the trial said: "I cannot remember whether the Area Court 1 at Vandeikya accepted in evidence the recommendation of the Vandeikya Local Government regarding the application before deciding the case." (See from page 25 last line to page 26 line 3 of the record.)

(iii) On 5rh November, 1976, the appellant was purportedly informed by the Ministry of Land by a letter- Exh.A that his application for a right of occupancy had been approved. By that time the trial at the Area Court 1 at Vandeikya had not commenced; and yet during the proceedings in that court, the appellant failed to bring that letter to the notice of the Court.

(iv) On 28th May, 1977, the Certificate of Occupancy Exh. B – was purportedly issued to the appellant in respect of the same land. By that time also, the trial at the Area Court 1 Vandeikya had not commenced but it did on 26th August, 1977. However, throughout those proceedings, the appellant did not inform that court that a Certificate of Occupancy had been issued to him in respect of the land. It was submitted by learned counsel for the appellant that the appellant could not have

done so because that court had no jurisdiction to adjudicate on such matters. I do not think that a mere notice to that court that the appellant had obtained a certificate of occupancy in respect of the land, would have affected the jurisdiction of that court. Even at that stage the appellant could have stopped his action against the respondents since what he would have achieved by obtaining a judgment for re-possession against them had already been achieved by Obtaining the Certificate of Occupancy. The respondents would then have been left with the choice of taking action to determine the validity of the Certificate of Occupancy at the High Court. But the appellant continued with the trial in the Area Court 1 and lost to the respondents. He then appealed to the High Court at Makurdi.

(v) The appeal at the High Court was not concluded until 20th May, 1978. Again, throughout that appeal, the appellant did not disclose to the court or seek leave to lead additional evidence in that court that he had obtained a Certificate of Occupancy in respect of the land even though that Court had jurisdiction to entertain such matters. If he did, it could have set the High Court upon an enquiry as to how he obtained the Certificate.

(vi) Shortly before the appeal was dismissed on 20th May, 1978 by the High Court, Makurdi, the appellant again brought the action the subject of this appeal on 7th April, 1978 but the statement of claim was not filed until 25th August, 1978. Vet he failed to disclose therein that he had lost the action which he instituted for repossession of the land, to the respondents. It was the respondents who in their Amended Statement of Defence, referred to the matter, raised the plea of estoppel, as well as the issue that the Certificate of Occupancy was obtained by fraud. The appellant did not file any Reply to contradict the averments and it could be presumed that he had admitted them.

Be that as it may, it seems to me that the matter for determination in this appeal is not whether or not the appellant obtained a Certificate of Occupancy in respect of the land, or whether that certificate had the effect of defeating the rights of the respondents as claimed by the appellant. Rather it is whether, the appellant who had previously instituted an action for repossession of the land in dispute against the same parties in this appeal and lost, without disclosing the fact that he had obtained a Certificate of Occupancy relating to the land which he then had in his possession, can now be allowed to relitigate the same issue by a fresh action.

It is a principle of law now well established that a party is estopped from relitigating a matter which had been a subject of

litigation between the same parties even where the party due to inadvertence or negligence, failed to put forward every subject of his case. This was the observation of Wigram V in Henderson v. Henderson (1843) 3 Hare 114 reported in 67 E.R.313 at page 319 thus:

“I believe I state the rule of the Court correctly when I say that where a given matter becomes the subject of litigation on, and of adjudication by a Court of competent jurisdiction, the court requires

the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases not only on the points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time".

See also Hoystead v. Commissioner of Taxation (1926) A.C.155 at page 170 where it was quoted with approval by the Privy Council; and it was adopted in A.G. Ijale v A.G. Leventis & Co. (1961)1 All N.L.R. 762 at page 769 and Standard Bank Nigeria Ltd. v Chief F.M. Ikomi (1972) 1 S.C. I64 at page 178.

In Ihenacho Nwaneri & Ors. v. N. Oriuwa & Ors. (1959)4 F.S.C. at page 132, this Court while dealing with the doctrine of estoppel per rem judicatam had these to say:

"It is well known that before this doctrine can operate, it must be shown that the parties. issues. and subject-matter were the same in the previous case as those in the action in which the plea of res judicata is raised,"

Also in New Brunswick Rail Co. v. British and French Trust Corporation Ltd (1939)A.C. at pages 19 – 20. it was observed that:

"The doctrine of estoppel (per rem judicatam) is only founded on considerations of justice and good sense. If an issue has been distinctly raised and decided in any action in which the parties are represented, it is unjust and unreasonable to permit the same issue to be litigated afresh between the same parties or persons claiming under them."

These two passages were cited with approval by the Court in Kalu Njoku & Ors. v. Ukwu Eme & Ors. (1973) 5 S.C. 293 at pages 304 & 305. Also see Samuel Fadiora v. Festus Gbadebo (1978)3 S.C. 219 at pages 228 – 231.

Applying this principle to the facts of this appeal, it is clear that the appellant instituted an action for repossession of the land in dispute, against the respondents and lost the action both at the trial court and on appeal at the High Court: See Exhs. C & D. He did not disclose in those two courts that he had obtained a Certificate of Occupancy – Exh B – relating to the land. But he again instituted a fresh action against the same two respondents for perpetual injunction, damages and other reliefs, which were based on the Certificate of Occupancy – Exh B. Was the appellant not therefore estopped per rem judicatam from bringing the fresh action I think so and I am of the view that all the following ingredients of the plea of estoppel per rem judicatam were present:-

(a) the parties in the previous action were the same as those in the fresh action.

(b) The issue litigated upon in the previous action which was for repossession of the land was also the same as the one for perpetual injunction in the fresh action, which pre-supposed that the appellant was ousted from possession.
(c) There was also in existence two judgments of courts of competent jurisdiction (The Area Court 1 of Vandeikya and the High Court of Makurdi) which had previously adjudicated on the matter.
Finally, it is inconceivable to think that the appellant would have had in his possession the Certificate of Occupancy relating to the land – Exh B since the 28th May, 1977, and conscious of the fact that the right acquired thereby had the effect under the law of defeating whatever right or virtue of the judgments in Exhs. C & D, and yet, he would have kept the said certificate in his pocket without either disclosing its existence or producing it throughout the previous legal proceedings with the respondents.
In the circumstances, I am of the firm view that the Court of Appeal was right in holding that regardless of the apparent validity of the Certificate of Occupancy – Exh B – in the possession of the appellant, he could not relitigate the same issue of recovery of possession (couched as perpetual injunction) against the two respondents. The appeal therefore fails; and it is hereby dismissed with N300.00 costs to the respondents.A. G. IRIKEFE, J.S.C. (Presiding): I have seen before now, the lead judgment just read by my learned brother, Kazeem, J.S.C. I am in complete agreement with his treatment of all issues, both of law and fact. This is indeed a strange case. It is simply incredible that the appellant in this case, would have in his pocket a certificate of occupancy to the disputed land and yet refuse to produce same before two courts of record siesed with full jurisdiction. The certificate cannot but be an after-thought and a fraudulent one at that. I also would dismiss the appeal and hereby do so, with costs as assessed in the lead judgment.

A. N. ANIAGOLU, J.S.C.:

I entirely agree with the judgment just delivered by my learned brother, Kazeem, J.S.C., the draft of which I have had a preview before now. I only wish to add a few comments of my own in order to

emphasize the utter hopelessness of the plaintiff/appellant's case against the background of what I must consider must be the plaintiffs clandestine activities in relation to his procurement of the Certificate of Occupancy, dated 28th May 1977, Exhibit B.

According to the plaintiff/Appellant, Exhibit B was issued to him on 28th May, 1977. Before then he had filed an action on 6th May 1976 against the 1st defendant only, which he did, in a second action, whose trial commenced on 26th August 1977. Before the commencement of the trial on 26th August 1977 he had securely in his possession the Certificate of Occupancy which ordinarily would have conferred title on him. Yet, with his possession of this certificate and with his knowledge of its legal effect he, as the plaintiff in the action, chose

(i) to proceed with the action instead of either withdrawing it or asking for immediate judgment to be signed in his favour on the basis of the certificate;

(ii) to go on appeal to the High Court against the judgment (Exhibit C) of the Area Court without disclosing to the Area Court at any stage of the proceedings that he was in possession of a Certificate of Occupancy in respect of the land in dispute even though the certificate had been issued before the commencement of the hearing of the proceedings in that Area Court;

(iii) to remain silent about the existence of the certificate, before the High Court throughout the proceedings in .the High Court until the High Court held that the judgment of the Area Court was correct and dismissed the appeal;

(iv) to initiate a fresh action in the High Court, founded on the Certificate of Occupancy, and ignoring the judgments Exhibit C & D and, for the first time, disclosing his Certificate of Occupancy.

The appellant's methods may satisfy him as highly acrobatic and his tactics, ingenuously gymanstic (the trial judge called him a "smart alee") but, the principles by which the legal doctrine of Res Judicata is decided do not permit of such keeping back, or nondisclosure, of available evidence when trial of a case is being conducted.

Two judgments (Exhibits C & D of two Courts of competent jurisdiction had been handed down dismissing the plaintiff's claim of ownership of the land in dispute before the plaintiff brought his action based on the Certificate of Occupancy, and treating those judgments as if they did not exist. That, certainly, cannot be.

The principle of res judicata decided in (1843) HENDERSON v. HENDERSON (1843)67 E.R. 313 at 319 was adopted in this country in FABUNMI v. DELEGAN (1965) N.M.L.R. 369 at 373 and was amplified by the pronouncement of Diplock, L.J., in MILLS v. COOPER (1967) 2 All E.R. 100 at 104 who said;

"The doctrine of issue estoppel in civil proceedings is of fairly recent and sporadic development, though non the worse for that. Although Haystead v. Taxation Commissioner did not purport to

break new ground, it can be regarded as the starting point of the modern common law doctrine, the application of which to different kinds of civil actions is currently being worked out in the courts. This doctrine, so far as it affects civil proceedings, may be stated thus: a party to civil proceedings is not entitled to make, as against the other party, an assertion, whether of fact or of the legal consequences of facts, the correctness of which is an essential clement in his previous cause of action or defence, if the same assertion was an essential element in his cause of action or defence in previous civil proceedings between the same parties or their predecessors in title and was found by a court of competent jurisdiction in such previous civil proceeding to be incorrect, unless further material which is relevant to the correctness or incorrectness of the assertion and could not by reasonable diligence have been adduced by that party in the previous proceedings has since become available to him."

The sound reasoning behind this principle is that a litigant is not permitted to nibble at his claims – breaking them down and taking them piecemeal. He is expected to bring all his claims, belonging to the same subject matter, at one and the same time. If he chooses to bring them piecemeal he may be met by the doctrine of res judicata or where appropriate, issue estoppel, as happened in FIDELITAS SHIPPING CO. LTD. v. VIO EXPORTCHLEB (1966) 1Q.B. 630 and also recently McLKENNY v. CHIEF CONSTABLE OF THE WEST MIDLANDS And Anr. (1980) 2 W.L.R. 689. This Court in LAWAL v. CHIEF DAWODU and Anr. adopted the reasoning in FIDELITAS SHIPPING CO. LTD.

The Certificate of Occupancy (Exhibit B), pitched against the judgment of the Area Court (Exhibit C)and that of the High Court on appeal on it (Exhibit D), was indeed, to employ the language of the Court of Appeal, a worthless document.

There is another angle to this case. From the evidence led it is clear that the land in dispute is situate in a non-urban area known as Tsemker in Vandeikya Local Government Area. From the judgments in Exhibits C & D, the land "belonged" to the defendants. The word "belonged" must, of course., he construed advisedly as the radical title to all lands in Northern Nigeria was vested, and had for sometime been vested, in the Governor, the individuals having only "rights of occupancy" which term represented the nearest equivalent to rights of ownership as obtained in the Southern part of Nigeria.

This was all, of course, before the coming into force of the Land Use Act by Section 48 of which all existing laws relating to the registration of title to, or interest in land, became subject to such modifications, as would bring those laws into conformity with the Land Use Act or its general intendment.

Section 36 of the Act has transitional provisions relating to land situate in non-urban areas such as the land in dispute in this case. Sub-section (2) thereof deals with agricultural lands while sub-

section (4) relates to developed lands. In either case the holder of the customary right of occupancy of such lands shall continue to hold the land and would be entitled, as of right, to a certificate of occupancy under the Act. Neither the Governor nor the Local Government would have a right to divest such land from the person in whom the land was properly vested. by the issue of Certificate of Occupancy over the land to another person in whom the land was not vested.

In the instant appeal, two courts had declared that the land in dispute was vested in the Respondents as customary holders, and had always been so vested in them under customary tenancy. Subject to the radical title (the sesein) being vested in the Governor by operation of law, all other incidents of ownership belong to the customary holder. Exhibit C & D had declared their title – a title which had all along been vested in them but merely declared by the courts, or rather, affirmed by the courts in a declaration.

I agree with my learned brother, Kazeem, J.S.C. that in the circumstances of this case, the Court of Appeal was right in holding, as it did hold, that the action was "incompetent" as the plaintiff could not relitigate the issues decided in Exhibit C & D.

Accordingly, I must also dismiss this appeal with costs to the Respondents hereby assessed at N300.00.

M. L. UWAIS, J.S.C.:

I have had the opportunity of reading in draft the judgment read by my learned brother Kazeem J.S.C. I entirely agree with the reasoning and conclusion therein.

It may be true that the appellant applied to the Military Governor of Benue State on 3rd February, 1976, that is before he commenced the first action against the respondents in the Area Court Grade II at Tse-mker. It may also be true that he received, from the Military Governor, both letter of grant of right of occupancy and the certificate of occupancy on 5th November, 1976and 28th May, 1977 respectively. But the fact remains that when he brought the second suit before the Area Court Grade 1 at Vandeikya, he did not reveal that he had been issued with a certificate of occupancy in respect

of the land in dispute.

After judgment was given against him, the appellant appealed to the High Court. There again he concealed his ownership of the certificate of occupancy. It was after losing the appeal in the High Court that he chose to bring yet another suit before the same High Court; but this time claiming against the respondents a superior right of occupancy over the land in dispute by virtue of the certificate of occupancy.

The question which remains unanswered is: why did the appellant behave the way he did If he had informed the Area Court Grade I that he had the certificate of occupancy that Court would have ceased to have jurisdiction in the case, vide section 41 of the Land Tenure Law, Cap 59 of the Laws of Northern Nigeria, 1963. He was also at liberty to withdraw the suit from the Area Court if he intended to rest his claim over the land in dispute on the ownership of the certificate of occupancy by instituting a fresh action in the High Court. This again, is another option which he failed to exercise. The appellant has himself, therefore, to blame for messing up his case if at all the case was genuine.

I quite agree that by the shoddy manner the appellant prosecuted the claim he had against the respondents, he brought himself to be estopped by the principle of res judicata, even if his case was bona fide.

It is for these and the reasons given by my learned brother Kazeem, J.S.C. that I feel that this appeal should fail. It is accordingly dismissed and the decision of the' Court of Appeal is affirmed with N300.00 costs to the respondents.

C. A. OPUTA, J.S.C.:

I have had the advantage of reading in draft the lead judgment just delivered by my learned brother Kazeem, J.S.C. That judgment has ably and adequately dealt with all the issues raised in this appeal. I am therefore in complete agreement with his reasoning and conclusions.

By way of emphasis, however, I wish to add a few comments of my own with regard to the Certificate of Occupancy, Ex.B, which formed the main thrust of the Appellant's attack against the unanimous judgment of the Court of Appeal, Kaduna Division. May be a brief statement of the facts in their chronological order may expose what my learned brother Aniagolu, J.S.C. rightly called "the plaintiff's clandestine activities in relation to his procurement of the Certificate of Occupancy dated 28th May 1977, Exhibit B". These facts are as follows:-

1. The Plaintiff/Appellant instituted an action at the Grade 2 Area Court Tsemker, against the 1st Defendant/Respondent, claiming the land in dispute as "portion of his father's farmland". This action was instituted on 6th May 1976. The Appellant later withdrew this action.

2. The Appellant later took another action CV.241/77 against the 1st defendant and this time added the 2nd defendant, in the D Grade 1 Area Court of Vandeikya, claiming the same piece of land as his "farmland". Hearing in this action started on the 26th August 1977. In his evidence, the Appellant admitted that when he returned in 1968 from Gboko where he ran to in 1964 during the TV Riots – he found the 2nd Respondent on the land in dispute. The 2nd Respondent had since January 1977 "built a Zink house there" claiming that "it was 1st defendant who gave the father the place ….."

It is relevant to note at this stage that having admitted the Defendants' possession, the Plaintiff/Appellant had an extra burden cast on him by S.145 Evidence Act No. 62 of 1958 to rebut the presumption that the defendants in possession were owners of the land in dispute. Did he discharge that onus No. The Vandeikya Area Court dismissed the 'plaintiff/Appellant's action holding:-

"As we have heard the evidence of….. both parties diligently and your witnesses respectively then have gone and viewed the disputed piece of land thoroughly we find that it is of you 1st defendant of Mbrara and not of the plaintiff of Ute". The judgment was given on 16/9/77 before the Land Use Decree now Act was signed into law on the 29th March 1978. By Section 36(4) of the Land Use Act No.6 of 1978:-

"Where the land is developed the land shall continue to be held by the person in whom it was vested immediately before the commencement of this Decree as if the holder of the land was the holder of a statutory right of occupancy issued by the Local Government and if the holder or occupier of such developed land, at his discretion, produces a sketch or diagram showing the area of land so developed the Local Government shall if satisfied that that person immediately before the commencement of this Decree has the land vested in him register the holder or occupier as one in respect of whom a customary right of occupancy has been granted by the Local Government" .

The evidence of the Appellant himself is that the 2nd Respondent has developed the land in dispute – He had since January 1977 "built a Zink house there". Now equity regards as done that which

should have been done. Applying this maxim to the facts of this case, the 2nd Respondent can be regarded as one "in respect of whom a customary right of occupancy" has been granted by the Vandeikya Local Government. The question that arises at this stage is – will the Government grant a Certificate of Occupancy to the Plaintiff/Appellant in respect of land over which the Local Government had previously granted a customary right of occupancy to the 2nd Respondent The answer obviously is No, except of course the facts were concealed from or not revealed to the Governor. Now a certificate of occupancy obtained by the Appellant by the concealment of material facts will definitely be a Certificate fraudulently obtained. Such a Certificate will be tainted with fundamental vice and fraud. This is stage 1.

I appreciate that it is not the Appellant's case that he obtained his Certificate of Occupancy No. BN611 EX.B after the judgment of the Vandeikya Area Court Grade I C. V. 241/77 but the facts silently but still eloquently cry out that that must have been the case. And that is the disquieting suspicion of fraud that shrouds this case. I will now consider this appeal on the basis that the Appellant obtained his Certificate of Occupancy on the 28th May 1977 as shown in Ex. B. The implications are even more astonishing:-

1. He had this very vital document in his pocket on the 26th August 1977 when he gave evidence in the Vandeikya Area Court and yet he did not breathe a word of it; he did not mention it even in passing; he did not tender it.

2. The appellant lost in the Area Court and then went on Appeal to the High Court. In the High Court the Appellant was apparently represented by counsel – Mr. Tsumba. It did not occur to either the Appellant or his counsel to intimate the court that he had this vital document which will make all the difference. He hid the Certificate of Occupancy even at the risk of having his appeal dismissed and it was dismissed on 20/5/78.

Is that the conduct of a litigant with a trump card By Section 148 of the Evidence Act Cap.62 of 1958:-

"the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case"

In the case on appeal, the behaviour of the Appellant lends strong support to the non-existence of any Certificate of Occupancy in favour of the Appellant from 6th May 1976 when he filed his first case against the 1st Defendant to 20th May 1978 when he lost his appeal in the High Court. But there is a Certificate of Occupancy tendered as Ex. B dated 28th May 1977. Exhibit B must have been procured by surreptitious and underhand means. That is a fair inference. This is stage 2.

Stage 3 opened with the Appellant suddenly recovering from his amnesia. He now remembered that he had Ex.B, a Certificate of Occupancy with regard to the land which since May 1976 had been in

dispute between himself as claimant and the Defendants/Respondents. He then filed an action in the High Court based on this Certificate of Occupancy – Suit No.MD/42/78. The Plaintiff/Appellant was not even honest enough to plead the Vandeikya Area Court Case CV.241/77 Ex.C. of the appeal judgment of the Makurdi High Court in Suit No. MD/263A/1977 – EX. D. May be he had another attack of amnesia. The defendants did not forget the previous litigations inter parties. They pleaded these in paragraphs 4 and 5 of their Statemet of Defence and in their paragraph 11 attacked the Plaintiffs "purported" Certificate of Occupancy as fraudulent and asked for its revocation in paragrpah 12. The learned trial judge Onu, J. (as he then was) was impressed by the antic of the Appellant whom he described as "a very smart alec". He over-ruled the Defendant/Respondents' plea of Estoppel per rem judicatam and gave judgment to the "Smart alec". The Court of Appeal in a very well considered judgment reversed the trial judge and dismissed the Appellant's action. He now appeals to this Court.

On the issue of estoppel per rem judicatam, Akpata, J.C.A. stated the law correctly when he quoted with approval, adopted and followed the observation of Wigram, V.C. in Henderson v. Henderson (1843) Hare 100 at pp.114/115 namely:-

"In trying this question I believe I stated the rule of the Court correctly when I say that, when a given matter becomes the subject of litigation in, and of adjudication by a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, Not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence, might have brought forward at the time".

The point being made here is that any question, issue, fact, pleading, evidence or argument which should have been raised in a previous proceeding inter partes but was not raised would be deemed in a future proceeding between the same parties to have been determined against the party who failed to raise such question, issue. or fact. The Appellant, if he really had the Certificate of Occupancy Ex.B, should have raised it as a vital document in support of his case in the Vandeikya Area Court Suit CV.241/77 EX.C and in the Makurdi High Court Appeal case No.MD/263A/1977 – EX. D. He did not. The law is that the adverse general decision in these two judgments – EXs. C and D – though they contain no express declaration to that effect, are deemed to carry with them, each, a particular adverse decision on the issue of the Certificate of Occupancy EX.B just as much as if that document had been expressly decided against the Appellant.

From yet another angle, the Appellant is estopped by his own conduct, in revealing the existence of his Certificate of Occupancy in the previous litigations inter partes, from now alleging that that Certificate exists. It will be unjust for the Appellant to now depart from the assumption which he induced the Respondent to adopt that the parties were fighting the previous cases with all their cards face upwards. The learned trial Judge observed that "the plaintiff decided to keep his gun-powder dry and he later on picked up the gauntlet with the respondents by prosecuting this case". Akpata, J.C.A. countered:-

"I am afraid he has misfired. Or should I say he can no longer make use of his gun powder, dry or wet".

That sums up the legal position. The Appellant is required to abide by the assumption that no Certificate of Occupancy existed because that formed the conventional basis upon which the parties fought the previous cases. As Lord Blackburn observed in Burkinshaw v. Nicholls (1878)3 A.C. 1004 at p.1026:-

"The moment the doctrine of estoppel is looked at in its true light it will be found to be the most equitable one and one without which the law of this country could not be satisfactorily administered. When a person makes to another a representation:- I take upon myself to say that such and such things exist and you may act upon that basis, it seems to me of the very essence of justice that between these two parties, their rights shall be regulated not by the real state of facts but by that conventional state of facts which the two parties agree to make the basis of their action".

All along the Appellant and the Respondents have fought this case from Vandeikya Area Court to the High Court on the conventional basis that neither party had a Certificate of Occupancy. Having lost in both Courts, it is not only too late in the day but it will also be wrong for the Appellant to now spring surprise on the Respondents by building up a brand new case based on a Certificate of Occupancy. The law will not allow the Appellant to be all that "smart".

Is the Certificate of Occupancy EX.B genuine In paragraph 11 of their Statement of Defence, the Respondents pleaded that it was fraudulent, "obtained by false claims and the existence of the High Court judgment was not brought to the notice of the Military Governor". The learned trial Judge did not make any specific finding on this issue. But since he gave judgment for the Appellant, one would conclude that he regarded EX.B as genuine. The Court of Appeal described EX.B, the Certificate of Occupancy as "a worthless document". I think, that is an understatement. In addition to being worthless, all the available circumstantial evidence point irresistibly to the conclusion that it was a fraudulent document viz:-

1. If it were issued on 28th May 1977, it is absolutely impossible to explain why it was not mentioned in the Area Court Suit CV.241/77 EX.3.
2. Why was it not also mentioned in the High Court appeal case Suit No.MDI/63A/1977

3. Why, as was pleaded in paragraph 6 of the Statement of Defence, was the Appellant's application for a Certificate of Occupancy "not disclosed to the community for their consent and for the consent of the Local Government to be obtained before recommending approval to the Military Governor as was customary"

The cumulative effect of all these unanswered questions will surely be, at least, a prima facie case of fraud which the Appellant must rebut and-which he did not rebut. One cannot on these facts and on the circumstances surrounding the mysterious issue of the Certificate of Occupancy Ex. B escape the conclusion that Ex.B looked very much tainted with fraud. It will therefore be highly unsafe to act on it.

In the final result, the court below was right in treating EX.B as a "worthless document" and in dismissing any claims based on it. I too will for the reasons given above, and for the more detailed reasons given in the lead judgment of my learned brother Kazeem, J.S.C., dismiss this appeal as completely lacking in merit. I adopt all the consequential orders made in the lead judgment.

Appeal dismissed.

Decisions of the Court of Appeal affirmed.