**JULIUS BERGER NIGERIA PLC & ANOR**

**V.**

**MRS. PHILOMENA UGO**

IN THE COURT OF APPEAL OF NIGERIA

ON FRIDAY, THE 13TH DAY OF MARCH, 2020

CA/OW/271M/2018

**LEX (2020) - CA/OW/271M/2018**

**OTHER CITATIONS**

3PLR/2020/50 (CA)

(2020) LPELR-49544(CA)

**BEFORE THEIR LORDSHIPS**

AYOBODE OLUJIMI LOKULO-SODIPE, JCA

ITA GEORGE MBABA, JCA

IBRAHIM ALI ANDENYANGTSO, JCA

**BETWEEN**

1. JULIUS BERGER NIGERIA PLC

2. GODWIN OBADO - Appellant(s)

AND

MRS. PHILOMENA UGO - Respondent(s)

**ORIGINATING COURT(S)**

IMO STATE HIGH COURT [Justice K. A. Ojiako, Presiding]

**REPRESENTATION**

ABISOLA AARINOLA (MRS), with him, OLUJARE O. OGUNNAIKE ESQ who settled the brief . - For Appellant

AND

EMEKA OZOANI ESQ SAN, with him, CHIKA S. OBARAECHI ESQ., NNEOMA IWU and G.W. MANUFOR ESQ. - For Respondent

**ISSUES FROM THE CAUSE(S) OF ACTION**

CONSTITUTIONAL AND HUMAN RIGHTS LAW – JUDICIARY – RIGHT OF APPEAL:- Order of cost made by Court of Appeal pursuant to Section 14(1) of the Court of Appeal Act, 2004 – Stipulation that it is not appealable – Constitutionality of - Section 241 (2)(c) of the 1999 Constitution of the Federal Republic the 1999 Constitution of the Federal Republic of Nigeria

ETHICS – LEGAL PROFESSIONAL:- “Depravity, impunity and abuse of the Court process” - Practice which the Supreme Court deems that “No lawyer worth his name should engage in - Deliberate act of mischief to frustrate, annoy and oppress a successful party in litigation, pretending to pursue a Court process – Attitude of Court thereto

**PRACTICE AND PROCEDURE ISSUES**

ACTION - ABUSE OF COURT/JUDICIAL PROCESS(ES): Instance(s) when abuse of Court process will arise - Fresh action to impeach a longstanding judgment using judicially rejected allegations – Attitude of Court thereto

ACTION – ESTOPPEL:- Issue estoppel and the principles of res-judicata – Meaning and essence of – When deemed to apply – Justification thereof

APPEAL - INTERFERENCE WITH AWARD OF COST:- Rule that award of costs is at the discretion of the trial Court – Duty of trial court thereto – Attitude of appellate Court to invitation to interfere therewith

APPEAL - RIGHT OF APPEAL: Order of cost made by Court of Appeal - Section 14(1) of the Court of Appeal Act, 2004 – “no appeal shall lie from any order made ex-parte or by consent of parties, or relating only as to cost." – Constitutionality of - Section 241 (2)(c) of the 1999 Constitution of the Federal Republic the 1999 Constitution of the Federal Republic of Nigeria

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

At the lower Court, the Appellants as plaintiffs, had sought, among other reliefs, the following:

“(a) A declaration that the judgment of this Honourable Court in Suit No. HOW/581/2007delivered by Hon. Justice N.B. Ukoha on October 26, 2009, was obtained by fraud.

(b) An order setting aside the judgment of this Honourable Court in Suit No. HOW/581/2007, delivered by Honourable Justice N.B. Ukoha on October 26, 2009, which was obtained by fraud.

Alternatively to A & B;

An Order setting aside the part of the judgment of Honourable Justice N.B. Ukoha which awarded to the claimant in suit NO.HOW/581/2007 in the sum of N28,516,680.00 (Twenty Eight Million Five Hundred and Sixteen Thousand Six Hundred and Eighty Naira) as special damages for Nigerian treatment and the sum of 108,00.000 (sic) Lakh for her overseas treatment for having been obtained by fraud.

(c) An Order for refund of the sum of N62,924,608.00 (Sixty Two Million, Nine Hundred and Twenty- Four Thousand, Six Hundred and Eight Naira) deposited in the Registry of the Court of Appeal, including interest accrued thereon.

(d) An Order awarding special damages to the claimants.” (Page 13 of the Records).

The summary of Appellants’ claim at the Court below was that some of the receipts tendered by the Respondent (as claimant in Suit No. HOW/581/2007) were procured by fraud/forgery. Therefore, since those receipts which were obtained by fraud/forgery were the basis of the trial Court’s award of special damages in favour of the Respondent, those damages awarded by the trial Court in its judgment should be set aside for the obvious fraud.

The Respondent was served the originating processes of this suit (How/806/2012) and instead of filing a defence to contradict the allegations of the Appellant that some receipts relied upon by the trial Court were obtained by fraud/forgery, the Respondent filed a Notice of Preliminary Objection dated 22nd January, 2018, challenging, in limine, the jurisdiction of the lower Court to adjudicate over the Suit. The ground of the Preliminary Objection was that the issue whether the lower Court’s judgment was based on the issue of fraud/forgery had been determined by the Court of Appeal in its interlocutory ruling (on an interlocutory application filed by the Appellants) in CA/OW/146/2010, on 28/3/2013 and so was defeated by the doctrine of Res Judicata.

DECISION(S) APPEALED AGAINST

The trial Court -

1. upheld the preliminary objection of the Defendant/Respondent, in part, agreeing with the Respondent, that Appellants’ Suit as constituted, was defeated by the doctrine of issue estoppel.

2. held that the suit was an abuse of the process of the Court.

3. dismissed the suit; and

4. awarded cost of N350,000.00 (Three Hundred and Fifty Thousand Naira) to the Respondent as cost, against the Appellants.

ISSUE(S) FOR DETERMINATION ON APPEAL

*BY APPELLANT:*

1) Whether or not the issues in dispute in suit No. How/806/2017 and those in the Appellant’s Motion on Notice dated December 5, 2011, filed in Appeal No.CA/OW/146/2010 are the same and were fully finally determined by the Court of Appeal, such as to form a valid ground for a successful plea of issue estoppel and the suit be deemed an abuse of the process of the Court?

2) Whether or not the Lower Court, was right to dismiss the Appellants’ suit, despite the ruling of the Court of Appeal of 28/03/2013 and the Lower Courts holding in its judgment that a judgment allegedly obtained by fraud can be set aside by a fresh action.

3) Whether or not the lower Court was correct to hold that its hearing of the suit would amount to an attempt to set aside a decision already confirmed by the Court of Appeal and extinguish the subject of an appeal currently pending before the Supreme Court?

4) Whether or not the Appellants’ action can be said to be an after-thought?

5) Whether or not in the circumstances of the suit at the Lower Court, the cost of N350,000 awarded in favour of the Respondent is not excessive and punitive?

*BY RESPONDENTS*

1) Whether this Honourable Court can rightly proceed to determine this appeal in the absence of vital records of appeal. (At the hearing of the Appeal on 3/2/2020, the Respondent’s Counsel applied to withdraw the issue one)

2) Having due regard to the Ruling of this Honourable Court on 28/3/2010, in suit No.CA/OW/146/2010, whether the trial high Court was right when it reached the decision that this suit is caught up by issue estoppel, abuse of process and is an afterthought, (Grounds 1, 2, 3, 4, 5, 6 and 7)

3) Whether the trial Court exercised its discretion judicially and judiciously when it awarded N350,000.00 as cost to the Respondent, (Ground 5).

*AS ADOPTED BY COURT*

*[The Court adopted Issue 2 and 3 of the Respondent’s Brief but reframed Issue 2 to read thus:*

“Having regard to the Ruling of this Honourable Court, delivered on 28/3/2013 in Appeal No. CA/OW/146/2010, whether the Trial Court was right to hold that Appellants’ suit No. HOW/806/2017 was caught - up by issue estoppel and was an abuse of the Court process, and was an afterthought.” (Grounds 1, 2, 3, 4, 5, 6 and 7 of the Appeal).]

DECISION OF [CURRENT] COURT

“[This appeal] is a gross abuse of the Court process, an after-thought and a violation of the cherished principles of res-judiciata, particularly, issue estoppel.”

**MAIN JUDGMENT**

ITA GEORGE MBABA, J.C.A. (Delivering the Leading Judgment):

This is an appeal against the judgment of Imo State High Court in Suit No. HOW/806/2017, delivered on 24th May, 2018, by Hon. Justice K.A. Ojiako, wherein the Court upheld the preliminary objection raised by the Respondent (in part) and dismissed the plaintiffs’ suit on the ground that it was caught up by the doctrine of estoppel and as such was an abuse of the Court process.

At the lower Court Appellants, as plaintiffs, had sought the following Reliefs:

“(a) A declaration that the judgment of this Honourable Court in Suit No. HOW/581/2007delivered by Hon. Justice N.B. Ukoha on October 26, 2009, was obtained by fraud.

(b) An order setting aside the judgment of this Honourable Court in Suit No. HOW/581/2007, delivered by Honourable Justice N.B. Ukoha on October 26, 2009, which was obtained by fraud.

Alternatively to A & B;

An Order setting aside the part of the judgment of Honourable Justice N.B. Ukoha which awarded to the claimant in suit NO.HOW/581/2007 in the sum of N28,516,680.00 (Twenty Eight Million Five Hundred and Sixteen Thousand Six Hundred and Eighty Naira) as special damages for Nigerian treatment and the sum of 108,00.000 (sic) Lakh for her overseas treatment for having been obtained by fraud.

(c) An Order for refund of the sum of N62,924,608.00 (Sixty Two Million, Nine Hundred and Twenty- Four Thousand, Six Hundred and Eight Naira) deposited in the Registry of the Court of Appeal, including interest accrued thereon.

(d) An Order awarding special damages to the claimants.” (Page 13 of the Records).

The summary of Appellants’ claim at the Court below was that some of the receipts tendered by the Respondent (as claimant in Suit No. HOW/581/2007) were procured by fraud/forgery. Therefore, since those receipts which were obtained by fraud/forgery were the basis of the trial Court’s award of special damages in favour of the Respondent, those damages awarded by the trial Court in its judgment should be set aside for the obvious fraud.

The Respondent was served the originating processes of this suit (How/806/2012) on the 6th of November, 2017 and instead of filing a defence to contradict the allegations of the Appellant that some receipts relied upon by the trial Court were obtained by fraud/forgery, the Respondent filed a Notice of Preliminary Objection dated 22nd January, 2018, challenging, in limine, the jurisdiction of the lower Court to adjudicate over the Suit on the ground that the Suit at the lower Court was based on the issue of fraud/forgery, which had been determined by the Court of Appeal in its interlocutory ruling (on an interlocutory application filed by the Appellants) in CA/OW/146/2010, on 28/3/2013.

Appellants had filed a counter affidavit to the preliminary objection, in opposition. The parties filed written addresses and after taking arguments on the preliminary objection, the trial Court, in a considered Ruling, delivered on 24/5/2018, upheld the preliminary objection, in part, agreeing with the Respondent, that Appellants’ Suit as constituted, was caught up by the doctrine of issue estoppel. It also held that the suit was an abuse of the process of the Court. The lower Court proceeded to dismiss the suit and awarded cost of N350,000.00 (Three Hundred and Fifty Thousand Naira) to the Respondent as cost, against the Appellants.

That is the decision Appellant appealed against, being aggrieved and dissatisfied. They filed their Notices of Appeal on 25/5/2018 (pages 698 to 704 of the Records of Appeal). They filed that brief of arguments on 29/10/2018, which was deemed duly filed on 28/11/18, and donated five(5) issues for the determination of the Appeal, as follows:

1) Whether or not the issues in dispute in suit No. How/806/2017 and those in the Appellant’s Motion on Notice dated December 5, 2011, filed in Appeal No.CA/OW/146/2010 are the same and were fully finally determined by the Court of Appeal, such as to form a valid ground for a successful plea of issue estoppel and the suit be deemed an abuse of the process of the Court? (Ground 1,3 and 5)

2) Whether or not the Lower Court, was right to dismiss the Appellants’ suit, despite the ruling of the Court of Appeal of 28/03/2013 and the Lower Courts holding in its judgment that a judgment allegedly obtained by fraud can be set aside by a fresh action. (Grounds 4 and 7).

3) Whether or not the lower Court was correct to hold that its hearing of the suit would amount to an attempt to set aside a decision already confirmed by the Court of Appeal and extinguish the subject of an appeal currently pending before the Supreme Court? (Ground 6).

4) Whether or not the Appellants’ action can be said to be an after -thought? (Ground 2)

5) Whether or not in the circumstances of the suit at the Lower Court, the cost of N350,000 awarded in favour of the Respondent is not excessive and punitive? (Ground 8)

The Respondent filed her brief on 4/2/2019, which was deemed duly filed on 27/3/2019, she distilled 3 issues for the determination of the Appeal as follows:

1) Whether this Honourable Court can rightly proceed to determine this appeal in the absence of vital records of appeal.

2) Having due regard to the Ruling of this Honourable Court on 28/3/2010, in suit No.CA/OW/146/2010, whether the trial high Court was right when it reached the decision that this suit is caught up by issue estoppel, abuse of process and is an afterthought, (Grounds 1, 2, 3, 4, 5, 6 and 7)

3) Whether the trial Court exercised its discretion judicially and judiciously when it awarded N350,000.00 as cost to the Respondent, (Ground 5).

(At the hearing of the Appeal on 3/2/2020, the Respondent’s Counsel applied to withdraw the issue one)

Arguing the Appeal, Counsel for Appellants Mrs. Abisola Aarinola, on issues 1, 2 and 3 (which she argued together) said that the doctrine of issue estoppel per rem judicata has been judicially pronounced upon and established by our Courts in a plethora of cases, and most notably by the Supreme Court in Cole V. Jibunoh (2016) 4 NWLR (Pt.1503) 499 at 521, where it was held:

“Where a Court of competent jurisdiction has finally settled a matter in dispute between parties, neither party nor their privies may re-litigate that issue under the guise of a fresh suit, because the matter is said to be res-judicata."

Counsel listed the conditions that must co-exist for the plea of res-judicata to be established as stated in the said case of Cole V. Jibunoh (supra), namely:

“(a) The parties in the previous action and the present one must be same;

(b) The subject matter of the litigation in the previous action must be the same as the one in the present or new action;

(c) The claim in the previous action must be given the same as the one in the present action;

(d) The decision in the previous action must be given by a Court of competent jurisdiction;

(e) The decision given in the previous action must be final or it must have finally disposed of the rights of the parties."

Counsel stressed that the party seeking to rely on the plea must establish and/or fulfill all of the above stated conditions Okukuje V. Akwido (2001) 3 NWLR (Pt.700)318 - 319. He argued that that was not established in this case at hand; that the trial Court was wrong to hold that the suit was caught up by the doctrine of res-judicata, when she said that Appellants were estopped from re-litigating the issue of the procurement by fraud/forgery of several of the receipts tendered by the Respondent in the suit No. HOW/581/2997, upon which the trial Court based and gave its judgment and awarded damages, on the grounds that the same issue had been finally determined by a panel of this Honourable Court in its ruling, delivered on 28/3/2013, on Appellants’ interlocutory application dated 5/12/2011, made in Appeal No. CA/OW/146/2010.

Counsel said this suit HOW/806/2017, between Julius Berger Nigeria Plc & Anor V. Mrs. Philomena Ugo, is strictly that of the question of –

“Whether the Respondent Committed fraud/forgery in obtaining judgment at the trial Court in Suit No. HOW/581/2007?"

(Counsel referred us to reliefs sought in the suit (as earlier reproduced in this judgment). Counsel also referred us to the Appeal No.CA/OW/146/2010 to say that the issue therein as per the interlocutory application of 5/12/2011, was whether or not the Appellants had made a case for the favourable exercise of the Court’s discretion to grant them leave to adduce fresh evidence? She said that the Appeal No. CA/OW/146/2010 was entered on issues of negligence, as found by the High Court in its judgment delivered on 26/10/2009, as well as the issue of quantum of damages awarded, based upon the finding of negligence; she said that the Court of Appeal, delivered its judgment on the substantive appeal on 5/2/2015 and dismissed same, while allowing in part, the Respondent’s Cross Appeal; that the judgment of the Court of Appeal did not contain any a valuation of issues of fraud/forgery, neither did it make any declarations in respect of it.

Counsel said Appellants’ interlocutory application, referred to in paragraph 4.10 of their brief, was heard, refused and struck out on the ground that the evidence which Appellants were seeking leave to bring in would amount to substituting or replacing the evidence that was tendered at the trial Court and evaluated by the said Court; that the rationale behind the Court of Appeal decision to refuse the application was based on the fact that the facts of the fraud/forgery committed by the Respondent and discovered by the Appellants were not properly pleaded at the trial Court; that issues were joined on them, but the trial Court did not get the opportunity to hear and evaluate the said facts and evidence. Counsel referred us to the holding of the Appeal Court on the CA/OW/146/2010, where it was held, on page 36 of the judgment, as follows:-

“It is undoubtedly clear from the state of pleadings of the parties at the trial Court, no issue of fraud or forgery was raised therein by the Appellants/Appellants. That is, fraud was not an issue pleaded or submitted for adjudication The case of the Appellants/Applicants at the Trial Court clearly excludes any evidence of fraud/forgery and it is not pleaded, the Court of Appeal cannot consider the reception of the evidence without an amendment of the pleadings.”

Counsel then said that a close examination of the issues highlighted above would reveal that the issue of fraud/forgery, as brought for determination in suit No. HOW/806/2017 has not been determined by any Court of competent jurisdiction prior to the suit (HOW/806/2017); that the issue of fraud/forgery was not placed before the Court in HOW/581/2007 as confirmed by the Court of Appeal in the above ruling. As such, Counsel said the trial Court in HOW/806/2017, made no findings or declarations on it in its judgment, delivered on 26/10/2009; she said that the issue of fraud/forgery was also not part of the issues for determination by the Court of Appeal, in the substantive appeal; that issue of fraud/forgery was only brought up, in passing, as the reason for the leave that was being sought in the interlocutory application filed by Appellant on December 5, 2011, but was not itself the issue to be decided by the Court of Appeal.

Counsel added that the consideration of the interlocutory application (CA/OW/146/10) which centred on whether or not the Court should exercise its discretion and allow the evidence of fraud/forgery to be brought in at the appeal stage, (and which the Appeal Court refused), cannot even be looked at as same was raised in an interlocutory application, not in the substantive case/appeal; she said that the Courts are barred from delving into the merits of substantive issues at the point of considering interlocutory application EFP Co. Ltd v N.D.I.C. FWLR (Pt. 367) 793 at 812.

Again, Appellants’ Counsel said that the Court of Appeal, in considering their interlocutory application for leave to adduce further fresh evidence, did not consider the issue of fraud/forgery as issue for determination, and could fraud/forgery could have been proved were not have considered same, because the facts and evidence by which fraud/forgery could have been proved were not placed before the Court in the Appellants’ motion of 5/12/2011.

Counsel said the trial Court erred in its evaluation of the issues, when it held that the aim of the Appellants’ interlocutory application was to set aside the judgment on appeal on grounds of fraud/forgery. Rather, that it was for leave/permission to adduce the evidence of fraud/forgery, which evidence would then have assisted the Court of Appeal in the determination of the substantive appeal, to make a declaration on the issue of fraud/forgery as relates to the judgment of the trial Court in suit No. HOW/581/2007, as the issue of fraud/forgery, being a substantive issue, could only have been dealt with in the substantive appeal and not in an interlocutory application.

Thus, counsel said the issues in this case (HOW/806/2017) and the issues in CA/OW/146/2010, are not the same and as such cannot form a valid ground for the plea of res jurdicata. She added that issues of fraud/forgery, alleged against the Respondent, were not determined at the trial Court in Suit No. HOW/581/2007, neither were they considered and determined in the substantive appeal in CA/OW/146/2010, nor in the interlocutory application for leave to adduce fresh evidence in the said CA/OW/146/2010.

Counsel said the trial Court even confused the Ruling in the interlocutory application to adduce fresh evidence in CA/OW/146/2010, delivered on 28/3/13, with the trial judgment of the Court of Appeal in that Appeal, delivered on 5/2/2015. He argued that the Ruling of 28/3/13, in CA/OW/146/2010, was not a final decision of the Court of Appeal, on the issue to lie plea of res judicata, because it did not finally and fully resolve the issue of commission of fraud/forgery. He added that even in the final judgment of 5/2/2015 in CA/OW/146/2010, the Court of Appeal did not make any pronouncements or findings on whether the Respondent did, indeed, commit fraud/forgery in obtaining the judgment in suit No. HOW/581/2007, therefore, even that final judgment of the Court of Appeal did not touch on issues of fraud/forgery.

Counsel also argued that the procedure adopted by Appellants to seek redress was proper, that is, by means of HOW/806/2017 seeking to nullify, the decision in HOW/581/2007, on grounds [of] being obtained by fraud/forgery, instead of filing fresh action to establish fraud/forgery by the Respondent. He cited authorities to say that a party has the vires to file a fresh action urging the Court to set aside a judgment obtained by fraud/forgery or deceit. Igwe V. Kalu (2002) 4 NWLR (Pt. 787) 453; Abacha V. Kurastic Nig. Ltd (2014) LPELR - 22703 (CA).

Counsel said the Trial Court was wrong to hold that Appellants, having appealed to the Court of Appeal in CA/OW/146/2010, against the decision in HOW/581/2007, should have stayed on that line of procedure, and not file fresh suit to set aside the same judgment (HOW/581/2007) appealed against in CA/OW/146/2010.

Counsel relied on Vulcan Gases Ltd V. Gesellchaft Fur Industries & Anor. (2001) 9 NWLR (Pt.719) 610 - wherein, she said the Supreme Court held that a judgment obtained by fraud can be set aside by either proceeding on appeal or by filing a fresh action.

Counsel further argued that, even where the judgment of a Trial Court has been confirmed by an Appellate Court, if it is discovered and established later on that the judgment at the Trial Court was obtained by fraud or upon a fraudulent set of facts, the said judgment is still liable to be set aside by a Court, such as the trial Court, despite the confirmation or affirmation by the Appellate Court. She relied on the authority of their Lordships in the decision in Duchess of Kingstons case (1775 - 1802) All ER. Rep. 623 per De Grey CJ at pages 629 - 630:

“Fraud is an extrinsit, collateral act, which vitiates the most solemn proceedings of Courts of Justice. Lord Coke says it avoids all judicial acts, ecclesiastical or temporal.”

She added that such vitiating factor vitiates the judgment and affects the foundation of the judgment, robbing it of its potency, along with all subsequent orders or directives made, based on it, voiding it abinitio; she relied on UAC V. Macfoy (1961) 3 All ER1169 –“one cannot put something on nothing and expects it to stand, it will collapse.”

Counsel further disclosed that the suit No. HOW/581/2007 was based on negligence and damages flowing therefrom; that the subsequent appeal (No. CA/OW/146/2010) was upheld by the Court of Appeal, and a subsequent appeal to the Supreme Court was pending; that issue of fraud/forgery was not the question before the Supreme Court in the appeal.

She urged us to resolve the issues for Appellants, saying that the decision of the Supreme Court in the pending Appeal at the Supreme Court (No.SC/84/2015) will not conflict with the outcome of the trial in suit No. HOW/806/2017.

On issue 4, Counsel said the action of the Appellants (suit No. HOW/806/2017) was not an afterthought, as the issues in HOW/581/2007, are verifiable from CA/OW/146/2010 and from this suit. He repeated some of the arguments earlier made on the issues 1 to 3.

On issue 5, Counsel said the sum of N350,000.00, awarded as cost, was excessive, and urged us to interfere with it, relying on Oyedeji V. Akinyele (2001) FWLR (Pt.77) 970; Olokunlade & Anor V. Samuel & Ors (2010) LPELR - 3942 CA; Citibank Nig Ltd & Anor V. Ikediashi (2014) LPELR - 22447 CA; ACB Ltd &Anor V. Ajugwo (2011) LPELR - 3637 CA; UBN & Anor V. Nwaokolo (1995)6 NWLR (Pt.400)127.

He urged us to also resolve the issues 4 and 5 for Appellants, and to allow the Appeal.

The Respondent’s Counsel, Emeka Ozoani Esq., SAN (who settled the brief), arguing issue 2, said the Trial Court had reached the right decision, that the suit was caught up by issue estoppel, having regard to the Ruling of this Court in Appeal No.CA/OW/146/2010, delivered on 28/3/2010 (sic) (28/3/2013).

The Respondent reproduced the order sought by the Appellants in their motion of 5/12/2011 in CA/OW/146/2010, namely:

“An order granting leave to the Appellants/Applicants to adduce further evidence in this Appeal by affidavit."

And the grounds for seeking the application were:

1) After the delivery of the judgment of the Lower Court which judgment form the basis of this appeal, and upon the Lower Court granting a conditional stay that the judgment be deposited in Court, the Appellant/Applicant conducted routine investigations to ascertain the authenticity of most of the documents/receipts tendered by the Respondent in the trial of the suit before the lower Court.

2) That further to the above, it was discovered that a whole lot of the documents/receipts relied upon the Respondent before the lower Court were forged and non-existent.

3) The Appellants/Applicants subsequently reported the matter to the police and the police formally investigated the matter and arraigned the Respondent before the Magistrate Court, Owerri, Imo State on charge of forgery in charge number OW/373C/2011: COMMISSIONER OF POLICE VS PHILOMENA UGO. (Page 44 of the Records of Appeal).

Counsel disclosed that the above charge was struck out by learned Chief Magistrate for being an abuse of the Court process (as observed by the Trial Court on page 686 of the Records of Appeal); he said that the Appeal Court, on 28/3/2013, held (dismissing the application) thus:

“On the whole, it is my firm view that the evidence sought to be adduced as fresh evidence are at best substitutive evidence and this Court has no power to admit such substitutive evidence. Substantive appeal is now adjourned to 17th April, 2013 for hearing.”

Counsel said Appellants did not appeal against that Ruling of 28/3/2013. And that, on 5/2/2015, the substantive appeal was determined and the Appeal dismissed for lacking in merit, while Respondent’s Cross Appeal succeeded in part. He said that Appellants had appealed against the said final judgment of the Court of Appeal in CA/OW/146/2010, and further filed a motion at the Supreme Court for stay of execution of the judgment (pages 567 to 572 of the Records of Appeal).

Counsel referred us to prayer (2) and ground (3) of the said motion for stay at the Supreme Court:

“Prayer 2:

An order releasing forthwith to the 1st Appellant/Applicant, the total judgment sum of N62,924,608.00 (Sixty Two Million Nine Hundred and Twenty Four Thousand, Six Hundred and Eight Naira), deposited in the Registry of the Court of Appeal pursuant to its ruling made on February 28,2011.

Ground 3:

The total monetary awards by the Trial Court and Court of Appeal amount to about N700,000.000.00 (Seven Hundred Million Naira)."

Counsel said that after about 9 years of the judgment of the trial Court, Appellants brought the present suit HOW/806/2017, seeking to impeach the judgment of the trial Court in the Suit HOW/581/2007, despite the pendency of the appeal at the Supreme Court, and after the unsuccessful attempt at the Court of Appeal to change the judgment by resort to seeking to adducing fresh evidence, that the judgment was obtained by fraud/forgery!

Counsel agreed that a party can seek to set aside a judgment on ground of fraud, by either an appeal against that judgment, or by bringing of fresh action to set it aside (Vulcan Gases Ltd V. Gesellschaft Fur Industries A.G. (2001) 9 NWLR (Pt.719) 610 at 668, but he added that, after Appellants had opted for the former (appeal against the judgment), unsuccessfully (or when that process is still on), cannot take to the other option of filing fresh action at the High Court to set aside the same judgment!

He submitted that the principle of estoppel would apply, as held by the trial Court, to stop Appellants from re-litigating the issue. He relied on the case of ODJEVWEDJE & Anor V. ECHANOKPE (1987) 1 NWLR (Pt.52) 632 at 654 - 655 on the principles the two kinds of estoppel. He also relied on Ntuks V. NPA (2007) All FWLR (Pt.387) 809, where, he said a similar scenario, as in this case, played out.

He submitted that the parties in this case are the same with those of the previous suit (HOW/581/2007); the issues are the same; that the ruling of the Court of Appeal (CA/OW/146/2010) had determined the issues to finality (which is the subject of matter further appeal to the Supreme Court).

Counsel further relied on the case of Ntuks and Ors V. NPA (supra) to say that raising the issue of fraud by the Appellants as in the interlocutory application in CA/OW/146/2010 and in this case HOW/806/2017 was an after-thought, and urged us to resolve the issue against Appellants.

On issue 3, whether the cost of N350,000 awarded was excessive, Counsel answered in the negative and said that the issue became merely academic as Appellants had paid the cost already, while the Appeal No. CA/OW/146/2010 was pending. He relied on the case of ECOBANK Vs HONEYWELL FLOUR MILLS (2018) LPELR - 45124 SC. Counsel also relied on Section 14(1) of the Court of Appeal Act to say that Appellants cannot bring a ground of appeal to challenge the cost awarded against it. He further relied on SPDC Vs Registrar of Business Premises, Abia State (2015)3 CAR 433 at 451.

Counsel also said that the general principle of law is that cost follows events; that a judgment creditor is always awarded cost and the same is at the discretion of the Court, to be exercised judicially and judiciously. He said that the Trial Court had exercised its discretion property and relied on Julius Berger Nig Plc V. IGP & Ors (2018) LPELR - 46127 CA.

Counsel urged us to resolve the issue too against Appellant, and to dismiss the Appeal.

RESOLUTION OF THE ISSUES

I think the two remaining issues for the determination of this Appeal, distilled by the Respondent, are more apt and good summaries of the five issues donated by the Appellant.

Appellants’ issues 1, 2, 3 and 4 are properly located in the Respondent’s issue 2 (which I rephrase thus):

“Having regard to the Ruling of this Honourable Court, delivered on 28/3/2013 in Appeal No. CA/OW/146/2010, whether the Trial Court was right to hold that Appellants’ suit No. HOW/806/2017 was caught - up by issue estoppel and was an abuse of the Court process, and was an afterthought.” (Grounds 1, 2, 3, 4, 5, 6 and 7 of the Appeal).

Of course, the issue 5 by Appellant agrees with the Respondent’s issues 3.

Was the Suit No. HOW/806/2017 caught-up by issue estoppel, abuse of the Court process and an afterthought? The reliefs sought by the Appellants in suit No. HOW/806/2017 have already been reproduced in this judgment, as follows:

“(a) A declaration that the judgment of this Honourable Court in Suit No. HOW/581/2007 delivered by Hon. Justice N.B. Ukoha on October 26, 2009, was obtained by fraud.

(b) An order setting aside the judgment of this Honourable Court in Suit No. HOW/581/2007, delivered by Honourable Justice N.B. Ukoha on October 26, 2009, which was obtained by fraud Alternatively to A & B;

An Order setting aside the part of the judgment of Honourable Justice N.B. Ukoha which awarded to the claimant in suit NO.HOW/581/2007 in the sum of N28,516,680.00 (Twenty Eight Million Five Hundred and Sixteen Thousand Six Hundred and Eighty Naira) as special damages for Nigerian treatment and the sum of 108,00.000 (sic) Lakh for her overseas treatment for having been obtained by fraud.

(c) An Order for refund of the sum of N62,924,608.00 (Sixty Two Million, Nine Hundred and Twenty- Four Thousand, Six Hundred and Eight Naira) deposited in the Registry of the Court of Appeal, including interest accrued thereon.

(d) An Order awarding special damages to the claimants.” (Page 13 of the Records).

It is also clear that the suit No. HOW/581/2007 was between the same parties in this case (HOW/806/2017) and in this Appeal, as well as in Appeal No. CA/OW/146/2010 (See pages 3, 71 and 118 of the Records of Appeal, for the statements of claim, in HOW/806/2017, HOW/581/2007 and the Ruling in CA/OW/146/2010, respectively).

There is also no dispute that the decision in HOW/581/2007 was the subject matter of Appeal No.

CA/OW/146/2010, which has been determined, finally, by this Court in favour of the Respondent on 5/2/15, and Appellants’ appeal dismissed. Before the final determination of the Appeal No.CA/OW/146/2010 on 5/2/15, Appellants had sought this Court (Court of Appeal) for “an Order granting leave to the Appellants/Applicants to adduce further evidence in this appeal by affidavit evidence.” The further evidence which Appellants wanted to adduce, if granted the leave, was that:

“1) After the delivery of the judgment of the Lower Court, which judgment form the basis of this appeal, and upon the Lower Court granting a conditional stay that the judgment (debt) be deposited in Court, the Appellants/Applicants conducted routine investigations to ascertain the authenticity of most of the documents/receipts tendered by the Respondent in the trial of the suit before the lower Court.

2) That further to the above, it was discovered that a whole lot of the documents/receipts relied upon by the Respondent before the lower Court were forged and non-existent.

3) The Appellants/Applicants subsequently reported that matter to the police and the police formally investigated the matter and arraigned the Respondent before the Magistrate’s Court, Owerri, Imo State on a charge of forgery on charge Number OW/373C/2011; COMMISSIONER OF POLICE VS PHILOMENA UGO." (See pages 119 of the Records).

There is also consensus by the parties that this Court, on the 28/3/2013, refused the application, and the same was dismissed. This Court held:

“The law is settled that a Court has a duty to prevent the improper use of its machinery and will not allow it to be used as a matter of vexation and oppressive behaviour in the process of litigation. See BenaPlastic Industries Ltd V. MV "ANATOLIY VASILVEY" & ORS (1999)10 NWLR (Pt.624) (20).

Given the background facts of this case, even though Exhibit A, the charge sheet against the Respondent, was founded on the subject of this appeal, the instant application to adduce fresh evidence is not an abuse of Process of Court, in that the Appellants/Applicants are not litigating again on this same issue which had already been litigated upon between the Appellants and the Respondent based upon facts on which a decision had already been reached. The case been (sic) prosecuted at the Magistrate Court against the Respondent is on the allegation of fraud/forgery, which we hold is not an issue before this Court.

On the whole, it is my firm view that the evidence sought to be adduced as fresh evidence are at best substitutive evidence and this Court has no power to admit such substitutive evidence, more over fraud/forgery was not part of the pleadings of the parties at the trial Court and neither was it an issue submitted to trial Court for adjudication. On the whole, this application lacks merit and it is hereby dismissed.” (See pages 155 to 156 of the Records).

The above shows that the attempt by Appellants to introduce fresh issues, alleging fraud and forgery by the Respondents to obtain the judgment in HOW/581/2007, was resisted by the Respondent, and refused by the Court of Appeal, especially as Appellants in their pleadings at the trial Court in HOW/581/2007, did not plead the alleged fraud/forgery. See the Ruling of 28/3/2013 in CA/OW/146/2010. Having therefore failed to plead the alleged fraud/forgery in their statement of defence in HOW/581/2007, and the case adjudged in favour of the Respondents, and Appellants having also failed in their attempt to invoke/introduce the alleged fraud/forgery at appeal level, to impeach the said judgment or to manipulate the legal process (by use of the police to charge the Respondent for fraud/forgery in Charge No. OW/373C/2011) wrongly, Appellants, in my view, was embarking on gross abuse of the judicial process, as the trial Court held, when they took out this suit (HOW/8O6/2017), seeking “declaration that the judgment in suit No.HOW/581/2007, delivered by Honourable Justice N.B. Ukoha on October 26, 2009, was obtained by fraud (and) an order setting aside the judgment for having been obtained by fraud.”

It is more so, and in my view, a demonstration of crass impunity and mischief by Appellants and their Counsel to adopt this strange procedure, after the unsuccessful attempt to introduce that line of evidence of fraud/forgery at Appeal stage into the suit failed as per the Ruling of this Court in CA/OW/146/2010, delivered on 28/3/2013! Appellant never appealed against that Ruling! Also the attempt to implicate the Respondent in the Magistrate’s Court in Charge No.OW.373C/2011 failed, being adjudged abuse of the Court process (Page 686 of the Records). And the substantive Appeal in CA/OW/146/2010, also failed, as the Respondent’s judgment in HOW/581/2007 was upheld and affirmed!

Appellants are currently in the Supreme Court, on Appeal, against the said decision of this Court, reached on 5/2/15 affirming the rights of the Respondent in the said suit No. HOW/581/2007. But rather than pursue that further appeal at the Supreme Court and/or wait for the determination of same.

Appellants elected to file this fresh action (HOW/806/2017), over seven years after taking the option of appeal to set aside the judgment in HOW/581/2007, to impeach the same judgment of the trial Court in HOW/581/2007, determined since 2009!

I lack appropriate words to describe the depth of the depravity, impunity and abuse of the Court process, displayed by Appellants and their Counsel in this case! No lawyer worth his name should engage in this type of practice, which appears as a deliberate act of mischief to frustrate, annoy and oppress a successful party in litigation, pretending to pursue a Court process. In the case of Edjerode V. Ikine (2001) LPELR - 1479 SC, it was held:

“The law is that abuse of Court process in regard to multiple actions between the same parties on the same subject matter may arise when a party improperly used judicial process to the irritation, annoyance and harassment of his opponent, not only in respect of the same subject matter, but also in the same issues in other actions.” See also Okafor V. AG Anambra State (1991)6 NWLR (Pt.200) 659 at 681; Saraki V. Kotoye (1992) 9 NWLR (Pt.264) 156.

In Globe Motors Holdings Ltd Vs Honda Motor Co. Ltd (1998) 5 NWLR (Pt.550) 373 at 381, the Supreme Court said:

“An instance of such (abuse) “is in form of vexatious and oppressive actions” When an action is instituted deliberately to circumvent the cause of justice and to bring the judicial process into ridicule and contempt “Any action or course of conduct that is seen designed to introduced anarchy into the judicial system must be dealt with appropriately”. See also Dingyadi V. INEC (No.2) (2010)18 NWLR (Pt.1224) 154 SC; (2010) LPELR - 952 SC.”

As argued by the learned Senior Counsel for Respondent, a party who seeks to set aside a judgment of the Court, for having been obtained by fraud, can do so by either of two ways, namely by means of appeal against the said judgment, or by means of a fresh action (for motion in the same Court) seeking to set aside the said judgment. See Vulcan Gases Ltd V. Gesellschaft Fur Industries A.G. (2001) 9 NWLR (Pt.719) 610 at 668.

The party, in my opinion, cannot take the two options simultaneously, or after the failure of the other. The above scenario seemed to have played out in the case of Onwuneme & Anor V. Customary Court Mbawsi & Ors (2018) LPELR - 44474 CA, where Appellant, while pursuing an appeal against a decision of the Customary Court at the Customary Court of Appeal, also filed a motion at the High Court, seeking to quash the said same judgment of the Customary Court. We held as follows:

“Surprisingly, Appellants abandoned their appeal at the Customary Court of Appeal and went on a frolic to the High Court, with what I consider a ridiculous prerogative writ to quash a legitimate decision of the Customary Court, which they were also appealing against in CC/UM/A/5/2002 at the Customary Court of Appeal formally. I think that was a gross abuse of the Court process. Appellant should have pursued the appeal against that decision of the customary Court of Appeal, or make the decision of the Customary Court of Appeal the subject matter of the prerogative writ as was the case of CCA Edo State V. Aguele &Ors (supra).”

The prerogative writ was an abuse of the Court process and was dismissed. That same fate was to be-fall this case. Of course, the issue of estoppel came to the fore, as rightly held by the learned trial Court, when it held:

It is clear that the plaintiff’s had sought to lead evidence on appeal, on forgery of the said receipts to impugn or set aside the judgment... Having sought to set aside the judgment by way of appeal and was so refused, they cannot turn round to attempt to actualize the said desire by this action. The plaintiffs are bound by the said decision of the Court of Appeal in the said application. This is based on the trite principle of law, that a party is precluded from contending the contrary or opposite of any specific point, which, having once been distinctly, put in issue and has with certainly and solemnity, been determined against him. There is no appeal against the said decision of the Court of Appeal over the said application, and my attention had been drawn to the fact that same has been set aside. The objection succeeds on this score and I hold that the plaintiffs are estopped from filing this action, seeking to set aside the judgment of the High Court in HOW/581/2007 on grounds of fraud, premised on the said same substitutive evidence. (See pages 691 and 693 of the Records of Appeal).

The case of Ntuks & Ors V. NPA (2007) All FLWR (Pt.387) 809 is quite instructive, on issue estoppel and the principles of res-judicata, generally, when the Supreme Court said:

It is now firmly settled that, where a Court of competent jurisdiction has settled by final decision, the matter in dispute between parties, none of the parties or their privies may re-litigate that issue again by bringing a fresh action. The matter is said to be resjudicata. The estoppel created is one by record, inter-parties. Thus, a successful plea of resjudicata ousts the jurisdiction the jurisdiction of the Court in the proceedings in which it is raised.

See the case of Ukaegbu & Ors V. Ugoji & Ors (1991) 6 NWLR (Pt.196) 127; Osunrinde & Ors V. Ajamogun & Ors (1992) 6 NWLR (Pt.246)156 at 183 - 184 and Alhaji Ladimeji & Anor Vs Salami &Ors (1998) 5 NWLR (Pt.548) 1 at 13. The principle of resjudicata 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 and for all of the matters decided, so that they cannot after wards be raised for re-litigation between the same parties or their privies. See Agu V. Ikewibe (1991)4 SCNJ 56.

That, of course remains the law, and no party is expected to re-litigate a suit which had been heard and determined finally by a competent Court by any guise simply because he may have discovered something which he failed to employ at the time the case was heard which if applied, would have tilted the balance of the case to favour him. Appellants’ attempt to resort to claims of fraud/forgery against the Respondent, for which they sought to lead fresh evidence on appeal (CA/OW/146/2010), to change the judgment of Court in HOW/581/2007 clearly shows the motive for embarking on this ill-fated suit HOW/606/2017. They (Appellants) are not happy with the judgment in HOW/581/2007 and want it frustrated and defeated, at all cost! Of course, having taken part in the trial of the suit (HOW/581/2007) to conclusion, and having also used Appeals to defeat that decision unsuccessfully thus far, Appellants must bow to the outcome of the existing judicial process in the case, which are binding on them. See Tukur V. Umar UBA & Ors (2012) LPELR - 9337 SC:

“Generally, estoppel means a bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true. A bar that prevents the re-litigation of issues." Per Ariwoola JSC

There would be no end to litigation, if a party is allowed to re-open his cases, already tried to finality, each time he comes to see what he would use to tilt the outcome of the case in his favour, if used, which he failed to use. I therefore resolve the issue one against the Appellant.

On issue 2, which quarrels with the award of N350.000 as cost against Appellants. I think the Respondent’s Counsel stated the law partly when he argued that Appellants’ have no right of appeal against order of cost by the trial Court. Section 14(1) of the Court of Appeal Act, 2004, provides as follows:

“Where, in the exercise by the High Court of a State or, as the case may be, the Federal High Court of its original jurisdiction, an interlocutory order or decision is made in the course of any suit or matter, an appeal shall with the leave of that Court or of the Court of Appeal lie to the Court of Appeal, but no appeal shall lie from any order made ex-parte or by consent of parties, or relating only as to cost.”

That is a throwback to Section 241 (2)(c) of the 1999 Constitution of the Federal Republic the 1999 Constitution of the Federal Republic of Nigeria as amended which says:

“2) Nothing in this section shall confer any right of appeal-

c) without the leave of the Federal High Court or a High Court or the Court of Appeal, from a decision of the Federal High Court or High Court made with the consent of the parties or as to cost only.”

See the case of SPDC Vs Registrar of Business Premises Abia State (2015) LPELR - 24285 CA; (2015)3 CAR - 433 at 451, where it was held:

“Thus, apart from the Appellant trying to preempt the Respondent’s case by raising that issue, it also lacks power to raise the complaint as that would be an attempt to fault ex-parte order of the Trial Court, or appeal against it contrary to Section 14(1) of the Court of Appeal Act, 2004, which says –“but no appeal shall lie from any order made ex-parte, or by consent of the parties or relating only to cost.”

It would appear the bar applies only where the appeal is as to cost only awarded by the trial Court. Thus, where the complaint against cost is one of the grounds of the appeal or issue, therein, I think the Appellate Court can entertain it.

But the issue of cost to be awarded is always at the discretion of the trial Court (or Court making the award) and can only be faulted, if it was not exercised judicially and judiciously. See Mbonu & Ors V. Nwagbara & Ors (2018) LPELR - 44711 CA; Nwawka V. Adikamkwu (2014) LPELR - 22927 CA Shanusi &Ors V. Odugbemi & Anor (2017) LPELR 43377 CA; Saeby v Olaogun, Akinbobola V. Plisson Fisko Nig. Ltd (1991)1 NWLR (Pt.167)270 (SC).

I do not see any reason to disturb the cost awarded by the trial Court, I resolve this issue too against the Appellants.

I see no merit in this appeal, which for me, is a gross abuse of the Court process, an after-thought and a violation of the cherished principles of res-judiciata, particularly, issue estoppel.

I dismiss the Appeal and award cost of Five Hundred Thousand Naira Cost (N500,000.00) against the Appellants, payable to the Respondent.

**AYOBODE OLUJIMI LOKULO-SODIPE, J.C.A.:**

I agree.

**IBRAHIM ALI ANDENYANGTSO, J.C.A.:**

Having gone through the process filed in this appeal, and having been privileged to read in draft the judgment of my Learned Brother I.G. Mbaba JCA, just delivered, I agree in toto with his reasoning and conclusions.

I have nothing further to add. The appeal lacks merit and is equally dismissed by me, abiding by the order of cost therein made.