**RAPHAEL AGU**

**v.**

**CHRISTIAN OZURUMBA IKEWIBE**

SUPREME COURT OF NIGERIA

FRIDAY, 19TH APRIL, 1991.

SC.107/1988

**LEX (1991) - SC.107/1988**

OTHER CITATIONS

2PLR/1991/24 (SC)

**BEFORE THEIR LORDSHIPS**

ANDREWS OTUTU OBASEKI, J.S.C. (Presided)

ADOLPHUS GODWIN KARIBI-WHYTE, J.S.C. (Read the Leading Judgment)

SAIDU KAWU, J.S.C.

PHILIP NNAEMEKA-AGU, J.S.C. (Dissented)

ABUBAKAR BASHIR WALI, J.S.C.

**BETWEEN**

RAPHAEL AGU – Appellant

AND

CHRISTIAN OZURUMBA IKEWIBE – Respondent

**ORIGINATING COURT**

COURT OF APPEAL

HIGH COURT OF EAST CENTRAL STATE

**REPRESENTATION**

J.H.C. OKOLO - for the Appellant

Chief I. TAGBO NWOGU - for the Respondent

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

REAL ESTATE/LAND LAW:- Dispute over ownership of land – Where submitted to arbitration – How proved - Whether the decision of arbitration panel can operate as an estoppel in relation to the land in dispute between the parties

ALTERNATIVE DISPUTE RESOLUTION – ARBITRATION:- Customary arbitration – Meaning of and recognition under Nigerian legal system – Whether operation ousted by Section (6) (5) of the Constitution – Whether only form allowed in Nigeria is to the extent and manner permitted under the Arbitration Act

ALTERNATIVE DISPUTE RESOLUTION – ARBITRATION:-Distinction between statutory arbitration and customary law arbitration – Common elements – Legal basis of all arbitrations - Whether outcome of arbitration has the same authority as the judgment of a judicial body – Whether will be binding on the parties and thus create an estoppels

ALTERNATIVE DISPUTE RESOLUTION – ARBITRATION AND NEGOTIATION:- Distinction between a binding arbitration and a negotiation for settlement – Relevant considerations

ALTERNATIVE DISPUTE RESOLUTION – ARBITRATION:- Customary arbitration – Proof of voluntarily submission – Where party is shown to have been summoned to participate in proceedings – Whether antithetical to voluntary submission which is of the very essence of a valid arbitration agreement

ALTERNATIVE DISPUTE RESOLUTION – ARBITRATION:- Arbitral proceedings – Distinction between an arbitrator and a court – Summonses – Whether an arbitrator does not have inherent or statutory power of issuing summonses like a court

CONSTITUTIONAL AND PUBLIC LAW:- Bodies exercising judicial bodies – Distinction between a court of law and an arbitrator/arbitral panel – Power of the High Court of a State which has unlimited jurisdiction under section 236 of the 1979 Constitution to adjudicate on all civil and criminal matters relating to legal rights, obligations, power, duty, interest, privilege or claim as well as penalty, forfeiture, punishment or other liability – Whether it is only such High Courts and other courts of competent jurisdiction that have the power to cause summonses to be issued to compel appearance of parties before them – Whether arbitration bodies have no such powers - Where a party to a dispute has to be summoned before an arbitration body which proceeds to hear the dispute and thereafter pass a judgment in favour of one of the parties as if it were a judicial body – validity of outcome

CONSTITUTIONAL LAW:- Existing law - Meaning of under the Constitution 1979 - Section 274(3) & 4(b) of the Constitution 1979 – Saving of customary law as existing law – Effect

CONSTITUTIONAL LAW:– JUDICIAL POWERS:- Freedom of disputing parties to settle their difference in any manner acceptable to them including Customary law arbitration – Whether not an exercise of the judicial power of the Constitution - Whether inconsistent with S. 6(1) and S. 6(5) of the Constitution which vest in the Courts adjudicatory powers

CONSTITUTIONAL AND PUBLIC LAW:- Judicial authority - whether persons exercising judicial functions in accordance with native law and custom and are duly authorised to adjudicate upon disputes among their community are deemed to exercise judicial powers – Constitutional validity - Sections 6(1) and (5) of the Constitution of 1979

CUSTOMARY LAW:– Meaning of – Status as an existing law by virtue of section 274(3), 4(b) - Customary arbitration - Definition of – How proved

CUSTOMARY LAW – ARBITRATION:- Customary law arbitration – Elements of – When deemed binding – Stage of proceedings at which either party thereto is free to resile or withdraw

CUSTOMARY LAW:– Meaning – Need to distinguish existing native law and custom from ancient custom with which present generation cannot be linked – Implication for the definition of customary arbitration

ETHICS – LEGAL PRACTITIONER:- Brief handling – Duty of competence - Need for Counsel to ensure always that the formulation of issues for determination is not so prolix and proliferate as to be more in number than the grounds of appeal on which they are based – Effect of failure thereto on client’s case

ETHICS – LEGAL PRACTITIONER:- Handling of appellate issues – Formulation of issues and ground of appeal – Duty to demonstrate competence thereto – Attitude of court to failure thereto

**PRACTICE AND PROCEDURE ISSUES**

APPEAL - Formulation of issues – Purpose of – Need for same to be based on Grounds of Appeal - Whether an appellant can be heard on a point of law not raised in the court below - Duty of an appellate Court

APPEAL:- Formulation of issues for determination – Need for same not to be formulated as abstract legal issues without concrete reference to the facts of the particular case -

EVIDENCE – When the principle of res judicata applies – Relevant considerations

EVIDENCE:- Burden of proof – Where party sets up the existence of a valid arbitral decision as ground for pleading res judicata - Onus of proving validity of the claimed arbitration – On whom lies

JUDGMENT – COURT:- Principle of res judicata – When applicable – Conditions precedent – Effect

JUDGMENT – COURT:- Decision of court – When will operate as estoppel per rem judicatam or issue estoppel – Relevant considerations

PLEADINGS:- Fundamental rule of civil procedure that parties are bound by their pleadings – Whether a party will only be permitted to lead evidence in support of his pleadings - Evidence which is contrary to or not supported by the pleadings – Whether goes to no issue

PLEADINGS - EVIDENCE:- Rule that a Plaintiff is entitled to lead evidence on a point raised in the Defendant's pleading – Whether an exception to the general rule precluding a party from leading evidence on any matter not covered by his pleading – When not applicable

PLEADINGS:- Purpose of pleadings - What a good pleading of customary arbitration should aver - Order 18 rule 7 of the R.S.C., 1982 – Effect

PLEADINGS:- Formulation of statement of claim or defence – Need to include material details necessary to constitute a complete cause of action or ground for defence

PLEADINGS:-Rule that it is only those material facts which a party has averred in his pleading that he is entitled to give evidence upon at the trial - Any evidence on a fact not pleaded or which is at variance with the averments in the pleadings – Whether goes to no issue and should be disregarded by the court

PLEADINGS - AVERMENTS:-What a person who is relying on arbitration under customary law needs to aver in his pleading – Need for the pleading to aver all the elements of a valid arbitration under customary law – Effect of failure thereto

WORDS AND PHRASES:- "Existing Law", “Arbitration” – “Customary Arbitration” – “Summoned” - Meaning of

WORDS AND PHRASES:- “Material' – Meaning for the purpose of formulating a complete cause of action or good ground for defence

**MAIN JUDGEMENT**

**KARIBI-WHYTE, J.S.C. (Delivering the Leading Judgment):**

The main contention in this appeal as can be gathered from the grounds of appeal filed and the issues for determination formulated by the parties concerns the question of the pleading in paragraph 8 of the statement of claim relating to arbitration at customary law, and whether the decision by the arbitration panel can operate as an estoppel in relation to the land in dispute between the parties. In other words the core of issues to be determined are concerned only with the nature of the pleading claiming the verdict of customary arbitration, and whether such verdict constituted an estoppel.

Like most disputes relating to land held under customary law, the questions of traditional history, evidence of acts of possession, ancient and recent were canvassed in support of the claims of ownership and declaration of title, trespass in the court of trial. Specific findings were made in that court. Similarly the issue of the arbitration of April, 1970 in accordance with the customary law was relied upon by the Plaintiff. At the conclusion of the hearing and addresses of learned counsel, the learned trial Judge on 5th June, 1974 rejected all the grounds relied upon by the plaintiff add dismissed all the claims in their entirety. Plaintiff gave notice of appeal and filed same on the 30th August, 1974. Unfortunately before the appeal was set down for hearing both the original plaintiff and defendant died. On the application of the present respondent, the oldest surviving son of the plaintiff made to the High Court of East Central State dated 14th March, 1975, the order for substitution was made.

On the 7th May, 1984, the present Appellant applied to the Court of Appeal and was granted an order to be substituted for the original Defendant who died on the 1st August, 1980.

After the filing and exchange of briefs, the appeal was set down for hearing on the 31st day of January, 1985. Appellant subsequent to this date, applied and was granted leave to amend his grounds of appeal. Further application was made to amend the brief of argument on the 15th January, 1986. The appeal was finally set down for hearing on the 18th March, 1986. The appeal was heard on that day and judgment was delivered on the 16th June, 1986.

The court below set aside the judgment of the trial Judge, holding than "There was an arbitration and that the result was lis binding on the parties and consequently the respondent is estopped from denying the appellant's title." Appellant's complaint here is against this judgment and particularly this aforementioned declaration.

It is pertinent and relevant to point out that Appellant had filed a notice of appeal on the 18th September, 1986, and complained of four grounds of appeal. The notice and grounds were struck out on the 11th December, 1989. On the 9th January, 1990, another notice of appeal was filed pursuant to leave granted by this Court on the 11th December, 1989, and is the only notice of appeal in this appeal, and the grounds of appeal are the only complaints against the judgment of the Court below. At the risk of obvious repetition, it is clear on even a cursory reading of the grounds of appeal relied upon that the only issues involved are with respect to the question of arbitration pleaded, and whether the arbitration if established constituted issue estoppel. The second ground of appeal seems to me merely an elaboration on the first ground. I consider it necessary in the circumstance to reproduce the three grounds of appeal and to point out their relevance to the issues for determination formulated.

The grounds of appeal are as follows: "GROUND OF APPEAL

(i) The learned Justices of the Court of Appeal erred in law and fact by reversing the Judgment of the learned trial Judge solely on the issue of arbitration pleaded, as an issue estoppel.

Particulars of Error

(a) The plaintiffs pleading on the arbitration as formulated in paragraph 8 of the Statements of Claim is vague and did not refer to any particular or definite arbitration.

(b) The Appeal Court presumed the fact that the said averment was denied by the defendant and the plaintiff put to the strictest proof thereof.

(c) The evidence led by P.W. 1 in support of that pleading was the only evidence which related the "arbitration" alleged to the Amalas of Umucheke. And even though P.W.4 testified on an arbitration, he made no reference to either the Umucheke Amalas or the Umucheke. And even though P.W.4 testified on an arbitration, he made no reference to either the Umucheke Amalas or the Umuosu Amalas.

(d) The defendant was therefore perfectly entitled on that pleading, in respect of which issues were joined, to lead evidence to show that the "arbitration" held was before the Umuosu Amalas and not those of Umucheke as claimed by the Plaintiff.

(e) There is ample evidence on the records of page 49 L.11-26 and P.51 L.15-19 that the learned trial Judge disbelieved the testimony of P. W.1 and found P. W.4 an unreliable witness, respectively.

(f) Both P. 52 L 1 -End, P. 53 L 1-7 and P.55 L.8-24 show that the learned trial Judge found the evidence of the arbitration conflicting and unsatisfactory and the only legitimate course open to the Court was to rationalise the determination of the case on the other evidence of traditional history and acts of possession adduced at the trial.

(ii) The learned trial Justices of the Court of Appeal mis-directed themselves on the facts and law when they held in parts,

"There was ample evidence to support the contention of the appellant that there was an arbitration the result of which was in his favour"

"The verdict according to P.W. I and P.W.4 is certain and conclusive" ... and "I cannot see from the evidence before the Court why the learned trial Judge said that the verdict was inconclusive. It would have been a different thing if the learned trial Judge did not believe P.W. 1 and P. W.4 on this issue of arbitration."

Particulars of Error

(a) The parties having joined issues on the issue of arbitration, the onus of establishing the particular arbitration relied on, coupled with the fact that it was in his favour rested squarely on the respondent herein, but that onus according to the learned trial Judge's findings of fact, was not discharged.

(b) The learned Justices of Appeal overstepped their bounds in law by reversing the clear finding of fact of the trial Court based on the evidence, as to the unsatisfactory nature of the said respondent's evidence regarding the requirements indicated in (ii) (a) above.

(c) It was wrong to apply the considerations of issue estoppel to the situation presented both by the pleading and the evidence on both sides, when it was not quite clear which arbitration was to be relied on.

(d) The evidence of the Defendant at P. 27 L 5-6 P.28 L 29-31, and P.30 L 7-19, D. W. 1 at P.31 L 21-End and P. 32 L 1-8, were legitimately adduced in rebuttal of the plaintiffs claim on the issue of arbitration and the learned trial Judge was right in reaching a conclusion that the plaintiffs case on that score was uncertain and unsatisfactory. Besides at no time did the Counsel for the plaintiff in cross examination of these two witnesses canvass the issue that the arbitration relied on by them was that of Umucheke as distinct from the Umuosu arbitration.

(e) The defendant was not in law bound to plead the Umuosu or any arbitration, having joined issues on the matter of the outcome of an arbitration with the plaintiff.

(iii) The judgment on the appeal is unwarranted and unreasonable having regard to the weight of evidence.

Particulars of Error

(a) The plaintiffs case at the trial was premised on Traditional Evidence, acts of possession and the unspecified arbitration.

(b) Both the trial Court and the Court of Appeal were satisfied as to the unsatisfactory nature of the plaintiffs case on traditional evidence and ads of possession. And' having so found it was preposterous for the appeal court to find for the plaintiff on the issue of arbitration only and in disregard of the credible evidence of D. W.2, D.W.3 and D.W.4, which 'the trial Court believed."

The issues for determination formulated by both Counsel would seem to me to have ignored the grounds of appeal on which they ought to be based. The Court has counselled counsel formulating issues on several occasions to ensure always that the formulation of issues for determination is not merely consistent with and within the scope and confines of the grounds of appeal relied upon, but also that they should not be so prolix and proliferate as to be more in number than the grounds of appeal on which they are based. This is because whereas an issue to be determined can take into consideration a number of grounds of appeal, it is not desirable 'to split a ground of appeal into a number of issues, See A.G. Bendel State v. Aldeyan (1989) 4 NWLR (Pt.ll8) 646; Ugo v. Obinkwe (1999) 1 NWLR (Pt.99) 566; Adelaja v. Fanoiki (1990) 2 NWLR (Pt.131) 137.

The object of the formulation of issues is to consider together a number of associated and related grounds of appeal within the issues to which they are related in the determination of the appeal. This approach facilitates de termination of the appeal before the court and renders the appeal more intelligible and comprehensible. I will now reproduce the issues for determination as formulated by Counsel in this appeal.

Appellant's formulation.

(a) Could the plaintiffs pleading in paragraph 9 of the statement of claim properly be said to raise a plea of binding arbitration against the defendant?

(b) If yes, was not the defence entitled to adduce and effectively rely on the evidence led in rebuttal thereto as per its joinder of issues pleaded in paragraph 9 of the statement of Defence or was the evidence of the Umuosu arbitration led by the defence, not legitimate and fairly warranted by the said pleading aforesaid; or Was the Court of Appeal right in its view that the Umuosu arbitration evidence led to rebuttal of the Plaintiffs said pleading, should have been pleaded, and should go to no issue, otherwise?

(c) Assuming (without conceding) that the plaintiffs evidence of the Umucheke arbitration was proper on the pleading advanced, was the trial court's finding rejecting that evidence of arbitration as unsatisfactory, not in accordance-with the evidence led at the trial?

(d) Was the Court of Appeal right in holding on the evidence, that the defendant (appellant) was estopped-from denying the Plaintiff's title to the disputed land?

It seems to me that only issues (a) and (d) relate to the complaints in the grounds of appeal filed, the issue (b) whether the defence was entitled to adduce evidence in rebuttal to the evidence or arbitration pleaded, though ancillary to the ground of appeal and relevant to the argument is not the issue complained of in that or any other ground of appeal. It has never been considered that every issue related to the issue formulated is necessarily an issue for determination. It may be merely ancillary.

Again (c) whether the Umucheke arbitration was correctly pleaded is not a ground of appeal, and particularly there is no ground of appeal or cross-appeal complaining of the trial Court's finding rejecting the Umucheke arbitration as unsatisfactory, and not in accord with the evidence led at the trial.

Learned Counsel to the Respondents has formulated two issues for determination in this appeal as follows -

"(1) Can the Appellant, without leave of the Court, be heard to argue a point of law in the Supreme Court which was neither raised in the High Court nor in the Court of Appeal?

(2) Was the Court of Appeal, Enugu right in holding, that on the pleadings, the only arbitration was the Umucheke Arbitration pleaded by the Plaintiff?

The issues as formulated by learned Counsel to the Respondent does not appear, to cover the entire scope of the grounds of appeal filed. There is no doubt that the Court below reversed the judgment of the trial Judge on the issue of the arbitration relied upon by the plaintiff but rejected in his Judgment by the learned trial Judge. The grounds of appeal however has gone further not only to complain against the pleading as sufficient to support a claim of arbitration under customary law, it also complains that the verdict in the arbitration has been used as an estoppel against the Defendant, who is now the Appellant before us.

Learned counsel to the parties relied on their briefs of argument which were filed and exchanged. Learned Counsel to Respondent sought and was granted leave to be absent during the hearing on grounds of ill-health. Mr. Okolo for the Appellant was present and orally expatiated on-his brief of argument.

It is convenient to dispose of the issue raised in the brief of learned counsel to the Respondent, which is whether appellant could without leave of this court raise an issue for the first time in this Court. Learned counsel submitted in his brief of argument that the issue of pleading estoppel by arbitration, having not been raised in the trial High Court, or the court below could not be raised in this cow it was contended that none of the grounds of appeal canvassed before this Court was argued hr any of the Courts below. Learned Counsel to Respondent admitted however that "The decision of the Appeal Court turned on the, safe issue of, estoppel by arbitration, and even then, on the more kindred issue of the pleadings of the Defendant/Appellant."

The following decided cases were cited and relied upon:

1. United Marketing Co. v. Hasham Kara (1963) 2 All E.R. 53 at p.55

2. Stool of Abinabina v. Enyimadu 12 WACA 171

3. Kate Enterprises Ltd. v. Daewoo Nigeria Ltd. (1985) 2 NWLR. (Pt.5) 116 at 125

4. Oguma v. LB.W.A. Ltd. (1988) 1 NWLR (Pt.73) 658 at p. 672

5. Ejiofodond v. Okonkwo (1982) 11 S.C. 74 at 93-98

6. Dweye & Ors. v. lyontahan & Ors. (1983) 8 S.C. 76 at 83; (1983) 2 SCNLR 135.

It is well settled law and established both by the rules of this Court and by the decisions referred to that without the leave of court, an appellant cannot be heard on a point of law not raised in the court below. The rationale for this decision would seem to have been derived from the fact that an appellate court is expected to hear grievances and complaints against decisions from the court below. The duty of an appellate Court being the correction of any errors of the Court below, it can only hear argument on issues decided in the court below which have resulted in such errors. Hence a fresh point of law in this Court not hitherto argued in the court below can hardly result in an allegation of error in the Court below. Of course, where the point of law taken for the first time on appeal involved a substantial and substantive or procedural point of law, and no further evidence could be adduced which would affect it, such point could be raised and entertained on appeal - See The Stool of Abinabina v. Chief Kojo Enyimadu (1953) 12 WACA 171.

However, where the allegation of error in the decision of the Court below complained about results from the decision of that Court, I do not think an appellant can be denied the right to complain of such error merely because the point of law relied upon was not the result of his argument in that Court below. The complaint in the instant appeal is against the judgment of the Court below which stated that "there was an arbitration and that the result was/is binding on the parties and consequently the respondent is estopped from denying the appellant's title."

The underlined words are part of the judgment of the Court below complained against. The point of law now relied upon which has arisen from the judgment of the Court of-Appeal could not have arisen before the decision in the Court below.

I think the rule about fresh points of law for the first time in the Appellate Court can more appropriately be confined to matters already canvassed in the court below and in respect of which-that Court had expressed an opinion. There are exceptions in respect of matters which involved substantial points of law, substantive or procedural where no further evidence could have been adduced which would affect the decision.

The rationale for this rule has been expressed by Lord Birkenhead, L.C in North Staffordshire Rly. Co: v.. Edge (19211) A:C. 254 at pp. 263, 264 where he said,

The efficiency and-authority of the Court of Appeal, and especially a final Court of Appeal; are increased and strengthened by' the opinion-of learned Judges who have considered these matter below.

To acquiesce in such an attempt as the appellants have made in this case is in effect to undertake decisions which may be of the highest importance without having received any assistance at all from the Judges in the Courts below."

This same view has been adopted, relied upon and applied by this court in many of its decisions. I will mention only Kate Enterprises Ltd. v. Daewoo Ltd (1985) 2 NWLR (Pt.5) 116; Oguma v. I.B.W.A. Ltd. (1988) 1 NWLR. (Pt.73) 658 at p.672.

However, I have already pointed out in this judgment that the matter before us is different. The issue of estoppel by arbitration; or the pleading thereto was not raised in either court below, and was not argued in the court below. But it is plain and does not admit of any argument that the Court below derided the appeal on that issue. Appellant is therefore entitled to challenge the judgment of the Court below on the ground on which it was decided. There is therefore no substance in Respondent Counsel's submission on the first issue formulated by him.

I now turn to the issues relating to the substantive complaints against the judgment of the Court of Appeal.

The first issue is whether "the Plaintiff's pleading in paragraph 8 of the Statement of Claim ... (could) properly be said to raise a plea of binding arbitration against the defendant,"

Learned counsel to the Appellant has submitted in his brief of argument and orally in expatiation before us that paragraph 8 of the Statement of Claim did not properly raise a plea of binding arbitration in favour of the Plaintiff/Respondent. Learned Counsel contended that a plea of arbitration must under the rule of pleadings be specifically pleaded by supplying the necessary facts to be relied upon to establish the validity of the process. This was not done in this case. It was also submitted that the customary law of the parties as to arbitration was not pleaded as was required by the mandatory provision of section 14 of the Evidence Act Cap. 62.

It was submitted that the learned trial Judge was right in rejecting the plea of arbitration. Counsel relied on Mbagbu v. Agochukwu (1973) 3 ECSLR. 90 at p.95. Learned counsel argued that if on the authority of Ayeni & Ors. v. Soweminro (1982)5 S.C. 60, the insufficient pleading was evidence of the arbitration claimed, Lewis and Peat (NRI) Ltd. v. Akhinden (1976) 7 S.C. 157 is authority for a sufficient denial of the pleading. Accordingly the Respondent was entitled to lead evidence in rebuttal. -Anero & Ors. v. Eze & Ors. (1986).

It was argued that the arbitration relied upon in this case being oral, and no particular arbitration having been pleaded, the defendants joined issue with the Plaintiff on the pleading. Thus having joined issues either party was entitled to lead evidence in support of its case.

Learned counsel to the Appellant relied on the Court of Appeal judgment in Okpuruwu v. Okpokam (1988) 4 NWLR (Pt. 90) 554 to contend that the concept of customary arbitration is unknown to Nigerian law.

Learned Counsel to the Respondent in his brief of argument submitted that paragraph 8 of the statement of claim criticised by learned counsel to the appellant as insufficiently pleading the issue of arbitration is misconceived. It was argued that only facts need be pleaded and not also evidence in proof of such facts. It was submitted that Defendant/Appellant merely denied the fact that there was an arbitration. There was no pleading by the Defendant/ Appellant of any other arbitration. It was accordingly argued that there could therefore be no irreconcilable conflict in the evidence of the two arbitrations.

Submitting that the issue was not a matter of customary law Stricto sensu Counsel argued that both the High Court and the Court of Appeal probably relying on Section 14(a) of the Evidence Act took judicial notice of the custom.

In summing up his submissions, learned Counsel to the Respondents relying on Otapo v. Sunmonu (1987) 2 NWLR (Pt.58) 587 and Lewis Peat (NR!) Ltd. v. Akhimien (1976) 7 S.C. 157 submitted first that paragraphs 7 of the Statement of Defence was insufficient to deny the Plaintiff s pleadings in respect of the arbitration.

Secondly, Onwusike v. Onwusike (1962) 6 ENLR 10 p.14 provides the rationale for the courts in Nigeria according validity to the decision of elders It is necessary at this point to reproduce both paragraph 8 of the Statement of Claim and paragraph 8 of the Statement of Defence subject matter of issue, for ease of reference.

Paragraph 8 of the Statement of Claim -

"In April, 1970 the defendant trespassed into the land in dispute and the plaintiff summoned him before the Chief and the elders of the Town who gave judgment in favour of the plaintiff and warned the defendant not to trespass again into the said land." Paragraph 8 of the Statement of Defence, is as follows -

"Paragraphs 8 and 9 are hereby denied. The defendant will at the trial put the plaintiff to the strictest proof thereof."

The pleadings reproduced above are those in issue in this appeal. I wish to dispose of the argument that the concept of arbitration at customary law is unknown to our legal system. Relying on the Court of Appeal decision in Okpuruwu v. Okpokam (1988) 4 NWLR (Pt.90) 554, it was submitted that our legal system does not recognise the practice of elders or natives constituting themselves as customary arbitrations to make binding decisions between parties in respect of land or other disputes. Counsel further submitted that it was a misnomer to talk of customary arbitration having the force of judgment, because it is merely a decision of the elders as distinct from the decision of a body duly vested with authority that can bind the parties.

I am concerned for now with the first proposition that the concept of customary arbitration is unknown to our legal system. It is important to point out here that this was not the position taken by appellants in the two courts below. In fact a perusal of the pleadings and the evidence in the court of trial clearly disclose that appellant recognised the customary arbitral process and relied on it himself. The Court of Appeal decision of Okpuruwu v. Okpokam (supra) relied upon for the proposition that customary arbitration is unknown seems to me on the facts not to have supported the proposition.

The facts of the case were that the land in dispute between Ofun Nzie Asuo of Okangha, the present respondents was taken to the Ofa top Chiefs and Elders, on the 7th August, 1982. The land was inspected on the 26th August, 1982. Neither of the parties objected to the proceedings, on the ground of the number of Chiefs who signed or thumb-impressed the document, the interest they represented, the authenticity of the document itself. Respondents relied on the award made in the arbitration in their favour.

In argument both Chief G.C.M. Onyiuke, S.A.N., for the Appellants and Dr. Okoi Arikpo, S.A.N., accepted the existence and recognition of customary arbitration. Chief Onyiuke in his submission relying on cases from Ghana, such as Ankrah & Ors. v. Darbah (1956) 1 WALR 89; Gyesiwa v. Mensah (1947) WACA cyclostyled Reports (No./Dec.) page 45; Samuel v. Okiji (1947) WACA cyclostyled reports p.49 prescribed the conditions rendering a customary arbitration binding on the parties as follows –

(1) Voluntary submission by both parties to the arbitration

(2) prior agreement by both parties to accept the award

(3) publication of the award.

Learned counsel submitted that the main distinguishing feature between a customary arbitration, and arbitration under statute is the condition of prior agreement to accept the award in the latter.

The Court of Appeal rejected and reversed the trial Judge on the contention that there is customary arbitration and relied for its view on Kobina Foli v. Obeng Akese (1930) 1 WACA 1; Larbe & Anor. v. Kwasi & Ors. (1950) 13 WACA 81; Inyang v. Essien (1957) 2 F.S.C. 39; (1957) SCNLR 112, Oline & Ors. v. Obodo & Ors. (1958) 3 F.S.C. 84; (1958) SCNLR 298, Ofomata & Anor. v. Anoka & Anon (1974) 4 ECSLR 251 and the provisions of Section 6(l) of the Constitution of the Federal Republic of Nigeria, 1979.

It seems to me that Uwaifo; J.C.A., who wrote the judgment of the Court, Oguntade, J.C.A. dissented on this point, held the view that customary arbitration was unknown to Nigerian Law because as he said, in the case before him, no custom relating to the so-called arbitration was pleaded by either side. Furthermore at p.572, he said "I do not know of any community in Nigeria which regard the settlement by arbitration between disputing parties as part-of its native law and custom."

It is somewhat of a surprise in view-of the evidence before the learned trial Justice of the Court of Appeal, by both parties to the appeal before him and submissions of learned-counsel that he can hold and express such a strong view about a pikefice relied upon by both parties: The learned Justice of Court of Appeal held the view on the strength of the decided cases that the concept of customary arbitration was peculiar to the Akans of Ghana and declared, at p.573. -

"I say by way of emphasis that we have no equivalent of Akan Laws and Customs in this country under which elders of the same description in Ghana's circumstances perform recognised judicial functions consistent with our judicial system. Those Elders under Akan Laws and Custom seem to exercise authority to have binding effect in the same status as did our old native authority courts, presided over by traditional rulers and chief in some parts of Nigeria with appeals going to district Officer's Courts and Residents' Courts. In that capacity, matters in difference by way of arbitration court be undertaken by them or referred to them to have them in accordance with their local customs. That to me is, the nearest and most probable comparison."

Without conceding that Nigerian Law recognises customary arbitration, the learned Justice went on to hold that in the light of the vesting of the judicial powers of the Constitution in the Courts named in S. 6(5) of the Constitution 1979, any other exercise of judicial power would be unconstitutional and invalid. Any question as to Arbitration could only apply to the extent and in the manner permitted by the Arbitration Law.

There seems to me some misconception about some of the provisions of the Constitution 1979, and the freedom between disputing parties to settle their difference in the manner acceptable to them. It is clearly unarguable that the judicial power of the Constitution in S. 6(1) is by S. 6(5) vested in the Courts named in that section. Not so a Customary arbitration. What then is a customary arbitration? I venture to regard Customary law arbitration as an arbitration in dispute founded on the voluntary submission of the parties to the decision of the Arbitrators who are either the Chiefs or Elders of their Community, and the agreement to be bound by such decision or freedom to resile where unfavourable.

In the first place a customary arbitration is not an exercise of the judicial power of the Constitution not being a function undertaken by the courts. Secondly, customary law is by virtue of section 274(3), 4(b) an "existing law" being a body of rules of law in force immediately before the coming into force of the Constitution 1979. Thus customary law which includes customary arbitration was saved by section 274(3) & 4(b) of the Constitution 1979. - See Giwa v. Inspector-General of Police (1985) 6 NCLR 369, Enyinnaya v. Commissioner of Police (1985) NCLR 464.

It is well accepted that one of the many African Customary modes of settling dispute is to refer the dispute to the family head or an elder or elders of the community for a compromise solution based upon the subsequent acceptance by both parties of the suggested award, which becomes binding only after such signification of its acceptance, and from which either party is free to resile at any stage of the proceedings up to that point. This is a common method of settling disputes in all indigenous Nigerian societies.

It is this kind arbitration which the court considered in Assampong. v. Kweku do Ors. (1932) 1 WACA. 192. Iii Phdlip lyjoku v. Felix Ekeocha (1972) 2 ECLR 199 Ikpeaiu, J., held that

"Where a body of men, be they Chiefs or otherwise, act as arbitrators over a dispute between two parties, their decision shall have a binding effect, if it is shown firstly that both parties submitted to the arbitration. Secondly that the parties accepted the terms of the arbitration, and thirdly, that they agreed to be bound by the decision: such decision has the same authority as the judgment of a judicial body and will be binding on the parties and thus create an estoppel."

This is a good and acceptable definition of customary arbitration. In Mbagbu v. Agochukwu (1973) 3 E.C.S.L.R (N.1) p. 90 the, issue was whether a dispute taken to a local non-judicial body of elders for settlement was binding on the parties. It was held that the decision was binding if accepted at the time it was made. If so accepted it could not thereafter be rejected. In this case Plaintiff reported the defendant to the Amala of Isi Eke (a body of Elders of Isi Eke) complaining of the trespass by the defendant who invaded his farm and harvested certain economic crops. According to the Plaintiff, the Amala of Isi Eke with Ihegiro Amaechi as the Chairman, decided that the land in dispute belonged to Plaintiff s father and therefore to him. Defendant was dissatisfied with the decision of the Amalas or Elders of Isi-Eke, and referred the dispute to one Chief Nnadi of Isi Ekenesie who summoned the parties to his house to settle the dispute. The dispute was so referred to Chief Nnadi of Isi Ekenesie by defendant, who refused to take the oath before the Amalas of Isi Eke, to confirm his claim to ownership of the land in dispute. Plaintiff and Defendant voluntarily submitted to each of the arbitration bodies, and provided the drinks and food for the member who arbitrated.

Equere Inyang v. Simeon Esscen (1957) 2 F.S.C. 39; (1957) SCNLR 112 was a case where the dispute was taken out of court for settlement by the Iman Council, which is not a Native Court. It is clear from the record that the parties understood that the Iman council was to settle the matter for them. This was the evidence of both the Plaintiff and Defendants' witnesses. Thus whatever decision which was not acceptable to either of the parties was not binding. The arbitrator failed to settle the matter and make peace between the parties. The Federal Supreme Court distinguished this case from the early case of Assampong v. Amaku (supra) on the ground that the latter was a native court, and its decision had binding effect. Not so, the instant case. With due respect the facts of the case do not support such a distinction. The persons who constituted the panel in Assampong v. Amaku, were appointed by two paramount chiefs to adjudicate upon the dispute. Similarly, the Iman Council was composed of Chiefs. Neither is a judicial body. They were constituted in accordance with native law.

In Idika v. Erisi (1988) 2 NWLR (Pt.78) at 573, the Supreme Court recognised and accepted the validity of customary arbitration. The two sides relied on the customary arbitration and each claiming the decision of the arbit ration in his favour. The trial Judge having not made a specific finding of fact on the crucial issues raised on the pleadings, the court of Appeal was right to have ordered a retrial.

It can be deduced from the above decisions that Nigeria law recognises arbitrations at customary law which is distinct and different from arbitrations under statute, if the following conditions are satisfied-

(a) If parties voluntarily submit their disputes to a non-judicial body, to wit, their Elders or Chiefs as the case may be for determination; and

(b) The indication of the willingness of the parties to be bound by the decision of the non-judicial body or freedom to reject the decision where not satisfied

(c) That neither of the parties has resiled from the decisions so pronounced.

These conditions are present in Assampong v. Amaku Qc Ors. (supra); Mbagbu v. Agochukwu (supra); Phillip Njoku v. Ekeocha (supra); Ofomata v. Anoka (supra); Inyang v. Essien (supra); Mika v. Erisi (supra), Mensal v. Takyiampong 6 WACA. 118; Kwasi v. Larbi (1952) 13 WACA 76 and many others. The conditions were not present in Foli v. Larbi (1930) 1 WACA 1, where the arbitration was not conducted by an Elder, Chief or members of the indigenous society in the traditional judicial process, but by a Judge of the Supreme Court.

Customary law has been described by Bairaman, F.J., in Owonyin v. Omotosho (1961) 1 All NLR. 304; (1961) 2 SCNLR 57 as "a mirror of accepted usage". It is existing native law and custom and not ancient custom with which present generation cannot be linked. Customary arbitration referred to is the prevailing practice of arbitral process or arbitration governed by rules of customary law. Our customary arbitration still maintains its flexibility and in the words of Osborne, C.J., in Lewis v. Bankole (1909) 1 NLR. 100-101.

...it appears to have been always subject to motives of expediency, and it shows unquestionable adaptability to altered circumstances without entirely losing its character."

The practice of Chiefs or Elders of the community settling disputes between members of their community is both recognised by our legal system and is not in conflict with the exercise of the judicial powers of the Constitution of 1979. I now turn to the contention that paragraph 8 of the Statement of Claim relied upon for the binding customary arbitration could not have that effect.

Learned counsel to the appellant submitted that the necessary facts to be relied upon in respect of the pleading were not pleaded. A plea of arbitration it was submitted must be specifically pleaded. Counsel argued that the customary law of the parties was not pleaded; and the arbitration relied upon was not pleaded.

Citing and relying upon Ayeni v. Sowemimo (1982) 5 S. C. 60, and Lewis Peat (NRI) Ltd. v. Akhimien (1976) 7 S.C. 157. It was submitted that paragraph 8 of the Statement of Defence constituted a sufficient denial.

In answer to the above submissions, learned counsel to the Respondents submitted that paragraph 8 of the Statement of Defence did not constitute sufficient denial of paragraph 8 of the Statement of Claim which contained all the facts necessary to establish the arbitration. He was required to plead facts and not evidence or law.

I have reproduced above the relevant pleadings in issue. The statement of claim in my view contains the fact that the defendant was summoned before the Chief and Elders of the town, who after due deliberation gave judgment in favour of the Plaintiff. The defendant denied these averments and put plaintiff to the strictest proof thereof.

Now what the Plaintiff is saying is that the Chief and Elders of the town before who the Defendant was summoned by him have decided the dispute before the Court in his favour.

Plaintiff led evidence of an arbitration in support of the pleading and called as his witness the Chairman of the arbitration panel.

The Defendant claimed that the arbitration referred to by Plaintiff was different from that which gave judgment in his favour. It is significant that Defendant did not plead this other arbitration, although he led evidence of it during the trial.

It is an elementary but fundamental rule of our civil procedure that parties are bound by their pleadings. A party will only be permitted to lead evidence in support of his pleadings. Evidence which is contrary to or not supported by the pleadings goes to no issue - See NIPC v. Thompson Organisation Ltd. & Ors. (1969) NMLR 99.

Thus in the instant case the evidence led by the Defendant in support of an arbitration which was not pleaded goes to no issue before the Court. Issue was only joined in respect of paragraph 8 of the statement of claim.

Mr. Okolo for the Appellant submitted before us that since issue was joined in respect of the arbitration in paragraph 8 of the statement of claim. Defendant was entitled to lead evidence in respect of any other arbitration to correct the facts in the plaintiffs pleading.

It is conceded that there are decided cases in support of the proposition that a Plaintiff is entitled to lead evidence on a point raised in the Defendant's pleading - Adenuga v. Lagos Town Council 13 W.A.C.A. 123; Onyekaonwu & Ors. v. Ekwuhiri & Ors. (1966) 1 All NLR 32. This is an exception to the general rule precluding a party from leading evidence on any matter not covered by his pleading. But the facts of the case disclose that such evidence can only be allowed where they answer the matters in the pleading. In the instant case learned Counsel is relying on the evidence of a different arbitration which was not pleaded as a rebuttal of paragraph 8 of the statement of claim. Accordingly, though the Defendant joined issues with Plaintiff in respect of the arbitration, there was no contrary evidence to challenge the assertion of the Plaintiff.

The Court of Appeal in considering this issue and answering the question posed by learned Counsel to the Respondent put it fairly clearly as follows at p.125 -

"I cannot see from the evidence before the Court why the learned trial Judge said that the verdict was inconclusive. It would have been a different thing if the learned trial judge did not believe P. W.1 and P. W.4 on this issue of arbitration. I will therefore answer the question posed by the respondent's Counsel by saying that there was an arbitration and that the result was/is binding on the parties and consequently the respondent is estopped from denying the appellant's title."

I agree entirely with this reasoning and hold that there was on the pleadings only one arbitration. The only arbitration being that pleaded by the Plaintiff in paragraph 4 of the Statement of Claim. The Court below was therefore right in reversing the finding of the trial Judge that the evidence of the plaintiff that there was an arbitration was unsatisfactory. The learned Judge's finding which was not based on the credibility of the witnesses which he did not disbelieve, was clearly inconsistent with and was not supported by the evidence before him. - See Kodilinye v. Odu (1935) 2 W.A.C.A. 336; Onowan & Anor. v. lserhien (1976) 1 NMLR 263.

I now turn to the issue whether the Appellant was estopped by the decision in the arbitration from denying the Plaintiff/Respondents' title to the land in dispute.

Learned Counsel to the Appellant has argued that the decision of the arbitration created an estoppel was neither pleaded by the plaintiff and was at no time the case of the Plaintiff. It was submitted that the Court below completely framed a new case for the Respondents on the issue of arbitration. Learned Counsel relying and citing ldika & Ors. v. Erisi & Ors. (1988) 2 NWLR (Pt.78) 563 submitted that the Court of Appeal was wrong to have given judgment in favour of a party on an issue that was neither canvassed at the trial nor on appeal. It was also submitted that the actual terms of the determination in the arbitration is unknown and uncertain.

Learned counsel submitted that the evidence led by the Respondents on arbitration did not suggest that Appellant accepted the verdict of the arbitration. On the evidence it was clear he rejected the verdict. It was accordingly submitted that the binding effect, or the capacity to resile from the arbitration cannot be called in aid.

Learned counsel then submitted that the verdict of the arbitration cannot under the conditions stated above constitute an estoppel per rem judicatam or issue estoppel. The Court below ought not on the facts before it disturb the specific findings of fact based on the evidence before the trial Court - Omoregie v. Idugiemwanye (1985) 2 NWLR (Pt.5) 41.

In his brief of argument, learned counsel to the Respondent, in answer, Mr. Nwogu rejected the accusation that the Court of Appeal framed for the Respondents a new case on the issue of arbitration not made by the parties in their statement of claim. It was submitted that the Court of Appeal dealt with the issues as formulated by the parties. Learned Counsel pointed out that the issue of the evidence of the arbitration was as of the grounds of appeal in the court below.

It seems to me learned counsel to the Appellant has ignored the issues formulated by the parties in the Court below on which the appeal was decided. The Court of Appeal pointed out in its judgment that the parties were agreed on one issue, the question of arbitration. The Appellant in the Court below who are the present Respondents stated the issue as follows –

"(a) Whether there had been a valid arbitration binding on the parties to the suit about the subject-matter of the dispute."

On his part learned counsel to the Respondents who are the present Appellants formulated one of the issues as follows -

(a) xxxxxxxxxxxxxxxxxxxxxxxxxx

"(b) On the pleadings and having regard to the evidence adduced at the trial there was an arbitration, the result which was binding on the parties and estopped the defendant/respondent from denying the plaintiffs titles'.

These were the formulations of the issues for determination on which the Court below based its decision. It is therefore not correct to say as alleged by the Appellants that the court below framed a new case on the issue of arbitration for the Respondents. The court below decided the issues as formulated by the parties.

The all important question is contained in issue (d) of the Appellant's formulation of issues for determination where the issue is whether the Court of Appeal was right on the evidence in holding that the defendant/appellant was estopped from denying the Plaintiffs title to the land in dispute?

Appellant has submitted in his brief of argument on the authority of Mbagbu v. Agochukwu (supra) and Inyang v. Essien (1957) 2 FSC 38; (1957) SCNLR 112 that for a party to rely on a verdict in an arbitration as res judicata he must first establish that the parties accepted the arbitration panel as well as the verdict. It was further submitted that a plea of res judicata should only be available when pleaded against a declaratory action brought by an unsuccessful party at the arbitration. The plea of res judicata is one of defence, and should contain the necessary averments of the certitude of the decision and the acceptance of the decision by the party against whom the rule is to operate. Learned Counsel argued that none of these attributes was either pleaded or satisfactorily established on the evidence. In the absence of these averments, the Court of Appeal was wrong in law in coming to the conclusion that the defendant/appellant was estopped from disputing the Plaintiff/Respondent's title to the land in dispute. Learned counsel submitted that neither ground 4 of the grounds of appeal relied upon, nor the Respondent's brief raised the issue of estoppel. Also paragraph 8 of the statement of claim did not raise the issue. It was also submitted that Appellant did not accept the verdict of the arbitration panel.

In his brief of argument, learned counsel to the Respondents argued that learned counsel to the Appellant agreed with the issue formulated on issue of arbitration which corresponded with ground 4 of the grounds of appeal. Learned counsel pointed out that the defendant accepted the arbitration, and under cross-examination answered that he never objected anytime to the decision of the "arbitration." It was accordingly submitted he cannot now resile from the agreement.

The issue here is whether the verdict of the arbitration constitutes an estoppel against the Appellants disputing the title of the Respondents. The Court of Appeal has held that there was an arbitration, and that the verdict was in favour of the Plaintiff/Respondent. The question is whether such a verdict constitutes estoppel? Learned counsel for the Appellants relying on Okpuruwu v. Okpokam (supra) and Nwabia v. Adiri (1958) 3 FSC 112; (1958) SCNLR 451 has argued that it is a misnomer to talk of a customary arbitration as having the binding force of a judgment. Accordingly the issue of estoppel per rem judicatam cannot therefore arise over such a decision. The cases of Oyelade v. Areoye (1967) 1 All NLR.321; Nkanu v. Onum (1977) 5 S.C.13; Efoke v. Usifo (1978) 6-7 S.C.187 were also cited.

I think it is well settled and judicial authority is not lacking for the view that persons exercising judicial functions in accordance with native law and custom and are duly authorised to adjudicate upon disputes among their community have always been recognised as having such powers. - See Chief Kweku Assampong v. Kwaku Amuaku & Ors. (1932) W.A.C.A. 192. The provisions of the Constitution of 1979, sections 6(1) and (5) have not altered the juridical position - See ldika v. Erisi (1988) 2 NWLR (Pt.78) 563 S.C.; Inyang v. Essien (supra).

The principle of res judicata applies where a final judicial decision has been pronounced by a judicial tribunal 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 afterwards be raised for re-litigation between the same parties or privies. - See Spencer-Dower & Turner –Res Judicata (1969) Second Ed. p.l.

This principle involves the judicial decision estopping or precluding, any party thereto in any later litigation the correctness of the earlier decision in law and fact. Also the same issue cannot be raised again between them - See lyaji v. Eyigebe (1987) 3 NWLR (Pt.61) 523; Odjevwedje v. Echanokpe (1987) 1 NWLR (PL52) 633 S.C. The policy ut sit finis litium interest rei publicae is the rationale for this view.

I shall consider a few cases where the issue has been examined.

In Assampong v. Amuaku & Ors. (supra), the West African Court of Appeal had no doubt that a decision given by a non-judicial body can constitute estoppel, where the constituent elements of an estoppel rem judicatam have been established. I have already stated the composition of the panel to show that it is a non-judicial body. It is also clear that there was a final and non-conditional verdict in favour of the Respondent. Where the verdict is conditional the decision was held not to be binding- See Ofomata & Ors. v. Anoka & Anor. (1974) 4 ECSLR p.251.

In Idika v. Erisi (1988) 2 NWLR (Pt.78) 563, where the issue was raised but not decided, Obaseki, J.S.C. observed that,

"whether the decision will operate as estoppel per rem judicatam or issue estoppel can only be decided when the terms of the decision is known and ascertained. If it qualifies to operate as res judicata both parties will be entitled to that plea. Similarly, if it qualified as issue-estoppel each party will be entitled to the plea. (Larbi v. Kwesi (1950) 13 W.A.C.A. 81; Mogo Chikwendu v. Mbamali & Anor. (1980) 3-4 S.C. 31 at 48").

In that case since no finding was made by the trial Judge on the verdict of the arbitration, the question of estoppel did not arise. The decision however raises the important suggestion that a decision in an arbitration by a non-judicial body is capable of giving rise to an estoppel.

In Inyang v. Essien (supra) the Federal Supreme Court held that the decision of the Iman Council which was not binding because it was not accepted by one of the parties did not constitute res judicata. It was also held that the decision was not binding because the Etinan Council and Iman Council were not Native Courts. The view of the Federal Supreme Court was that the Iman Council was only instructed to bring the parties together and make peace between them. This could not be done because the parties did not accept the settlement. Thus the Federal Supreme Court would seem to have in this case limited the bindingness of a decision to the decisions of judicial tribunals. This was the view of the Court of Appeal in Okpuruwu v. Okpokam (supra).

I do not think it could be so restricted. In my view the ratio decidendi in Inyang v. Essien was that the parties having not accepted the settlement of the Iman Council, the arbitration failed. A judicial tribunal for the purpose of estoppel has been given a more liberal and broader definition.

Spencer-Bower & Turner, in Estoppel 2nd Ed. pp.21-22 has defined a judicial tribunal for the purposes of estoppel to include tribunals whether or not it is known by the name of a Court at all. It is stated as follows -

"It is now stated to be well established that it is quite immaterial whether the tribunal which pronounced the decision relied upon as a ground of estoppel is a court of record, or not, or whether it is what has been denominated by custom, or statute, a Superior Court, or not, or even whether it is known by the name of a Court at all... It is enough if the alleged "judicial tribunal" can properly be described as a person, or body of persons, exercising judicial functions by common law, statute, patent, charter, custom or otherwise in accordance with the Law of England, or in the case of a foreign tribunal, the law of the particular foreign state, whether he or they, be invested with permanent jurisdiction to determine all causes of a certain class as and when submitted, or be clothed by the State or the disputants, with merely temporary authority to adjudicate on a particular dispute, or group of disputes."

The above definition is broad and liberal to include decisions of arbitrations under customary law. The Customary judicial process employed by the parties in this case are as was described by Dr. T. O. Elias in his Nature of African Customary Law (1956) p.212, a mode of

"referring a dispute to the family head or an elder of the community for a compromise solution based upon subsequent acceptance by both parties of the suggested award, which becomes binding only after such signification of its acceptance and from which either party is free to resile at any state of the proceedings up to that point."

This was precisely what happened in this case. Applying the foregoing principles to the facts of this case, there is no doubt that (i) there is evidence of voluntary submission of the parties to the authority of the Chiefs and Elders of the Community, (ii) initial willingness of the parties to be bound by the decision of the Chiefs and Elders of the Community, (iii) the Chiefs and Elders of the Community exercise judicial functions according to custom (iv) the terms of the decision were known, final and unconditional. These characteristics satisfy the requisite of estoppel.

The terms of the decision which awarded title to the land in dispute to the Respondents having been known, the party in whose favour it was made is entitled to rely on the plea of res judicata in subsequent litigation in respect of the subject-matter or the issue - See Idika v. Erisi (supra).

I think the Court of Appeal was in the circumstance right to hold that Appellants were estopped by the decision of the customary arbitration from disputing the title of the Respondents. The appeal against the judgment of the Court of Appeal dated 16th June, 1986 is hereby dismissed. Appellant shall pay N500 as costs to the Respondents.

**OBASEKI, J.S.C.:**

I have had the advantage of reading in draft the judgment just delivered by my learned brother, Karibi-Whyte, J.S.C. I agree with his opinion on all the issues for determination.

I agree with him that the appeal fails and I hereby dismiss it with N500.00 costs to the respondent.

**KAWU, J.S.C.:**

I have had the advantage of reading in draft the lead judgment of my learned brother, Karibi-Whyte, J.S.C., which has just been delivered. I am in complete agreement with his reasoning and also with his conclusion that the appeal should be dismissed. On the pleadings and the evidence adduced at the trial, I am satisfied that the trial court was in error in its decision that there was no arbitration, and that the Court of Appeal was absolutely right in reversing that decision. I too will dismiss the appeal with costs assessed at N500.00 to the respondent.

**WALI, J.S.C.:**

I have the privilege of reading in advance a copy of the judgment of my learned brother, Karibi-Whyte, J.S.C., and which has just now been delivered. I agree with the reasoning and the conclusion that the appeal lacks merit.

For these same reasons which I hereby adopt as mine, I too hereby dismiss the appeal. The judgment of the Court of Appeal setting aside the decision and order of the trial court is affirmed with \*500.00 costs to the respondent.

**NNAEMEKA-AGU, J.S.C.** (Dissenting):

In an Umuahia High Court, in the then East-Central State (now in Imo State) the plaintiff brought an action against the defendant claiming a declaration of title to a piece of land called "Okpoto Aguzie" and £50:0s:0d (fifty pounds) damages for trespass. According to the plaintiff his claim was based on traditional history, acts of possession and ownership, and customary arbitration. After trial, F.O. Nwokedi, J., dismissed the claim in its entirety on the ground that none of the grounds for the claim was established to his satisfaction.

Dissatisfied with the said judgment, the plaintiff appealed to the Court of Appeal Enugu Division which agreed with the learned trial Judge on his findings with respect to the evidence of tradition and acts of ownership. However, the learned Justices of Appeal in their unanimous judgment held that the plaintiff was entitled to succeed on the issue of arbitration. Then they allowed the appeal on that ground and reversed the judgment of the learned trial Judge.

The defendant (hereinafter called the appellant) has appealed further to this court. Counsel on both sides have filed and adopted their briefs of argument. Mr. Okolo, for the appellant also addressed us orally. Arising from the grounds of appeal filed, the learned counsel for the appellant has formulated the following issues for determination in the appeal:

"(a) Could the plaintiffs pleading in paragraph 8 of the Statement of Claim properly be said to raise a plea of binding arbitration against the defendant?

(b) If yes, was not the defence entitled to adduce and effectively rely on the evidence led in rebuttal thereto as per its joinder of issues pleaded in paragraph 9 of the Statement of Defence? Or was the evidence of the Umosu arbitration led by the defence, not legitimate and fairly warranted by the said pleading aforesaid; or Was the Court of Appeal right in its view that the Umosu arbitration evidence led in rebuttal of the plaintiffs said pleading, should have been pleaded, and should go to no issue, otherwise?

(c) Assuming (without conceding) that the plaintiffs evidence of the Umucheke arbitration was proper on the pleadings advanced, was the trial court's finding rejecting that evidence of arbitration as unsatisfactory, not in accord with the evidence led at the trial?

(d) Was the Court of Appeal right in holding on the evidence, that the defendant (appellant) was estopped from denying the plaintiff s title to the disputed land?"

The learned counsel for the plaintiff (the respondent herein) on the other hand formulated only two issues, namely:

"(1) Can the appellant, without leave of court, be heard to argue a point of law in the Supreme Court which was neither raised in the High Court nor in the Court of Appeal?

(2) Was the Court of Appeal, Enugu right in holding that, on the pleadings, the only arbitration was the Umucheke Arbitration pleaded by the plaintiff?

As observed by my learned brother Karibi-Whyte, J.S.C., in his judgment this formulation is far from satisfactory. But quite apart from the fact that it does not cover the whole grounds of appeal filed, as it should, it is couched in abstract terms without concrete reference to the complaints of the appellant in the appeal. An issue for determination ought not to be formulated as abstract legal issues without concrete reference to the facts of the particular case. Also it is for an appellant to put forward the foundation of the issues for determination in an appeal in his grounds of appeal. It is not open to a respondent to depart from those grounds, or ignore some of them, or add his own. He can only, without departing from the grounds, formulate the issues with a slant favourable to his client's case. In the formulation of issues, he can only add to grounds of complaint if he has filed a cross-appeal or a respondent's notice. If he ignores some of the grounds in the formulation of the issues, he may be deemed to have conceded them. On the above principles, it appears to me that the respondent's 1st issue for determination is vague: it is not even clear what point that did not arise in the courts below which, in his contention, the Supreme Court is being called upon to hear and determine.

However, I shall now proceed to consider the issues raised by both sides as I understand them after reading the two briefs.

I have had the privilege of a preview of the' judgment of my learned brother, Karibi-Whyte, J.S.C., in this appeal. I agree with him that the issues as to whether arbitration was duly pleaded and whether it could on the facts of this case sustain an estoppel against the appellant were duly raised. Reference may be made to the following facts:

First: After the rejection by the learned trial Judge of the case of arbitration as pleaded and testified to by the respondent, the Court of Appeal allowed the appeal and reversed the Judge on that ground only. Their Lordships of the Court of Appeal held:

"I cannot see from the evidence before the court why the learned trial Judge said that the verdict was inconclusive. It would have been a different thing if the learned trial Judge did not believe P.W. 1 and P. W.4 on this issue of arbitration. I will therefore answer the question posed by the respondent's counsel by saying that there was an arbitration and that the result was/is binding on the parties and consequently the respondent is estopped from denying the appellant's title."

It can be said that up to that point it was not open to the appellant who had a verdict on that ground, among others, in his favour in the court of trial to have raised it. The Court of Appeal having found against him on that ground, he became entitled to appeal on it, as he did. It is noteworthy that learned counsel for the respondent was frank enough to agree in his brief that:

"The decision of the Appeal Court turned on the sole issue of estoppel by arbitration, and, even then, on the more limited issue of pleading of the defendant/appellant."

The appellant automatically became entitled to complain against it in his appeal. As it is so, the well-known rule that an appellant will not be allowed, to, without leave, raise a point of law or of fact not raised in the court below does not arise. The contention of the learned counsel for the respondent that none of the grounds now being canvassed by the appellant was raised in the court below therefore becomes a non-issue.

Secondly: The appellant duly raised the issue of the pleading and evidence of the arbitration in ground (ii) of the appellant's grounds of appeal, fully set out in the judgment of my learned brother, Karibi-Whyte, J. S. C. I shall limit myself to setting out particulars (b) and (c), which state:

"(b) The learned Justice of Appeal over-stepped their bounds in law by reversing the clear finding of fact of the trial court based on the evidence, as to the unsatisfactory, nature of the said respondent's evidence regarding the requirements indicated in (ii)(a) above.

(c) It was wrong to apply the considerations of issue estoppel to the situation presented both by the pleading and the evidence on both sides, when it was not quite clear which arbitration was to be relied on."

Thirdly: The appellant expressly raised these issues in paragraphs (a) and (d) of the issues for determination as formulated by him and set out above. I therefore agree that the issues clearly arose from the decision of the court below and have been duly raised in this appeal.

I have enjoyed the analysis of decided cases on arbitration under customary law which have been made by my learned brother, Karibi-Whyte, J.S.C., in his judgment. I entirely agree with him in that part of his judgment.

The legal basis of all arbitrations is voluntary agreement. If there is a distinct agreement to appoint an umpire to determine the difference between the parties and other conditions are present, there is an arbitration. In Collins v. Collins 28 L.J. Ch-186, arbitration was defined as:

...a reference to the decision of one or more persons, either with or without an umpire, of a particular matter in difference between the parties."

See also Boss v. Helsham L.R.2 Ex.72; also Re Dawdy and Hartcup 15 Q. B.1). 426. This element of voluntary agreement entered into our concept of arbitration under customary law from the beginning. In the case of Omanhene Kobina Foli v. Ohene Obeng Akese (1930) 1 WACA 1,Deane, C.I., cited with approval the opinion of Maule, J., in Fuller v. Fenwick (1846) 16 L.J.C.P. 79 where he stated:

"If this case had gone on, in the usual course the law would have been determined by a Judge and the facts by a jury. The parties have thought fit to withdraw the case from this form of trial and have, thought that an arbitrator was more proper to decide matters of fact than a jury and could more conveniently dispose of matters of law than a Judge on account of the expense of contesting before a court an intricate point of law."

It is useful to refer to the opinion of Deane, CT, in the same case of Foli v. Akese (supra). He stated:

...in submission to arbitration the general rule is that as the parties chose their arbitrator to be the Judge in the dispute between them, they cannot when the award is good on its face object to his decision either upon the law or on the facts." (Italics mine).

Again the Privy Council in the case of Kwasi & Others v. Larbi 13 WACA 76 at p.80, stated:

"Since it is established that the parties gave their consent to the submission of the dispute to elders without any express reservation of a right to resile and since there is certainly no right to resile after the award is made, it is for the appellants to satisfy the Board that a right so contrary to the basic conception of arbitration is recognized by native customary taw."

It is clear from all these cases that voluntary submission of both parties of their cases or points of difference between them for arbitration is basic to a binding arbitration. This same element of voluntary agreement was emphasized by the same West African Court of Appeal in - Akrah & Ors. v. Darba (1956) 1 WALR 89. Also in Gyesiwa v. Mensah (1947) WACA Cyclostyled Reports (Nov/Dec.) 45.

The West African Court of Appeal encapsulated the elements of a binding arbitration in the case of Essie Gyesiwa v. Kobina Mensah (1947) WACA Cyclostyled Reports (Nov./Dec.) 45 where their Lordships stated at p.47:

"It is, however, clear from many decisions that there must be not only a voluntary submission of the matter in dispute but also it must be shown that it was agreed by both parties that the decision of the arbitrators will be accepted as final and binding".

In addition to these two elements, the court added yet a third where it continued:

"To the question of these formalities, counsel for the respondent addressed much learned argument but upon this point there is no evidence in the present case and counsel was unable to cite any authority upon which this court may found the conclusion that any custom in regard thereto has been established and adopted by the courts."

From the above opinion, with which I entirely agree, it is clear that before a party to a case in the High Court, which has unlimited jurisdiction under the Constitution can defeat the right of his adversary to have his case adjudicated upon by the courts on the ground that there has been a previous binding arbitration which raises an estoppel between them, four ingredients must be pleaded and established by evidence, namely:

(i) that there has been a voluntary submission of the matter in dispute to an arbitration of one or more persons;

(ii) that it was agreed by the parties either expressly or by implication that the decision of the arbitrators will be accepted as final and binding;

(iii) that the said arbitration was in accordance with the custom of the parties or of their trade or business; and

(iv) that the arbitrators reached a decision and published their award.

Applying the above principles in Gyesiwa Case (supra) their Lordships found that there was no arbitration. The case was remitted for retrial. These elements of a binding arbitration, as opposed to a negotiation for settlement, were also re-affirmed in the case of Ankrah & Ors. v. Dabra & Anor. (1956) 1 W.A.L.R. 89.

True, most of these were Gold Coast cases. But they-derived from the same common law principles. So, the trend continued also in Nigeria after the split-up of the West African Court of Appeal. The rationale appears to be this: that such a customary arbitrator is not a court and is not vested with judicial powers. So before his decision can be binding on, or create an estoppel between the parties, it must be based on voluntary agreement, which must, inter alga, on, our rules of pleadings, be averred and proved. For this reason, there is a distinction between arbitration by persons exercising judicial functions by native law and custom, such as was the case in Chief Kweku Assampong v. Kweku Amoaku, Mensah, Okyir and Anor. (1932) 1 WACA 192 and persons who negotiate a settlement, but have no judicial function and could, therefore, not exercise one, as was the case in Eguere Inyang & Anor. v. Simeon Essien & Anor. (1957) 2 F.S.C. 39; (1957) SCNLR 112. Whereas decisions of the former class have always been regarded as binding as those of courts of competent jurisdiction, which are capable of sustaining a plea of res judicata, the latter have no such binding force. For them to have any binding force the above ingredients of a binding arbitration under customary law including voluntary submission, must be averred and proved. The latter class is illustrated by Inyang's case (supra). I must emphasize that until the Native Court, reforms in both Nigeria and the Gold Coast in the year 1934, Paramount Chiefs had very powerful judicial powers, particularly in matters affecting land. The Imam Council had no such powers at the time where Inyang's case (supra) was decided.

It is from the above background and principles that I shall now consider the pleadings and evidence in this case under appeal. In paragraph 8 of the statement of claim, the respondent, as plaintiff pleaded as follows:

"8. In April, 1970 the defendant trespassed into the land in dispute and the plaintiff summoned him before the Chief and elders of the town who gave judgment in favour of the plaintiff and warned the defendant not to trespass again into the land." (Italics mine).

There is no other averment of anything like arbitration or even settlement in the rest of the statement of claim. Rather the respondent averred another trespass in 1971 as a result of which he brought this action for a declaration of title and damages.

Mr. Okolo has attacked the pleading m this paragraph on a number of grounds. In particular, he has submitted that it is not sufficient to raise a plea of arbitration.

I may pause here to consider the questions: what is the purpose of pleading? What should a good pleading of customary arbitration aver? In answering the first question, I derive a lot of benefit from part of the provisions of Order 18 rule 7 of the R.S.C., 1982, which states:

...every pleading must contain, and contain only, a statement in a summary form of the material facts or defence, as the case may be, but not the evidence by which those facts are to be proved, and the statement must be as brief as the nature of the case admits"

In other words, it must contain all, but only, material facts necessary to put the other side on notice of the case he is about to meet. Thus in Philipps v. Philipps (1878) 4 W.B.D. 127, Cotton, L.J., stated at p.139:

"In my opinion it is absolutely essential that the pleading not to be embarrassing to the defendants, should state those facts which will put the defendants on their guard, and tell them what they are to meet when the case comes on for trial."

And Scott, L.J., underscored the point in Bruce v. Odham Press Ltd. (1936) 3 All E.R. at p.294, where he stated:

"The word `material' means necessary for the purpose of formulating a complete cause of action (or good ground for defence); and if any one material statement is omitted the statement of claim is bad."

It is of course trite that it is only those material facts which a party has averred in his pleading that he is entitled to give evidence upon at the trial. So, any evidence on a fact not pleaded or which is at variance with the averments in the pleadings goes to no issue and should be disregarded by the court. See Aniemeka Emegokwue v. James Okadigbo (1973) 4 S.C. 113 at p.117; Waghorn v. George Wimpey & Co. Ltd. (1969) 1 W.L.R. 1764; Atanda v. Ajani (1989) 3 NWLR (Pt.111) 511.

On these principles, the answer to the second question, i.e. what a person who is relying on arbitration under customary law needs to aver in his pleading easily suggests itself. The pleading must aver all the elements of a valid arbitration under customary law, as I have outlined above. It must plead that both parties voluntarily submitted the matter in dispute to arbitrators according to custom and agreed, either expressly or by implication, to be bound by the decision of the arbitrators and that the arbitrators reached a verdict. It is from these premises that I should now consider whether, on the pleading, in paragraph 8 of the statement of claim, there was due pleading of an arbitration between the parties.

The first observation I should make is that it was averred that the plaintiff "summoned" the defendant before the chiefs and elders of the two. Now the word summoned as used by a lawyer - and the statement of claim was settled by counsel who is presumed to have used technical words in the technical sense - comes from the old writ of summoneas, a writ - judicial of great authority and compulsion to appear in court or other judicial body. The essence of a summons is to command. So, when the respondent pleaded that he summoned the appellant before the Chiefs and elders of the two who gave judgment in favour of the plaintiff, I clearly understand it to mean that the appellant was bound to appear before them, whether he liked it or not and whether or not he wanted them to go into the dispute between them. This is clearly antithetic to voluntary submission which is of the very essence of a valid arbitration agreement. It must be borne in mind that arbitrators are not a court. They are not clothed by the Constitution with any judicial authority as such. It is the High Court of a State which has unlimited jurisdiction under section 236 of the 1979 Constitution to adjudicate on all civil and criminal matters relating to legal rights, obligations, power, duty, interest, privilege or claim as well as penalty, forfeiture, punishment or other liability. Such High Courts and other courts of competent jurisdiction have the power to cause summonses to be issued to compel appearance of parties before them. On the other hand, arbitration bodies have no such powers. The binding effect of their decisions derives from the fact that parties which have the right to resort to court for adjudication of their disputes have, with their eyes wide open, agreed to opt for a decision by a non-judicial body, the decision of which they have voluntarily agreed to be bound by. When a party to such a dispute has to be summoned before the arbitration body which proceeds to hear the dispute and thereafter pass a judgment in favour of one of the parties as if it were a judicial body, such cannot be said to be a valid arbitration. The elements of voluntary submission which is of the very essence of an arbitration according to custom is lacking. To make matters worse, as the learned trial Judge pointed out in his judgment the parties were not ad idem as to what arbitration the respondents were relying upon whether Umuosu or Umucheke arbitration. He said:

"It is not very certain whether plaintiff and defendant are talking of the same arbitration as plaintiff referred to Umucheke Arbitration and the defendant mentioned Umuosu Arbitration."

I have to bear in mind the fact that it was the duty of the respondent as plaintiff to plead precisely and properly the arbitration he was relying upon and also discharge the onus of proving it. But I cannot say that he succeeded in doing either. I am therefore satisfied that the pleading in paragraph 8 of the statement of claim falls short of a proper pleading of an arbitration according to custom. The court of trial should not have received any evidence on arbitration on the basis of such a pleading and the court below should have drawn no inference therefrom. For the same reason whatever "decision" was reached by such a body could not have validly raised an estoppel against the appellant or been a valid ground for reversing the judgment of the learned trial Judge.

I therefore allow the appeal, set aside the decision of the Court of Appeal and restore the decision of the High Court which had dismissed the respondent's claim.

I award N500.00 costs to the appellant.

Appeal dismissed.