

- i. A declaration that the defendant is estopped from enforcing the judgment he had in Suit N0. B/518/98 after allowing the claimant to withdraw his appeal against the judgment.
- ii. A declaration that by withdrawing his appeal against the decision in Suit N0. B/518/98 following the resolution of the problems between the claimant and the defendant, the defendant is estopped from insisting on his right by virtue of the decision in Suit N0. B/518/98 when the purpose of the customary arbitration was to ensure that all pending proceedings in court were put to an end.
- iii. An Order that the decision of the family in the customary arbitration is subsisting and binding on the parties including the defendant.
- iv. Perpetual injunction restraining the defendant by himself, his servants, agents and privies from harassing, molesting or in any other way intimidating the claimant as a result of the insistence of the defendant to enforce the judgment awarded in his favour in the said suit N0. B/518/98.

The Originating Summons is supported by an affidavit of 21 paragraphs deposed to by the claimant. Attached to the affidavit are Exhibits A, B, C and D.

On 26/5/16, the Defendant/Applicant filed a Notice of Preliminary Objection challenging the jurisdiction of this Honourable Court to entertain this matter on the following grounds:-

- a. That this Originating Summons be struck out for being incompetent.
- b. That this Honourable Court declines jurisdiction based on the principle of res judicatam.

In his written address S. O. Omere Esq., of Counsel to the Defendant/Applicant raised three issues for determination viz:-

- a) Whether the suit/application of the claimant is covered by order 3 Rule 10 of the Edo State High Court (Civil Procedure) Rules 2012.
- b) Whether in the circumstances of this case this Honourable Court has the jurisdiction to entertain this action being an issue as to title to land adjudicated upon by the High Court and the Court of Appeal and requiring the calling of evidence from other persons, an originating summons is a proper (medium) to determine the issue?
- c) Whether this Honourable Court can restrain the defendant/applicant from enforcing the judgment of this court and the Court of Appeal by relying on a mere allegation of a family resolution which is not before the court

and upon the claimant being unable to show that he also performed his own part of the alleged resolution/conclusion, bargain and mandate.

Learned Counsel submitted on issue(a) that Order 3 Rule 10 of the Rules of Court 2012 on which this action is based does not avail the claimant as the appropriate rule that his action should have been commenced under is Order 3 Rule 7 of the Rules of Court 2012. The aforesaid rule deals with an Originating Summons being the procedure for the construction of a Deed, Will, Enactment or other written law. From the foregoing the claimant's claim is without basis being a matter not provided for or envisaged under Order 3 Rule 10 of the rules of court 2012 and one involving serious issues still outstanding between the parties despite being adjudicated upon by the High Court and Court of Appeal citing the case of **Amasike V. C.A.C. (2010) 7 KLR 2131 at 2133 – 2134.**

On issue 2, learned counsel submitted that parties are not allowed to relitigate issues that had being prosecuted to finality by a court of competent jurisdiction. The Customary Arbitration alleged is not binding and it is intended as a relitigation by this originating summons. The parties are estopped from relitigating the title and rights of entry into the land in the circumstance. See **Afolabi V. Governor Osun State (2003) 13 NWLR (Pt. 836).** Mr. Omere submitted that the answer to issue(a) determines the other two(2) issues.

In conclusion, learned counsel urged the Court to strike out the claimant's summons as this case relates to a land dispute.

It is unclear why the claimant/respondent failed to respond to this notice of preliminary objection. Be that as it may, I have carefully examined the notice of preliminary objection and I find in agreement with Mr. Omere of Counsel to the defendant/respondent that by virtue of OR3 Rule 7 of the Edo State High Court (Civil Procedure) Rules 2012 this claim based on the facts in the originating summons calls to question issues of customary arbitration, customary arbitration or anything on customary law is only proved by facts led in evidence. The submissions of Mr. Omere in this regard and concerning the essence of originating summons are upheld by me. This claim ought to have been commenced by writ of summons. The suit is therefore not competent. The preliminary objection on this ground is upheld.

However, the preliminary objection on the ground that this suit is caught by the plea of res judicata is not supported by sufficient materials. The judgment of the High Court and the order in the Court of Appeal ought to have been exhibited. At this preliminary stage and with no application for leave to use the documents filed by the claimant/respondent, it is my opinion therefore that the question on

res judicatum can not be adequately tackled. However, this action has been found incompetent and it is ordered struck out.

Hon. Justice E. F. Ikponmwen
JUDGE

COUNSEL:-

S. Iredia-Osifo Esq., for the Claimant/Respondent

S. O. Omere Esq., for the Defendant/Applicant