

SUPREME COURT OF NIGERIA
8TH OCTOBER, 1993. SC, 203/1988.
CORAM:- M.L. UWAI, O. OLATAWURA,
M.E. OGUNDARE, U. MOHAMMED, S.U. ONU, JJSC.

VICTORY OLUROTIMI DEFENDANT/APPELLANT

AND

MRS. FELICIA M. IGE PLAINTIFF/RESPONDENT

APPEALS - Practice & procedure - failure of trial court to include consequential order within judgment - when made an issue in appeal - failure of Respondent to attack the record and query its genuiness - implications thereof.

COURTS - Consideration of only one issue by trial high court - granting a relief not claimed - whether court has dealt with the Real Action filed.

JUDGMENTS - Consequential orders - not contained within judgment - but recorded in the enrolment of judgment - whether such judgment is complete and valid- minutes of every judgment - effect thereof.

JUDGMENTS - Where a judgment leaves the very point in issue undecided - whether that judgment can be altered

LEGISLATION - High Court Rules of Ondo State - whether formal drawn up order is essential thereunder.

FACTS

The Plaintiff/Respondent was granted possession of the Land in dispute situate at Akure by the Ondo State Government vide a duly registered statutory right of Occupancy. The Land had earlier been acquired by government, The Defendant/Appellant was alleged to have entered the land and removed one of the survey pillars. When efforts made by the Respondent to stop the trespass did not succeed, she filed an action before the Ondo State High Court against the Appellant claiming N1,000.00 as general damages for trespass and perpetual injunction restraining the defendant from committing further trespass.

The Appellant in denying the claim stated that the disputed land was granted to him by a late Oba via a Deed of Conveyance that was registered in the Lands Registry. The trial Judge gave judgment in favour of the Respondent and awarded title to her, which was not fact of her claim without considering the issue of damages and injunctions that form the basis of the Respondent's claim. Appellant's appeal to the Court of Appeal was dismissed. On further appeal by the Appellant to the Supreme Court, it had to determine whether the High Court had considered the Respondent's claim and whether the lower court was right in affirming the trial court's judgment.

HELD (unanimously allowing the appeal and remitting the case to the High Court for retrial)

1. It is clear from the tail end of the trial High Court's judgment that the award of N200.00 general damages, the order restraining the Appellant from further disturbing the Respondent on the land in dispute and the award of costs of N500.00 against the Appellant, were not contained in the judgment read by the learned trial Judge. (P86 L38)

2. The trial court's judgment as contained in the record of proceedings is incomplete because the consequential orders were not included therein, but were only recorded in the enrolment of judgment. The Appellant having made it an issue in this appeal, the Respondent's failure to attack the record and query its genuineness in view of the omission to record the consequential orders within the judgment shows that the record is authentic and the trial Judge had carelessly failed to remember to make the orders in his judgment. (P87 L8)

3. A formal drawn up order is not essential under the High Court Rules of Ondo state. The minutes of every final or interlocutory judgment must be made and these have the full force and effect of a formal order or Decree, and the judgment of a court shall be the decree of the court. (.P87 L19)

4. Where a judgment did not affect the status of the parties and did not finally dispose of their rights, but left the very point in issue undecided, such a judgment is clearly not a final judgment (P87 L27)

5. As the trial court considered only one issue and touched no other issue, declaring title to the land in dispute in favour of the Respondent being a

relief which was not claimed by the Respondent, it is abundantly clear therefore, that the court had not dealt with the real action filed by the Respondent in the writ of summons. (P87 L32)

6. After the Court of Appeal had considered the erroneous decision of the trial court and expunged the wrongful order that awarded title to the Respondent from the record, there remained no valid judgment of the trial court to be affirmed by the Court of Appeal (as it did). (P88 L9)

REPRESENTATION:

A.O. Akanle, for the Appellant.
Respondent, absent and unrepresented.

CASES REFERRED TO

1. Kalu v. Odili & 4 Ors. (1993)5 NWLR (Pt.240) at p.167 - 168
2. Ugo v. Obiekwe & Anor. (1989)1 NWLR (Pt.99) 566. p. 580.
3. Standard Consolidated Dredging & Construction Co. v. Katoncrest Nig Ltd (1986)5 NWLR (Pt 44) 791 p.799.
4. Okoye v. N.C.F. Co. Ltd (1991)6 NWLR (Pt.199)501.
5. Abbey v. Lamptey (1947)12 WACA 156
6. Afuwape v. Shodipe 91957)2 FSC 62
7. Umunna v. Okwuraiwe (1978)6-7 SC. 1
8. Ekpeyong & Ors v. Nyang & Ore (1975)2 SC 71
9. Kalio & Ors v. Daniel-Kalio (1975)2 SC 15
10. Nigeria Housing Development Society Ltd & Ors v. Mumuni (1977)2 SC 57
11. University of Lagos & 2 Ors v. Dada (1971)1 UILR Pt.111
12. Union Beverages v. Owolabi (1988)1 NWLR (Pt.68)
13. Thynne v. Thynne 1955) P272
14. Re Harrison's share (1955) Ch 260
15. Hall v. Meyrick (1957)2 QB 455
16. Shofejun v. Adeyemi & Ors 1981 FMLR 184
17. Oyediran & family v. Amoo & Ors (1970) NSCC 264
18. Obioma v. Olomu (1978)3 SC 1
19. Chief Registrar v. Vamos (1976)1 SC 33
20. Makajnuola v. Balogun (1989)3 NWLR 192 at 200

STATUTE REFERRED

High Court (Civil Procedure) Rules of Ondo State 1977 0.31 r.4

LEAD JUDGMENT BY MOHAMMED

This is an appeal from the judgment of Benin Division of the Court of Appeal in which it affirmed the judgment of Adeloye, J. (as he then was) of Ondo State High Court, sitting at Akure. The respondent, who was plaintiff at the trial High Court, took out a writ endorsed with the following claim:- *"The plaintiff's claim is N1,000.00 as general damages for trespass committed and still been (sic) committed by the defendant on the piece or parcel of land in possession of the plaintiff situate and being at and known as Plot 12 on Block XXI on Okuta Elerinla Residential Scheme Akure the same measuring approximately 966.58 square metres and particularly described on Plan No. AK 1373/OD attached to the Certificate of Statutory Right of Occupancy dated 16/11/79 and registered as 56/56/117 of the Lands Registry in the office at Akure and delineated by survey pillars No. CP225, CP227, CP231 and CP232 on the Survey Plan prepared by D.O. Akingbogun.*

An order of perpetual injunction restraining the defendant his servants and or agents from committing further acts of trespass on the said piece of land."

The respondent in her statement of claim, gave a detailed description of the land in dispute. The land was part of a parcel of land acquired by the defunct Government of Western State of Nigeria. By due process of law when Ondo State was created out of the old Western State the acquired land became vested in the Ondo State Government. On 1st September, 1979 the respondent was granted possession of the land in dispute by Ondo State Government. A Certificate of Statutory Right of Occupancy dated 16th November, 1979 and registered in the Lands Registry at Akure, was issued to the respondent.

In 1981 the appellant, who was defendant at the trial High Court, entered the disputed land and removed one of the survey pillars. The respondent reported the matter to the Permanent Secretary, Ministry of Lands and Housing, Akure who wrote a letter to the appellant over his encroachments on the disputed land. When the trespass did not stop the respondent filed the present action before the High Court Akure and claimed damages for trespass and perpetual injunction.

The appellant on his part stated in his statement of defence that the disputed piece of land was granted to him by the late Deji of Akure, Oba Ademuwagun II, in 1970. The land was later conveyed to him through a Deed of Conveyance registered in the Lands Registry Ibadan. The Lands Registry is now in Akure after the creation of Ondo State. The appellant

averred that he never disturbed or trespassed on any person's land and that all his activities had been limited to his own parcel of land.

After pleadings were exchanged, the parties called witnesses and tendered documents in proof of their respective cases. In a judgment in which, with respect, the learned trial Judge had paid little attention to details, the following conclusion was delivered:-

"In my view the defendant can only lay claim to land in the Elerinla area because he built a foundation there. The fact of building a foundation only shows occupation but not title. In the event, I find no evidence of defendant's title to the land notwithstanding that he might have buried his mother there and starked (sic) building materials on the land. Defendant has failed to
10 *prove title to the area claimed by him. On the other hand the Town Planning has validly acquired and paid compensation to {sic} the area shown as Plot 12 Block XXI on the Akure Area Planning Authority map and the same has been lawfully conveyed to the plaintiff. I declare title in her."*

15 It is clear from the judgment that the trial court did not consider the issue of damages for trespass and injunction which form the basis of the respondent's claim. The trial court also awarded title to the respondent which was not part of her claim before the court. Dissatisfied with the decision of the trial High Court, the appellant appealed to the Court of
20 Appeal. One of the grounds before the Court of Appeal complained about the award of N200.00 as general damages without making any specific finding over the issue or showing the ground upon which the grant was based.

The Court of Appeal, per Salami, J.C.A., with whom Uche Omo,
25 J.C.A. (as he then was) and Ndoma-Egba, J.C.A., concurred, unanimously dismissed the appeal. It is against that judgment the appellant sought for and obtained leave to prosecute this appeal. Five issues were formulated by the appellant's counsel from the five grounds of appeal. The learned counsel for the respondent urged that only issues (b), (c) and (d), from the issues
30 raised by appellant, are relevant for the determination of the appeal. I quite agree with the respondent's counsel, because issues (a) and (b) speak of the same matter. However, I am still not satisfied with the way the issues were drawn up by the appellant's counsel. This court had in several authorities, given guidelines on how issues for the determination of appeal are formu-
35 lated. Nnaemeka-Agu, J.S.C., in the case of Chief Onwuka Kalu v. Chief Victor Odili & 4 Ors. (1992) 5 NWLR (Pt.240) at pages 167-168, was confronted with issues formulated in the same manner as the appellant's counsel had done, in this appeal. My Lord Justice Nnaemeka-Agu paused in his judgment and commented that the so-called issues were rather argu-

ments of appeal. He went on to say as follows:-

"An issue for determination in an appeal must not only arise from and relate to the grounds of appeal filed, and no more, but also must be such a proposition of law or of fact or both so cogent, weighty, and compelling that a decision on it in favour of a party to the appeal will entitle him to the judgment of the court; see Chukwuma Ikwudili Ugo v. 5 Amamchukwu Obiekwe & Anor (1989) 1 NWLR (Pt.99) 566 p.580; Standard Consolidated Dredging & Construction Co. v. Katonecrest Nigeria Ltd. (1986) 5 NWLR (Pt.44) 791 p.799; Okoye v. N.C.F. Co. Ltd. (1991) 6 NWLR (Pt. 199) 501. This is why as a matter of practical facts, an issue emerges from one or more grounds of appeal filed not usually the other 10 way round. It certainly serves no useful purpose to pick out isolated statements of the court whose judgment is appealed from and make "issues" of them. Issues are intended to not only focus on the vital areas of conflict in the appeal but also serve as spring boards for argument: they are not intended to constitute arguments themselves." 15

Coming back to the case in hand, I will take out from the issues formulated that I believe is relevant and throwaway the husk. The issues should be as follows:-

- (a) Whether or not the extent of the land acquired is certain in view of the discrepancy between the evidence of P.W.2 and D.W.4. 20
- (b) Whether the Akure Town Planning and the Government of Ondo State could validly divest appellant of the land he acquired by purchase.
- (c) Whether the Court of Appeal was right to affirm a judgment in which the trial court awarded title taking into consideration, the provision of the Land Use Act. 25
- (d) Whether the High Court had considered the claim of the respondent in its judgment.

In his argument in support of the issue formulated over the award of title to the respondent, learned counsel for the appellant touched the issue of the award of damages for trespass and injunction. The learned counsel submitted that the award of damages for trespass and injunction only featured in the enrolment order of the High Court's judgment. Similar issue was raised before the Court of Appeal but the learned Justices did not make a clear decision over it. This issue is very fundamental because the enrolment order appears to be inconsistent with the judgment and that is 30 why I have made it a separate issue in the determination of this appeal. I intend to deal with this issue first, because if I agree with the learned counsel for the appellant that the judgment of the trial court is perverse, that in itself shall dispose of this appeal. 35

I have reproduced the conclusion of the learned trial Judge in his judgment and, as I said above, the learned trial Judge did not consider the case of the respondent which was based on a claim for damages and injunction. However, in the enrolment of judgment the following facts emerged:-

"ENROLMENT OF JUDGMENT"

5 *BETWEEN: SUIT NO. AK/4/82*

Mrs. Felicia Mobolanle Ige - Plaintiff

v.

Mr. Victor Olurotimi Defendant

UPON the following claims of the plaintiff against the defendant to wit:-

- 10 1. *N1,000 as general damages for trespass committed and is still
been (sic) committed by the defendant on the piece or parcel of
land in possession of the plaintiff situate and being at and known
as Plot 12 on Block XXI on Okuta Elerinla Residential Scheme
Akure the same measuring approximately 966.58 square metre
15 and particularly described on Plan No. AK/1373/OD attached to
the Certificate of Statutory Right of Occupancy dated 16/11/79
and registered as.56/ 56/117 of the Lands Registry in the office at
Akure and delineated by survey pillars Nos CP225, CP227, CP231
and CP232 on the said Survey Plan prepared by D.O. Akingbogun.
20 SGD.*

(HON. S.F. ADELOYE)

JUDGE

2. *An order of perpetual injunction restraining the defendant, his
servants and or agents from committing further acts of trespass on
25 the said piece or parcel of land."*

UPON the court hearing Mr. A.O. Fesobi for plaintiff and Mr.

Ajakaiye for defendant, court gave judgment as follows:-

- 30 *'Further to the grant of title I award N200 general damages to the plaintiff
and restrain the defendant from further disturbing the plaintiff on the said
plot 12 in block XXI Elerinla Layout Akure. Cost of N500 awarded against
the defendant in favour of the plaintiff.'*

ISSUED AT AKURE under the SEAL of the COURT and the HAND of the
presiding Judge, this 7th day of May, 1984."

- 35 I have reproduced the tail end of the judgment of the trial High
Court earlier in this judgment and it is clear that the award of N200 general
damages, the order restraining the appellant from further disturbing the
respondent on the land in dispute and the award of costs of N500 against
the appellant, were not contained in the judgment read by the learned trial
Judge on 7th May, 1984. The record of proceedings is very clear over this

issue. The learned counsel for the respondent submitted, in the respondent's brief, that the learned trial Judge made the orders as contained in the enrolment of judgment order on 7th May, 1984 when he delivered his judgment. If that is so, the judgment which I have seen and read in the record of proceedings is incomplete because those consequential orders were not included in the judgment. Since the consequential orders were only recorded in the enrolment of judgment and the appellant has made it an issue in this appeal, it is imperative that the respondent must attack the record and query over its genuineness in view of the omission to record the orders in the judgment. Having failed to do so this court is left with no alternative but to accept that the record is authentic and the trial Judge had carelessly failed to remember to make the orders in his judgment.

Those orders are supposed to be a summary of the finding of the learned trial Judge, in his judgment.

The judgment of a court shall be the decree of the court. A formal drawn up order is not essential under the High Court Rules of Ondo State of Nigeria - see Order 31 rule 4 of Ondo State High Court (Civil Procedure) Rules 1977. But the minutes of every judgment, whether final or interlocutory, must be made and these have the full force and effect of a formal Order or Decree. However, the court may of its own motion or on the application of either party order a formal order to be drawn up. See *J.O. Abbey v. Lamptey* (1947) 12 WACA 156.

I do not attribute any deliberate act to the learned trial Judge over this uncompleted decision. However, it is well settled that where a judgment did not affect the status of the parties, and did not finally dispose of their rights, but left undecided the very point at issue, such judgment is clearly not a final judgment see *Afuwape v. Shodiye* (1957) SCNLR 265; (1957) 2 FSC 62.

In the entire judgment of *Adeloye, J.* (as he then was) no mention was made of the claim for damages for trespass and injunction. In the entire judgment, the only issue considered by the learned trial Judge is whether the land in dispute, which the appellant claimed to have purchased from late *Deji of Akure*, *Oba Ademuwagun Adesida*, in 1970, is within or outside the gazetted expanse of land acquired by *Akure Town Planning Authority*. The learned Judge touched no other issue and, at the conclusion of the judgment, the court declared title to the land in dispute in favour of the respondent, a relief which was not claimed by her. It is abundantly clear therefore, that *Adeloye, J.* (as he then was) had not dealt with the real action filed by the respondent in the writ of summons before his court. The Judge did not make any decision on the claim for damages for

trespass and injunction and the judgment delivered is clearly inconsistent with the drawn up order. Assuming I accept that the Enrolment Order is based on actual decision made by the learned trial Judge, it is still not enough to simply award damages in trespass to land without giving any reason on how the court arrived at what amounted to reasonable damages. Umunna v. Okwuraiwe (1978) 627 S.C. 1. The Court of Appeal considered the erroneous decision of the trial court in which the learned trial Judge awarded title to the respondent, which was not part of the plaintiff's claim and expunged the order from the record. Now after the award of title has been expunged and considering the fact that there is no decision in the judgment on the claim for damages for trespass and injunction, what will be left? It goes without saying so that the judgment was left with no claim to support it. It is an uncompleted decision which became silent over the main claim filed by the respondent against the appellant. There is therefore no valid judgment of the trial court to be affirmed by the Court of Appeal. With this issue having determined the fate of this appeal. I do not intend to consider the remaining issues raised for its determination.

In the result, this appeal succeeds and it is allowed. The judgments of both the trial High Court and the Court of Appeal are hereby set aside. Since the claim filed by the respondent has not been considered by the learned trial Judge, I order that the case be remitted to the trial court for another Judge to be assigned to retry the claim de novo. The appellant is entitled to the costs of this appeal which I assess at N1,000.00 and I also award N500.00 as costs in the High Court and N200.00 in the Court of Appeal.

25

UWAIS JSC

I have had the advantage of reading in draft the judgment read by my learned brother Mohammed, J.S.C. I agree that the appeal has merit and that it should be allowed and the case be remitted to the High Court to be heard de novo by a different Judge.

The respondent, as plaintiff in the High Court of Ondo State, claimed before Adelaye J. (as he then was) that the appellant had trespassed onto her piece of land. She, therefore, claimed N1,000.00 general damages and perpetual injunction to restrain the appellant, his servants or agents from trespassing or committing any acts of trespass on the piece of land. Pleadings were exchanged. The appellant averred in paragraphs 7 and 8 of his statement of defence that the land in dispute was purchased by him and it was conveyed to him, in a registered deed of conveyance, by the late Deji of Akure Oba Ademuwagun II in 1970.

Witnesses were called by the parties at the hearing in the High Court. In his judgment, the learned trial Judge rejected the appellant's case when he stated as follows:-

"In my view the defendant can only lay claim to land in the Elerinla area because he built a foundation there. The fact of building a foundation only shows occupation but not title. In the event, I find no evidence of defendant's title to the land notwithstanding that he might have buried his mother there and staked (sic) building materials on the land. Defendant has failed to prove title to the area claimed by him."

Having so held, the learned trial Judge did not go on to consider the merit of the respondent's claims but simply stated thus:- 10

"On the other hand, the Town Planning (Authority) has (sic) validly acquired and paid compensation to (sic) the area shown as Plot 12 Block XXI on the Akure Area Planning Authority map and the same has been lawfully conveyed to the plaintiff. I declare title in her."

(Emphasis mine). 15

Dissatisfied with the decision of the trial court, the appellant herein appealed against the decision to the Court of Appeal. In its judgment in respect of the award of title made to the respondent by the High Court, the Court of Appeal (Uche Omo, J.C.A. as he then was, Ndoma-Egba and Salami J.J.C.A.) found as follows (per Salami, J.C.A.)::- 20

"The respondent took out a writ of summons claiming N1,000.00 general damages for trespass and injunction. In a case where there is a claim for trespass along with a claim for injunction the respondent/plaintiff is deemed to have put his title at stake or in issue and the trial court is duty bound to investigate title to land or exclusive possession of the area she claimed. I can find nothing in the writ of summons nor in the statement of claim indicating that there was ever any claim for a declaration of title. Consequently, I hold that declaration of title in the respondent was made in error as such a claim was never before the court and it is not a consequential order. The order awarding title to the respondent having been made without jurisdiction can be expunged on the authority of Shofekun v. Adeyemi; & others (1981) FNLR 184 and is hereby expunged." 25 30

Despite this finding the Court of Appeal went ahead to consider other 35 issues and concluded by dismissing the appeal in the following terms:-

"In the circumstances all the grounds of the appeal are unsuccessful, the appeal, therefore fails and is dismissed. The judgment and order of the court below is hereby affirmed with cost which I assess at N200.00."

In the further appeal to this court, the appellant formulated five issues for determination. However, I intend to mention here only issue no. (d) the determination of which is sufficient to decide the appeal before us. The issue reads:-

- 5 *"(d) as respondent did not claim title which the court of first instance awarded her; as the lower court expunged this order; whether or not the lower court could still affirm the judgment of the court of first instance which is for title alone especially in view of the Land Use Act, - Ground 1."*

In the appellant's brief of argument, learned counsel for the appellant 10 argued the issue as follows:-

"14. ISSUE D - Decision about Title

- (a) respondent's claim is for damages for trespass and injunction,*
- (b) the judgment of the court of first instance is for title alone,*
- (c) nothing is said about damages and injunction.*
- 15 *(d) it is only in the enrolment of judgment that damages for trespass and injunction feature,*
- (e) we urge court, however to discountenance the enrolment of judgment whose contents are not in consonance with the judgment itself,*
- (f) it is trite law that a court cannot award what is not claimed:-*
- 20 *(i) Oyediran v. Amoo (1970) 1 ANLR 313 at 317;*
- (ii) lko v. John Holt 2 FSC 50 at 52;*
- (iii) State v. President, Customary Court (1967) NMLR 267 at 276.*
- (g) indeed the lower court so found and expunged the order awarding title to respondent.*
- 25 *(h) in addition, under the Land Use Act, Nigerians can have only rights of occupancy, statutory or customary on land,*
- (i) surprisingly, however, the lower court still affirmed the judgment of the trial court and thereby affirmed a judgment given without jurisdiction and which was not claimed at all,*
- 30 *(j) nor is there anything in the judgment about damages for trespass and injunction claimed,*
- (k) the judgment of the lower court should consequently not be allowed to stay as it is perverse."*

At the hearing of the appeal he expatiated on the argument; he 35 referred to the order drawn by the High Court which purported that the learned trial Judge gave the following judgment:-

"UPON the court hearing Mr. A.O. Fesobi for plaintiff and Mr. Ajakaiye for defendant, court gave judgment as follows:

Further to the grant of title I award N200.00 general damages to

the plaintiff and restrain the defendant from further disturbing the plaintiff on the said Plot 12 in Block XXI Elerinla Layout, Akure. Cost of N500.00 awarded against the defendant in favour of the plaintiff.'

ISSUED AT AKURE under the SEAL of the Court and the HAND of the presiding Judge, this 7th day of May, 1984.

5

(SGD.) B. AFOLABI

HIGHER REGISTRAR."

Nothing can be further from the truth.

The respondent was not represented at the hearing of this appeal but in her brief of argument it is argued that the judgment of the trial court was delivered in open court and that the order made by the learned trial Judge is as contained by the enrolment order above. It is further noted argued, that the trial court had the jurisdiction to entertain the plaintiff's claim and that the fact that the learned trial Judge gave judgment in respect of the title to land, which was not claimed, his jurisdiction to hear the case was not ousted.

First of all it is very clear that the learned trial Judge awarded to the respondent title to the land in dispute contrary to the claims in her writ of summons and statement of claim. It is settled law that a trial court cannot grant to a plaintiff a remedy which has not been claimed by the plaintiff because it has no power to do so-see *Ekpenyong & Ors. v. Nyong & Ors.* (1975) 2 S.C. 71 at pp.81-82; *Kalio & Ors. v. Daniel-Kalio* (1975) 2 S.C. 15 at pp.17-19; *Nigerian Housing Development Society Ltd. & Anor. v. Mumuni* (1977) 2 S.C. 57 at p.81; *University of Lagos & 2 Ors. v. Dada* (1971) 1 U.I.L.R. (Pt.3) 344 at p.349; and *Union Beverages v. Owolabi* (1988) 1 NWLR (Pt.68) 128 at p.133. The learned trial Judge was therefore in error to have granted title to the land in dispute to the respondent since it was not claimed by her. Therefore the Court of Appeal acted correctly when it disallowed the award.

Secondly, once the award of title to the respondent is set aside, there is nothing in the judgment delivered by the learned trial Judge to show that the respondent's claims for trespass, damages and injunction had been considered by the learned trial Judge. As a result, his judgment was incomplete and therefore perverse. The Court of Appeal was in serious error to have upheld the judgment. There is nothing to sustain it since it did not address the respondent's claims.

With regard to the order drawn up by the High Court, there is nothing in the judgment of the trial court which shows that the learned trial Judge considered the issues of trespass or the award of damages for tres-

pass nor the grant of injunction against the appellant. It is amazing, therefore, how the learned trial Judge came to sign the drawn up order. Although the responsibility of drafting drawn up orders is in practice that of the Registrar of the Court, it is the duty of the trial Judge or the presiding Justice in an Appeal Court to ensure that the order is correctly drawn. It does not appear that sufficient care was exercised. In the present case, by the learned trial Judge, before signing the drawn up order.

Where an order is wrongly drawn up, a party who thinks that it is wrong and wishes to have it altered may in the ordinary way apply or appeal against it, as the case may be, - see *Thynne v. Thynne* (1955) P.272. Until the order is corrected it remains provisionally effective- *Re Harrison's Share* (1955) Ch. 260 and *Hall v. Meyrick* (1957) 2 Q.B. 455. In the present circumstances, since the order was wrongly drawn up and there is no need to correct it, in the light of the decision to follow, it ought, in the interest of justice to be expunged from the record. I, therefore, so order.

Finally, the judgment of the trial court which was upheld by the Court of Appeal did not, by its failure to deal with the respondent's claims, affect the status of the parties, neither did it finally dispose of their rights since it leaves undecided the very points in issue, namely whether the appellant committed trespass on the land in dispute and was therefore liable to damages and to be restrained from committing further trespass. In the circumstances, the proper order to be made is to remit the case to the High Court in order to have it heard de novo.

In the result, I allow the appeal for the reasons given above and those contained in the judgment of my learned brother Mohammed, J.S.C. The decisions of the trial court and the Court of Appeal are hereby set aside. The costs awarded by them are hereby set aside. The appellant is awarded costs assessed as follows, in the High Court N500.00; in the Court of Appeal N200.00 and in this Court N1,000.00.

30

OLATAWURA JSC

The issue in this appeal appears to me simple in view of the claims in the writ of summons and the judgments of the lower courts. It is pertinent to mention the claims before the court of trial were for damages for trespass committed by the defendant and also an order of perpetual injunction restraining the defendant, his servants and agents from committing further acts of trespass. Pleadings were filed and exchanged. The trial came before Adeloye J. (as he then was) and on 7th May, 1984 he gave judgment in favour of the plaintiff as, follows:-

"In my view the defendant can only lay claim to land in the Elerinla area because he built a foundation there. The fact of building a foundation only shows occupation but not title. In the event, I find no evidence of defendant's title to the land notwithstanding that he might have buried his mother there and stacked building materials on the land. Defendant has failed to prove title to the area claimed by him. On the other hand the Town Planning has validly acquired and paid compensation to (sic) the area shown as Plot 12 Block XXI on the Akure Area Planning Authority map and the same has been lawfully conveyed to the plaintiff. I declare title in her."

The judgment of the learned trial Judge is silent on the issue of perpetual injunction. However, the Enrolment Order which should reflect the judgment of a court gave the plaintiff a claim in respect of which the learned trial Judge was completely silent in the judgment. In fact the enrolment order is the antithesis of the judgment of the court: The Enrolment Order reads:- *"Further to the grant of title I award N200 general damages to the plaintiff and restrain the defendant from further disturbing the plaintiff on the said Plot 12 in Block XXI Elerinla Layout Akure. Costs of N500 awarded against the defendant in favour of the plaintiff."*

It is therefore not surprising that when this issue of title was raised in the Court of Appeal, the Court per Salami, J.C.A. said:-

"I can find nothing in the writ of summons not in the Statement of Claim indicating that there was ever any claim for a declaration of title. Consequently, I hold that the declaration of title in the respondent was made in error as such a claim was never before the court and it is not a consequential order. The order awarding title to the respondent having been made without jurisdiction can be expunged on the authority of Shofekun v. Adeyemi & Others (1981) FNL R 184 and is hereby expunged."

The appeal of the defendant was dismissed, hence the appeal to this court. Briefs were filed by both parties but only the appellant's counsel was in court at the hearing of the appeal. I will confine my contribution to issue (d) which for ease of reference I reproduce hereunder:-

"(d) as respondent did not claim title which the court of first instance awarded her; as the lower court expunged this order, whether or not the lower court could still affirm the judgment of the court of first instance which is for title alone especially in view of the Land Use Act, - Ground 1."

The respondent has admitted that issue (d) above is one of the 3 issues the respondent considered germane to the appeal.

The appellant's main attack is based on the elementary principle of

law that without an amendment to a claim filed, the court not being a Father Christmas, cannot grant more than the claim in the writ of summons: Oyediran & Family v. Amoo & Ors. (1970) NSCC 264.

It appears to me that the respondent misconceived the kernel of the submission on this point for the respondent has submitted that *"the mere fact*
5 *that the trial court gave judgment for title to land and which was not claimed in the writ does not oust the jurisdiction of the trial court"*. The crux of this issue as stated earlier is that the trial court gave judgment for a claim not before the court. Since the Court of Appeal has rightly expunged that part of the judgment, the best the respondent could have done was to have
10 appealed against that part of the judgment. In his oral submission in amplification of his brief, Mr. Akanle went further to emphasise that since that part of the judgment of the trial court has been expunged, the only course left for the lower court was to have dismissed the case or to order a retrial. It is difficult to reconcile the stand of Mr. Akanle's final submission where
15 he firmly urged a dismissal of the action with his earlier submission for a retrial. However there are findings made by the trial court which as I will point out shortly will decide whether the appeal should be dismissed or a retrial ordered. The learned trial Judge appreciated the defendant/appellant had a building/foundation which only "shows occupation but not title". He
20 also agreed that the appellant might have buried his mother on the land, but that he failed to prove title.

Since the title granted to the respondent by the trial Judge had been expunged by the Court of Appeal, there is nothing left in the judgment to enable the lower court find in favour of the plaintiff/respondent. Although
25 in principle a retrial will not be ordered where to do so will give the plaintiff an opportunity of having another bite at the cherry, but in this case the case of both parties were not adequately considered. Since some of the findings are in favour of both the plaintiff and the defendant, it will therefore lead to a miscarriage of justice to find in favour of either party where such findings
30 did not show conclusively that the plaintiff has failed completely to prove her case and neither can it be said that the defendant's defence has failed completely. Neither party will be prejudiced if a retrial is ordered.

It is for these reasons and the fuller reasons contained in the lead judgment of my learned brother Uthman Mohammed, J.S.C. that I will
35 also allow the appeal. The judgments of both the High Court and the Court of Appeal are hereby set aside. The case is remitted to the High Court of Justice, Ondo State to be heard by another Judge. I also make the same order as to costs.

OGUNDARE JSC

I have had the advantage of a preview of the judgment of my learned brother, Mohammed, J.S.C. just delivered. The judgment of the learned trial Judge contained in the record of appeal before us made no award of damages for trespass nor did it contain any order for an injunction nor an order for costs.

The rules of the High Court of Ondo State in force at the time of the trial in that court allowed for a formal decree to be drawn up - see Order 31 rule 4 of the High Court (Civil Procedure) Rules of Ondo State. This formal decree is usually referred to as "Enrolment Order". The enrolment or drawn-up order must reflect the judgment delivered in open court; it is not to be an addendum to it. The power of a Judge to amend his judgment is limited only to where there is a clerical mistake in the judgment or order, or an error arising from an accidental slip or omission. And the inherent power of a court to vary its own orders relates only to where it is necessary to carry out its own meaning and to make its meaning plain - see: *Thynne v. Thynne* (1955) P.272. The error or omission must be an error in expressing the manifest intention of the court. The correction can only be made on motion.

The Enrolment Order on page 58 of the record of appeal is inconsistent with the judgment delivered in open court and copied on pages 50-57 of the record. There is nothing on record to suggest that the trial Judge ever amended the judgment he delivered in open court nor were there circumstances to justify an amendment being made. There is nothing in the judgment to suggest that the learned trial Judge ever adverted to his mind to the claims before him; he rather proceeded to consider, as between the parties, who had title to the land in dispute. The end result was that judgment was entered in plaintiff's favour on a claim not put forward by her while the trial Judge made no pronouncement on the claims put forward by her.

Regretably, although this issue formed part of the issues for determination in the appeal to the Court of Appeal, the learned Justices of Appeal who sat on the appeal did not decide it. After setting aside the order for title made by the learned trial Judge, they should have allowed the appeal before them and as the trial Judge gave no decision on the claims before him, order a retrial before another Judge.

For the reasons given in the lead judgment of my learned brother, Mohammed, J.S.C. and in the very elucidating judgment of my brother Uwais, J.S.C. a preview of which I have had the advantage of, I too allow this appeal and set aside both the judgments of the Court of Appeal and

the High Court of Ondo State and abide by the order of retrial and the order for costs made in the lead judgment.

ONU JSC

Having been privileged to read in draft the lead judgment of my
 5 learned brother, Uthman Mohammed, J.S.C. just delivered, I agree that
 the appeal succeeds and it is allowed by me. I however wish to add a few
 words of mine.

The plaintiff/respondent's claim in the trial court against the appel-
 10 lant who was defendant simply put, was for general damages for trespass
 and perpetual injunction. Having, in my view lost sight of the claim before
 him, the learned trial Judge at the end of the day inauspiciously and erro-
 neously concluded his judgment by the use of the words:-

"I declare title in her".

With utmost due respect, while the learned trial Judge by the above conclu-
 15 sion left out the issue of damages for trespass and injunction which formed
 the basis of the respondent's action, he proceeded to decree title in her. It is
 an established principle of law that a court is without powers to grant a
 party a relief or reliefs not asked for. See *Obioma v. Olomu* (1978) 3 S.C.
 1; *Chief Registrar v. Vamos* (1976) 1 S.C. 33; and *Makanjuola v. Balogun*
 20 (1989) 3 NWLR (Pt. 108) 192 at 206. Indeed, the relief granted to the
 respondent in the instant case is a substantive, not an ancillary or conse-
 quential relief and the law frowns on such an act. See the decision of this
 court in *Union Beverages Ltd. v. MA. Owolabi* (1988) 1 NWLR (pt.68)
 128; and *Unilag v. Dada* (1971) 1 All NLR (Pt.3) 344 at 349.

25 Quite apart from the proliferation of issues submitted by learned
 counsel on behalf of the appellant, adequate treatment of which has been
 fully made in the lead judgment of my learned brother, it can no longer be
 seriously contended, in my view, that the decisions of the trial court and
 that of the Court below constitute concurrent findings of facts. This is be-
 30 cause, what the trial court indeed decided, and which is not what appears
 on the enrolment order, coupled with the failure of the court below to make
 comments thereon, made the entire decision perverse.

For the above and the fuller reasons given in the lead judgment of
 my learned brother Uthman Mohammed, J.S.C., with which I entirely agree,
 35 I allow this appeal, set aside the decisions of both courts below and make
 the same consequential orders inclusive of those as to costs. In addition, I
 agree that there shall be a trial de novo before another Judge as contained
 in lead judgment.