

SUPREME COURT OF NIGERIA
19TH FEBRUARY, 1993. SC. 268/1989
CORAM:- S. KAWU, S. M. A. BELGORE,
P. NNAEMEKA-AGU, U. OMO, I. L. KUTIGI, JJSC

CHIEF KARIMU AJAYI ARUBO
(The Alashe of Ojuwoye, Mushin) APPELLANT
AND

FATAI AYINLA AIYELERU & 4 ORS RESPONDENTS

CIVIL PROCEDURE - Power conferred by a provision of High Court Rules - whether disjunctive or conjunctive - construction of the rule.

CIVIL PROCEDURE - Abuse of court's process - where rule of court does not empower court to dismiss the action - reliance on court's inherent powers - is mandatory

CIVIL CAUSES - where a party's action has collapsed - whether court can create a cause of action - where none exists.

COURTS - Steps that suggest favour to one side - contradicts principles of fair hearing - judge must allow parties to fight their fight

ESTOPPEL - Issue estoppel - when properly raised - effect thereof

JUDGMENT - By court of competent jurisdiction - binding on the parties until reviewed or reversed by the court - tribunal of inquiry - whether capable of reviewing Supreme Court's Judgment

POINT OF LAW - Waiver - proper meaning of - when not applicable

FACTS

Before the Lagos High Court, the plaintiff/Appellant claimed, inter alia, against the Defendants/Respondents a declaration that he is the head of Ojuwoye Community account of all rents collected on behalf of Ojuwoye Community and perpetual injunction. After pleadings had been filed, the Defendants relying on two earlier consolidated cases that went up to the Supreme Court, raised the plea of issue estoppel and urged that the action be dismissed being an abuse of court's process. The trial Judge struck out paragraphs 2 - 50 of plaintiff's statement of claim but went ahead to amend and or granted leave for the amendment of plaintiff's claim and writ of summons suo motu instead of dismissing the claim, since the only remaining paragraph did not disclose any cause of action.

Plaintiff sought to place reliance on the recommendation of a tribunal of inquiry that overruled even the Supreme Court judgment in the previous suits relied upon by Defendants in pleading issue estoppel. He urged that the Defendants' participation in the tribunal of inquiry amounted to a waiver of their right in the said previous suits. On appeal to the Court of Appeal, by the Defendants, the appeal was allowed and Plaintiff's claim was dismissed in its entirety. Dissatisfied with the Court of Appeal's judgment, the Plaintiff appealed to the Supreme Court.

HELD (Unanimously dismissing the appeal)

1. The Court's power under Order 6 rule 25 of High Court Rules Lagos State is to either strike out or amend pleading, the word "Or" used in the rule having a disjunctive connotation. Power to strike out and amend is not conferred upon the court by the said rule.(p. 36)

2. The trial Judge having no conjunctive Power under the rule, was in error to have proceeded to amend the claims after striking out the pleading. The court's power does not extend to the power to dismiss the suit under the said order..(p. 37 L. 3)

3. Though the Rule of Court under consideration has no provision authorising the dismissal of a suit for being an abuse of process, provisions of the 1979 constitution conferred on every superior court of

record all inherent power and sanctions of a court of law.
(p. 37 L. 10)

4. Once a court is satisfied that any proceeding before it is an abuse of process it has the power, indeed the duty to dismiss such proceeding.(p. 37 L. 20)

5. A Judge as an impartial umpire cannot make a new case for either party where the case it brought to court has collapsed. Therefore, he cannot in the exercise of his power to order an amendment create a cause of action where none existed.(p. 38 L. 33)

6. Our principles of fair hearing under s.33 of the 1979 Constitution makes it improper for the Judge to take any step in the proceedings which can remotely give the impression that he is inclining to one side against the other. He must allow the parties to fight their fight and make all necessary applications as they may deem necessary on their own initiative.(p. 38 L. 33)

7. What litigants expect in a court of law are even-handed justice reached in accordance with law and the rules of the game under the basic principle that whoever must fail or succeed must do so without any assistance from the courts. (P. 39 L. 11)

8. The Court of appeal was right to have set aside the trial court's order for amendment which was made in breach of established principles of justice. (p.39 L. 22)

9. Under our rules of pleading, a judicial decision may involve a determination on a number of issues. Issues raised and determined between same parties in a previous suit cannot, save in¹ special circumstances, be raised again in any other suit as a matter of public policy, since issue estoppel can be raised in respect of those issues. (p.39 L.36)

10. It was no more open to the Appellant to raise any issue as to the headship or ownership of any of the lands of the Ojuwoye Community for those issues have been caught by issue estoppel against the Plaintiff/Appellant. (p. 40 L.32)

(11) A tribunal of inquiry is inferior to both the High Court and the Supreme Court which under the constitution are vested with unlimited powers to adjudicate on rights of parties and see to the execution of their decisions. (p. 41 L. 30)

(12) Final judgment given in favour of a party by a court of competent jurisdiction is binding on the parties and their privies, and can only be set aside on appeal. A tribunal of inquiry is not a court of appeal, competent to review, set aside or override such a judgment. (p. 41 l. 34)

(13) In point of law, waiver is generally an express or implied abandonment of a right, and a defence against its subsequent enforcement. Whilst a mere statement not to insist on the right is not a waiver in the absence of consideration, a deliberate election not to insist on one's full rights will be binding. Definitely, mere participation in an inquiry per se, cannot constitute a waiver. (p.42 l. 15)

(14) A compromise by the parties to set aside a conclusively binding judgment of a court of competent jurisdiction cannot be effective until and unless the court is called upon to exercise its function of review or reversal. (p. 43 L. 33)

(15) As there is no reversal of the past judgments by any court and in the absence of materials upon which to find a waiver, the Respondents' rights under those judgment cannot and have not been waived. (p. 42 L. 40)

PER BELGORE JSC *"Once a judge has decided that a claim cannot be maintained whereby he strikes it out or dismisses it he is functus officio and cannot re-open it by ordering an amendment"*. (p.44 L. 20)

REPRESENTATION

Chief Sam Ade Oshisanya, L. U. Ihenacho For the Appelants
P. O. Jimoh Lasisi, Oladipo Olayinka For the Respondents

CASES REFERRED TO

1. Akinliyi & 5 others v. Ladega Suit No. 1/291/58

<u>Arubo v. Aiyeleru (1993) 2 KLR Nnaemeka-Agu JSC</u>	27
2. Chief Jimoh Aileru & others v. Lasisi Salu Suti No. HR/108/61	
3. Aminu Ajayi, Chief Ojora v. Abudu L.A. Odunsi (1959) 4 F.S.C189	
4. Willis v. Earl of Beauchang (1886) 11	
5. Stephenson v. Garrett (1898) 1 Q.B 677	5
6. Spring Grove Services Limited v. Deane (1972) 116 s. 844	
7. Orizu v. Anyagbunan (1978) 57 S.C. 21	
8. Ojo v. Oseni (1987) 4 N.W.L.R. 622	
9. Adetutu v. Aderohonmu & ors (1984) 1 S.C.N.L.R 515	10
10. Thoday v. Thoday (1964) 1 ALL E.R. 341	
11. Fidelitas shipping Company Ltd v. Exportchleb (1965) 2 ALL E.R 4	
12. Samuel Fadiora & anor v. Festus Ggbdebo (1978) 3 S.C. 219	
13. Paul Cardoso v. Daniel & ors (1986) 2 N.W.L.R. 1	15
14. Henderson v. Henderson (1843) 67 E. R 313	
15. Humani Ajoke v. Amosa Oba (1962) 1 A.N.L.R. 13	

STATUTES & RULES

1. High Court of Lagos State (Civil Procedure) Rules, 1977 0.16 r. 25, 0.22 r. 4, 0.25 rr. 6 & 7	20
2. Rules of Supreme Court of England 1985 0. 18 r. 19	25
3. Constitution of the Fed. Rep. of Nigeria 1979 ss. 6 (6) (a), 33	
4. Halsbury Laws of England Volume 37 3rd Edition	

BOOK REFERRED TO

Spencer - Bower and Turner on Res judicata 2nd Edition

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LEAD JUDGMENT BY NNAEMEKA-AGU JSC

This is an appeal by the plaintiffs against the judgment of the Court of Appeal, Lagos Division. In the leading judgment of Awogu,

J.C.A. to which Ademola, J.C.A. and Akpata. J.C.A. (as he then was) concurred, that court allowed an appeal against the ruling of a Lagos High Court which had upheld the defendants' objection to a substantial part of plaintiff's pleading but proceeded to amend plaintiff's claims. The Court of Appeal not only set aside the amendments but
 5 also dismissed the plaintiff's claims in their entirety. Hence the plaintiff has appealed to this court.

The facts from which the appeal arose are rather interesting.
 10 By a writ of summons the plaintiff as the Alashe of Ojuwoye commenced an action in a Lagos High Court against the six defendants "for themselves and as representatives of Ojuwoye Community" claiming the following reliefs:

15 *"(a) a declaration that the plaintiff as the Alashe of Ojuwoye is the head of Ojuwoye Community and that there can be no Ojuwoye Community without the Alashe of Ojuwoye:*

20 *(b) an order compelling the Defendants, their servants and/or agents to render to the plaintiff an account of all rents or moneys collected on behalf Ojuwoye Community; and/or agents from collecting any further rents or moneys in respect of any property belonging to Ojuwoye Community;*

25 *(d) A perpetual injunction restraining the Defendants, their servants and/or agents from collecting their occupation of the plaintiff's Palace, No. 24 Ojuwoye, Mushin." (Sic).*

30 Sometime after pleadings had been filed the defendants under a "Notice For Further Directions" applied that paragraphs 2 to 56 of the statement of claim be struck out and the plaintiff's claim be dismissed. The grounds for the application were stated to be as follows:

35 *"GROUNDS OF APPLICATION*

1. The defendants plead issue estoppel based on the decision of the High Court in Akinliyi & 5 Ors. v. Ladega and Chief Jimoh Aileru & Ors. v. Lasisi Salu Suits Nos. 1/291/58 and HK/108/61 and

confirmed by the Supreme Court in Suit SCI/1967: William Ladega (for himself and on behalf of the Alashe Family) - Akinliyi and 4 Ors. (for themselves and on behalf of the Ojuwoye Family).

2. *The parties herein and/or their predecessors in title in Suit numbers 1/291/58 and KH/108/61 and SCI/1967 pleaded their tra-⁵ditional history and testified in support thereon.*

3. *The issue of ownership of all Ojuwoye land as raised and determined in favour of the Defendant applicants (pp.9-12 of Ex-¹⁰hibit A confirmed in Exhibit B) that they are the owners of Ojuwoye land and that the descendants of Alashe are their customary tenants.*

4. *The headship of Ojuwoye Community was raised and de-¹⁵termined in favour of the defendants/applicants therein that Alashe is not the head of Ojuwoye Community and that Bale of Ojuwoye is the head of Ojuwoye Community (p.12 of Exhibit A).*

5. *The learned trial Judge in suit Numbers 1/291/58 and HK/²⁰108/61 found also that:-*

*(i) the Alashe is a fetish priest whose appointment is subject to the consultation of the Elders of Ojuwoye Community (p.13 of Exhibit B).*²⁵

(ii) The Bale of Ojuwoye is the head of Ojuwoye Community (p.12 of Exhibit A).

(iii)... the question of the ownership of all lands at Ojuwoye³⁰ has been put in issue, and having regard to all the evidence I have accepted in this case, I have also come to the conclusion as a finding of fact that the ancestors of the plaintiff were the first settlers on the land now known and called Ojuwoye and I hold that the defendants' ancestors were strangers and were customary tenants of the plaintiff's³⁵ family' (P.12 of Exhibit A).

6. *The plaintiff/respondent herein testified in 1/291/58 and HK/108/ 61 as 2nd D.W.*

7. *The claims raised in the endorsements on the Amended Writ of Summons and incorporated by reference in paragraph 56 of the Statement of Claim ought to have been raised in a counterclaim against the present applicants and/or predecessors in 1/291/58 and 136 HK/108/61.*

5 8. *The present claim herein is an abuse of court process and tend to prejudice, embarrass and delay the fair trial of this action.*

9. *The parties in this action are the same individually and also in their representative capacities as in Suits Numbers 1/291/58 and HK/108/61 and SC 1/1967.*
10

b) a consequential order that the plaintiff's claim herein be dismissed as disclosing no cause of action;

(c) such further directions as may seem fit in the circumstances."

15 Exhibited to the affidavit in support of the application were:-

(i) The judgment in Suit Nos. 1/291/58 and HK/108/61 (consolidated)

(ii) Supreme Court Appeal No. Sc. 1/1967.

20 There were also a counter - affidavit and a further affidavit to which the amended statement of claim and amended statement of defence in 1/291/58, and the statement of claim and statement of defence in HK/1 OX/61 were also exhibited. Also exhibited was a further counter - affidavit to which the Report of a Tribunal of Inquiry
25 on Alashe of Ojuwoye Chieftaincy.

In those consolidated suits, the learned trial Judge made a number of findings before reaching his conclusion. The most important of those findings were as follows:

(i) The issue of ownership of the whole of the communal lands of Ojuwoye family was raised and resolved in favour of the plaintiffs therein who are the present defendants. It was held that the
35 present plaintiffs were strangers.

(ii) An issue was also raised as to the headship of Ojuwoye Community. It was decided that the head of the Community was the Bale, as maintained by the present defendants, and not the Alashe, as maintained by the present plaintiffs.

(iii) The learned Judge finally held that whatever rights the present plaintiff might have had had been lost by them according to native law and custom.

The Supreme Court dismissed the appeal by the present plaintiff (as defendants/appellants) in the consolidated suits. Thereafter the present defendants executed a writ of possession in respect of No. 24 Ojuwoye, Mushin, which is now being claimed as the Palace of the Alashe by the present plaintiff.

The contentions of the defendants/respondents in the application before Balogun, J, in this suit the ruling on which has led to this appeal were that paragraphs 2 - 56 of the statement of claim in this suit raise issues which had been raised and finally decided in the two consolidated suits and the Supreme Court appeal therefrom. So they raise issue estoppel in favour of the defendants/respondents. Therefore, the pleading which sought to raise them again should be struck out. They also contended that raising them again in a fresh suit was an abuse of process for which the whole suit should be dismissed.

In his ruling which ran into some 24 pages of type - script, the learned trial Judge, Balogun, J. made a number of findings. It is better, I believe to quote his ipsissimi verbis which are relevant and material.

(i) On the law, he stated as follows:

"Having considered the submissions of learned counsel for both parties very carefully, I find it very simple to arrive at the clear conclusion, on the authorities, that the plaintiffs cannot be allowed to re-open for determination in this present action issues which had been put in issue and finally determined between him and/or his predecessors in title or privies on the one hand, and the Defendants and/or their predecessors in title or privies on the other hand, in the earlier actions; and that it is a clear abuse of the process of the court for the plaintiff to seek to re-litigate such issues in this present action. For these reasons it seems to me that all averments in the Statement of Claim relating to any issue which had been determined in the earlier proceedings must be struck out"

(ii) On the ownership of Ojuwoye lands he held

"The issue of ownership of all lands at Ojuwoye, as shown above
 "in this ruling was put in issue in the earlier proceedings between the
 predecessors in title to the parties to the present action or the parties
 hereto. Accordingly, that issue of ownership of those lands cannot be
 5 re-opened in this present action. It is a case of 'issue estoppel' as dis-
 tinct from cause of action estoppel."

(iii) On the headship of Ojuwoye Community he found that
 10 it had been settled in the previous suits that the Bale and not the
 Alashe was the head of the community and that the Alashe was al-
 ways appointed after consultation with the community. As these were
 issues which had been decided in the previous consolidated cases
 and the Supreme Court on appeal therefrom he held that the situa-
 15 tion raised issue estoppel in favour of the present defendants. He,
 therefore, struck out paragraphs 2-56 of the 56 paragraph statement
 of claim. But suo motu, he granted to the plaintiff leave to amend to
 enable him continue the proceedings. He ordered as follows:

20 "For all those reasons, and doing the best I can to meet the
 Justice of this case in this present application, and pursuant to all
 powers enabling, I make orders as follows:-

1. As respects claim (a) endorsed on the Writ of summons
 25 herein I grant leave to the plaintiff to amend the same to add the
 words:

"...and that as the Alashe of Ojuwoye, the plaintiff is entitled
 to Occupy No. 24 Ojuwoye, Mushin as his Official Residence or Iga',
 30 the said property having been so used since "

OR WORDS TO LIKE EFFECT;

2. As respects claim (b) and (c) endorsed on the writ of sum-
 mons, I make an order striking out the same, without prejudice to
 the plaintiff amending his writ of summons to claim such other reliefs
 35 as he deems fit as consequential to claim (a) as in the proposed amend-
 ment in Order 1 above; so however that the plaintiff shall not seek
 any

3. As respects the averments in the Statement of Claim, I
 make an order striking out all the averments in paragraphs 2 to 56

thereof in so far as those averments relate to assertion of right, title, or interest to OJUWOYE FAMILY LAND, the ownership of which had been finally determined in the earlier proceedings mentioned above in this Ruling, but without prejudice to Order 4 herein granting leave to both parties to amend their pleadings as respects the claims for which the plaintiff has been granted leave in Order 1 above 5 to set up in an Amended Writ of Summons;

4. Subject to Order 1, 2 and 3 above, I hereby make an Order granting leave to both the plaintiff and the defendant to amend their Statement of Claim and Statement of Defence in this present action. 10

5. I further order, that the plaintiff shall file and serve his Amended Writ of Summons and his Amended Statement of Claim together and within fourteen (14) days from today on the reliefs and issues 15 preserved for determination by this Ruling and the orders hereby made; and that the defendants shall file and serve their Amended Statement of Defence within fourteen (14) days thereafter;

6. Liberty to Apply: One more word. I think I ought to emphasise 20 that in making the Amendments to the Writ of Summons and the Statement of Claim for which leave has been hereby granted, care must be taken by the plaintiff not to seek any reliefs in the Amended Writ or make any averments in the Amended Statement of Claim to 25 re-instate any reliefs or averments which have hereby been struck out."

The defendant appealed to the Court of Appeal. That court allowed the appeal and dismissed the plaintiff's case in its entirety. The court held that the order to amend the claims and the statement 30 of claim were in error; that he should have considered the application to dismiss the suit; and that having struck out 55 out of the 56 paragraphs in the statement of claim, the single remaining paragraph was not sufficient to sustain the action. Hence the appeal was allowed 35 and the claims dismissed.

Dissatisfied with the judgment of the Court of Appeal the plaintiff has appealed to this court. From the three grounds and additional ground of appeal filed by him, he formulated the following issues:

"1. Whether the Court of Appeal was justified in dismissing the plaintiff's claim in its entirety despite the existence of claim (a) which the trial Judge directed the plaintiff to amend, and despite the existence of claim (d) which was perfectly legitimate and unassailable.

5 *2. Even if there were serious irregularities in the claim whether it would serve the end of justice to strike the claim out rather than to dismiss it in its entirety.*

10 *3. Whether Alashe Chieftaincy title or its Palace or Iga was affected by any issue estoppel.*

4. Even if there was any issue estoppel on Alashe Chieftaincy title or on its Palace or Iga whether such an issue estoppel had been waived
15 *in view of the subsequent inquiry of Justice Olushola Thomas into Alashe Chieftaincy title.*

5. Whether paragraphs 2 - 56 of the statement of claim were struck out totally and absolutely without any reservation whatsoever; and if
20 *there was any reservation whether the plaintiff was entitled to amend in view of the reservation.*

6. Since paragraph 2 -56 of the statement of claim were not struck
25 *out 'simpliciter' but conditionally whether it was reasonable in the circumstance to allow the plaintiff to amend in order to effect a fulfilment of the condition.*

7. Whether the Court of Appeal committed an error of misdirection
30 *or misinterpretation of claim (d) of the Writ of summons; and whether the error affected its decision.*

8. Whether it was irregular for the Court of Appeal not to consider
35 *the issue of costs which was one of the two things appealed against.*

9. Whether the weight of evidence was indeed in favour of the plaintiff."

The respondents in their brief formulated the issues thus:

"2.1 WHETHER IT IS NOT AN ABUSE OF PROCESS OF

THE COURT TO PERMIT AN AMENDMENT OF THE TRIAL WHICH WILL ALLOW THE PLAINTIFF TO RE-OPEN THE QUESTION OF TITLE TO LAND NAMELY THE RECOVERY OF A PARCEL OF LAND SITUATE AT NO.24 OJUWOYE MUSHIN NOW REDESIGNATED 'THE PALACE' OR IGA (YORUBA LANGUAGE WORD FOR PALACE) AN ISSUE DETERMINED IN FAVOUR OF THE DEFENDANTS IN SUIT NOS. 1/291/58 AND HK/108/61.

2.2. WHETHER THE ISSUE OF HEADSHIP OF OJUWOYE COMMUNITY WAS NOT CAUGHT BY THE DOCTRINE OF ISSUE ESTOPPEL BY JUDGMENT IN THE EARLIER SUIT 1/291/58 AND HK/108/61.

2.3. If so, was IT NOT AN ABUSE OF PROCESS TO RE-OPEN THAT ISSUE IN THIS SUIT.

2.4. WHETHER A TRIBUNAL OF INQUIRY CAN REVIEW THE DECISION OR FINDINGS OF A COURT OF COMPETENT JURISDICTION NAMELY THE HIGH COURT AND THE SUPREME COURT.

2.5. WHETHER THE COURT OF APPEAL WAS NOT RIGHT IN SETTING ASIDE THE DECISION OF THE HIGH COURT GRANTING SUO MOTU AN ORDER OF AMENDMENT IN FAVOUR OF THE PLAINTIFF.

2.6 IF SO, WAS THE COURT OF APPEAL RIGHT IN DISMISSING THE PLAINTIFF'S CLAIMS IN ITS ENTIRETY."

What cannot be and has not been disputed in these proceedings is that paragraphs 2-56 of the pleading in the statement of claim were struck out by the learned trial Judge. Learned counsel for the appellant, however contends that because the learned trial Judge proceeded to, suo motu, subsequently amend the claims before the court, there remained in existence some... between the parties. It was only a conditional striking out, he contended. It was his further submission that on the final orders made by the learned trial Judge, claim (a) was still existing in the amended form and claim (d) was "fresh and unimpaired and did not require any amendment." So, he submitted, there was no justification for dismissing the claims in their entirety. Dismissing the two claims in the circumstances did not meet

the end of justice, he submitted. Citing Aminu Ajayi, Chief Ojora v. Abudu Lasisi Ajibola Odunsi (1959) 4 F.S.C. 189. at pp.190 and 19; (1959) SCNLR 496, counsel submitted that where a court has no jurisdiction over a matter the correct order to make is one striking out the suit, not one dismissing it.

5 Learned counsel for the respondent on the other hand submitted that on a proper application of the rule under which the learned trial Judge acted, he had no power to amend the claim after striking out the pleading in support thereof. He had no power to amend the
10 claim suo motu, particularly after striking out the pleading. As the learned trial Judge found that issue estoppel arose on the issues raised on the statement of claim in view of the previous suits between the parties and on appeal therefrom an order of dismissal made by the
15 Court of Appeal was the correct order.

I wish to observe that, contrary to the submission of the learned counsel for the appellant, what is in issue is not a question of jurisdiction. Rather, it is the power of and what orders that could be made by a
20 Judge under Order 16 rule 25 of the High Court of Lagos State (Civil Procedure) Rules, 1972. So, the case of Ojora v. Odunsi (supra) is not in point.

Now Order 16 rule 25 of the Rules provides as follows:-

25 *"25. The Court or a Judge in Chambers may at any stage of the proceedings order to be struck out or amended any matter in any endorsement or pleading which may be unnecessary or scandalous or which may tend to prejudice, embarrass, or delay the fair trial of the action; and may in any such case, if the Court or Judge in
30 Chambers shall think fit, order the costs of the application to be paid as between legal practitioner and client."*

I wish to note that although more restrictively drafted, this rule is, subject to my observation below, to a great extent in pari materia with Order 18 rule 19 of the Rules of the Supreme Court,
35 1985 in England. Like its English counterpart the rule constitutes a wide and general provision, both useful and necessary, to enforce the rules of pleading. It empowers the court to strike out or amend a pleading or an endorsement which is unnecessary or scandalous or which may tend to prejudice, embarrass or delay the fair trial of the

action. The power given to the court under the rule is to either strike out or amend, the word "or" having a disjunctive connotation. It does not give to the court power to strike out and amend. As such a conjunctive power was not given to the learned trial Judge he was in error to have proceeded to amend the claims after striking out the pleading. As far as the rule itself goes, the power of court is to strike out or amend: it does not extend to the power to dismiss the suit. There is no provision for conditional striking out, as learned appellant's counsel has suggested.

So, unlike Order 18 rule 19 of the R.S.C. (1985), Order 6 rule 25 of the Lagos State Rules has no provision for a suit to be dismissed if it is an abuse of process. But then every superior court of record in Nigeria is conferred by section 6(6)(a) of the 1979 Constitution with "all inherent powers and sanctions of a court of law." Now inherent jurisdiction or power is a necessary adjunct of the powers conferred by the Rules and is invoked by a court of law to ensure that the machinery of justice is duly applied and properly lubricated and not abused. One most important head of such inherent powers is abuse of process, which simply means that the process of the courts must be used bona fide and properly and must not be abused. Once a court is satisfied that any proceeding before it is an abuse of process it has the power, indeed the duty, to dismiss it. See on this, *Willis v. Earl of Beauchamp* (1886) 11 p.59, p.63.

It has been held in numerous cases that it is an abuse of process of the court for a suitor to litigate again over an identical question which has already been decided against him even if the matter is not strictly *res judicata*: see *Stephenson v. Garnett* (1898) 1 Q.B. 677, C.A.; also *Spring Grove Services Limited v. Deane* (1972) 116 S.J. 844. So reading Order 6 rule 25 of the High Court of Lagos (Civil Procedure) Rules together with section 6(6)(a) of the 1979 Constitution of the Federal Republic, it is clear that the High Court of Lagos State has the jurisdiction and the power to strike out plaintiff's pleading if it is satisfied that it seeks to relitigate issues which have been covered by issue estoppel and proceed to dismiss the suit if there are no outstanding issues. What I must consider below is whether these two circumstances warranting the striking out of the pleading and dismissal of the suit by the Court of Appeal existed in this case.

But before I go further, I must consider a relevant point which has been raised by the respondents as an issue in paragraph 2.5 of their brief: that is whether the Court of Appeal was not right in setting aside the decision granting suo motu an order of amendment of the plaintiff's claims. It is noted that there was no application before the learned trial Judge for the claim to be amended. The learned trial Judge in obvious misconception of his powers to strike out or amend under Order 6 rule 25 as being conjunctive instead of disjunctive proceeded to amend the claims, suo motu after striking out the pleading. Learned counsel for the respondent has submitted that the learned trial Judge had no power to order and make the amendment of the plaintiffs claims suo motu in spite of the provisions of Order 25 rules 1 and 7 of the High Court of Lagos State (Civil Procedure) Rules. Counsel submitted that an amendment cannot be made in order to create a cause of action or to evolve a case for the parties where there was none. Learned counsel for the appellant submitted that the learned trial Judge was right to have made the order he made in the interest of justice. The reversal of the learned Judge on this by the Court of Appeal was wrong because that Court has permanently shut out the plaintiff from the judgment seat, he submitted.

In my view, the line taken by learned trial Judge which has been supported by learned counsel for the appellant appears with respects, to have overlooked a number of fundamental principles. First in our adversary system the correct position of a Judge is that of an impartial umpire. He cannot make a new case for either party where the case it has brought to court has collapsed: see *Orizu v. Anyaegbunam* (1978) 5 S.C. 21. Secondly, for the same reason, his power to order an amendment is limited by the fact that he cannot order one where it will be tantamount to creating a cause of action where none existed. If, as in this case, all the material averments in the statement of claim have been struck out for any reason, any amendment made will be, in appropriate metaphor, like shutting the stable after the horse has bolted. He cannot do that. Above all, the broad implications of our principles of fair hearing which is a constitutional right of all Nigerian litigants under section 33 of the Constitution of 1979 makes it improper for the Judge to take any step in the proceedings which can even remotely give the impression that he is inclining to one side against the other. He should throughout the proceedings remain an impartial umpire; so he must allow the parties to fight their fights and on their own initiative make all necessary applications as they may deem necessary. He cannot suggest such an application to either side; see *Ojo v. Oseni & Anor.* (1987)

4 NWLR (Pt.66) 622. at p.635. So the role of the learned trial Judge in this case whereby, without any application for an amendment by the plaintiff and without hearing any argument on the propriety or otherwise of such an amendment from the parties, he decided that an amendment was necessary and proceeded to make them, as it now appears in order to keep the plaintiff on the saddle, cannot be too strongly deprecated. In fairness to him, he believed that the amendments were necessary in order to meet the ends of justice. 5

With respects, I think that the justice which litigants expect in a court of law is even - handed justice reached in accordance with law and the rules of the game. According to the basic principles of that form of justice whosoever must fail or succeed must do so without any assistance from the courts. I cannot say that such was the case in this case. For one thing, the way the amendment was ordered in this case did not give the defendants the opportunity of uttering a word in opposition before an amendment which put a new angle to claim (a) was introduced and relying on that plaintiff was granted leave to file fresh pleading after all the material averments in his pleading were struck out. On a calm view of all the decided cases, including Adetutu v. Aderohunmu & Ors. (1984) 1 SCNLR 515, P.523-524; I am of the clear view that an amendment which was made or ordered in breach of all the above principles ought not to be allowed to stand. The Court of Appeal was, therefore, correct to have set aside the orders for amendment. 10 15 20

From the above background, I shall now proceed to deal with the outstanding issues raised in this appeal. For a proper consideration thereof, and as the backbone of all the issues is issue estoppel it is necessary to advert, even briefly to the nature of issue estoppel. It quite often happens that in a case before the court that persons who are parties or privies to a suit presently before the court had earlier had a shot at the same subject-matter and upon the same issues. If either party or privy to the previous suit should try to relitigate the same subject-matter and issues in a subsequent suit, the other party if a defendant, can meet him with a plea of res judicata, or, if a plaintiff confront him with the previous judgment as a relevant fact. But our rules of pleading recognize the fact that a judicial decision may involve a determination on a number of issues. Any of those issues which had been raised and determined between the same parties in the previous suit cannot, except in special circumstances, be raised again in another suit. This is a matter of public policy. In such a case, the plaintiff is estopped from raising those is- 25 30 35

sues again in the new suit: if he does, the defendant can raise issue estoppel against him as far as those issues go. But it must be emphasized that an issue in this case may also include such conditions upon which it depended in the previous suit or if the issue belonged to the subject of the litigation but was not actually raised at the previous litigation. Diplock, C.J., stated the principle in the English Court of Appeal in the case of *Thoday v. Thoday* (1964) 1 All ER 341, where he stated at page 352 thus:

"The second species, which I will call 'issue estoppel', is an extension of the same rule of public policy. There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish his cause of action: and there may be cases where the fulfilment of an identical condition is a requirement common to two or more different causes of action. If in litigation on one such cause of action any of such separate issues whether a particular condition has been fulfilled is determined by a court of competent jurisdiction either on evidence or on admission by a party to the litigation, neither party can, in subsequent litigation between them on any cause of action which depends on the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was."

See also *Fidelitas Shipping Company Limited v. Export club* (1965) 2 All E.R. 4 at pages 9-10. This principle was cited with approval in the case of *Samuel Fadiora & Anor v. Festus Gbadebo & Anor* (1978) 3 S.C 219, at p.228. See also *Paul Cardoso v. Daniel & Ors* (1986) 2 NWLR (Pt.20) 1.

On these principles it appears to me from a summary of the findings of the courts in the consolidated suits of 1/291/58 and HK./108/61 and the Supreme Court Appeal therefrom that it was no longer open to the appellant to raise any issue as to the headship of Ojuwoye Community or the ownership or possession of any of the lands of the community- not even of No. 24, Ojuwoye, Mushin which to all intents and purposes is a part of their communal lands but which is being referred to as the plaintiff's palace in this suit. Those issues have been caught by issue estoppel against the plaintiff/appel-

lant. For, although No.24, Ojuwoye, Mushin was not specifically put in issue in the previous suits, being a part of Ojuwoye communal lands which had been adjudged to belong to the defendants' and not the plaintiffs people, it is caught by issue estoppel in its wider concept: see further *Henderson v. Henderson* (1843) 67 E.R. 313, p.319. It was because the learned trial Judge in this suit so found that he had to strike out paragraphs 2-56 of the plaintiff's pleading. As I have stated, there is nothing under the rules like striking out with reservation.

Next, I shall consider the effect of the setting up of a tribunal of inquiry on the rights of the parties as settled by the previous suits. The factual situation is this: some thirteen years after the rights of the parties had been settled by the previous suits in the High Court and the Supreme Court. and execution levied by the respondents on 24, Ojuwoye, Mushin, the government of Lagos State set up a Tribunal of Inquiry presided over by Olusola Thomas, J., into the Ojuwoye Tribunal of Inquiry presided over by Olusola Thomas, J., into the Ojuwoye chieftaincy. The tribunal recommended, and the government accepted it, that the plaintiff was the head of Ojuwoye community. This was, no doubt, a reversal of the decision in the previous suits which was confirmed by the highest court in the land. The only evidence of the Report of the Inquiry is a letter, Exhibit Y written by the Council Manager of Mushin Local Government showing acceptance of the plaintiff/appellant as Alashe of Ojuwoye. The photocopy of the Report of the Inquiry, Exhibit 1, was held to be inadmissible. The Court of Appeal held that the rejected Report and the letter, Exhibit Y, could not reverse the subsisting decisions of courts in consolidated suits numbered 1/291/58, HK/108/61 and SC.1/1967. No doubt a tribunal of inquiry is an inferior tribunal to both the High Court and the Supreme Court which are by the Constitution vested with unlimited powers to adjudicate on rights of parties who appear before them and see to the execution and enforcement of their decisions. Once a party gets a final judgment in his favour before a court of competent jurisdiction, such a judgment is effective, conclusive and binding on the parties and their privies and can only be upset on appeal. A tribunal of inquiry is not a court of appeal, competent to review, set aside, or override such a judgment. The learned authors

42 Arubo v. Aiyeleru (1993) 2 KLR Nnaemeka-Agu JSC
of Spencer-Bower and Turner on Res judicata (2nd Edn.) in para-
graph 43 at pages 9-10 correctly summarized the position thus:

"Where a judgment or order which fulfils all the requisites of
a good res judicata has once been pronounced a subsequent order
merely embodying a compromise by the parties, on appeal, of their
5 rights and liabilities so adjudged, or merely purporting to rescind or
set aside by consent the former judgment or order, without the court
being called upon to exercise its functions of review, or having any
judicial cognizance of the unofficial reversal is not a decision at all and
has no effect whatever on the first judgment, which remains the only
10 res judicata binding on the parties. (Counsel's italics). Still less entitled
to the name of 'judicial decision' is an order which does not purport
to embody any consent to an existing judgment but merely records
an undertaking by a party to allow judgment to be signed if at a
15 future date he fails to comply with certain conditions or which is pref-
aced by an express declaration that no judgment on the matters in
issue is pronounced or desired by the parties."

But learned counsel for the appellant has submitted that the re-
spondents, by submitting to the Tribunal of Inquiry had waived their rights
under the judgments. Now, it cannot be doubted that in point of law, waiver
20 is generally, an abandonment of a right, and a defence against its subse-
quent enforcement. It may be express or implied: but a mere statement not
to insist on the right is not a waiver in the absence of consideration, though
a deliberate election not to insist on a persons' full rights will be binding
25 (See Vol.37 Hals, Laws of England (3rd Edn.) p.152. The first problem of
the appellant in this respect is that, as the Report, Exh. "1" had been re-
jected, there is insufficient material from which to decide on the above
relevant principles relating to waiver. Definitely mere participation in the
inquiry cannot per se constitute a waiver. But assuming, but not agreeing
30 that a judgment of court could be waived in such a way as to bar the
successful party from insisting upon of competent jurisdiction is so conclu-
sive, solemn, and binding upon the parties and their privies. I have my
grave doubts as to whether rights arising from it can be waived. For one
thing the above statement of the law by the learned authors of Spencer
35 Bower and Turner make it clear that a consent or compromise by the
parties to set aside or compromise upon such a judgment cannot be effec-
tive until and unless the court is called upon to exercise its function of
review or reversal. A fortiori a waiver which is by its nature a negative act
cannot be more effective in the matter than a positive act of consent or

compromise. As it is so, and in view of what I have said about absence of materials upon which to find a waiver, and as there is no review or reversal of the judgments by any court. It is my view that the respondents' rights under those judgments cannot be, and have not, been waived.

It is left for me to consider what the learned trial Judge should have done after striking out all but one of the 56 paragraphs of the statement of claim on the ground that he sought to relitigate issues which had been decided in the previous suits. As I stated above, to relitigate them amounts to an abuse of process. Now once a court is satisfied that the proceeding before it amounts to an abuse of process, it has the right, in fact the duty, to invoke its coercive powers to punish the party which is in abuse of its process. Quite often that power is exercisable by a dismissal of the action which constitutes the abuse. 5 10

As I have held that the learned trial Judge was wrong to have proceeded to, suo motu, amend the claim before the court and to have allowed the parties to amend their pleadings, the next question is what he should have done. In my view, he should have considered whether any subsisting pleading of the plaintiff could sustain a cause of action or item (d) of his claim, if as he was bound to find on the remaining single paragraph of the statement of claim, he came to the inevitable conclusion that it could sustain neither, he should have invoked his inherent powers and, in view of his finding of abuse of process, dismissed the action. It is not correct, as learned counsel has done, to describe an abuse of process as an irregularity. It is a much more fundamental vice which is usually punished with a dismissal. In this case, it is rooted in public policy as expressed in the Latin maxim. 15 20 25
"nemo debet bis vexari pro una et eadem causa" - no one shall be subjected to defend the same cause twice. No question of weight of evidence arises. There can be no question of merely striking out the claim in a situation like this in which the cause of action was dead since 1967 - that is over fifteen years before the present matter went to court. The Court of Appeal was, therefore, right to have dismissed the claim in its entirety. 30

I agree with the learned counsel for the respondents that in so far as the appellant did not appeal on the issue of costs in the Court of Appeal, they cannot raise the issue now. In any event, the principle is that costs follow the event: so in view of the result of the appeal, I do not see how he can now rightly complain of costs in this Court or the Court of Appeal. 35

For all I said above, the appeal fails and is hereby dismissed. I assess and award costs against the appellant in the sum of N1000.00.

KAWU JSC

I have had the advantage of reading, in draft, the lead judgment
 5 of my learned brother. Nnaemeka-Agu, J.S.C. which has been delivered. I am in complete agreement with him that the Court of Appeal was, in the circumstances right to have come to the conclusion that the learned trial Judge, having struck out practically all the material
 10 averments in the plaintiffs claim ought to have dismissed the whole action. In my judgment this appeal fails and it is accordingly dismissed. Costs assessed at N1,000.00 are awarded to the respondents.

BELGORE JSC

15 Order 16 r.25 of Lagos State Civil Procedure Rules only permits of either striking out or amending the claim. It does not permit of dismissal and it does not provide for amending after striking out or dismissing. The position is always that a matter struck out or dismissed
 20 is no longer there and as such there is nothing to amend. Our system of law anticipates the Judge to manifest fairness all along, to hold an even balance. Once a Judge has decided that a claim cannot be maintained whereby he strikes it out or dismisses it, he is functus officio, and cannot re-open it by ordering an amendment. Should he
 25 hold that the action is not competent or cannot be maintained whereby he strikes out and dismisses it, that matter is no longer before him. To turn around and order amendment of what is no longer before him may unfortunately create the impression that he is not holding an even balance *Ojo v. Oseni & Anor* (1987) 4 NWLR (Pt.66)
 30 622, 635. The impression is aggravated by the trial Judge making the order suo motu for the amendment. Judges should deal with the complaints of the parties and must desist from helping parties to make their case.

For the foregoing reasons and fuller reasons in the judgment
 35 of my learned brother Nnaemeka-Agu, J.S.C., particularly on the issue estoppel which I adopt as mine, I find no reason to interfere with the decision of the Court of Appeal which set aside the ruling of the trial court. I also dismiss this appeal and make the same orders as to costs as in the judgment of Nnaemeka-Agu. J.S.C.

OMO JSC

I have been privileged to read in draft the lead judgment of my learned brother, NNAEMEKA-AGU, J.S.C., just delivered. I entirely agree with the views therein expressed and the conclusions arrived thereat. 5

The finding of the learned trial Judge that 55 out of 56 paragraphs of the appellant's pleadings were caught by the doctrine of issue estoppel (*res judicata*), which he expressed himself as having no difficulty at arriving at, was very correct. In exercise of his powers under Order 16 Rule 25 of the High Court of Lagos (Civil Procedure) Rules 1972, he also acted properly by striking those offending paragraphs out. It was in his anxiety "to meet the justice of this case" that he took the obviously incorrect step of *suo motu* amending the only paragraph of the statement of claim left, in an undisguised attempt to create a cause of action, therefrom. 10 15

The learned trial Judge erred in so doing on two grounds. Firstly, the Rule of Court under which he acted gave him only the power to either strike out or amend. It did not empower him to take both actions. Secondly, if he had opted to exercise the power of amendment, this cannot be done *suo motu*. It must be pursuant to an application (oral or written) by the party affected (in this case, the appellant) setting out the nature of the proposed amendment, and seeking the exercise of his power under the appropriate Rule of Court to grant such an exercise of his power under the appropriate Rule of Court to 'grant such an application. It will thereafter be necessary for the respondents to be heard, before the proposed amendment is granted or refused. Vide: *Humani Ajoke v. Amusa Oba & Ors* (1962) 1 All NLR 73 (82). The Court of Appeal was therefore right to have set aside the order of the trial Judge. 20 25 30

The Court of Appeal however did not merely set aside the Order of the trial Judge. It went further to dismiss the action, on the ground, per Awogu, J.C.A. that if the learned trial Judge had "stopped to ask himself whether the sale remaining paragraph of the Statement of Claim disclosed a cause action, his answer would, no doubt, have been in the negative". It held that the power of dismissal could have been exercised under Order 22 Rule 4 of the Civil Procedure Rules of the High Court of Lagos 1972 which provides that: 35

"The Court or a Judge in Chambers may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court or a Judge in Chambers may order the action to be stayed or dismissed or judgment to be entered accordingly, as may be just."

One of the possible objections to this course of action is that the application before him was pursuant to the provisions of Order 16 Rule 25, and that he was invited to strike out the pleadings and not dismiss the action. I prefer the view expressed by my learned brother, NNAEMEKA-AGU, J.S.C. in his judgment, that the learned trial Judge should have exercised his inherent power to dismiss, on the ground that the offending paragraphs of the pleadings also constituted an abuse of process. The Court of Appeal's action is therefore saved by this power, which it can exercise if the court of trial failed to do so.

For these reasons and the more detailed ones in the judgment of NNAEMEKA-AGU, J.S.C. which I adopt as mine, I also dismiss this appeal with costs to the respondents assessed at N1,000.00 only

KUTIGI JSC

I have had the opportunity of reading before now the judgment of my learned brother Nnaemeka-Agu, J.S.C I agree with his reasoning and conclusions. The appeal is dismissed with costs as assessed.