

SUPREME COURT OF NIGERIA
17TH JUNE, 1994. SC. 45/1993.
CORAM:- S. M. A. BELGORE, A. B. WALI,
I. L. KUTIGI, M. E. OGUNDARE, U. MOHAMMED, JJSC.

ABIODUN ADELAJA & 2 OTHERS APPELLANTS/APPLICANTS
AND
YESUFU ALADE & ANOTHER RESPONDENTS

APPEALS - Notice and grounds of appeal - Application for amendment and leave to argue additional ground - When to be granted.

APPEALS - Notice and grounds of appeal - Prayer to deem attached notice and grounds of appeal as properly filed - Where there is no evidence that the said amended notice has been filed and appropriate fees paid - Whether that prayer will be granted.

EVIDENCE - Affidavit evidence - Motion to amend grounds of appeal - Where there is no deposition in respect of a prayer - When the prayer will not be granted.

PRACTICE & PROCEDURE - Pleadings - Appeals - Application to amend pleadings before the Supreme Court - Type of amendment that may or may not be allowed.

FACTS

The Applicants are Appellants in a pending appeal on a land matter before the Supreme Court. By a Motion on Notice, they filed the present application seeking the following three orders:- (a) Leave to amend the Appellants' Notice and Grounds of Appeal by redrafting parts of grounds 2 & 3, and adding a new ground 5 to the Grounds of appeal.

(b) Leave to amend the Appellants' Amended Statement of Claim. And (c) Deeming as properly filed and served the Amended Notice and Grounds of Appeal (Exhibit A) on the payment of the appropriate fees. The motion is an affidavit of 22 paragraphs sworn to by the First Appellant/Applicant

on behalf of all the other Appellants. The Supreme Court had to determine whether to grant the application.

HELD (Unanimously granting the application in part)

Leave to amend notice and grounds of appeal

1. There is no difficulty in granting prayer (a) giving applicants leave to amend grounds 2 & 3 of the Notice and Grounds of Appeal and for leave to argue additional grounds 5 as per their Exhibit A. Additional ground 5 prima facie raises a substantial point of law and the prayer is proper. (P. 101 L.38)

No Deposition in the affidavit in respect of a prayer - Effects

2. Prayer (c) cannot be granted in the absence of evidence that the Amended Notice and Grounds of Appeal (Exh. A) has been filed and appropriate fees paid. There is no deposition to that effect in the affidavit. (P. 102 L.4)

Application to amend pleadings - Before the Supreme Court

3. There is no doubt that in appropriate cases this court has inherent power to grant an application to amend pleadings in order to bring them in line with the facts proved before the court. The powers are exercised however only if and when necessary to prevent an occurrence of substantial injustice. But an amendment to change the nature of the claims before the court will not be allowed. (P.102 L.29)

Amendment of pleading that will be allowed

4. In the instant case there is no problem with the new paragraph 19(1) above. This amendment is clearly intended to bring the Amended Statement of claim in line with the evidence already led at the trial. Leave to amend para. 19(1) will present no problem and it is hereby granted. (P. 103 L.I)

Reason for refusing amendments of part of pleading

5. Leave to amend para. 19(3) however cannot be granted. It is an attempt to change the nature of the claim by widening the scope of the injunction to include an “access road” an area not previously included in the claim and patently not within the plots bought by the appellants/applicants. This would certainly require additional evidence on both sides. It is accordingly disallowed. (P. 103 L.12)

CASES REFERRED TO

Sam Warri Esi v. Shell B.P. (1958)3 FSC 94

Foko v. Foko (1968) NMLR 441

LEAD RULING BY KUTIGI JSC

By Motion on Notice the appellants/applicants pray for the following orders
“(a) Leave to amend the Notice and Grounds of Appeal filed and dated 16/6/92 against the judgment of the Court of Appeal dated 20/3/92 by redrafting parts of Grounds 2 & 3 of the said Notice and Grounds of Appeal adding a new ground 5 to the Grounds of Appeal of the said Notice and Grounds of Appeal in terms of Exhibit ‘A’ attached hereto.

“(b) Leave to amend Plaintiffs’ (now Appellants in this court) Amended State of Claim filed on 20/11/89 and contained in pages 15 - 18 of the Record of Appeal to the Supreme Court by deleting the former paragraphs 19(1) and 19(3) of the Amended Statement of Claim and replacing same paragraphs 19(1) and 19(3) contained in Exhibit ‘B’ attached hereto.

(c) Deeming as properly filed and served the Amended Notice and Grounds of Appeal (Exhibit A) on the payment of the appropriate fees.

AND order or orders as this Honourable Court may deem fit to make in the circumstances.”

The motion is supported by an affidavit of 22 paragraphs sworn to by one Christopher Abiodun Adelaja, the first appellant/applicant. Paragraphs 2-21 read as follows-

“2. That I have the authority and consent of the other applicants/Appellants to be referred to as Applicants, to swear to this Affidavit on their behalf.

3. That I have claims in the High Court against the Defendants/Respondents as follows:-

(i) Declaration of Title to a Statutory Right of Occupancy under the provision of Decree No. 6 of 1978 in respect of all that piece or parcel of land, lying and situate at Tabontabon Village, Off Ring Road, Ibadan as per the Plan No. FAIM/32A drawn by Licensed Surveyor A. O. Adebogun dated 16/11/79.

(ii) N200 general damages for a continuing trespass commenced since month of June 1977 by the Defendants, their agents and/or servants on the said landed property in Ibadan.

(iii) Injunction restraining the Defendant their agents, servant, privies and all those claiming through the Defendants from committing further acts of trespass on or in any other way interfering with plaintiffs' ownership and/or possession of the said landed property.

4. *That the 2nd Applicant and I partially succeeded in the High Court,*
- 5 *having been granted title to the land in dispute but our claims for trespass and injunction in respect of the land in dispute failed.*
5. *That the claims by the 3rd Applicant in respect of the land in dispute was dismissed in its entirety.*
6. *That each of the parties to the suit at the High Court lodged on Appeal*
10 *respectively against the decision which were not given in their favour. The said Appeal by us who were the Plaintiffs was filed on 4/8/80 and contained in pages 96 - 97 of Supreme Court's Record while the appeal of Defendants/Respondents filed on 24/10/80 is on pages 98- 99 of the Record of Appeal to the Supreme Court.*
- 15 7. *That we were granted leave to file Amended and Additional Grounds of Appeal by the Court of Appeal on 5/2/91. This is contained in pages 133-137 of the Supreme Court Record.*
8. *That after the address by both parties to the Appeal based on the briefs filed, judgment was delivered by the Court of Appeal on the 20th of March*
20 *1992 and in its unanimous judgment our Appeal was dismissed and the Respondents' Appeal was allowed and among other things the Court of Appeal non suited us. The judgment is from pages 147 - 161 of the Record of Appeal to the Supreme Court.*
9. *That we timeously lodged a Notice of Appeal against the decision of the*
25 *Court of Appeal and filed same on 16th of June 1992. This is reflected on pages 162 - 165 of the Record of Appeal to the Supreme Court.*
10. *That we received the Record of Appeal to the Supreme Court on 12/10/93 and transmitted same to our Counsel on the same date.*
11. *That after going through the Record our Counsel Funso Odeleye Esq.*
30 *informed us and we believe him that in respect of Ground2 of the Notice and Grounds of Appeal there was an error as to the proper citation of the Survey law and that he will have to redraft Ground2 of the Grounds of Appeal to effect the correction.*
12. *That the said Counsel also informed me and I believe him that the*
35 *particular (i) of Ground3 requires deleting after the word "Exhibit K", subsequent sentences being not relevant thereto.*
13. *That the said Counsel further informed me and I do believe him that after going through the Record of Appeal that he decided that we required to put up another ground of Appeal to put all our case across in prosecu-*

tion of the Appeal.

14. *That I am further informed by the said Counsel and I do believe him that to effect all the things stated in paragraphs 11, 12 and 13 supra we require leave of the Supreme Court to Amend our Notice and Grounds of Appeal.*

15. *That the said Amended Notice and Grounds of Appeal is hereto attached and marked Exhibit 'A'.*

16. *That I am further informed by the said Counsel and I do believe him that after a perusal of the pleadings filed in the High Court and the evidence led in support of them he will want the reliefs as reflected in paragraphs 19(1) and (3) of the Amended Statement of Claim to be redrafted to represent the state of evidence on Record.*

17. *That the new reliefs are as stated in Exhibit 'B' attached thereto.*

18. *That the said counsel informed me and I believe him that to redraft the Amended Statement of Claim which is part of the Record of the Supreme Court in terms of Exhibit 'B', we require leave of the Supreme Court to amend the Amended Statement of Claim.*

19. *That the Applicants is not introducing in any new matter of raising any new issue in the case and that the amendment will not require adducing fresh evidence.*

20. *That the amendment does not derogate from the proceeding paragraphs of the Amended Statement of Claim and it is based on evidence before the court and will require no reply or response from the Respondents.*

21. *That I am further informed by the said Counsel and I believe him that the Respondents will not be prejudiced if the Application is granted.*

The respondents though served did not file any counter affidavit. In fact they were neither present nor represented at the hearing of this motion. The motion was moved by Mr. Odeleye learned counsel for the applicants who said he was relying entirely on the affidavit above in support of the motion. The court was urged to grant the application.

Prayer (a) and (c) which relate to the amendment of the Notice and Grounds of Appeal will be taken together. I have seen the original Notice and Grounds of Appeal on pages 162 - 165 of the record and compared same with the new Amended Notice and Grounds of Appeal EXHIBIT A, attached to motion. I observe that grounds 2 & 3 were only recorded in parts to make them more precise and to the point while ground 5 is the only new ground sought to be added. I have no difficulty in granting prayer (a) giving applicants leave to amend grounds 2 & 3 of the Notice and Grounds of Appeal and for leave to argue additional ground 5 as per their Exhibit A. Addi-

tional ground 5 in my view prima facie raises a substantial point of law. I think the prayer is proper and I will grant it.

Prayer (c) cannot be granted in the absence of evidence that the Amended Notice and Grounds of Appeal (Exh.A) has been filed and applicant paid.

- 5 There is no deposition to that effect in the affidavit. Consequently the applicants are given six (6) weeks from today within which to file the Amended Notice and Grounds of Appeal.

Prayer (b) is for leave to amend paragraphs 19(1) and 19(3) of applicants' Amended Statement of Claim contained on pages 15 - 18 of the record.

- 10 The new paragraph 19(1) and (3) according to Exhibit B attached to the motion, read thus –

“19. (1) Declaration of title to a Statutory Right of Occupancy under the provision of Decree 6 of 1978 in respect of all that piece or parcel of land particularly plots 28 & 29 property of Kola Ayodele suing by his Attorney, the third plaintiff, plot 32 property of first plaintiff and plot 33 property of 2nd plaintiff, all within Alade layout lying being and situate at Tabontabon Village, Off Ring Road, Ibadan verged blade as per the plan No. FA/M/32A drawn by Licensed Surveyor A.C. Adebogun dated 16/11/79.

- (Underlining is supplied by me).

- 20 (3) Injunction restraining the defendants from continuing further acts of trespass on or in any other way interfering with plaintiffs' ownership and or possession of the said landed property and their access road as reflected in both Plan No. FA/M/32A of 21/2/78 and plan No. FA/M/32A of 16/11/79”. (Underlining is supplied by me).

- 25 The portions underlined in both sub-paragraphs 1 & 2 of para. 19 above are the new amendments sought to be introduced by the applicants.

There is no doubt that in appropriate cases this court has inherent power to grant an application to amend pleadings in order to bring them in line with the facts proved before the court. The powers are exercised however only if

- 30 and when necessary to prevent an occurrence of substantial injustice. Generally speaking all such amendments ought to be made for the purpose of determining the real question in controversy between the parties or correcting any defect or error in the proceedings. If the amendment sought relate to a mere misnomer, it will be granted almost as a matter of course (SAM
35 WARRIESI v. SHELL B.P. (1958)3 FSC 94, but an amendment to change the nature of the claims before the court will not be allowed (see FOKO & ORS v. FOKO & ORS (1968) NMLR 441).

In the instant case there is no problem with the new paragraph 19(1) above. This amendment is clearly intended to bring the Amended Statement of

Claim in line with the evidence already led at the trial. In fact the plots referred to therein and their respective owners were amongst others pleaded in paragraphs 7, 8 & 9 of the Amended Statement of Claim while the learned trial judge in his judgment on page 67 granted a declaration of title to the 1st plaintiff in respect of plot 32 amongst others, and to the 2nd plaintiff in respect of plot 33 although none was made in favour of the 3rd applicant in respect of his four plots which included plots 28 & 29. The Court of Appeal however non-suited all the appellants/applicants when they appealed to that court. I am therefore clearly of the view that leave to amend para. 19(1) will present no problem and it is hereby granted. Leave to amend para. 19(3) however cannot be granted. It is an attempt to change the nature of the claim by widening the scope of the injunction to include an “access road” an area not previously included in the claim and patently not within the plots bought by the appellants/applicants. This would certainly require additional evidence on both sides. It is accordingly disallowed (See FOKO & ORS v. FOKO & ORS (supra)).

To summarise, it is hereby ordered as follows –

1. Leave to amend the Notice and Grounds of Appeal dated and filed on 16/6/92 as per Exhibit A attached to the motion is hereby granted.
2. The Amended Notice and Grounds of Appeal to be filed within six (6) weeks from today.
3. Leave to amend para. 19(1) of the Amended Statement of Claim is hereby granted while leave to amend para. 19(3) of same is refused.

BELGORE JSC

I agree entirely with the ruling of my learned brother, Kutigi J.S.C. For the reasons advanced by him, I also make the same consequential orders he has made in granting this application in part.

WALI JSC

I have read before now the lead Ruling of my learned brother, Kutigi JSC and I entirely agree with it. I adopt the reasons contained therein as mine as well as the consequential orders.

I make no order as to costs.

OGUNDARE JSC

I have had the advantage of reading the draft of the Ruling just delivered by
my learned brother Kutigi JSC. I agree entirely and I have nothing more to
5 add.

MOHAMMED JSC

10 I agree with the ruling delivered by my learned brother, Kutigi JSC also
grant leave as prayed.

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