

SUPREME COURT OF NIGERIA
13TH JANUARY, 1995, SC. 202/1992
CORAM:- M.L. UWAIS, A.B. WALI, I.L. KUTIGI,
M.E. OGUNDARE, U. MOHAMMED, JJSC.

ELIJAH IDISE & 5 OTHERSAPPELLANTS
(For themselves and on behalf
of Owevwen Community of
Agbarha)

AND

WILLIAMS
INTERNATIONAL LTDRESPONDENT

ACTIONS - Representative action - Where cause of complaint is common to the community - Essential condition for sustaining a representative action.

ACTIONS - Representative action - Where pleadings show that parties have neither common grievance nor interest - Whether action was wrongly entertained in a representative capacity.

ACTIONS - Cause of action - Whether single in the present case - So then plaintiffs can establish common interest.

FACTS

Before the Ughelli High Court, the six plaintiffs/appellants jointly for themselves and on behalf of their community sued the defendant in representative action claiming N500,000.00 as general damage for negligence. The defendant's negligence led to damage in the only road leading from Owevwen (plaintiffs' community) to Ughelli, rendering impassable to traffic. The incident took place during the defendant's pipe laying contract. Vehicles and human beings could no longer pass through the road thereby paralysing the economic life of the plaintiffs community. Some members of the community fell into the trench filled with water, wound themselves and were treated by bone experts.

The trial high court gave judgment in favour of the plaintiffs and awarded N200,000 as general damages. The defendant's appeal to the Court of Appeal was upheld as that court struck out the plaintiffs' action for being incompetent on the ground that they could not in law sue in a representative capacity. Being dissatisfied, the plaintiffs have now appealed to the Supreme Court to determine whether the Court of Appeal was right in holding that the plaintiffs have no common cause of action.

HELD (Unanimously dismissing the appeal per lead judgment of **WALI JSC**)

Representation - Essential Condition

1. There is no doubt in this case that the cause of complaint is common to the community, but the injury suffered by each member and its extent is different. This means as stated in Adediran & Ors. v. Interland Transport Ltd. (supra) the wrong is only a common platform on which the individual members of the community can bring an action. The essential condition for sustaining a representative action is that the persons who are to be represented have the same interest as the plaintiff in one and the same cause or matter. There must therefore be a common interest alike in the sense that it subject or its relation to that subject must be the same. (p. 142 A)

Pleadings - Showing that parties have no common interest

2. The pleadings in this case, particularly paragraphs 8, 9, 10, 11 and 15 and the evidence adduced in support thereof show clearly that the parties have neither a common grievance nor a common interest in the action. The case of each member of the community must depend on its own merit as the causes of action are different. The learned trial judge was wrong in entertaining the action in a representative capacity and also in awarding a lump sum as damages for reliefs not specifically pleaded and proved. (p. 142 D)

Cause of action - Whether single

3. It is a misconception of the facts in this case for learned counsel for the appellants to contend that the only cause of action in the case is the damage to the community road in which all the members of the said community have a common interest, while from the pleadings it is shown that some suffered physical injuries, some economic, others inconvenience etc, thus showing no common interest and common grievance. (p. 142 E)

NOTABLE POINTS OF INTEREST**WALI JSC***1. Views of a concurring justice - Deemed to be obiter dicta*

As for Issues 3, 4 and 5, these were based on the concurring judgment of Uche Omo JCA, (as he then was) which is not the lead judgment, whatever Uche Omo JCA, said in his concurring judgment, which differs from the lead judgment, with which he agreed, can only be obiterdicta, and therefore it will be a mere academic exercise to consider them. (p. 139 C)

2. Essential condition of a representative action

The essential condition of a representative action 'brought under the provision of the rule (supra) is that the persons that are to be represented must have the same interest in one cause or matter. Mere identity or similarity of circumstances in a litigation may not necessarily result in the parties thereto having a common interest and a common grievance. (p. 140 C)

REPRESENTATION

Chief B.B.E. Idigbe for the appellants.

Dr. Mudiaga Odje SAN, with M.A. Toyin Keshinro for the Respondent.

CASES REFERRED TO

Oragbade v. Onitiju (1962) All N.L.R. 332

Emono v. Nigerian Ports Authority (1966) L.L.R. 208

Aja v. Okoro (1991) 9 - 10 SCNJ 1

Adediran v. Interland Transport Limited (1991) 9 NWLR (pt. 214) 555 (1991) 12SCJN27

Markt & Co. Ltd. v. Knight Steamship Company Ltd. (1910) 2 KB 1021

Amuchree v. Newington 14 WACA 97

Carter v. Rigby & Co. (1896) 2 QB 113

Steam Navigation Co. v. Tsune Kijima (1895) AC 661 (PC)

RULES REFERRED TO

High Court (Civil Procedure) Rules 1988 of the then Bendel State of Nigeri O. 7 r. 9.

High Court of Lagos State (Civil Procedure) Rules, 1972 0.13 r. 14

LEAD JUDGMENT BY WALI JSC

This is an appeal from the judgment of the Court of Appeal, Benin division in which it set aside the judgment of Ughelli High Court presided

over by Omo-Agege J, (as he then was) striking out the plaintiffs' (now appellants') claim for incompetence on ground that the plaintiffs could not in law sue in a representative capacity.

In the trial court, the six plaintiffs (jointly for themselves and on behalf of Owevwen Community Agbarha) sued the defendant claiming the sum of N500,000.00 as general damages for negligence resulting in damaging the only road leading from Owevwen village to Ughelli - Agbarha Otor Road, rendering it impassable to vehicular as well as pedestrian traffic.

The claims were denied by the defendant. On the order of the trial court, the parties filed and exchanged pleadings.

The particulars of negligence and the damages suffered as a result thereof are contained in the following paragraphs of the Statement of Claim:-

"9. The defendant, while laying pipes across the said road at a point a few yards from Owevwen village, dug a deep trench across the road but after laying the pipes negligently filled it up that it left that portion as a valley into which all rain Water in the area around it collects and thereby cause a deep pool of water across the road which also makes it impossible for vehicles to pass to and from the plaintiffs' town. It also creates difficulties for member of Owevwen community to pass through it to their farms.

Particulars of Negligence

- (i) Failure on the defendant to cover up the track of the pipeline across the road so as to avoid water collecting on that portion of the road.*
- (ii) Failing to foresee that if the pipeline track is not raised high it will be covered up by water during the rainy season.*

10. The damage caused to the road as pleaded in paragraphs 8 and 9 above paralysed the economic life of the plaintiffs' community from about December, 1979 till the time the plaintiffs filed this action and still doing so.

11. Many a time women with cassava loads on their heads returning from their farm would fall with their loads when attempting to wade across the pool of water stretching across the road as a result of the negligence of the defendant. Men also carry their bicycles on their shoulders or heads across the pool of water. Traders could not carry their wares to the market or got to Warri and other places to buy wares. The plaintiffs shall tender during the trial some of the photographs taken during the period to show

the pathetic and sorry situation plaintiffs found themselves as a result of the defendant's negligent act.

12. The plaintiffs could not attend even their own market at the junction due to the horrible condition of the road.

13. Some members of the community who during the process of attempting to walk across that portion of the road got themselves injured and were treated by native doctors and experts in bone setting. “

On the evidence adduced before him, the learned trial Judge made the following findings -

“I find that by their negligent conduct they caused the road to be flooded as alleged and thereby made it impossible for vehicle to use it to and from Owevwen Village as before. The photograph, Exhibit “B”, clearly shows the difficulties experienced by the people - in it, is a man with trousers rolled up to his knees trying to push his motor-cycle through the pool; some three other men each carrying his bicycle and yet another man all trying to find their way. The look in their faces is one of sadness.

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“I am of the opinion that the company owed a duty of care to Owevwen Community in respect of the road and having interfered with it were under a duty to return it to its original condition, that is, to keep it motorable; for their failure to do so they are liable to the plaintiffs.

Now to damages - As could be seen from the evidence, the economic life of the plaintiffs was paralysed over a period of time. I believe the evidence that the company paid no heed to the complaints made to them.”

He then finally concluded -

“The company in this case have by their negligent operations caused hardship to the plaintiffs, turned a deaf ear to their complaints and then self-righteously turned round to claim justification under cover of a third party, namely, Nigerian National Petroleum Corporation, who are not before the court. In all the circumstances I will award the plaintiffs the sum of N200,000.00 as general damages plus costs”

Aggrieved by the judgment of the trial court the defendant appealed against it in the Court of Appeal Benin Division. It is noteworthy that one of the issues raised and canvassed in the Court of Appeal is the competence of the action as instituted in the trial court. On this decisive issue, Dahiru Musdapher, J.C.A. who delivered the lead judgment, with which both Uche Omo J.C.A. (as he then was) and Ejiwunmi, J.C.A., agreed, reached the following conclusions -

trial court and in place thereof substituted an order of striking out the respondents' claim as "*incompetent*"

The plaintiffs, dissatisfied with the Court of Appeal decision, have now appealed to this Court. And for the purpose of determining this appeal, the plaintiffs and the defendant will be referred to as the appellants and respondent respectively.

In compliance with the provisions of the rules of this Court, the parties filed and exchanged briefs of argument.

In the brief of argument filed by the appellants, the following issues were raised for determination

"1. Were the Justices of the Court of Appeal justified in permitting the respondents to argue a fresh or new point of law that was not pleaded, raised and contested in the trial court?"

2. Is it correct to hold as the Justice of Court of Appeal did, that the plaintiffs on record have no common interest with Owevwen community to which they themselves also belong? In other words is the case of Oragbade v. Onitiju (1962) WNLR 21 applicable to this case.

3. Was the Justices of Court of Appeal (Uche-Omo in particular) right to hold that the appellants should have founded their claim on nuisance instead of Negligence?"

4. Where the Justices of Court of Appeal (Uche-Omo in particular) right in holding that:

(i) Exhibit "C" was wrongly rejected by the trial court.
(ii) The trial Judge failed to make a finding of fact as to whether or not the road in question was acquired by NNPC? Note: Would it have made any difference to the case if the road was in fact acquired by NNPC (without conceding)?

(iii) The trial Judge gave the respondents' counsel false impression that the evidence of NNPC was not necessary.

5. Were the Justices of the Court of Appeal (Uche-Omo) justified in holding that the award of N200,000.00 damages was manifestly high and arbitrarily awarded N3,000.00 instead?"

The respondent formulated three issues in his brief to wit -

"1. WHETHER THIS ACTION IS COMPETENT AND/OR PROPERTY CONSTITUTED; OR, IN OTHER WORDS, WHETHER THE APPELLANTS HAVE THE STANDING TO SUE IN THIS CASE.

II. WHETHER THE ISSUE OF THE COMPETENCE AND PROPER CONSTITUTION OF THE ACTION AS SET OUT IN ISSUE 1 ABOVE, WAS PROPERLY RAISED AND DETERMINED FOR THE FIRST TIME IN THE COURT OF APPEAL. A

III. WHETHER THE APPELLANTS ARE ENTITLED TO DAMAGES IN THIS CASE."

As pointed out by learned Senior Counsel for the respondent, issue Number I of the issues raised by the appellant is incompetent as it is not based on any of the four grounds of appeal filed in this appeal. It is therefore struck out. See *Aja Mazi Aja & Ors v. John Okoro and Ors.* (1991) 9-10 SCNJ 1; (1991) 7 NWLR (Pt. 203) 260. B

As for issues 3, 4 and 5, these were based on the concurring judgment of Uche Omo, J.C.A., (as he then was) which is not the lead judgment, whatever Uche Omo, J.C.A., said in his concurring judgment, which differs from the lead judgment, with which he agreed, can only be *Obiter dicta*, and therefore it will be a mere academic exercise to consider them. C

The only remaining pertinent issue in the appeal is issue No.2 which is covered by ground 1 of the grounds of appeal. Under this issue, it was the submission of learned counsel for the appellants that by the averments contained in paragraphs 8, 9, 10, 11 and 15 of the Statement of Claim, the appellants have revealed a common cause of action and that the Court of Appeal was completely in error to have considered paragraph 15 of the Statement of Claim in isolation of the rest of the pleadings with particular reference to the paragraphs mentioned *supra*. Learned counsel also submitted that the only cause of action in the case is the damage to the community road in which all the members of Owewwe community, including the appellants, have a common interest and which damages resulted in economic loss and inconvenience to the said community. Learned counsel further submitted that the case of *Oraghade v. Onitiju* (1962) WNLR 21 relied upon by the Court of Appeal in its judgment is not apposite. He urged this Court to allow the appeal and restore the judgment of the trial court. D E F

In reply to the submission above, learned Senior Counsel for the respondent submitted (under issue 1 of the respondent's brief which is in substance the same with issue No.2 of the appellant's brief), that the action instituted by the appellants was incompetent as they failed to G

140 Idise v. Williams Int. Ltd. (1995) 1 KLR Wali JSC
establish the necessary facts to ground a representative action in that
there was no sameness of interest and grievance in the case. Learned
Senior Counsel referred to paragraphs 4, 6, 11 to 15 of the Statement
of Claim as well as the evidence of PW1 and the provision of Order 7 rule
9 of the High Court (Civil Procedure) Rules 1988 of the then Bendel State
A of Nigeria and the cases of Oragbade v. Onitiju (1962) 1 SCNLR 70; (1962)
WNLR 21; (1962) 1 All NLR (Pt. 1) 32 and Adediran & Anor v. Interlard
Transport Limited (1991) 9 NWLR (Pt. 214) 155; (1991) 12 SCJN 27 to
support his submissions. He therefore urged this Court to dismiss the ap-
peal and affirm the judgment of the Court of Appeal.

B It seems clear to me that the appellants filed the action under the
provision of Order 7 rule 9 of the High Court (Civil Procedure) Rules, Cap.
65 of the Laws of Bendel State of Nigeria 1976 applicable in Delta State.
The rule provides as follows:-

C *"9. Where there are numerous persons having the same interest in
one cause or matter one or more of such persons may sue or be
sued, or may be authorised by the court or Judge to defend in
such cause or matter on behalf or for the benefit of all persons so
interested."*

D The essential condition of a representative action brought under the provi-
sion of the rule (supra) is that the persons that are to be represented must
have the same, interest in one cause or matter. Mere identity or similarity
of circumstances in a litigation may not necessarily result in the parties
thereto having a common interest 'and a common grievance.

E In the leading case of Markt & Co. v. Knight Steamship Company
Ltd. (1910) 2 KB 1021 a similar provision to Order 7 rule 9 (Supra) to wit
Order XVI rule 9 of the English Rules, came under consideration. The brief
facts were as follows:

F The plaintiffs shipped goods on a steamship belonging to the de-
fendants for conveyance from New York to Japan, and in the course of the
voyage, the ship was sunk by a Russian cruiser. Both the ship and cargo
were lost. The plaintiffs brought a representative action in which they were
described as suing on behalf of themselves and others, owners of cargo
lately laden on board the said ship. The writs were endorsed with a claim
for *"damages for breach of contract and duty in and about the carriage of
G goods by sea"*. It was held

*"that, upon the writs as they stood, the plaintiffs and those whom
they purported to represent were not "persons having the same in
one cause or matter" within the meaning of Order XVI rule 9 and*

that the plaintiffs were not entitled to bring representative actions.”

The claims for damages in Markt & Co. Ltd. v. Knight Steamship Company Ltd. (supra) were based on injury resulting from a breach of contract; but what is relevant to the present case is the consideration given to Order XVI rule 9 of the English Rules which is in pari materia with Order 7 rule 9 of the Bendel State High Court (Civil Procedure) Rules. A

In Amachree & Ors. v. Newington 14 WACA 97, the facts of which were narrated as follows -

“The nine appellants as co-plaintiffs sued the respondent claiming a single amount for damages for assault and false imprisonment. In the course of the case for the plaintiffs the trial Judge invited Counsel for the plaintiffs to consider whether it was competent for them to bring one action, and Counsel said it was as they were all detained at the same time and in the same places. He did not call all the plaintiffs to give evidence. At the end of the case the Judge non-suited the plaintiffs on the ground that it could not be said they had jointly together a ground for instituting a suit for the damage each suffered, and each must sue separately.” B C

On appeal to the West African Court of Appeal against the trial court’s decision, it was held on page 99 (Per Coussey J.A) that:- D

“the cause of action of each plaintiff may be said to arise out of similar transactions, but they are distinct transactions in the sense that there is not joint tort. Order 4 rule 2 permits joinder of plaintiffs in an action but not joinder of causes of action. The alleged damages of each plaintiff is not a common ground of action.” E

See also cases of Carter v. Rigby & Co:- (1896) 2- QB 113 and Steam Navigation Co. v. TsuneKijima (1895) AC 661 (PC) which were considered and applied in Amachree v. Newington (supra). The two cases involved claims for damages in tort, as it is in this case and it was held on the facts, that the plaintiffs in each case could not bring a representative action since the cause of action in respect of each plaintiff was separate and distinct. F

In J.A. Adediran & Ors. (as representative and on behalf of all members of Ire-Akari Housing Estate, Isolo v. G

Interland Transport Ltd. (1991) 12 SCJN27; (1991) 9 NWLR (Pt.214) 155 the plaintiffs brought a representative action claiming damages for nuisance being committed by the defendant. They succeeded in the High Court but lost in the Court of Appeal. On further appeal to this court, one

of the issues raised was the applicability of the provisions of Order 13 rule 14 of the High Court of Lagos State (Civil Procedure) Rules, 1972 which is in pari materia with Order 7 rule 9 of the Bendel State High Court (Civil Procedure) Rules, this court held:

- A *“For an action to lie in a representative capacity, there must be-*
 (i) a common interest;
 (ii) a common grievance and
 (iii) the relief must be beneficial to all”

There is no doubt in this case that the cause of complaint is common to the, community, but the injury suffered by each member and its extent is different. This means as stated in Adediran & Ors. v. Interland Transport Ltd. (supra) the wrong is only a common platform on which the individual members of the community can bring an action.

The essential condition for sustaining a representative action is that the persons who are to be represented have the same interest as the plaintiff in one and the same cause or matter. There must therefore be a common interest alike in the sense that its subject or its relation to that subject must be the same. See Markt & Co Ltd. v. Knight Steamship Co. Ltd (supra), Oraghade v. Onitiju (1962) 1 All NLR 32; and Oganioha & Ors v. Oghene & Ors. (1961) 1 All NLR 59.

D The pleadings in this case, particularly paragraphs 8, 9, 10, 11, and 15 and the evidence adduced in support thereof show clearly that the parties have neither a common grievance nor a common interest in the action. The case of each member of the community must depend on its own merit as the causes of action are different. The learned trial Judge was wrong in entertaining the action in a representative capacity and also in awarding a lump sum as damages for reliefs not specifically pleaded and proved.

F It is a misconception of the facts in this case for learned counsel for the appellants to contend that the only cause of action in the case is the damage to the community road in which all the members of the said community have a common interest, while from the pleading it is shown that some suffered physical injuries, some economic, others inconvenience etc, thus showing no common interest and common grievance. On this issue, I entirely agree with and endorse the submission of learned Senior Counsel for the respondent in his brief that:-

“Indeed, the interests revealed in this case are not only varied, but rather variegated, ranging from the separate and distinct farming and trading activities of individual members of the Community on

the one hand; to physical injuries as well as personal inconvenience alleged to have been suffered by some individual members of the Community, on the other hand."

On the whole, I find no reason to disagree with the findings and the conclusions of Musdapher J.C.A., in his lead judgment. The appeal has no merit and it fails. It is accordingly dismissed. The judgment of the Court of Appeal is hereby affirmed with N1,000.00 costs to the respondent.

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B

UWAIS JSC

I have had the opportunity of reading in draft the judgment read by my learned brother Wali, J.S.C. I agree that the appeal has no merit. It accordingly, fails and is hereby dismissed with N1,000.00 costs to the respondent against the appellants.

C

KUTIGI JSC

I have had the opportunity of reading before now the judgment just delivered by my learned brother Wali, J.S.C. I agree with it. The appeal is therefore dismissed with costs of N1,000.00 to the respondents.

D

OGUNDARE JSC

I have had the advantage of a preview of the judgment of my learned brother Wali, J.S.C just delivered. I agree entirely with the reasoning and conclusion reached by him which I also adopt as mine. I too dismiss this appeal with costs as assessed in the judgment of my brother.

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F

MOHAMMED JSC

I have had the privilege of reading in draft, the judgment of my learned brother, Wali, J.S.C., and I agree that this appeal ought to be dismissed. Consequently, I hereby affirm the judgment of the Court of Appeal. I abide by the order made on costs in the lead judgment. The appeal is dismissed.

G