

**SUPREME COURT OF NIGERIA**  
 19TH SEPTEMBER, 1995. SC. 203/1991  
**CORAM: S.M.A. BELGORE, LL. KUTIGI,**  
**M.E. OGUNDARE U. MOHAMMED, Y.O. ADIO, JJSC.**

IDOWU BAMISHEBI & 4 OTHERS ..... PLAINTIFFS/APPELLANTS  
 AND  
 NOSIRU OTE & 5 OTHERS ..... DEFENDANTS/RESPONDENTS

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***PLEADINGS*** - Amendment - Land dispute - Application for amendment pleadings by plaintiffs - After both parties had closed their cases - Which to be granted.

***PLEADINGS*** - Amendment - After closure of parties case - That will not bring case in line with evidence - But will enable a party present a new case - Will not be granted.

**FACTS**

The plaintiffs went to court in 1977 seeking a declaration of title to land damages and an injunction against the defendants. On discovering discrepancies between their evidence and the specification of the disputed land on a survey plan, the plaintiffs sought for and obtained a series of amendment to their pleadings. This led to long and unnecessary delays in the case, with three different judges handling it in succession. At one juncture, the plaintiffs now applied for a discontinuance of the case, while at the same time asking for a further amendment of their statement of claim. This was after they had called twelve witnesses to testify, and the defendants had called seven witnesses. The plaintiffs, then curiously, abandoned their bid to discontinue the case, and sought only the amendment, in which they now claimed a much bigger area of land.

The trial judge struck out the application for an amendment of pleading at this stage, and went on to dismiss all the claims of the plaintiffs in his judgment. Aggrieved, the plaintiffs went on appeal. The Court of Appeal while dismissing the appeal, frowned at the antics of the plaintiffs. The plaintiffs have further appealed to the Supreme Court raising essentially one issue for determination.

**ISSUE FOR DETERMINATION**

*Whether the courts below were correct in refusing Plaintiffs' application for leave to amend their plan and paragraph 10 of their Statement of Claim.*

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

***Pleadings - Amendment - Land dispute***

1. I have no hesitation whatsoever in holding that the learned trial judge correctly applied the principles relating to such an application to the circumstances of the case before him. As the history of the case shows the plaintiffs were well aware that they had made such a mess of their case that state they thought of discontinuing it. I cannot see how the amendment sought by him, if granted, would not entail further evidence being led on both sides. Both parties had closed their respective cases. To grant the application would entitle the Defendants to ask for leave to also file an amended plan. The whole case would then be re-opened for Plaintiffs to call further evidence (p. 1820 B)

***Amendment - That will not bring case in line with evidence***

2. On the evidence as it stood the amendment sought could not have the effect of bringing Plaintiffs' case in line with their evidence but rather would enable them present a completely new case. I agree with the learned trial Judge that in the circumstances of this case injustice would be done to the Defendants if Plaintiffs' application were granted. The learned trial Judge was, in my respectful view, right to refuse the application and the court below is right to affirm that decision. (p. 1820 D)

**NOTABLE POINTS OF INTEREST**

**BELGORE JSC**

***1. Purpose of pleadings***

The purpose of pleadings is to bring to attention of born parties what the issues in dispute between them are. As is clearly provided in Ogun State High Court Rules, Order 14 Rule 5: "*Every pleading shall contain a statement of all the materials facts on which the party pleading relies, but not the evidence by which they are to be proved.....*" (p. 1821 E)

***2. Pleadings - Permitted amendment***

The amendment permitted by Order 15 is the one that will not "tend to prejudice, embarrass, or delay the fair trial of the suit, and for the purpose of determining in the existing suit the real question or questions in controversy between the parties..." The attempt to take a case out of a little enclave in the original plan, Exhibit A, and to invade a substantially wide area outside it after all the evidence had closed, would have created a totally new case from that originally pleaded and testified upon by the parties.(p. 1822 A)

**REPRESENTATION**

T.E. Williams, Esq., for the Appellants

Chief A Fadayiro, S.A.N. R.A. Ogunwole with him for the Respondents

**CASES REFERRED TO**

Ojah v. Chief Ogboni (1976) 4 S. C. 69 at 76.

Cropper v. Smith (1884) 26 Ch. D. 710 at 711

Solanke v. Ajibola (1969) 1 N.M.L.R. 253

**RULES REFERRED TO**

Ogun State High Court (Civil Procedure) Rules 1977; 0.14, r 1, 0. 15

**LEAD JUDGMENT BY OGUNDARE JSC**

The Plaintiffs (who are appellants in this appeal) have sued the defendants claiming -

*“1. Declaration of title to all that piece and parcel of land situate, lying and being at Ijana Agangbo, Oke-Suna Road, Otta, Ogun State.*

*2. N200.00 damages for trespass against the defendants for going on the land without the authority and consent of the Plaintiffs.*

*3. Injunction to restrain the defendants their agents or servants from any further acts of trespass on the said land. “*

Pleadings and plans were filed and exchanged. In paragraphs 10 and 11 of their Statement of Claim the plaintiffs pleaded:

*“10. The land in dispute is situated at Ijana Agangbo, Otta and is edged RED on Plan No. AK693AJOG drawn by D. O. Akingbogun Esq., Licensed Surveyor and attached to this Statement of Claim.*

*11. The land in dispute forms part of a larger area of originally settled upon by Ogunyinka Eda who migrated from Ile Ife with his wife Oyabunmi about 200 years ago. “*

The Defendants denied paragraph 11 and in reply to paragraph 10 pleaded as hereunder:

*“5. The defendants state that plan filed with the Statement of claim does not show the land of their family in relation to the land said to be in dispute and a counter plan will be tendered at the trial.”*

The Defendants later sought and obtained leave to file an amended Statement defence. Paragraph 5 of their amended Statement of Defence read:

*“5. The Defendants state that plan filed with lit regular and does not show the land of their family in relation to the land said to be in dispute and a plan of OKE ALASE land No. AB366/OG drawn by A. B. Apatira, Licensed Surveyor is attached to this Amended Statement of Defence and*

marked "B".

Plaintiffs also sought and obtained leave of court to file and amended Statement of Defence. Paragraphs 10 and 11 of this amended Statement of Defence are word for word identical with paragraphs 10 and 11 of their original Statement of Claim. As if the parties were not yet done with amendments of their pleadings, the Defendants now sought and obtained leave to file a further amended Statement of Defence and plan wherein they pleaded inter alia:

*"8. The defendants state that the land in dispute is situate at ITOWO COMPOUND, Iwaiye quarters Osi Otta and particularly shown in Plan No. AB366 edged GREEN. It is a port of the land settled upon originally by the defendants ancestor OKE ALASE about 300 years ago. The remaining portion formerly called IGBARA is now called IJANA AGANGBO.*

.....  
*OKE ALASE settled on a large area of land shown in Plan No. AB366/ OG edged RED, planted his gods on the land on which he settled, built a house in which he lived with his family. "*

At the trial the plaintiffs' Surveyor, Daniel Olanrewaju Akingbogun gave evidence wherein he testified as follows:

*"I know the plaintiffs and the land in dispute. Plaintiffs commissioned me to survey the land in/ dispute. This is a plan of the land in dispute. Plan No. 693A/OG tendered and marked Exhibit "A". The area in dispute is verged Yellow. The area verged Yellow contained many buildings. So also are the adjacent areas. The area in dispute is part of the area called Ijana Agangbo compound. The entire built up area has been divided by me on Exhibit "A" into area A, B and C the plaintiffs gave me the names of the owners of the respective houses in the area."* (Underlining is mine)

Later in the evidence, he testified thus:

*"The area verged RED is claimed by the plaintiffs. The area edged VIOLET is the area verged RED is claimed the plaintiff defendants according to their plan. Defendant's plan No. AB366/OG. I lifted the area verged VIOLET and BLUE from the defendant's plan. The area claimed by the defendants is almost surrounded by the area claimed by the plaintiffs on my plan.*  
"

In his evidence, Rufai Oyede the 5th Plaintiff testified thus:

*"The land in dispute in this case is the same as the land on which Ogunyinka Eda settled. I now say that the land in dispute is part of the land settled upon by Ogunyinka Eda.*

*We engaged 1<sup>st</sup> P.W. to survey the land in dispute. He surveyed the land and gave us a plan."*

Further in his evidence he added:

*“The defendants have only three houses on the land in dispute.”*

Sensing that there was a discrepancy between Plaintiffs’ plan and their Survey’s evidence on the one part and paragraph 10 of their amended Statement of Claim on the other hand, the Plaintiffs sought and obtained the leave of court to file a further amended Statement of Claim wherein they pleaded in paragraphs 10 and 11 as hereunder: \_

B *“10. The land in dispute is situated at Ijana Agangbo, Otta and is edged YELLOW on Plan No. AK693AIOG drawn by D.O. Akingbogun Esqr., Licensed Surveyor and attached to this Statement of Claim.*

C *11. The land in dispute forms part of a larger area of land originally settled upon by Ogunyinka Eda who migrated from Ile-Ife with his wife Oyabunmi about 200 years ago. “*

They thus brought their pleadings in line with the evidence already adduced by their Surveyor. I need mention that in the affidavit in support of the application for amendment the 3rd plaintiff Sule Dada deposed, inter alia as follows:

D *“6. That both the evidence and the plan shows (sic) that even though the area claiming by the plaintiffs is edged RED on the plan the area actually in dispute is edged YELLOW.*

E *7. That it is now necessary to amend paragraph 10 of our further amended Statement (sic) of Claim by amending the word RED to YELLOW*

*8. The amendment sought is to bring the pleading in line with the evidence led”.*

F At the close of the case of the Plaintiffs, witnesses for defence were called and after six witnesses had testified for the defence the plaintiffs brought an application praying for leave of court to discontinue the action .

In the supporting affidavit to this application Rufai Oyede, one of the plaintiffs affirmed as follows:

G *“2. That I have the authority of the other Plaintiffs to swear to this affidavit.*

*3. That when we took this action we instructed our counsel to take action on the area edged RED on our plan.*

*4. That when our Surveyor produced the plan he limited the land in dispute to the area edged YELLOW.*

H *5. That in fact, the area edged YELLOW is only a very small portion of our land to which we wanted to seek declaration of title.*

*6. That we did not discover the Surveyor’s mistake until we had given evidence.*

*7. That the cause of our action is the movement of the Defendants to certain areas of our land without our consent and permission*

*8. That the areas in Question are not around the area edged YEL-*

9. That we don't intend to waste further time in pursuing this action.

10. That if we now want to amend or plan it will take a long time and this trial may be unduly delay.

11. That we have thought it wise to discontinue the action.

12. That it is in the interest of justice that we be given leave to discontinue the action herein. “(Underlining are mine)

The motion was not taken until the defence had called its 7th and last witness. Meanwhile, the Plaintiffs filed yet another motion praying, this time, for leave to “amend their plan and make consequential amendment in paragraph 10 of the Statement of Claim to show the colour of the area in dispute”. This motion was supported by an affidavit sworn to by the same Rufai Oyede in which he deposed as hereunder:

“2. That authority of the other plaintiffs to swear to this affidavit.

3. That when we took this action we instructed our counsel to take action on the area edged RED on our plan.

4. That when our surveyor produced the plan he limited the land in dispute to the area edged YELLOW.

5. That in fact, the area edged YELLOW is only a very small portion of our land wanted to seek declaration of title.

6. That we did not discover the Surveyor's mistake until we had given evidence.

7. That the cause of our action is the movement of the Defendants to certain areas of our land without our consent and permission.

8. That the areas in question extend much beyond the area edged YELLOW on our plan.

9. That the Defendants have joined issue with us over an area much larger than the area verged YELLOW on our plan.

10. That evidence on both sides shows that the parties are litigating on the whole area claimed by the defendants.

11. That the plan as it is now does not indicate the right area in dispute.

12. That it is necessary to have an amended plan showing the true area in dispute as extent of the claim of the parties has been shown by evidence to extent far beyond the area edged YELLOW. “

In the counter affidavit sworn to by the 1st Defendant Nosiru Ote, he deposed

“17. That if the application is granted we may need to amend our own plan and both parties may need to give further evidence.”

When motions for (a) leave to discontinue the action and (b) to amend plaintiffs' plan came before the learned trial Judge on 17<sup>th</sup> June 1985,

learned counsel for the Plaintiffs sought and obtained leave to withdraw the first motion, that is, the motion to discontinue the action; the motion was struck out. Learned counsel for the parties addressed the court on the second motion on 11th July 19975. In the course of their addresses learned counsel for  
 B the Plaintiffs filed the proposed amended plan and Statement of Claim. In his Ruling delivered on 15th July 1985 the learned trial Judge observed:

*“It is true that an amendment can be granted at any stage of proceedings. Certainly to grant the application in this case would amount to allowing the plaintiffs to set up a new claim of frightening dimension from  
 C the one they put forward 8 years ago. If for 8 years the plaintiffs did not know what case they have put forward it is too much of a pity. To grant application would amount to grave injustice to the defendants been hard put to it to defend the action for 8 years. It is in the interest of justice that the application should be dismissed and it is dismissed with N50.00 (Fifty Naira) costs  
 D to the defendants/respondents*

Having dismissed the application learned counsel for the parties dressed the court on the substantive action. In his judgment given on the 26th of September 1985 the learned trial Judge dismissed plaintiff’s claims.

Being dissatisfied with that judgment the Plaintiffs appealed to the  
 E court of Appeal raising in the appeal the issue of the refusal, by the trial Judge, of their application to file an amended plan. The Court of Appeal dismissed the appeal observing on the issue of amendment:

*“From the various applications for amendment, the affidavit of Sule Dada and Rufai Oyede in support of the applications for amendment and  
 F discontinuance of the Suit coupled with the evidence of the 1<sup>st</sup> P.W., it is not difficult to see that the appellants were blowing hot and cold in the High Court. The Appellants were not in any doubt as to the area of land which they claimed to be in dispute and which was edged YELLOW in exhibit; “A”. The defendants/respondents were not in any doubt either.*

*The learned trial judge found that it was on Exhibit “A” that the parties joined issues and contested the case. He stated that it is in the interest of justice that the application be refused. I think he was right in refusing the application in the light of all the events leading to the last application for amendment. It is true that the object of court is to decide the right of  
 G H parties and not to punish them for the mistakes which they make in the conduct of their cases; OKEOWO & ORS V. MIGLIORI & ORS. supra.*

*It is also true that the amendment should not be allowed if:*

- (a) it will cause injustice to the respondent:*
- (b) the applicant is acting mala fide: or*

(c) by his blunder, the applicant has done some injury to the respondent which cannot be compensated by costs or otherwise.

See OJAH & ORS V. CHIEF E. OGBONI (1976) 4 S. C 69 at 76 and CROPER V. SMITH (1884) 26 Ch.D. 710 at 711.

In one breadth they laid the blame on their counsel and in another, it was on their surveyor and none of their excuses is true. B

The Appellants by their amendment are saying that the land now in dispute is the area edged RED in Exhibit "A" which is a very considerable expense (sic) of land which was not in issue between the parties by reference to their survey plans.

I am of the view that the amendment if allowed would cause injustice to the respondents. I agree with the learned Senior counsel for the respondents that the appellants wanted to amend their plan by substituting for it an entirely new plan with new colouring and new dimensions thereby presenting a new case altogether. While it is in the interest of justice to decided cases on their merits, there will be risk of failure of justice to allow the amendment. C D

There was no mistake as contended by the appellants that the word YELLOW was erroneously inserted in the plan. The evidence of 1st P. w., various applications of the appellants to amend their statement of claim and plan before the last application and the affidavits in support of the application confirm this. From all the antecedents one can rightly say that the amendment sought tends to over-reach and delay the trial of the action. The trial judge adjudicated on the area verged YELLOW in Exhibit "A" on which issues were joined by the parties. E

It my view that the learned Judge exercised his discretion judicially in refusing the amendment. The Appellants have not shown that the exercise of the discretion by the learned trial Judge in refusing the amendment was not in accord with common sense and according to justice. There is no miscarriage of justice in the exercise of his discretion. See ODUSOTE V. ODUSOTE (1971) N. M. L. R. 288 and SOLANKE V. AJIBOLA (1969) N.M.L.R. 253." Per Ogwuegbu JCA. (as he then was). F G

The plaintiff have now appealed to this court against the judgment of the court of Appeal and going by their Brief of argument in this Court the main issue for determination is as to whether the courts below were correct in refusing plaintiffs' application for leave to amend their plan and paragraph 10 of their Statement of Claim. H

It is contended for the Plaintiffs that no injustice would be caused to the Defendants if plaintiffs' application were granted. For the Defendants, it is submitted that the Court below properly directed its mind to the principles



governing the grant of an amendment and came to the right decision affirmating the learned trial Judge's refusal to grant an amendment as sought by the Plaintiffs.

I have considered the arguments adduced in favour of the contending parties in this case. I have also considered the circumstances leading to the application by the Plaintiffs for leave to file an amended plan and to amend paragraph 10 of their Statement of Claim. I have no hesitation whatsoever in holding that the learned trial judge correctly applied the principle relating to such an application to the circumstances of the case before him the history of the case shows the Plaintiffs were well aware that they had made such a mess of their case that at a state they thought of discontinuing it. I cannot see how the amendment sought by him, if granted, would not entail further evidence being led on both sides. Both parties had closed their respective cases. To grant the application would entitle the defendants to for leave to also file an amended plan. The whole case would then be opened for Plaintiffs to call further evidence. On the evidence as it stood the amendment sought could not have the effect of bringing plaintiffs' in line with their evidence but rather would enable them present a completely new case. I agree with the learned trial Judge that in the circumstances this case injustice would be done to the Defendants if Plaintiffs' application were granted. The learned trial Judge was, in my respectful view, right to refuse the application and the court below is right to affirm that decision.

In conclusion, I see no merit whatsoever in this appeal which I hereby dismiss with costs assessed at N1, 000.00 in favour of the defendants.

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### **BELGORE JSC**

In the Statement of Claim of Appellants at trial Court paragraph 10 states:

*"The land in dispute is situate at Ijana Agangbo, OTTA AND IS EDGED yellow on plan No. AK693A/OG drawn by D.O. Akingbogun, Esqr., Licensed Surveyor and attached to this Statement of claim".*

The above quoted paragraph 10, just like the paragraphs had been subjected to several amendments as the trial progressed. Due to several amendments and objectives, the case that started with Delano J. (as he then was) was taken afresh by Kuforiji J. and later again de novo by Sonoiki J. The plaintiffs called twelve witnesses and closed their case. The Defendants called seven witnesses. For a case filed in 1977, with several motions and amendments at the instance of the Plaintiffs. Sonoiki J. started hearing in 1984, after before two other Judges. Around 16<sup>th</sup> May 1985 there were two motions that

were irreconcilable by the Plaintiffs one for discontinuance of the case, the other was praying to amend paragraph 10 of the Statement of Claim aforementioned. However motion for discontinuance was withdrawn and struck out and the other motion was taken on 11th July, 1985. The motion sought to replace the Survey Plan land in dispute already admitted as Exhibit A with another Plan 590/0G drawn by another Surveyor. It must be pointed out that the defendants after their 7th witness had closed their case on 20th May 1985 the trial judge, Sonoiki J. concluded as follows in refusing the application to amend the plan and paragraph 10 of Statement of Claim:

*“It is true that an amendment can be granted at any stage of the proceedings. Certainly to grant the application in this case would amount to allowing the plaintiffs to set up a new claim of frightening dimension from the one they put forward 8 years ago. If for 8 years the plaintiffs did not know what case they have put forward it is too much of a pity. To grant plaintiffs’ application would amount to grave injustice to the defendants who have been hard put it to defend the action for 8 years. It is in the interest of justice that the application should be dismissed and it is dismissed with N50 (fifty Naira) costs to the defendants/respondents. “*

Learned trial Judge proceeded to write a well considered judgment and dismissed the suit in its entirety. An appeal to Court of Appeal was dismissed, learned justices frown on the tactics of the Plaintiffs trying to raise an entirety new case from the one fought for about eight years. Thus this appeal to this court.

The purpose of pleadings is to bring to attention of both parties what the issues in dispute between them are. As is clearly provided in Ogun State High court Rules, Order 14 Rule 5:  
Every pleading shall contain a statement of all the materials facts on which the part pleading relies, but not the evidence by which they are to be proved .....

Order 14 rule 1 provides that such a pleading must be served a plan when necessary. In the case the plan served was testified upon in accordance with the plaintiffs’ pleading and they closed their case. When they filed their motion headed simply  
"Motion on Notice Under Order 14 of the High Court (Civil Procedure) Rule 1977".

Perhaps a refuge have been allowed them to amend. But the amendment so sought is substantial and it would have changed the size and parameters of their case that at that stage a different case from that defended by the defendants would have emerged. Learned trial Judge’s ruling in refusing the

amendment as upheld by Court of Appeal cannot be faulted in law under the circumstances of the case before him. To have allowed the amendment would have led to gross injustice to the defendants who waited patiently for eight years of delay due to the plaintiffs vacillations .

B The amendment permitted by Order 15 is the one that will not “tend to prejudice, embarrass, or delay the fair trial of the suit, and for the purpose of determining in the existing suit the real question or question in controversy between the parties ..... “ The attempt to take a case out of a little enclave in the original plan, Exhibit A, and to invade a substantially wide area outside it after all the evidence had closed, would have created a totally new case from that originally pleaded and testified upon by the parties. To my mind this  
C appeal has no merit, at best it has delayed justice in this case.

For the fuller reasons contained in the judgment of my learned brother, Ogundare J.S.C I also dismiss this appeal and make the same orders as to costs.  
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#### **KUTIGLJSC**

E I read in advance the judgment just delivered by my learned brother Ogundare J.S.C. I agree with his conclusion that the lower courts rightly refused Appellants’ application for leave to amend their Survey plan and Statement of Claim at the stage the application was made. Certainly an inconsistent amendment or an amendment to change the nature of the Claim before the court will not be allowed and so with an amendment which would not cure the defect in the proceedings.  
F

The Appeal is dismissed with N1, 000.00 costs in favour of the defendants/Respondents.

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#### **MOHAMMED JSC**

G I also agree that this appeal should be dismissed. My learned brother, Ogundare, JSC, has covered all the salient issues raised in this appeal and I have nothing more to add. I make same orders as to costs.

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#### **ADIOJSC**

H I have had the preview of the judgment just read by my learned brother, Ogundare, J.S.C. and I agree with him that this appeal has no merit. I dismiss it and abide by the order for costs.