

**SUPREME COURT OF NIGERIA**  
27TH FEBRUARY, 1996. SC. 7/1993  
**CORAM:-M. L. UWAISS CJN, M. E. OGUNDARE,**  
**U. MOHAMMED, Y. O. ADIO, A. I. IGUH, JJSC.**

MABEL AYANKOYA & 8 OTHERS ..... PLAINTIFFS/  
APPELLANTS  
AND  
E. AINA OLUKOYA & ANOTHER ..... DEFENDANTS/  
RESPONDENTS

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**ACTIONS** - *Competence of action - Where local Court Rules Provision is adequate - It is wrong to decide that the action is incompetent - Based on foreign rules of court.*

**AGENCY** - *Estoppel and holding out - Principal is bound by acts of agent - He presents to another person - As having authority to act on his behalf*

**JUDGMENTS** - *Technicality - Misjoinder of parties and causes - Decision of Court - Whether to be based solely on technicality.*

**FACTS**

The appellants, as plaintiffs, instituted an action in the High Court of Oyo State, Ibadan, against the defendants/respondents claiming the sum of N24,629 as amount paid by them to the respondents for the supply of drinks which were not supplied, or in the alternative a declaration that they are entitled to the sum of N24,629 for a consideration that has failed. The plaintiffs gave evidence of their various payments and methods of payments to the respondents and the fact that the 1st respondent held out the 2nd respondent to the appellants as her clerk/cashier, who also acted in that capacity. The respondents gave evidence denying most of the averments of the appellants. At the end of the trial and upon the evidence led before him, the learned trial judge found for 7 of the plaintiffs, dismissing the claim of 2 of them.

Dissatisfied with the decision of the trial court, the respondents appealed to the Court of Appeal, which court, allowed the appeal, set aside trial court's judgment and struck out the claims of the appellants. The appellants have now appealed against that decision of the Court of Appeal raising four issues.

**ISSUES FOR DETERMINATION**

*"(i) Whether the lower court was right by its reference to foreign rules of court in the construction of local rules of court, especially when the*

*local rules or procedure provided for a wider base.*

*(2) Whether the plaintiffs' action was incompetent for misjoinder of parties and/or misjoinder of causes of action. Etc., see p. 456*

**HELD** (Unanimously allowing the appeal per lead judgment of **ADIO JSC**)

***Competence of action***

1. The answer to each of the first and second issues is in the negative. The court below was not right in basing its decision on cases decided on the basis of the provision of foreign rules of court particularly order 16 rule 1 of the English Rules. The Oyo State High Court (Civil Procedure) Rules make adequate provisions applicable to the relevant issue in this case in Order 8 rule 1 and the provision of the said rule is not similar to or in parimateria with Order 16 rule 1 of the English Rules. The appellants' action was competent (p. 459 E)

***Judgments - Technicality***

2. The answer to the question raised under the third issue is in the negative. The court below was wrong in basing its decision solely on technicality. In any case, the appellants' action was not incompetent. Even if the action was defective on the ground of misjoinder of parties or misjoinder of causes of action, the respondents' right, if any, to raise the objection had been waived. The action had been heard on its merit without any application filed by the respondents raising an objection on the ground of misjoinder of parties or causes of action and it could not be defeated on that ground. (p. 461 D)

***Estoppel and holding out***

3. If a person represents or permits it to be represented that another person has authority to act on his behalf he will be bound in the same way as he would be if that other had in fact authority to act. The foregoing is based on the legal principles of 'estoppel' and 'holding out'. There is nothing strange or new about it as the law always allows one man to authorize another to contract for and bind him by an authorized contract. The legal effect is that he who does an act through another is deemed in law to do it himself. In the present case, the 1st respondent held out the 2nd respondent as her (1st respondent's) agent in dealing with the appellants and she (the 1st respondent) was liable for the acts or omissions of the 2nd respondent. (p. 462 C)

**NOTABLE POINTS OF INTEREST****ADIO JSC**

**1. Order 8, rule 1 High Court Rules of Oyo State wider than Order 16 rule 1 of English rules** With respect, it has to be pointed out that Order 8 rule 1 of the High Court (Civil Procedure) Rules of Oyo State, which authorizes persons claiming jointly, severally or in the alternative to be plaintiffs, is by far wider than Order 16 rule 1 of the English Rules. The rule applies where (as in the present case) if such persons brought separate actions any common question of law or fact would arise. If in an application, pursuant to the rule by any defendant, it appears that the joinder of the plaintiffs may embarrass the defendant or delay the trial of the action, the court or Judge may order separate trials. The foregoing provisions, which form a significant part of the provisions of rule 1 of Order 8 of the High Court (Civil Procedure Rules of Oyo State constitute the fundamental difference between the provisions of the rule and the provisions of Order 16 rule 1 of the English rules (p. 458 C)

**2. Remedy for misjoinder**

Rule 7 of Order 10 of the Rules provides a remedy for misjoinder. It is that any defendant alleging a misjoinder of causes of action may at any time apply to the court or a Judge for an order confining the action to such of the causes of action as may be conveniently disposed of together. In exercising the power conferred by rule 7 aforesaid the court or Judge may, under rule 8 of the Order, order that cause of action, which cannot conveniently be disposed of together with others, be excluded. (p. 459 D)

**OGUNDARE JSC****3. Principal liable to third parties for acts of agent**

Although the learned trial judge wrongly predicated his conclusion on this issue on the doctrine of vicarious liability (which doctrine is only applicable in the law of tort as rightly observed by the court below.), the latter court however, was wrong in my respectful view to reverse the trial judge on the issue of the liability of the 1st defendant for the act of the 2nd defendant. Their Lordships of the court below rightly observed that, in contract, the principal may be liable to a third party for the act of his agent "if he confers authority express or ostensible on that agent." On the findings of the learned trial judge, which findings are supported by the credible evidence adduced at the trial, the 2nd defendant was at all times the agent of the 1st defendant. (p. 472 F)

**REPRESENTATION**

Olanrewaju Esq. for the Appellants  
O. Fagbemi Esq. for the 1st Respondent  
2nd Respondent not represented

**CASES REFERRED TO**

Adediran v. Interland Transport Ltd (1991) 9 N.W.L.R. (Pt. 214) 155  
Kalu v. Odili (1992) 5 N.W.L.R. 130 at p. 185  
Obembe v. Wema Board Estate Ltd. (1977) 5S.C 115  
Nipol Ltd. v. Bioku Investment & Property Co. Ltd. (1992) 3 N.W.L.R. (Pt. 232) 727  
Rimmer v. Webster (1902) 2 Ch. 163  
Amachree & Ors. v. Newington 14 W.A.C.A. 97  
Walters v. Green (1899) 2 Ch. 696  
The Universities of Oxford and Cambridge v. George Gill & Sons (1899) 1 Ch. 55  
Kukoyi v. Ladunni (1976) 11 SC 245  
Rosenje v. Bakare (1973) 5 SC. 131 140  
S.C.O.A. v. Okoebor (1958) 3 FSC 87, 88  
Smurthwaite v. Hannay (1894) A.C. 494  
Carter v. Rigby (1896) Q.B. 113  
Hire Brothers v. S.S. Insurance syndicate Ltd. (1895) 72 L.T. 79

**RULES REFERRED TO**

High Court (Civil Procedures) Rules Cap 46, Laws of Oyo State, 1978,  
Order 8 rules 1 & 10, Order 10 rules 1 & 7  
Supreme Court of England Rules, 1896, Order 16, rule 1 (now Order 15,  
rule 4)

**LEAD JUDGMENT BY ADIO JSC**

In the writ of summons which contained the claim in the action which the appellant instituted against the respondents in the Ibadan Judicial Division of the High Court of Oyo State, the appellants claim was as follows:-

*“The plaintiffs claim against the Defendants jointly and severally is for the Recovery of various sums of money totaling Twenty-Four Thousand, Six Hundred and Twenty-Nine Naira (N24,629) being money paid by the plaintiffs to the Defendants at various dates in 1984 at Mrs. E. Aina Olukoya’s Beer Supply Shop: SW8/871C Liberty Stadium Road, Ibadan, for the Purchase of assorted Brands of cartons of Beer and Drinks.*

*The Defendants failed to supply the cartons of beer and drinks. And have refused and/or neglected to Refund the payments for the Beer and Drinks despite repeated demands.*

*In the alternative - Plaintiffs claim a Declaration that they are entitled to Repayment - Back of their various Beer Purchase. Deposits with the Defendants at Ibadan since 1984 totaling the sum of Twenty Four Thousand, Six Hundred and Twenty Nine Naira (N24,629.00) upon a consideration that has failed."*

The averment in the Statement of Claim was that at various times in 1984, each of the appellants paid certain amount of money as usual, to the 2nd appellant for and on behalf of the 1st respondent for weekly supply allocation of assorted beer and drinks. It was alleged that the 2nd respondent collected the various sums of money from the appellants during the course of his employment with the 1st respondent. The appellants in their averments in their Statement of Claim, gave particulars of the amount collected from each of them in the manner aforesaid, including the date of payment, mode of payment (whether by cash or cheque). The quantity and the type of drinks for which payment was made. Only the 5th appellant paid with a cheque which she issued to the 2nd respondent. The 2nd respondent was to cash the cheque and use the cash for the aforesaid purpose.

The evidence led by the appellants was, inter alia, that the 1st respondent was a beer distributor. The 2nd respondent was a clerk/cashier to the 1st respondent. The 1st respondent had her beer shop on the ground floor of her house whilst she lived on the first floor. The appellants, between 1979 and 1984, patronised the 1st respondent and became her customers as they used to buy beer from her. During the relevant period, the 1st respondent introduced the 2nd respondent to each of the appellants as her clerk through whom the appellants could order and pay to the 1st respondent for beer of all types. No receipt was to be issued for any payment, made in the manner aforesaid, but such payment was to be recorded in the 1st respondent's ledger book by the 2nd respondent. The arrangement was followed for some time without hitch but in March, 1984, the appellants paid various sums of money individually, at different times and in the manner aforesaid for some cartons of beer but none of them was supplied with the cartons of beer which she ordered for and the amount paid by each of them was not refunded to her.

The 1st respondent denied ever knowing the 2nd, and the 6th to 9th appellants. Her evidence was that she was selling her beer on cash and carry basis and she asserted that she never gave the 2nd respondent authority to accept money in advance or at all from her customers. In the case of the 2nd

respondent, he denied knowing some of the appellants but admitted that he dealt with some of them in his private and/or personal capacity separate from the transactions involving the appellants, the 1st respondent and himself (the 2nd respondent).

After consideration of the evidence before him and the submissions of the learned counsel for each of the parties, the learned trial Judge entered judgment in favour of the appellants in terms of their Statement of Claim except the two of them (2nd and 7th plaintiffs) whose claims were struck out. The learned trial Judge gave consideration to the question whether by virtue of Order 8 rule 1 of the High Court (Civil Procedure) Rules of Oyo State the appellants could join their causes of action in one writ of summons and he came to the conclusion that they could. He also considered the question whether there was a contract between the appellants and the respondents and, if so, whether the respondents jointly or any of them could be held liable for the refund of the contract and he held that a master and servant relationship existed between the respondents. He rejected the evidence that the 1st respondent did not instruct the 2nd respondent to collect or accept money on behalf of the 1st respondent. Consequently, the learned trial Judge held that the 2nd respondent was directly liable while the 1st respondent was vicariously liable for the act of the 2nd respondent.

Dissatisfied with the judgment of the learned trial Judge, the respondents lodged an appeal against it to the Court of Appeal. The court below allowed the appeal. The judgment of the learned trial Judge was set aside and the appellants claim was struck out. The court below held that the learned trial Judge erred in law in holding that the 1st respondent was liable vicariously for the acts of the 2nd respondent because of the relationship of master and servant between them. In the view of the court below, the submission of the learned counsel for the respondents that the 5th appellant by issuing a cheque to the 2nd respondent made him her own (5th appellant's) agent was correct. In any case, the court below held that the appellants could not bring a joint action as they did.

Dissatisfied with the judgment of the court below, the appellants have lodged an appeal against it to this court. The appellants and the 1st respondent duly filed and exchanged briefs. The appellants formulated four issues for determination in their brief and the 1st respondent adopted and relied on the issues as formulated by the appellants. The aforesaid issues are as follows:-

*“(1) Whether the lower court was right by its reference to foreign rules of court in the construction of local rules of court, especially when the*

*local rules of procedure provided for a wider base.*

*(2) Whether the plaintiffs' action was incompetent for misjoinder of parties and/or misjoinder of causes of action.*

*(3) Whether the lower court was right in basing its decision solely on technicality of procedure, especially when the procedure is not fundamentally defective.*

*(4) Whether the Court of Appeal should not have discovered that vicarious liability is applicable to conversion in this case."*

With reference to the first and the second issues, it was pointed out in the appellants brief that the court below allowed the respondents appeal mainly on the ground that the appellants' action, as constituted in the High Court, was procedurally defective and incompetent because of misjoinder of causes of action and misjoinder of the parties (the appellants) as plaintiffs. It was also pointed out that because the court below took the view that Order 8 rule 1 of the High Court (Civil Procedure) Rules of Oyo State was in pari materia with Order 16 rules 1 of the Rules of the Supreme Court of England it applied the legal principles in decided cases based on the provision of the aforesaid English rule to the present case. The contention of the appellants was that the provision of Order 8 rule 1 of the High Court (Civil Procedure) Rules of Oyo State was wider than the provision of Order 16 rules 1 of the English rules and for that reason, the court below was wrong in determining the relevant issue in this case on the basis of the principles the relevant issue in this case on the basis of the principles decided in the cases in which the English rule aforesaid was applied. It was submitted that English rules of court were applicable in the High Court of Oyo State only in cases where the High Court (Civil Procedure) Rules of Oyo State did not make provisions for the matter in question. In the end, what the court below actually or largely did was to apply Order 16 rule 1 of the English rules to the present case in circumstances in which it was not applicable. By so doing, the court below held that the appellants' action was incompetent and struck it out, thus occasioning a miscarriage of justice to the appellants. The appellants learned counsel concluded by submitting that the decision of the learned trial Judge that Order 8 rule 1 of the High Court (Civil Procedure) Rules of Oyo State was applicable in this case was right.

The submission made for the respondents was that Order 8 rule 1 of the Oyo State High Court (Civil Procedure) Rules was in pari materia with Order 16 rule 1 of the English Rules and the court below was right in relying for guidance on the cases decided on the construction of Order 16 rules 1 of the English Rules. It was contended that decisions on the construction of foreign statutory provisions are persuasive guides in the construction

of statutory provisions of our laws which the in pari materia with the foreign statutory provisions in question. It was, therefore, submitted that what the court below did could not have occasioned a miscarriage of justice to the appellants.

I think the contention made for the appellants that the English rules could be applied by the High Court in Oyo State only when there was no provision made for the matter in question in the High Court (Civil Procedure) Rules of Oyo State was right. See *Uhunwangho v. Okojie* (1989) 5 N.W.L.R. (Pt. 122) 471 at p. 486; and *Kolawole v. Alberto* (1989) 1 N.W.L.R. (Pt. 98) 382 at pp. 395 and 407. Above all, the provisions of Order 37 rule 10 of the former High Court (Civil Procedure) Rules of Oyo State were as follows:-

*“10. Where no provision is made by these rules or by any other written laws, the procedure and practice in force for the time being in the High Court of Justice in England shall, so far as they can be conveniently applied, be in force in the Court. Provided that no practice which is inconsistent with these rules shall be applied.”*

The legal position is that rule 10 of Order 37 of the Oyo State High Court (Civil Procedure) Rules applied only when no provision was made by the rules or any other written law. If there is a provision made in the rules in relation to any matter decisions based on a rule applicable in the High Court of Justice in England can be applicable in Oyo State as persuasive authority only where it is similar to or is in pari materia with the rule in question in the Oyo State High Court (Civil Procedure) Rules. The foregoing was the reason given by the court below for relying on the principles enunciated in cases based on the provision of order 16 rule 1 of the rules applicable in the High Court of Justice in England in construing the provisions of Order 8 rule 1 of the High Court (Civil Procedure) Rules of Oyo State. The court below, after setting out the provisions of Order 8 rule 1 of the High Court (Civil Procedure) Rules stated, inter alia as follows:

*“This rule is not dissimilar with Order 16 Rule 1 of the English Rules which provides thus:-*

*“All persons may be joined in one action as plaintiffs, in whom any right to relief is alleged to exist whether jointly, severally or in the alternative and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment.”*

..... The alleged damage to each respondent is not a common ground of action. Each transaction was different as to the date, the amount and the goods



involved. I am therefore of the clear view that the suit was wrongly constituted under the law applicable and that this error of procedure is not a mere irregularity. The object of the rule referred to above and of course the English Rules is to prevent the multiplicity of actions whenever possible where several persons would have been entitled to bring several actions in which a common question of law or fact would have needed to be determined. But there must have arisen from the same transactions or the same series of transactions.

The rule therefore deals with joinder of parties and not joinder of causes of action."

With respect, it has to be pointed out that Order 8 rule 1 of the High Court (Civil Procedure) Rules of Oyo State which authorises persons claiming jointly, severally or in the alternative to be plaintiffs, is by far wider than Order 16 rule 1 of the English Rules. The rule applies where (as in the present case) if such persons brought separate actions any common question of law or fact would arise. If in an application, pursuant to the rule by any defendant, it appears that the joinder of the plaintiffs may embarrass the defendant or delay the trial of the action, the court or Judge may order separate trials. The foregoing provisions, which form a significant part of the provisions of rule 1 of Order 8 of the High Court (Civil Procedure) Rules of Oyo State constitute the fundamental difference between the provisions of the rule and the provisions of Order 16 rule 1 of the English rules. In this case, the common question of fact that arose was that there was series of transactions between the respondents and the appellants severally in connection with buying and selling of beer and other drinks and one common question of law that arose for determination was whether as the respondents failed to supply the beer or drinks paid for by the appellants the two respondents were liable. Each of the appellants could bring separate action against the respondents and if that was what was done the foregoing common question of law or fact would have arisen for determination. The foregoing nature of this case which influenced the learned trial Judge in coming to the decision that the case was properly before the High Court, clearly showed that Order 8 rule 1 of the Oyo State High Court (Civil Procedure) Rules was applicable in the circumstances.

If the respondents felt that the claim of the appellants as presented would embarrass them or delay the trial they should have, pursuant to the provisions of rule 1 of Order 8 of the High Court (Civil Procedure) Rules made an application for the purpose of bringing the matter to the attention of the learned trial Judge who, if he was satisfied that such was necessary, would have ordered separate trials. Indeed, what is in the contemplation of

the rule is that any defendant who has any complaint about the joinder of the plaintiffs should invoke without delay, the provisions of the rule, by filing an application praying for separate trial of the suit. He does not have to allow the proceedings to go on in the hope of using the defect, if any, to defeat the plaintiffs claim. By virtue of Order 8 rule 10 of the High Court (Civil Procedure) Rules no cause or matter can be defeated by reason of the misjoinder or non-joinder of parties, and the court is empowered in every cause or matter to deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. B

In the case of joinder of causes of action, Order 10 rule 1 of the High Court (Civil Procedure) Rules of Oyo State provides that subject to the rules, the plaintiff may unite in the same action several causes of action but if it appears to the court or a Judge that any such causes of action cannot be conveniently tried or disposed of together, the court or Judge may order separate trials of any such causes of action is to be had or may make such other order as may be necessary or expedient for the separate disposal thereof. Rule 7 of Order 10 of the Rules provides a remedy for misjoinder. It is that any defendant alleging a misjoinder of causes of action may at any time apply to the court or a Judge for an order confining the action to such of the causes of action as may be conveniently disposed of together. In exercising the power conferred by rule 7 aforesaid the court or Judge may, under rule 8 of the Order, order that causes of action, which cannot conveniently be disposed of together with others be excluded. C D E

The answer to each of the first and second issues is in the negative. The court below was not right in basing its decision on cases decided on the basis of the provisions of foreign rules of court particularly Order 16 rule 1 of the English Rules. The Oyo State High Court (Civil Procedure) Rules made adequate provisions applicable to the relevant issue in this case in Order 8 rule 1 and the provision of the said rule is not similar to or in pari materia with Order 16 rule 1 of the English Rules. The appellants' action was competent. F

With reference to the question raised under the third issue, the court below was of the view that the determination of the question whether the appellants could bring the action jointly as they did might be adequate to dispose of the appeal to that court. The court below examined the views of the learned trial Judge, on the point, including the provisions of Order 8 rule 1 of the said Rules was similar to Order 16 rule 1 of the English Rules. After citing some decided cases, based on the construction of Order 16 rule 1 of the English G H

Rules and relying on them, the court below came to the conclusion that the action instituted by the appellants was incompetent and struck it out. The complaint of the appellants was, inter alia, that the appeal before the court below was not decided on its merit; the judgment was based on technicality. For the respondents, it was submitted that the issue of misjoinder of parties or causes of action was not a mere irregularity. As a result, the appellants were incompetent and the action itself was incompetent.

The rules in the High Court (Civil Procedure) Rules of Oyo State permitting joinder of parties or joinder of causes of action are designed to prevent multiplicity of actions and prevent delay and thus save the parties unnecessary costs. See *Adediran v. Interland Transport Ltd.*, (1991) 9 N.W.L.R. (Pt.214) 155. Consistent with the beneficial and laudable objectives of the aforesaid rules, any defendant who intends to raise the issue of misjoinder of parties or misjoinder of causes of action has to do so without delay by making an application to the court so that the remedy provided by the rules can be granted. The situation would not be allowed to degenerate into using the defect as a technical point upon which an opponent's claim will be defeated when the whole case has been heard on merit and the only thing left is to adjourn the case to a later date for judgment. The rules do not permit such a situation, *Karibi- Whyte, J.S.C.*, expressed the following view, on the point, in *Kalu v. Odili* (1992) 5 N.W.L.R. (Pt. 240) 130 at p. 185:-

*"An action cannot be defeated on the grounds of non-joinder or mis-joinder. This is even not such a case. It is well settled law, and the practice in all our courts that where an action has not been properly constituted, whether as regards joinder of the causes of action or as to parties, it has always been procedurally beneficial and prudent to raise objection to the defect in the action before or at the hearing of the action. See Martins v. Federal Administrator General (1962) 1 ALL N.L.R. 120, (1962) 1 S.C. N.L.R. 209."*

Here too, one has to refer to Order 8 rule 10 that provides that no cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties and that the court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The court below itself expressed the same view in its judgment that rule 1 of Order 8 of the High Court (Civil Procedure) Rules was designed to prevent multiplicity of actions wherever possible and that the said rule dealt with the joinder of parties. It is, however, not clear why the court below did not apply rule 10 of Order 8. There was no indication that the respondents ever applied duly to the learned trial Judge promptly at the appropriate time for the remedy provided in the Rules to any defen-

dant who alleges misjoinder of parties to enable the issue to be determined promptly before the court continued with the trial of the case on merit. It does not appear that the court below also adverted its mind to the provisions of rule 10 of Order 8 of the Rules and the decision in Kalu's case, supra. at p. 185. An objection not taken at the earliest opportunity may be regarded as waived. See *Obembe v. Wema Board Estate Ltd.*, (1977) 5 B S.C. 115. Cases should not be decided on the basis of technicalities. They should, wherever possible, be decided on merit. See: *NIPOL Ltd. v. Bioku Investment & Property Co. Ltd.* (1992) 3 N.W.L.R. (Pt. 232) 727. This court's view, on the matter was expressed at p. 783 by Olatawura, J.S.C., as follows:-

*"The reluctance to consider an alternative course which appears more cumbersome gives the impression albeit untrue, that the outcome of such a decision is based on technicality. Technicality in the administration of justice shuts out justice. A litigant sent out of court without a hearing is denied justice. A man denied justice on any ground much less a technical ground grudges the administration of justice. It is therefore better to have a case heard and determined on merits than to leave the court with a shield of victory on mere technicality."* C D

The answer to the question raised under the third issue is in the negative. The court below was wrong in basing its decision solely on technicality. In any case, the appellants action was not incompetent. Even if the action was defective on the ground of misjoinder of parties or misjoinder of causes of action, the respondents right, if any, to raise the objection had been waived. The action had been heard on its merit without any application filed by the respondents raising an objection on the ground of misjoinder of parties or causes of action and it could not be defeated on that ground. E F

I now come to the question raised under the 4th issue. The question is the liability, if any, of the 1st respondent for the act or omission of the 2nd respondent who collected various sums of money from the appellants and failed to deliver the money to the 1st respondent. The learned trial Judge held that the liability of the 1st respondent for the act or omission of the 2nd respondent in the matter could be based on the vicarious liability of a master for the act or omission of the servant. The court below did not agree with the view of the learned trial Judge. The court below stated, inter alia, as follows:- G

*"In contract cases, the principal may be liable to a third party for the acts of his agent if he confers authority express or ostensible on that agent. By mixing the doctrine of vicarious liability known in tort and relating it to action in contract, the learned trial Judge had veered into the bush and has thereby decided on irrelevant factors. What should be decided upon is whether* H

*the 1st appellant is liable for the acts of the 2nd appellant where it can be ascertained that the 2nd appellant is the agent of the 1st appellant."*

B The submission made for the appellants was that what was involved was the tort of conversion and so the 1st appellant was liable for the act of the 2nd appellant. In the case of the respondents, the court below was right in the view it expressed because the legal relationship between the appellants and the respondents was based on contract.

C The evidence before the learned trial Judge, which he accepted and which he has not been shown to be wrong in accepting, was that the 1st respondent introduced the 2nd respondent to the appellants as her clerk through whom they (appellants) could pay to and take delivery of drinks from her (1st respondent). If that was true, as it was found to be, then the relationship of agency had been created by the representation, to the appellants, by the 1st respondent of the 2nd respondent as having authority to accept money as deposit for the supply of beer and other drinks. If D a person represents or permits it to be represented that another person has authority to act on his behalf he will be bound in the same way as he would be if that other had in fact authority to act. See *Rimmer v. Webster* (1902) 2 eh. 163. The foregoing is based on the legal principles of "estoppel" and "holding out". There is nothing strange or new about it as the law always E allows one man to authorize another to contract for and bind him by an authorised contract. The legal effect is that he who does an act through another is deemed in law to do it himself. See *Chitty on Contracts, Specific Contracts*, para. 1, 22nd ed. In the present case, the 1st respondent held out the 2nd respondent as her (1st respondent's) agent in dealing with the F appellants and she (the 1st respondent) was liable for the acts or omissions of the 2nd respondent.

G The appeal has merit and it succeeds. I hereby allow it. The judgment of the court below dated 5th June, 1990, and the order for costs are hereby set aside. The judgment of the learned trial Judge dated 17th July, 1987, is hereby restored in its place. The respondents shall pay N500.00 as costs in the court below and N1,000.00 as costs in this court.

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### **UWAIS CJN**

H I have had the opportunity of reading in draft the judgment read by my learned brother Adio, J.S.C. I entirely agree with him. Accordingly I too will allow the appeal and it is hereby allowed. The decision of the court of Appeal is set aside. I abide by the order as to costs stated in the said judgment.

**OGUNDARE JSC**

I have had the advantage of reading in draft the judgment of my learned brother Adio, J.S.C. just delivered, I agree with him that this appeal should succeed.

The facts have been fully set out in the lead judgment of my learned brother Adio JSC; I need not go over them again. I only wish to comment briefly on two important issues of law arising in the appeal. When this action was instituted by the Plaintiffs, the Defendants were served with a writ of summons and statement of claim. Each Defendant entered appearance and filed a defence to the action. There were nine Plaintiffs and each claimed a separate amount against the defendants jointly and severally. The 1st defendant in her statement of defence pleaded as hereunder:

*"5. Further to the denial of paragraph 3 of the statement of claim, the 1st defendant avers that the plaintiffs' action is incompetent and in breach of Order 10 Rule 1 of the High Court (Civil Procedure) Rules 1978 of Oyo State, each plaintiff's cause of action as pleaded in paragraph 11 of the said statement of claim being distinct and the plaintiffs not being partners."*

The 2nd defendant in her own statement of defence made a similar plea. The issue of misjoinder of plaintiffs and causes of action was raised at the trial. The learned trial judge, Falade J., rejected the plea. He observed as follows:

*"It appears that there are several contracts culminating in this action. Each plaintiff entered into a distinct contractual relationship with the defendants. I will later deal with the position of each defendant in this case. Therefore, can the plaintiffs bring themselves together to sue the defendants in a cause of action? It has to be noted here that the issue between the plaintiffs, though individually and the defendants is the failure to supply cartons of lager beer and Guinness stout they paid for at different times and non-refundable or their money in the alternative."*

*The two defendants categorically stated in their respective pleadings that this action is incompetent. By paragraph 5 of her statement or defence, the 1st defendant pleads that:*

*"5. Further to the denial of paragraph 3 of the statement of claim, the 1st defendant avers that the plaintiffs' action is incompetent and breach of Order 10 Rule 1 of the High Court (Civil Procedure) Rules 1978 of Oyo State. Each plaintiffs' cause of action as pleaded in paragraph 11 of the said statement of claim being distinct and the plaintiffs not being partners."*

The 2nd defendant also pleads in paragraph 13 of his defence that:

*"13. The 2nd defendant shall content (sic) at the trial of the case that this action is incompetent (sic) as there are various causes of (sic) merged into this suit."*

This objection was formidably and competently tackled by Chief Ogunyemi, Mr. Okunlola supporting him. His argument was that the plaintiffs could not join different causes of action and if I understand him very well, they could not even join the case action (sic), except they have common interest in the same subject matter. He then referred me to Practice and Procedure of the Supreme Court etc., by Akinola Aguda Page 11 Articles 10.0 and page 112 Articles 1005 and 1006.

As to the joinder of parties, it appears that our law and rules are clear on this. Order 8 Rule 1 of the High Court (Civil Procedure) Rules provides solution to this point. It provides that:

*'8. All persons may be joined in one action as plaintiffs, in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist whether jointly, severally or in the alternative, where if such persons brought separate actions any common question of law or fact would arise .....'*

After considering the submissions of learned counsel on the point particularly the case of Amachree & Ors. v. Newington (1952) 14 W.A.C.A. 97 the learned trial Judge went on to say:

"However, our own rule has copious provision for joinder of causes of action. Order 10 Rule 1 of the High Court (Civil Procedure) Rules is in vogue here. It provides that:

1. Subject to these rules, the plaintiff may unite in the same cause of action several causes of action .....

Chief Ogunyemi strongly feels that even this rule will not apply to the instant case.

Aguda on Practice and Procedure Article 12.04 appears to agree and accept that causes of action may be joined once they are not inconsistent.

As at today, there is not yet a clear and cut Nigerian authority on the question of joinder of causes of action of this nature.

But from order 10 Rule 1 of the High Court (Civil Procedure) Rules, it is my considered view that plaintiffs may join in one writ distinct and different causes of action against the same defendant or defendants even without leave of the court on two conditions:

(a) if each brought a separate action same common question of law (or) of fact would arise in all the actions; and

(b) that all rights to relief claimed in the action, whether they are joint, several or alternative are in respect of or arise out of the same transaction or series of transactions.

I am fortified in this opinion by Odgers' principles of Pleading and Practice in Civil Actions in the High Courts of Justice 21st Edt. by D. E.

Casson and I. H. Dennic Page 31.

1. House Property and Investment Co. Ltd. v. H.O. House Nail Company Limited (1885) 20 Ch.D. 190.

This is where the owners and tenants of two or more adjoining houses were allowed to join in one action to restrain or to recover damages for any nuisance or other injuries which affect their respective properties though to different extents, provided such nuisance or injury is caused by the same acts of the same person.

2. Booth v. Briscoe (1877) 2 Q.B.D. 496.

3. Universities of Oxford and Cambridge v. Gill (1899) 1 Ch.55.

In this case, two universities were allowed to join in one action to restrain a publisher from selling his books as

*"The Oxford and Cambridge Publications"*

It is my view, therefore, that the relief sought for by the plaintiffs arise out of the series of transactions which they severally entered into with the defendants. I consider that the same question of law and similar facts will be determined if they had come severally. Therefore, I hold that the writ of summons and statement of claim are competent."

At the end of the trial the learned trial Judge having found against the defendants and in favour of seven of the plaintiffs, the defendants appealed to the Court of Appeal where the issue of the competence of the action in the trial High Court was again raised. Sulu-Gambari JCA in his lead judgment in that Court with which Akanbi and Ogwuegbu JJ.CA (as they were then) agreed, set out the provisions of Order 8 Rule 1 of the Oyo State High Court Civil Procedure Rules then applicable and observed:

*"This rule is not dissimilar with Order 16 Rule 1 of the English Rules .....*

He set out the provisions of the English Rule and after considering some cases cited before the Court below, observed as follows:

*"In the case before us, the cause of action of each respondent may be said to have arisen out of similar transactions but they are distinct transactions. The alleged damage to each respondent is not a common ground of action. Each transaction was different as to the date, the amount and the goods involved. I am therefore of the clear view that the suit was wrongly constituted under the law applicable and that this error of procedure is not a mere irregularity. The object of the rule referred to above and of course including the English Rules is to prevent the multiplicity of actions wherever possible where several persons would have been entitled to bring several actions in which a common question of law or fact would have been*



*needed to be determined. But there (sic) must have arisen from the same transactions or the same series of transactions.*

*The rule therefore deals with the joinder of parties and not joinder of causes of action. The guiding principle is whether the plaintiffs “have the same interest” in the action not whether it was similar acts of a defendant that give rise to different causes of action.*

*I come to the conclusion therefore that this action was brought by incompetent parties and therefore that the suit is also incompetent. Where incompetent parties sued, the order to be made by the trial judge should be that of striking out the case - see Okechukwu & Sons Ndah (1967) N.M.L.R. 368 at 378; Agbonmagbe Bank Ltd. v. General Manager of G. B. Ollivant Ltd. (1961) All NLR. 116 and Martins v. Federal Administrator General (1963) L.L.R. 65. The conclusion I reach is that the action as endorsed in the writ of summons at the trial court was ab initio incompetent and the learned trial judge should have declared so.”*

*He then allowed the appeal and struck out plaintiffs claims. The plaintiffs appealed against this decision to this Court.*

*Is Order 8 rule 1 of the Oyo State Rules in pari materia with the old Order 16 rule 1 of the English Rules in force prior to October 26th 1896? Order 8 rule 1 provided:*

*“1. All persons may be joined in one action as plaintiffs, in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally or in the alternative, where if such persons brought separate actions any common question of law or fact would arise; provided that, if upon the application of any defendant it shall appear that such joinder may embarrass or delay the trial of the action, the Court or a Judge may order separate trials, or make such other order as may be expedient, and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment. But the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person who shall not be found entitled to relief unless the court or a Judge in disposing of the costs shall otherwise direct.”*

*And Order 16 rule 1 provided:*

*“All persons may be joined in one action as plaintiffs, in whom any right to relief is alleged to exist whether jointly, severally or in alternative and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment.”*

The House of Lords had held in *Smurthwaite v. Hannay* (1894) A.C. 494 that the rule dealt merely with the parties to an action and did not apply to joinder of several causes of action. Each of the several plaintiffs in that case, it was held, had a distinct and separate cause of action. See also *Carter v. Rigby & Co.* (1896) 2 Q.B. 113. In consequence of the difficulties that arose as a result of the decision of the House of Lords in *Smurthwaite v. Hannay* (supra), the rule was amended to read:

*"All persons may be joined in one action as plaintiffs, in whom any right to relief in respect of or arising out of the same transaction of or arising out of the same transaction or series of transactions is already to exist whether jointly, severally, or in the alternative, where, if such persons brought separate actions, any common question of law or fact would arise."*

The amendment opened the door for joinder not only of parties but also of causes of action.

The amended rule gave cause for consideration in *Stroud v. Lawson* (1898) 2 Q.B. 44. There, a plaintiff in his statement of claim on his own behalf claimed damages from the defendants who were directors of a company, for inducing him by fraud to purchase shares in the company and stated in his particulars of the alleged fraud (among other things) that the defendants had declared and paid a dividend on the shares of the company when there were no profits and he claimed in the same action on behalf of himself and all other shareholders of the company a declaration that the payment of the dividend as aforesaid was ultra vires and illegal, and judgment against the defendants for repayment of the amount of the dividend to the company. It was held that the plaintiff was not entitled under Order XVI r. 1, to join both causes of action in one action, as the right to relief claimed in his personal capacity and the right to relief claimed by him as representing the shareholders did not arise out of the same transaction or series of transactions within the meaning of the rule. In this judgment, A. L. Smith. L.J. at pages 48 - 49 of the Report observed:

*"In the first part of the statement of claim the plaintiff on his own behalf claims damages against the three defendants other than the company for having induced him to become a member of the company by various false representations. That is a common law action of deceit personal to the plaintiff. In the second part of the statement of claim he sues the same defendants and the company limited not in his personal capacity but in a wholly different capacity, namely, on behalf of himself and all other shareholders in the company, on the ground that the defendants other than the company declared and paid a dividend on the shares of the company out of capital which was ultra vires and he claims that they should put back*

*the money which was so paid, not into his own pocket, but into the coffers of the company for the benefit of the shareholders as a body. This kind of action he could not bring in his personal capacity. He could only sue in a representative capacity on behalf of himself and all the other shareholders in the company, and he was obliged to join the company as a co-defendant with the other defendants on the record. Thus he is joining with the well-known common law action of deceit another kind of action altogether, well known in the Chancery Division. In my opinion these are wholly separate and distinct causes of action which do not arise out of the same transaction or series of transactions. With regard to one of them, in respect of which the plaintiff sues in his personal capacity, he has to prove fraud. With regard to the other, in respect of which he sues in a representative capacity, he has not to prove fraud but merely that the act of the directors was ultra vires. I do not think this case comes within the terms of Order xvi., r. 1."*

After quoting the new rule, the learned Lord Justice held:  
According to the terms of the rule the plaintiff in this case cannot join the two causes of action which he is putting forward in different capacities, unless he can show that they both arise out of the same transaction. It is not enough for him to show that, if separate actions were brought "a common question of law or fact would arise" for those words do not apply, unless the right to relief in each case arises out of the same transaction. I do not think that is so in the present case.

Chitty L. J. in his own judgment, observed at pages 51 - 52:  
"The question then arises whether both the causes of action arise out of the same transaction within the meaning of Order xvi., r.1. That rule in its present form was framed with reference to the difficulty which arose in the cases of *Smurthwaite v. Hannay* (1894) A.C. 494 and *Carter v. Rigby & Co.* (1896) 2 Q.B. 113. It is obvious on the fact of the rule that it was not thereby intended to allow any number of different plaintiffs to join in one action any number of separate and different causes of action, but that it was intended merely to effect a modification of the old rule by which a limited liberty of joining plaintiffs with separate causes of action should be conferred. The nature of the limitation is plain upon the face of the rule. It provides that "all persons may be joined in one action as plaintiffs in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative, where, if such persons brought separate actions, any common question of law or fact would arise."

The learned Lord Justice then set out two conditions that must be fulfilled for the rule to apply. He opined at page 52 thus:

*“..... that the right to relief alleged to exist in each plaintiff should be in respect of or arise out of the same transaction, and also that there should be a common question of fact or law .....”*

It would appear that the interpretation given to the rule by the Court of Appeal (England) was rather narrow but the reason for this can be found B in the judgment of Chitty, L.J., wherein at p. 52 he said:

*“I do not deal with the words “series of transactions”, because they were not relied upon by the plaintiff’s counsel.”*

He ended his judgment in these words at pages 52-53:

*“It is not necessary for the present purpose to say to what cases the rule would apply. But I mentioned during the argument by way of illustration C a case where persons having separate inheritances in a graveyard had separate rights of action in respect of disturbance of graves therein by one common act. I think the rule might apply to such a case and they could therefore join as co-plaintiffs in one action. The sum of my judgment is that D the separate causes of action joined in this case do not arise out of the same transaction.”*

It is crystal clear from the English authorities that the English Order 16 r.1 (in force post October 26th 1896) allowed for joinder of parties and of causes of action arising out of the same transaction or series of transactions and where a common question of fact as well as law exists. See: E Walters v. Green (1899) 2 Ch. 696 (where the causes of action arose out of series of transactions); The Universities of Oxford and Cambridge v. George Gill & Sons (1899) 1 Ch. 55 (where the causes of action arose out of series of transactions).

Coming back to the case on hand, Order 8 r.1 of the Oyo State F High Court Rules under consideration was rather in pari materia with the amended Order 16 r.1 of the English Rules than with that rule in its previous form. All cases on which the former rule were determined are therefore, inappropriate in determining the proper construction of the Oyo State rule. Of course, the English authorities founded on the amended Order 16 r.1 G are only persuasive in this country. Having regard, however, to the soundness of these authorities vis-a-vis the wording of the amended rule I have no hesitation in applying them to this case and in holding that Order 6 r. 1 of the Oyo State High Court (Civil Procedure) Rules applied not only to joinder of plaintiffs but also to joinder of causes of action. The case of Amachree & ors v. Newington (1952) 14 WACA 97 is inapposite as it was decided on H the rule of court then applicable, that is, Order 4 rule 2 of the then Supreme Court (Civil Procedure) Rules which provided -

*“Where a person has jointly with other persons a ground for institut*

*ing a suit, all those other persons ought ordinarily to be made parties to the suit."*

The West African Court of Appeal rightly held that that rule only applied to joinder of parties and not, unlike Order 8 rule 1, to joinder of causes of action as well. Order iv rule 2 of the then Lagos State Rules of the High Court considered in *Kukoyi & ors. v. Ladunni* (1976) 11 SC 245 was in pari materia with the rule of court applicable in *Amachree & ors v. Newington* (supra) and for that reason, therefore, that case too is not of assistance in the consideration of the correct construction of Order 8 rule 1. It is of interest to note that the amended Order 16 rule 1 of the English Rules is now summarised in Order 15 rule 4 R.S.C.

With profound respect, therefore, to their Lordships of the court below Order 8 rule 1 cannot be and is not in pari materia with Order 16 rule 1 in its original form. The provisions of Order 8 rule 1 which extend to any right or relief (a) "in respect of or arising out of similar transaction or series of transactions" and (b) "where if such persons brought separate actions any common question of law or fact would arise" have made the rule to be far wider in its application to Order 16 rule 1 of the English Rules considered them. Order 8 rule 1 provided not only for joinder of plaintiffs but also for joinder of separate claims of the said plaintiffs which may conveniently be tried together. In the result the court below was in serious error to have concluded as it did that the action as formulated in the court of trial, was incompetent. The English authorities on Order 16 rule 1 of the English Rules in its original form cannot be of any help in the construction of Order 8 rule 1 of the Oyo State Rules. The learned trial Judge was right when he held that the action was properly constituted.

The second issue of law I like to touch briefly on is the liability of the 1st defendant for the act of the 2nd defendant. The learned trial judge found as follows:

*"The next question is whether the 2nd defendant was employed as a clerk/cashier or messenger. The onus of proving the status of the 2nd defendant, to my mind, is in the 1st defendant. The plaintiffs pleaded and gave evidence that the 1st defendant introduced the 2nd defendant to them as her clerk with the instruction to deal with him by paying for and taking delivery of their respective orders which they complied with. To my mind, the plaintiffs cannot go further. It is not their duty to investigate what the 1st defendant told them. The 1st defendant denied ever given (sic) such instruction and this was supported partially by the 2nd defendant, yet, has she succeeded in discharging the onus that the 2nd defendant was not her clerk? I*

*think she has not. Three issues are at stake here. Firstly, the plaintiffs pleaded and gave evidence that receipts were not issued by the defendants for monies paid for their orders. The two defendants confirmed this. The plaintiffs also stated that the sales were recorded in a (ledger) book. The 1st defendant admitted this. Also, the plaintiffs (said) that after payment, the 2nd defendant supplied them with their consignment. The 1st defendant also conceded to this. What she refuted was that the 2nd defendant received money for such orders. But under cross-examination she admitted that whenever she was out of the shop, she left the 2nd defendant and one Rasaki, another employee to attend to customers. To my mind, this is more than the work of a messenger. I therefore reject the evidence of the two defendants that she did not instruct the 2nd defendant to receive money from customers. For instance, if during her absence from the shop her customers bring money, the 2nd defendant will definitely receive it for and on behalf of the 1st defendant particularly when there had been an instruction that they (employee) could attend to customers when she was not in the shop."*

These findings have not been disturbed and were not challenged before us. The learned trial judge made this further finding that the 2nd defendant was at all times relevant to the case leading to this appeal an employee of the 1st defendant. Having so found the learned trial judge considered the liability of the 1st defendant and observed:

*"The 1st defendant who is an employer of the 2nd defendant states that she is not vicariously liable. Then in what way, if at all, is she liable.*

*The expression "Vicarious Liability" or, perhaps, more accurately, vicarious act is apt to cover all cases whether the act is in the master's sphere or not, that is to say whether he is liable directly or liable merely through the servant, he is liable vicariously for the negligent act of the servant done in the course of his employment. See: Broom v. Morgan (1953) 1. Q.B. 597 at 612.*

*I need not unnecessarily stretch the doctrine of vicarious liability. Suffice it to say here that for a vicarious liability to arise there must be:*

- (a) the relationship of master and servant;*
- (b) the servant must have committed a tort, a breach or an act, and*
- (c) the servant must have done the act in the course of his employment.*

*See: 1. Morgan v. Launchbury (1973) A.C. 127.*

*2. Staveley Iron and Chemical Co. Ltd. v. James (1956) A. C. 627:*

*and 3. Keppel Bus Co. Ltd. v. Sa'ad bin Ahmed (1974) 1 WLR 1082.*

*There is no doubt that the tests enunciated above fall squarely within the facts of the instant case.*

*It is my considered view therefore that the 2nd defendant is liable directly while the 1st defendant is vicariously liable to the plaintiffs."*

The above passage came under attack in the court below and that court per Sulu-Gambari, J.C.A. observed:

B *"The learned trial judge came to the conclusion that there is a master/servant relationship existing between the 1st and 2nd appellants: he held also that the 2nd appellant is liable to the respondents for the acts of the 2nd appellant. The conditions the learned trial judge pontificated, as earlier indicated in his judgment, for vicarious liability to arise and the authority cited by him in that regard over-look the fact that vicarious liability can only be relevant in actions in tort.*

C *In am of a firm opinion that there is no vicarious liability in an action in contract. In contract cases, the principal may be liable to a third party for the acts of his agent if he confers authority express or ostensible on that agent. By mixing the doctrine of vicarious liability known in tort and relating it to action in contract, the learned trial judge had veered into the bush and has thereby decided on irrelevant factors. What should be decided upon is whether the 1st appellant is liable for the acts of the 2nd appellant where it can be ascertained that the 2nd appellant is the agent of the 1st appellant."*

E It is rather strange that the court below did not consider whether on the facts as found agency arose between the two defendants. Sulu-Gambari. J.C.A. only considered the facts as relating to the 5th plaintiff and concluded that the *"1st appellant cannot be held liable to the 5th respondent for the amount in the cheque issued in favour of the 2nd appellant"*

F Although the learned trial judge wrongly predicated his conclusion on this issue on the doctrine of vicarious liability (which doctrine is only applicable in the law of tort as rightly observed by the court below), the latter court however, was wrong in my respectful view to reverse the trial judge on the issue of the liability of the 1st defendant for the act of the 2nd defendant. Their Lordships of the court below rightly observed that, in contract, the principal may be liable to a third day for the act of his agent *"if he confers authority express or ostensible on that agent."*

G On the findings of the learned trial judge, which findings are supported by the credible evidence adduced at the trial, the 2nd defendant was at all times the agent of the 1st defendant. That 1st defendant held out the 2nd defendant as her servant and agent is clearly borne out by her evidence at the trial. On the findings of the learned trial judge a relationship of principal and agent arose between the 1st and 2nd defendants. See James v. Mid Motors (Nigeria) Co. Ltd. (1978) 11-12 Sc. 31, 66-67; Rosenje v. Bakare 19735 SC. 131,

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140. The person who deals with third parties in such a way as to imply that another person has his authority to act on his behalf cannot be heard to deny the actions of that other party. See S.C.O.A. v. Okoebor (1958) 3 FSC 87, 88; (1958) SCNLR 303 where Hurley, Ag. FJ. observed:

*"I do not think that the respondent's evidence that he had not sent anybody to collect the 650 and had not authorised the company to pay it out has any bearing on the question whether or not there was implied authority; he had dealt with the company in such a way as to imply that they had his authority to pay to a third party, and that being so, the absence of express authority is immaterial and it makes no difference whether or not he in fact authorised any third party to collect."*

See also Trencos Ltd. v. African Real Estates and Investment Co. Ltd. and Anor. (1978) 4 SC 9, 26; (1978) All NLR 124, 135-136 where Aniagolu, J.S.C. observed:

*"Normally, true agency arises by agreement only but there are circumstances in which the law recognised agency by estoppel in which case the principal may be estopped from denying that another is his agent and his relationship with third parties may be affected by the acts of that other."*

The case on hand presents one of such circumstances.

From the facts found by the learned trial Judge that a case of agency arose between the 1st and 2nd defendants which would make the 1st defendant liable for the act of the 2nd defendant. The conclusion of the learned trial Judge that the 1st defendant was liable for the act of the 2nd defendant is correct even though the learned trial judge applied a wrong principle of law. With profound respect to their Lordships of the court below, they were in error to hold to the contrary.

For the reasons given above and the other reasons given in the lead judgment of my learned brother Adio, J.S.C. I too allow this appeal and set aside the judgment of the court below. I restore the judgment of the trial High Court and abide by the order for costs made by my learned brother Adio, J.S.C.

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### MOHAMMED JSC

I have had the privilege of reading the judgment of my learned brother Adio, J.S.C., and I agree with him that this appeal ought to be allowed. I have nothing more to add. I abide by all the consequential orders made by my learned brother, including the assessment and award of costs.



**IGUH JSC**

I have had the privilege of reading, in draft, the lead judgment just delivered by my learned brother, Adio, J.S.C., and I agree entirely that this appeal should be allowed.

B I desire however to say a few words of my own by way of emphasis only on the question of the joinder of persons or parties in one action as plaintiffs as well as the joinder of causes of action which has featured as one of the main issues for consideration in this appeal.

C The facts of this case have been fully set out in the lead judgment and I find it unnecessary to recount them all over again. It suffices to state that learned counsel for the defendants, relying on the decision in *Amachree and others v. Newington* (1952) 14 W.A.C.A. 97, had argued before the trial court that the plaintiffs could not properly join several causes of action in the same suit.

D The learned trial Judge, in his judgment, was of the view that the reliefs sought by the plaintiffs arose out of the same transaction or series of transactions and that common questions of law and/or facts would arise for consideration if the plaintiffs had filed separate actions severally. He therefore ruled that the action was competent.

E The Court of Appeal, on the other hand, was of the view that although the cause of action of each of the plaintiffs could be said to have arisen out of similar transactions, they were nevertheless distinct and independent transactions. The court therefore held that there being no common cause of action or common grievance between the plaintiffs against the defendants, the suit was wrongly constituted on ground of misjoinder of causes of action. It found that the procedural error was not a mere irregularity but went to the root of the action. The court below examined the provisions of Order 8 Rule 1 of the Oyo State High Court (Civil Procedure) Rules, Cap. 46, Laws of Oyo State, 1978 which, it stated, were not dissimilar with those of the older Order 16 Rule 1 of the Supreme Court Rules of England. It further considered the decisions in *Smurthwaite and others v. Hannay* (1894) A. C. 494, *Carter v. Rigby and Co.* (1896) Q.B. 113, *Amachree and other v. Newington*, supra, which it described as “highly relevant” and persuasive in the present case and *Hire Brothers v. S.S. Insurance Syndicate Ltd.* (1895) 72 L. T. 79 and finally came to the conclusion that the suit was wrongly constituted and incompetent. It set aside the decision of the trial court and struck out the plaintiff’s action.

H It seems to me necessary to point out that the cases of *Smurthwaite and others v. Hannay*, *Carter v. Rigby & Co.* and *Hire Brothers v. S. S.*

Insurance Syndicate Ltd. *supra*, relied upon by the Court of Appeal are all English decisions based on the provisions of the old Order 16 Rule 1 of the Supreme Court Rules of England which were applicable in England before the 26th day of October, 1896. The said Rule provided as follows:-

*“All persons may be joined in one action as plaintiffs, in whom any right to reliefs is alleged to exist whether jointly, severally or in the alternative and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment.”* B

It is clear to me that the provisions of the old Order 16 Rule 1 of the Supreme Court Rules of England only dealt with and permitted the joinder of parties but made no provision for the joinder of causes of action. It is equally clear that the decision of the House of Lords (England) in *Smurthwaite and others v. Hannay*, *supra*, was rightly followed by the West African Court of Appeal in *Amachree and others v. Newington*, *supra*, as the latter case, based on Order 4 Rule 2 of the Supreme Court (Civil Procedure) Rules applicable in Nigeria at all material times, also permitted only joinder of plaintiffs but not joinder of causes of action. C D

The said Order 4 Rule 2 of the Supreme Court (Civil Procedure) Rules on which *Amachree*’s case was decided provided thus -

*“Where a person has jointly with other persons a ground for instituting a suit, all these other persons ought ordinarily to be made parties to the suit”.* E

It is thus clear that the provisions of the old Order 16 Rule 1 of the Supreme Court Rules of England and Order 4 Rule 2 of the Supreme Court (Civil Procedure) Rules (Nigeria) merely dealt with joinder of parties and had no application to joinder of causes of action. F

As against the above two Rules of Court and the various decisions based on them which were considered by the court below, there are the provisions of Order 8 Rule 1 of the High Court (Civil Procedure) Rules of Oyo State which the Court of Appeal described as “not dissimilar” with the old Order 16 Rule 1 of the English Rules. It was as a result of this decision of the Court of Appeal that the provisions of the old Order 16 Rule 1 of the Supreme Court Rules of England which were in *pari materia* with Order 4 Rule 2 of our Supreme Court (Civil Procedure) Rules above mentioned were not dissimilar with those of Order 8 Rule 1 of the High Court (Civil Procedure) Rules of Oyo State, Cap. 46 of 1978 that it was able to interpret the said Order 8 Rule 1 in line with the decisions in *Smurthwaite v. Hannay*, *Carter v. Rigby and Co.*, *Amachree v. Newington* etc, referred to above. G H

Accordingly the Court of Appeal was of the view that the present case is also caught by misjoinder of causes of action.

Order 8 Rule 1 of the Oyo State High Court (Civil Procedure) Rules, Cap. 46 of 1978 provides as follows:-

B *"All persons may be joined in one action as plaintiffs, in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally or in the alternative, where if such persons brought separate actions, any common question of law or fact would arise; provided that, if upon the application of any defendant it shall appear that such joinder may embarrass or delay the trial of the action, the court or judge may order separate trials, or make such other order as may be expedient, and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief. For such relief as he or they may be entitled to, without any amendment. But the defendant, though unsuccessful, shall be entitled to this costs occasioned by so joining and person who shall not be found entitled to relief, unless the court or a Judge in disposing of the costs shall otherwise direct."*

D A close study of the above provisions of Order 8 Rule 1 of the Oyo State High Court (Civil Procedure) Rules, Cap. 46 of 1978 discloses in no mistaken terms that the joinder of persons or parties as plaintiffs in one action and the joinder of causes of action in one suit are both provided for. Two limiting factors or conditions must however be established by such plaintiffs to qualify for this joinder. These are: -

E (1) That the right to relief is in respect of or arises out of the same transaction or series of transactions; and

(2) That if separate actions were brought by such persons, a common question of law or fact would arise.

F But it must be noted that the said provisions of Order 8 Rule I have in the overall interest of fair administration of justice further stipulated a proviso, to wit -

G *"..... that if upon the application of any defendant, it shall appear that such joinder (of several plaintiffs) may embarrass or delay the trial of the action, the court or a Judge may order separate trials, or make such other order as may be expedient....."*

(Words in brackets supplied)

H With the greatest respect, therefore, it cannot be right, as propounded by the Court of Appeal, that the provisions of Order 8 Rule 1 of the Oyo State High Court (Civil Procedure) Rules, Cap. 46 of 1978 are in pari materia with those of the old Order 16 Rule 1 of the Supreme Court Rules of England. This is because, the former, without doubt, is much wider in terms and scope than the latter. Whereas Order 8 Rule 1 of the Oyo State High Court (Civil Procedure) Rules, Cap. 46 of 1978 covers the joinder of persons

or parties as plaintiffs in one action as well as joinder of causes of action, the provisions of the old Order 16 Rule 1 of the Supreme Court Rules of England which were applicable before the 26th October, 1896 dealt with the joinder of parties only. I cannot with respect therefore, subscribe to the view of the court below that the provisions of the old Order 16 Rule 1. of the Supreme Court Rules of England or the English decided cases based thereunder and relied upon by the court below are of any assistance in the construction of Order 8 Rule 1 of the Oyo State High Court (Civil Procedure) Rules, Cap. 46 of 1978 or in the determination of the present action. B

I think I ought to mention that it was in consequence of the decision in *Smurthwaite v. Hannay*, supra in 1894 and subsequent decisions in 1896 along the same line that the old Order 16 Rule 1 of the English Supreme Court Rules dealing with the joinder of plaintiffs was amended and extended. The amended Order 16 Rule 1 of the Supreme Court Rules of England which come into force on the 26th October, 1896 provided thus C

*"All persons may be joined in one action as plaintiffs, in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally or in the alternative, where if such persons brought separate actions, any common question of law or fact would arise".* D

In my view, it is the amended Order 16 Rule 1 of the Supreme Court Rules (England) that is in *pari materia* with Order 8 Rule 1 of the High Court (Civil Procedure) Rules of Oyo State. Both rules make provisions for and permit the joinder of plaintiffs as well as the joinder of causes of action but only in circumstances and under the conditions I have earlier on indicated. I should perhaps add that the amended Order 16 Rule 1 is now Order 15 Rule 4 of the English Supreme Court Rules. I must also stress that the position can be seen to be very much unlike what the Nigerian and the English Rules of Court were at all material times upon which the decision in *Smurthwaite v. Hannay* which was followed in *Amachree v. Newington* was taken. E F

In the present case, the court below conceded that the cause of action of each of the plaintiffs might be said to have arisen out of similar transactions but concluded that the action was incompetent. With profound respect, I think that the court below was in gross error there. On the facts of the case, it is clear that the Oyo State High Court (Civil Procedure) Rules, Cap. 46 of 1978 at all times material to the institution of this action permitted joinder of persons or parties as plaintiffs in one action as well as the joinder of persons or parties as plaintiffs in one action as well as the joinder of causes of action. The two conditions for the invocation of the joinder in issue appear to me fully established in that the right to relief arose G H

out of series of transactions in which if separate actions were brought by each of the plaintiffs, a common question of law and, to a great extent, of facts would arise. In the circumstances I find myself unable to subscribe to the view of the court below that the plaintiff's action as formulated is incompetent on ground of misjoinder.

B Two more points deserve attention on this issue of misjoinder. The first, as I have already observed, is that if, upon the application of any defendant, it shall appear that an order for joinder may embarrass or delay the trial of the action, the trial court or a Judge has the power under the provisions of Order 8 Rule 1 of the Oyo State High Courts (Civil Procedure) Rules, 1978 to order separate trials or to make such order as may be expedient. It is worthy of note in the present case that no such application was made by any of the defendants.

C In the second place, Order 8 Rule 10(1) of the High Court (Civil Procedure) Rules of Oyo State, 1978 stipulates thus -

D *"No cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every cause or matter deal with the matter in controversy as far as regards the rights and interests of the parties actually before it."*

E Even where, therefore, a case of misjoinder or non-joinder of parties is established, Order 8 Rule 10(1) of the High Court (Civil Procedure) Rules of Oyo State stipulates that such misjoinder or non-joinder shall not defeat a cause of action.

F Additionally it is settled principle of law that non-joinder or misjoinder of parties may not ipso facto be fatal to a proceeding and the appellate court may order a retrial in an appropriate case. See I.S. Ekpere and others v. Aforije & Another (1972) 1 All NLR 220 and Anyaduba and Anor v. N.R.T.C. Ltd. (1992) 5 N.W.L.R. (Pt. 243) 535 at 656. But as I have observed, no case of misjoinder, whether of parties or causes of action has been established in the present case for a consideration as to whether or not to order a retrial of the action.

G On the whole this appeal has merit and it is for the above and the more detailed reasons contained in the lead judgment of my learned brother, Adio, J.S.C., that I, too, allow this appeal and set aside the judgment of the court below.

H The judgment of the trial court is hereby restored. I abide by the order as to costs contained in the lead judgment.