

SUPREME COURT OF NIGERIA
31ST JANUARY 1997. SC. 209/90
CORAM:- A. B. WALI, I. L. KUTIGI, M. E. OGUNDARE,
U. MOHAMMED, S. U. ONU, JJSC.

CHIEF MEBURAMI AKINNUBI & ANOR DEFENDANTS/
(Administrators of the Estate of Rufus APPELLANTS
Gbadebo Akinnubi deceased)

AND

1. GRACE OLANIKE AKINNUBI (MRS.)..... PLAINTIFF/RESPONDENT
(As Guardian ad litem of her five children)
2. THE PROBATE REGISTRAR 1ST DEFENDANT/RESPONDENT
3. OWENA BANK (NIG.) LTD. 4TH DEFENDANT/RESPONDENT

MATRIMONIAL CAUSES - Yoruba customary marriage - Whether 1st respondent stood in loco parentis - To the children of her marriage.

PRACTICE & PROCEDURE - Capacity to sue - Where appellant sued as guardian ad litem - Whether court can amend the writ & pleadings - To show she was suing as next friend.

PRACTICE & PROCEDURE - Juristic person - Issue of party not being a juristic person - Whether abandoned - As no submission was presented on that issue.

PRACTICE & PROCEDURE - Opposition - Where a particular prayer was not opposed - Whether appellants can now oppose it on appeal.

FACTS

The 1st respondent was engaged in a Yoruba customary marriage with her deceased husband, at Akure. They had 5 children. Issues related to letters of administration in respect of the estate of the deceased gave rise to this action. The defendants/appellants (brothers of the deceased) obtained letters of administration in spite of 1st respondent's opposition. The 1st respondent filed an action before the Akure High Court seeking to set aside the said letters of administration. The appellants by a motion, unsuccessfully sought to have the action preliminarily dismissed while the 1st respondent by her motion secured her prayer for rent payment by the 4th respondent. The appellants being dissatisfied with trial court's rulings in the 2 motions ap-

pealed without success to the Court of Appeal. They have further appealed to the Supreme Court raising 5 issues.

ISSUES FOR DETERMINATION

“1. Whether the plaintiff/1st respondent, being a widow of a Yoruba Customary Law marriage, can maintain an action to administer, or to participate in the administration of, her deceased husband’s intestate estate. Or, Alternatively,

2. Whether the lower court was right in not holding that the plaintiff/1st respondent, being a widow of a Yoruba customary law marriage, could not properly sue in law as she did in the suit. Etc, see p. 264

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

Capacity to sue

1. I cannot see how the lower court could have been held to err in holding that the 1st respondent’s capacity could be amended to show that she was suing as “next friend” to her infant children but not as guardian ad item. I agree entirely with the opinion of the Court of Appeal, per Musdapher, JCA where the learned Justice held:-

“If there is authority to sue, (and I take it, that the children if adults have the authority to sue) and there is a defect relating only to the failure of the plaintiff to correctly state on the writ the capacity in which he has brought the action, then the proper order for the court to make is one amending the writ (and the pleadings) (p. 266 E)

Juristic person

2. The learned trial Judge, quite correctly, also ruled that the argument had been abandoned. The proceedings before the High Court are clear and, although the appellants’ counsel did refer to the 1st defendant, the Probate Registrar, as not being a juristic person capable of being sued, he failed to make a single submission before the trial court in support of such averment. The learned trial Judge was right therefore to say that the prayer in paragraph 1(C) of the motion had been abandoned and the Court of Appeal was right also to affirm such finding. (p. 267 C)

Where a particular prayer was not opposed

3. The appellants did not even make any submission in opposition to the application of the 1st respondent in which she sought to be given N 12,000.00 out of the accrued rents from the deceased estate to be used for the maintenance and education of the children under her care. The learned trial Judge

before granting the order observed in his ruling thus:

“In view of lack of objection to prayers sought in this application by any of the respondents I hereby give the following order:”

The appellants are therefore too late, in my view, to come now and apply for leave to raise the issue about the grant of N12,000.00 to the 1st respondent which the trial court ordered. (p. 268 C)

Yoruba customary marriage

4. The Court of Appeal is quite right to observe that the 1st respondent stood in loco parentis to the children of her marriage with the deceased. (p. 268 E)

REPRESENTATION

Both Appellants and Respondents absent

CASES REFERRED TO

Alieru v. Anibi (1952) 20 N.L.R. 46

Suberu v. Sunmonu (1957) 2 F.S.C. 33

Gbogbolulu of Vakpo v. Head Chief Hodo 7 W.A.C.A. 164

State v. Fairlakes Hotel Ltd. (1988) 5 N.W.L.R. (Part 92) 1

Bolaji v. Akapo 2 F.N.R. 241 at 245

Aileru v. Anibi 20 N.L.R. 46

Okeowo v. Migliore (1979) 11 S.C. 138

Oloto v. Attorney-General (1957) 2 F.S.C. 74

Thomas v. Olufosoye (1985) 3 NWLR (Part 13) 523

Bello v. A-G of Oyo State (1986) 5 NWLR (Part 5) 828 at 876

Ebba v. Ogodo (1984) 5 S.C. 84

LEAD JUDGMENT BY MOHAMMED.JSC

This is an appeal from the decision of the Benin Division of the Court of Appeal. The 1st respondent, Mrs. Grace Olanike Akinnubi, as plaintiff, initiated these proceedings before the Akure High Court, Ondo State. From the facts gathered from her pleadings and affidavit verifying the endorsements on the writ, the 1st respondent was the widow of one late Rufus Gbadebo Akinnubi who died intestate in Lagos, on 6th February, 1983. They were married under the Yoruba Customary Law and their marriage was blessed with five children who were all minors when their father, Mr. Akinnubi, died. The deceased at the time of his death owned a storey building in Okitipupa.

The building was let to Owena Bank (Nigeria) Ltd. the 4th defendants in this suit sometime in 1986, the 2nd and 3rd defendants who are

brothers of Mr. Akinnubi, applied to the Probate Registrar, High Court of Justice, Ondo State, for a grant of Letters of Administration of the estate of Mr. Rufus Gbadebo Akinnubi. The application was published in a Public Notice, by the Probate Registrar, in the Daily Sketch Newspaper. On seeing the publication, the 1st respondent got her solicitor to lodge a caveat
 B against the application. An attempt was made to reconcile the 1st respondent with the two brothers of her deceased husband over the issue of the grant of the Letters of Administration. At the meeting, she advanced argument, through her solicitor, that she should be made a co-administratrix in the application for a grant of Letters of Administration of the estate
 C of her deceased husband as representing the interest of her infant children. The reconciliation reached deadlock due to uncompromising attitude of the 1st and 2nd appellants.

On 11th July, 1986, the Probate, Registrar who is 2nd respondent, in this appeal, granted Letters of Administration to the 1st and 2nd
 D appellants. On hearing about it, the 1st respondent got a warning letter delivered to the 4th defendant giving the bank notice that Letters of Administration had been irregularly granted to the 1st and 2nd appellants and that the bank should not deal with them until the matter was decided by higher authorities.

On 17th October, 1986, the 1st respondent commenced an action
 E against the two brothers of her deceased husband, the 1st and 2nd appellants. She joined in the suit, the Probate Registrar and Owena Bank (Nigeria) Limited who are the 2nd and 3rd respondents, respectively, in this appeal. In the suit she claimed for the following reliefs:-

“1. A declaration that the Letters of Administration granted by the
 F 1st defendant to the 2nd and 3rd defendants on the 11th day of July, 1986, in respect of the estate of Rufus Gbadebo Akinnubi (deceased) is null and void and of no legal effect whatsoever, because the Probate Registrar (the first defendant) ignored a caveat which was lodged by the plaintiff against the
 G appointment of 2nd and 3rd defendants as the only administrators to the exclusion of the plaintiff.

2. An order to set aside the purported grant made by the 1st defendant to the 2nd and 3rd defendants.

3. An injunction to restrain the 2nd and the 3rd defendants from
 H performing the functions and duties of administrators of the said Estate.

4. An injunction to restrain the 1st and the 4th defendants from having any transactions or dealing with the 2nd and 3rd defendants in their capacities as administrators of the said Estate.

5. An order that the estate of the late Rufus Gbadebo Akinnubi be

administered by the Administrator-General and Public Trustees of Ondo State of Nigeria.

6. Damages against the 1st defendant for wrongfully and in bad faith granting Letters of Administration to the 2nd and 3rd defendants, and damages against the 2nd and 3rd defendants for wrongfully and illegally obtaining the said Letters of Administration.” B

In some of the averments in the 1st respondent's statement of claim she explained that since the death of her husband she had single-handedly been responsible for the education and up-keep of the five children of the family to the exclusion of any of the relatives, including the 1st and 2nd appellants. She maintained the five children under extremely hard conditions C and sometimes had to resort to hawking fruits and all sorts of vegetable products in open motor parks in Lagos, in order to keep body and soul together.

The 1st and 2nd appellants filed a joint statement of defence and denied all the claims of the 1st respondent. Their denial is best explained in D paragraphs 8, 9, 10, 11, 16, 17, 18, 19 and 23 which read as follows:-

“8. The 2nd, and 3rd defendants deny that the plaintiff brought this action as guardian ad litem of the five surviving children of Late Rufus Akinnubi.

Save this denial paragraph 3 of the Statement of Claim is E admitted.

9. Further to paragraph 8, thereof, the 2nd and 3rd defendants asserts that the plaintiff has brought this action for her own personal benefit, and without justification under customary law, particularly under Ikale F Native law and custom.

10. The 2nd and 3rd defendants further contend that the plaintiff is not entitled to bring this action, nor is she entitled to be appointed a co-administratrix with all or any of the 2nd and 3rd defendants.

11. The marriage between the plaintiff and the deceased Rufus Gbadebo Akinnubi was contracted under Ikale Native Law and Custom at G Okitipupa in Ikale Local Government Area, Ondo State. The 2nd and 3rd defendants will, in proof of this assertion, rely On the affidavit verifying the endorsements on the writ sworn and filed in this Court by the plaintiff on the 17th day of October, 1986 (17/10/86), in connection with this suit.

16. The brothers of the deceased Rufus Gbadebo Akinnubi as well H as Chief H.O. Kwewumi have been taking care of the plaintiff and the five surviving children of the deceased since 1983.

17. Upon the death of the plaintiff's husband, late Rufus Akinnubi, the plaintiff, who under Yoruba customary law became part of the deceased's

estate, was allotted or bequeathed according to Ikale Customary Law, to one of the deceased's brother, by name Crosdale Akinnubi, teacher, of Layelu High School, Ode-Aye, who was expected to perform all matrimonial duties for the plaintiff and act for the surviving children of the deceased as a person in loco parentis.

B 18. Although the plaintiff did not disagree nor reject the decision of her late husband's Akinnubi family which was taken at a family meeting at Okitipupa allotting or bequeathing her to the said Crosdale Akinnubi, she, nevertheless, decided to stay and remain in Lagos without the permission or authority of her said new husband.

C 19. The plaintiff has now deserted her said new husband, Mr. Crosdale Akinnubi.

23. With regard to paragraph 20 of the Statement of Claim, the 2nd, and 3rd defendants maintain that as the marriage between the plaintiff and the deceased was contracted under native law and custom, she (the plaintiff) has no right to be appointed (or joined with any member of the deceased's family) as a co-administratrix of the estate of her deceased husband."

Before the parties completed exchange of pleadings two motions were filed on the 19th of January, 1987. One of the motions was filed by the 1st respondent.

E It was brought under the inherent jurisdiction of the Court. In it the 1st respondent prayed for the following order:

"a. An order directing the 4th defendant/respondent to pay to the 5th defendant/respondent for the use and benefit of the plaintiff/applicant three years advance rent of N36,000.00 being N12,000.00 per annum in respect of the property situate lying and being at Broad Street, Okitipupa which is taken on lease by the 4th defendant/respondent and is the subject-matter of the substantive action.

b. In the alternative: an order directing the 4th defendant/respondent to make an interim payment of one year's accrued rent of N12,000.00 representing payment for the period 1st October 1985- 30th September, 1986 to the 5th defendant/respondent for the use and benefit of the plaintiff/applicant in respect of the said property pending the final determination of the substantive suit. And for any further or other orders as this Honourable Court may deem fit to make in the circumstances."

H The second motion, which was brought under the provisions of Order 23, rule 2 of the High Court (Civil Procedure) Rules of Ondo State, was filed by the 1st and 2nd appellants. In it the appellants questioned the competency of the 1st respondent to institute this action. The appellants had, earlier in their Joint Statement of Defence, in paragraph 33, indicated that they would

raise such legal issues as preliminary points of law for the determination of the trial court before the commencement or during the trial of the suit. In the motion the appellants applied for an order dismissing the 1st respondent's suit on the following grounds:-

“(that the plaintiff has no locus standi, or standing, to institute this action, she being under customary law herself a part of her husband's estate to be administered, and ipso facto, not in law entitled to be appointed an administratrix of her deceased husband's estate.

(b) that the plaintiff's pleadings disclose no reasonable cause of action, and the action is an abuse of the process of the Court, in that:

(i) the condition precedent to instituting this action has not been fulfilled, namely, filing in court a Notice to Prohibit the Grant of the Letters of Administration, or Caveat, as required by law,

And/or

(ii) No valid 'Notice to Prohibit the Grant of the Letters of Administration or caveat, was filed in Court, as required by law.

(c) that the action is incompetent, it not having been properly constituted, and that, by reason of the fact that all the parties necessary for the invocation of the judicial powers of this Court are not before it, as the 1st defendant is not a juristic person capable of being sued: See:(1) Section 6(6)(b) of the Constitution of the Federal Republic of Nigeria, 1979 (as amended and modified);

(2) Oloriode v. Oyebi (1984) 1 SCNLR ,390.

And

(2) Such further order or other order or orders as the court may deem fit to make in the circumstances.

And further take notice that the applicants will, at the hearing of this application, rely on, among other documents, the following:

(1) The plaintiff's pleadings (that is, her Statement of Claim),

(2) The plaintiff's Affidavit verifying the endorsements on the writ, sworn by the plaintiff and filed in this Court on the 17th day of October, 1986.”

The learned trial Judge fixed the two motions for hearing on the same day. On 18th February, 1987, the two motions were argued, each counsel giving reasons why the order sought by his client ought to be granted. In a well considered ruling the learned trial Judge dismissed all the prayers in the application filed by the appellants and held that the 1st respondent had locus standi to institute her action. The prayer of the 1st respondent, in her motion, was granted in the following terms:

“That the 4th defendant/respondent i.e. Owena Bank (Nig.) Ltd.

make an interim payment of one year's accrued rent of N12,000.00 in respect, of the deceased's property at Broad Street, Okitipupa, Ondo State representing a year's rent for the period 1st October, 1985 - 30th September, 1986 to the 5th defendant/respondent i.e. The Administrator-General and Public Trustee Ondo State for the maintenance and education of the children of the deceased in this suit i.e. Taiwo Akinnubi, Kehinde Akinnubi, Idowu Akinnubi, Alaba Akinnubi and Babatunde Akinnubi and that any such payment for the maintenance and education of above named children of the deceased in this suit shall be paid to the plaintiff/applicant in this suit i.e. Grace O. Akinnubi pending the final determination of the substantive action in the suit."

The appellant's being dissatisfied with the ruling delivered by the learned trial Judge, filed an appeal before the Benin Division of the Court of Appeal. The Court of Appeal, in an unanimous decision dismissed the appeal. The appellants have now come here armed with six grounds for the prosecution of their appeal. Five issues were raised for the determination of the appeal and they read as follows:-

" 1. Whether the plaintiff/1st respondent, being a widow of a Yoruba Customary Law marriage, can maintain an action to administer, or to participate in the administration of, her deceased husband's intestate estate.

Or, alternatively,

Whether the lower court was right in not holding that the plaintiff/1st respondent, being a widow of a Yoruba customary law marriage, could not properly sue in law as she did in the suit.

3. Whether in view of the facts contained in the plaintiff's pleadings and the decision in the case of *Aileru & Ors. v. Anibi* (1952) 20 NLR 46, the lower court was right in amending the capacity in which the plaintiff brought the action to show that she brought the action as "Next friend to the named children."

4. Whether the lower court ought to have refused or neglected to consider the issues raised in the appellants appeal as to:

(a) The non-juristic personality of the Probate Registrar or the improper constitution of the suit; and

(b) whether the trial court had power or jurisdiction to order the payment of money out of the proceeds of the deceased's intestate estate when the said order contravenes specific provisions of the law.

5. Whether the lower court was right in relying on extraneous matters in coming to its decision in the case."

The issues raised by the learned counsel for the 1st respondent in the respondent's brief, although couched in a different terminology, were

similar, in all respects to the issues raised by the appellants above. Before I consider the submissions of both counsels for the appellants and the 1st respondent it will be instructive to pause and explain why only the appellants and the 1st respondent remain combatants in this suit at this stage. The Probate Registrar who is the 1st defendant and 2nd respondent, in this appeal, had not filed his statement of defence when the appellants challenged the competency of the 1st respondent to institute this action. Owena Bank (Nigeria) Ltd, the 4th defendant filed a Statement of Defence in which it admitted most of the averments in the Statement of Claim which concerned the bank. In paragraph 6 the Bank said:

“The 4th defendant does not want to pay its money to any wrong hand, but will be willing and ready to pay the rent due to whoever is properly and legally authorised to claim same.”

The 5th defendant, Administrator-General and Public Trustee was mentioned once in the motion paper filed by the 1st respondent, and when the learned trial Judge delivered his ruling in which he ordered for an interim payment of one year to be paid to the 5th defendant out of the accrued rents in respect of the property of the deceased. The Administrator-General was to keep the money for the maintenance and education of the deceased children. During the hearing of arguments for the two motions the learned trial Judge ruled that the 5th defendant had been properly joined as a party to the suit. Counsel for the 1st defendant was in court when the two motions were argued but from the record of proceedings he did not make any submission in support or against any of the motions. In short, this being an interlocutory application, therefore the role played by the 1st and the 4th defendants could only be considered when the action was determined on the merits. Thus at this stage the real contest is between the appellants and 1st respondent. The 1st and 4th defendants had to await the outcome of this *“preliminary objection as to the capacity of the 1st respondent to sue”* before they take part fully in the proceedings.

I will consider issues 1, 2 and 3 together because, what had been raised there was based on alternative submissions and that decisions in them overlap. There is no dispute over the type of marriage which was solemnized between the 1st respondent and her deceased husband. It was a marriage under native law and custom. There is no dispute either that Mr. Rufus Gbadebo Akinnubi died intestate in Lagos: Again, parties are not in dispute over the provisions of the Yoruba Native Law and custom that a widow could not inherit her deceased husband's property nor could the woman be appointed an administratrix of her late husband's estate - See: Aileru v. Anibi (1952) 20 NLR 46 and Ajayi Yesufu Suberu & Ors. v. Bakare Sunmonu & Ors. (1957)

SCNLR 45; (1957) 2 FSC 33.

What the appellants want the court to accept and is strongly disputed by the learned counsel for the 1st respondent is that the 1st respondent could not properly, in law, bring her action in the way she did in this suit. The learned counsel seems to have made a vague submission here. I will refer to the decision of the Court of Appeal on this issue and the grounds of appeal against that decision. The Court of Appeal, Per Musdapher, J.C.A., held that the 1st respondent instituted this action not for her own benefit but for the benefit of her children who were under her custody and care. On the issue of her suing as guardian ad litem, the Court of Appeal held that it was an error on the part of the 1st respondent to institute this action as guardian ad litem. The Court, however, referred to the case of Gbogbolulu of Vakpo v. Head Chief Hodo (1941) 7 WACA 164 and held that it was the children that were real plaintiffs in this action and that since they could not sue under rules of court, they could only do so through or by their “next friend” who is their mother.

The appellants grounds 1 and 2 in this appeal attacked this decision but when submissions were made on the issues formulated on those grounds the counsel for the appellant was too slipshod about the presentation of the argument in support of his averments in those grounds of appeal. I cannot see how the lower court could have been held to err in holding that the 1st respondent’s capacity could be amended to show that she was suing as “next friend” to her infant children but not as guardian ad litem. I agree entirely with the opinion of the Court of Appeal, Per Musdapher, J.C.A. where the learned Justice held:

“If there is authority to sue, (and I take it, that the children if adults have the authority to sue) and there is a defect relating only to the failure of the plaintiff to ‘correctly state on the writ the capacity in which he has brought the action, then the proper order for the court to make is one amending the writ (and the pleadings) See: Tottenham v. Tottenham (1986) 1 CH 628. If the trial court fails to do this, the Court of Appeal may still make the order of amendment. As the West African Court of Appeal said in Gbogbolulu of Vakpo v. Head Chief Hodo (1941) 7 WACA 164.

“It is the duty of the Courts to aim at doing substantial justice between the parties and not to let that aim be turned aside by technicalities

X X X X X

As soon as any question arose as to the capacities of the respective parties, it was, in our view, the duty of the court to make any formal amendment on the claim which will make clear the capacity in which the plaintiff

sued.

X X X X X

provided that could be done without any hardship to either party. The Court has full powers to take this course since it appeared that no hardship would accrue to either party by the heading of the suit being amended even at this stage."

B

The issue about the refusal of the Court of Appeal to consider the argument of the appellants on the non-juristic personality of the Probate Registrar had been considered earlier in this judgment, that the Probate Registrar had not filed his Statement of Defence when the appellants moved the trial court, through the motion on notice, challenging the capacity of the 1st respondent to institute this action. The Court of Appeal was confronted with this ground of appeal and it held, quite correctly, that paragraph 1(c) of the motion was not seriously considered by the learned counsel for the appellants during the hearing of the motion. **The learned trial Judge, quite correctly, also ruled that the argument had been abandoned. The proceedings before the High Court are clear and, although the appellants counsel did refer to the 1st defendant, the Probate Registrar, as not being a juristic person capable of being sued, he failed to make a single submission before the trial court in support of such averment. The learned trial Judge was right therefore to say that the prayer in paragraph 1(c) of the motion had been abandoned and the Court of Appeal was right also to affirm such finding.**

D

E

The learned counsel for the appellants raised the following question in issue 4(b) of the appellants brief:-

"Whether the trial court had power or jurisdiction to order for payment of money out of the proceeds of the deceased's intestate estate when the said order contravenes specific provisions of the law."

F

The above issue was raised against the Court of Appeal's finding where the lower court held that the learned counsel did not argue this point before the trial High Court. What the learned counsel argued in respect of the payment of N12,000.00 of the rents coming from the estate of the deceased to the Administrator-

G

General, was that the interim payment was an incompetent order since the 1st respondent had no locus standi to institute the action. The Court of Appeal went further and said that the learned counsel for the appellants cannot in the interlocutory appeal and without leave of the Court of Appeal raise a new issue which touched the legality or otherwise of the order made.

H

Before the hearing of this appeal, the learned counsel should have followed the proper procedure and apply for leave to argue this fresh point of

law which was not argued before the High Court. He instead wrote in the appellants brief that he was asking for leave of this court to argue the new points and referred to Order 6 rule 5(1) of the Rules of the Supreme Court, 1985. He also mentioned the case of A.-G., Oyo State v. Fair lakes Hotel Ltd. (1988) 5 NWLR (Pt.92) 1. This court did hold that if a ground of appeal is to be argued for the first time in this court and that it had not been argued in all the lower courts, it can only be done by leave of the Supreme Court, and must be indicated in the brief filed by the party raising it. It has been emphasised in that decision that the ground to be argued must be a substantial point of law in respect of which no further evidence is required. This is not the case in this appeal which is from a decision not on the merits but on a preliminary objection. **The appellants did not even make any submission in opposition to the application of the 1st respondent in which she sought to be given N12,000 out of the accrued rents from the deceased estate to be used for the maintenance and education of the children under her care.** The learned trial Judge before granting the order observed in his ruling thus:

“In view of lack of objection to prayers sought in this application by any of the respondents I hereby give the following order.”

The appellants are therefore too late, in my view, to come now and apply for leave to raise the issue about the grant of N12,000.00 to the 1st respondent which the trial court ordered.

The submission of counsel on issue 5 is taking me back to the points raised in issues 1, 2 and 3 which I have considered earlier in this judgment and I do not need to repeat them. **The Court of Appeal is quite right to observe that the 1st respondent stood in loco parentis to the children of her marriage with the deceased.** There is no need to comment on some of the observations of the lower courts which touch the merits of this suit, this being an appeal from an interlocutory decision.

In sum, all the issues raised in this appeal have to be resolved in favour of the 1st respondent. This appeal has therefore failed and it is dismissed. The 1st respondent is entitled to the costs of this appeal and I award her N1,000.00 to be paid by the 1st and 2nd appellants.

H **WALI JSC**

I have the privilege of reading the lead judgment of my learned brother Uthman Mohammed, J.S.C., and I agree with the reasons he gave for dismissing the appeal. I adopt them as mine.

For these same reasons, I also hereby dismiss the appeal and adopt

the order for costs made in the lead judgment.

KUTIGI JSC

I read in advance the judgment just delivered by my learned brother Mohammed, J.S.C. I agree with his conclusion that the appeal lacks merit and must be dismissed. I accordingly dismiss it with N1,000.00 costs to the plaintiff/respondent. B

OGUNDARE JSC

I read in advance the judgment of my learned brother Mohammed, J.S.C. just delivered. For the reasons given by him which I adopt as mine I, too, C dismiss this appeal as totally lacking in merit and abide by the order for costs made in the said judgment of my learned brother.

ONU JSC

I had the advantage to read before now the judgment just delivered D by my learned brother Mohammed, J.S.C. and with it I am in entire agreement that the appeal lacks merit and must perforce fail.

I only wish to add the following few words of mine in expiation in this interlocutory appeal wherein the less said about the merits of the matter the better. E

Of the five issues submitted to us as arising for determination, I deem the consideration of only issue one (issues 2-5 being in the alternative) as sufficient to dispose of the matter in contest. That issue states:

"1. Whether the plaintiff/1st respondent, being a widow of a Yoruba Customary Law Marriage, can maintain an action to administer, or F to participate in the administration of her deceased husband's intestate estate."

Now, under Yoruba customary law, a widow under an intestacy is regarded as part of the estate of her deceased husband to be administered or inherited by the deceased's family; she could neither be entitled to apply for a G grant of letters of administration nor to be appointed as co-administratrix of her deceased husband's estate vide *Bolaji v. Akapo & Ors.* 2 FNR 241 at 245 and *Aileru & Ors. v. Anibi* (1952) 20 NLR 45. In the former case; it was decided that the widows of the deceased chief were not entitled to be issued with H Letters of Administration; but four of their children who were adults were deemed entitled to be issued with the letters. In the latter case, it was decided that the widows were not suitable persons to grant letters of administration and the Court there appointed suo motu the Administrator-General to 'administer the estate. In *Suberu v. Sunmonu & Ors.* (1957) SCNLR 45; (1957) 2 FSC

33, it was held inter alia that it is a well settled rule of native law and custom of the Yoruba that a wife could not inherit her husband's property. See also Order 8 rule 13 and 14 of the Ondo State High Court (Civil Procedure) Rules. What the decision in the instant case clearly exemplifies is that a mother (the plaintiff/respondent - widow in the case herein) may not successfully sue as a guardian ad litem on behalf of her infant children but may successfully do so on behalf of the Real plaintiffs (her infant children) as their next friend. Thus, the Court of Appeal in the case in hand (per Musdapher, J.C.A.) inexorably guided by section 16 of the Court of Appeal Act, 1976, was, in my firm view, right when it amended plaintiff/respondent's capacity to show that she was suing the appellants for and oil behalf of her children as next friend and not as guardian ad litem. In this regard.

"If there is authority to sue, (and I take it, that the children if adults have the authority to sue) and there is a defect relating only to the failure of the plaintiff to correctly state on the writ the capacity in which he has brought the action, then the proper order for the court to make is one amending the writ (and the pleadings) See Tottenham v. Tottenham (1956)1CH.628.If the trial court fails to do this, the Court of Appeal may still make the order of amendment. As the West African Court of Appeal said in Gbogbolulu of Vakpo v.Head Chief Hodo(1941)7WACA 164.

"It is the duty of the Courts to aim at doing substantial justice between the parties and not to let that aim be turned aside by technicalities.

As soon as any question arose as to the capacities of the respective parties, it was, in our view, the duty of the Court to make any formal amendment on the claim which will make clear the capacity in which the plaintiff sued.

provided that could be done without any hardship to either party. The court has full powers to take this course since it appeared that no hardship would accrue to either party by the leading of the suit being amended even at this stage."

See also Okeowo v. Migliore (1979) 11 SC 138 and Oloto v. Attorney-General (1957) 2 FSC 74; (1957) SCNLR 375

The appellant's contention that neither the trial Court nor the Court of Appeal gave any serious attention to 1st defendant's (Probate Registrar's) capacity i.e. to be joined or not to be joined as a party whereas in the argument of the motion on notice as well as argument proffered on appeal in relation

thereto respectively, the point would appear clearly to have been abandoned thus rendering the issue of 1st defendant's capacity to sue, in my opinion a non-issue. In the instant case, the plaintiff/respondent having in her statement of claim pleaded such primary facts (to wit" her relationship of mother and a fortiori, being in loco parentis to the infant children of her deceased husband) upon which the conclusion of law as whether she has the necessary B locus standi to maintain the action can be arrived at, her capacity to sue, supported by credible evidence, can neither be lightly impugned nor denied. The action must be justiciable and there must be a dispute (as indeed there is here) between the parties. There being no known provision under Yoruba Native law and custom prohibiting a widow from suing as the next friend of the legitimate infant heirs of her deceased husband therefore, I take the firm view that the plaintiff/respondent has full capacity or standing to sue the appellants as her children's next friend. See: Chief Irene Thomas & Ors. v. The Most Rev. Timothy Olufosoye (1985) 3 NWLR (Pt. 13) 523 and A.G., Kaduna State v. Hassan (1985) 2 NWLR D (Pt.8) 483.

Under section 6(6)(b) of the Constitution of the Federal Republic of Nigeria, 1979, the courts are to entertain suits at the instance of any person only where the question to be determined relates to the civil rights and obligations of the party suing. This section has been interpreted to mean that before E a person could bring a suit in respect of any subject matter, the person must show that he has a legal right or special interest in that subject matter. See Adesanya v. President of Federal Republic of Nigeria (1981) 2 NCLR 358 and Thomas v. Olufosoye (supra). In respect of the rights of the infant children to the intestate estate of the deceased, it cannot be gainsaid that any act on the F part of the defendants (appellants herein) which gave to the plaintiff (respondent herein) a cause of action invokes, in my humble view, the application of the maxim ubi jus ibi remedium See Bello v. AG of Oyo State (1986) 5 NWLR (Pt.45) 828 at 876. The respondent as the next friend of the infant children of the deceased has therefore, a special interest in the subject matter of the G action, herein.

Besides, the decisions of the two courts below being concurrent findings of facts which have neither been impugned as erroneous in law or procedure or otherwise howsoever perverse, this court will be loathe to interfere to set them aside. See Ebba v. Ogodo (1984) 1 SCNLR 372; (1984) 5 SC 84. H

For these reasons and those fuller ones stated in the judgment of my learned brother Mohammed, J.S.C. I too dismiss this appeal and make the same consequential orders inclusive of those relating to costs set out therein. Appeal dismissed