

**SUPREME COURT OF NIGERIA**  
2ND OCTOBER, 1998. SC. 62/1995.  
**CORAM :- M. L. UWAIS CJN, S. M. A. BELGORE,**  
**U. MOHAMMED, S. U. ONU, A. I. IGUH, JJSC.**

1. LAWRENCE ELENDU & ANOR. .... APPELLANTS  
(For themselves and as representing the purported  
Dike-na-Ofei Development Union)

3. NZE E.E. OGBUJI & ANOR.  
(For themselves and as representing Oha  
Ndi Osu Owerre).

5. ALPHONSUS UKACHU & ANOR.  
(For themselves and as representing the Osu Owerre  
Development Union)

AND

FELIX EKWOABA & 4 ORS. .... RESPONDENTS  
(For themselves and as representing  
the Ezihe Formerly Umuokpukpara Development Union.

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***ACTIONS*** - *Locus standi* - Where the plaintiffs have ready interest in a  
raging controversy - They had the locus standi to institute the action.

***APPEALS*** - *Concurrent findings of fact* - Which have not been shown to  
amount to a miscarriage of Justice - Or in any way perverse - Will not be  
interfered with.

***CONSTITUTIONAL LAW*** - *Freedom of association* - The case of the  
parties - Was not fought on the constitutional right of freedom of asso-  
ciation.

***INJUNCTIONS*** - *Relief sought* - As an injunction follows the natural  
cause of events in a case - It was proper to grant the injunction in the  
circumstances of this case

***PLEADINGS*** - *Traverse* - To be proper - Must deny specifically each

*allegation of fact in the statement of claim.*

**PLEADINGS** - Evidence - At variance with pleadings - Issues are tried on parties' pleadings and the parties are bound thereby.

### **FACTS**

In the High Court of Imo State, Mbano-Etiti Judicial Division holden at Etiti, the plaintiffs/respondents pursuant to the leave granted by the trial Court instituted an action for themselves and as representatives of Ezihe Development Union against the defendants/appellants, then the three sets defendants jointly and severally for inter alia: a declaration that there is no village known as and called Dike-na-Ofeiyi in Osu-Owerre Autonomous Community of Imo State which consists of seven villages, and perpetual injunction. The fact in issue was whether a new village apart from the seven existing ones known and called Dike-na-Ofeiyi, had been created after due customary Processes by excising same from the old (existing) Villages constituting an autonomous community of Osu Owerre community council in Mbano Division of Imo, State. Ten witnesses testified for the plaintiffs while three witnesses were called in support of the appellant's defence. Several documents were tendered as exhibits in support of the cases of both parties.

At the close of hearing the learned trial judge entered judgment in favour of the plaintiffs for all the reliefs claimed. Defendants being dissatisfied appealed to the Court of Appeal, Port Harcourt Division. That court dismissed the appeal and affirmed the judgment of the trial court. The defendants being further aggrieved appealed to the Supreme Court raising three issues which was adopted by the plaintiff.

### **ISSUES FOR DETERMINATION**

*"(a) Whether the Court of Appeal was right in holding that the Respondents had locus standi to institute the action in the High Court having regard to the failure by the Respondents (Ezihe Development Union) to fulfil the conditions precedent for their action to lie in a representative capacity and the capacity in which the said Respondents actually prosecuted their claim to judgment in the trial court leading to the present*

*appeal.*

*(b) Whether the Court of Appeal was right in affirming the trial court's decision awarding suo motu to the Respondents injunctive relief of wider scope to that claimed by the Respondents.*

*(c) Whether the Court of Appeal's decision was right in law having regard to:*

*(i) the provisions of section 37 of the 1979 Constitution as Amended relating to the group rights to association of the Appellants herein.*

*(ii) the Supreme Court's decision in SC. 269/90: His highness V.A. Otiotoju v. Governor of Ondo State & 2 ors. delivered on 29th April, 1994."*

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

***Pleadings - Traverse***

1. Surely, the above averment, especially in the underlined portion, does not, in my opinion, constitute a proper traverse vide Order 25 rules 9 and 14 of the High Court (Civil Procedure) Rules of Imo State, 1988. See Lewis & Peat (NRI) Ltd. v. A.E. Akhimien (1976)7 SC. 157; Cardoso v. Daniel (1986)2 NWLR (Part 20)1 and Meridian Trade Corporation Ltd. v. Metal Construction (W.A) (1998)4 NWLR (Part 544)1 at page 13, wherein it is a well settled proposition of law that the defendant must deny specifically each allegation of fact in the plaintiff's statement of claim. Every allegation if not specially or generally denied, or by necessary implication stated to be not admitted, shall be taken as established at the hearing. (p. 2397 C)

***Actions - Locus standi***

2. The learned trial Judge held as follows:-

*"To determine whether one has a locus, the court would have to look at the course of action in deciding whether there is a locus. Can it in all honesty be contended that the Plaintiffs by going to court based on the facts averred in the pleadings have no protectible interest i.e no locus*

*standi in the matter between them. I do not agree. I think they have a ready present interest in a raging controversy as to whether or not the Dike Na Ofeiyi was created in 1974 and should be allowed to go. I therefore hold that they have the necessary locus standi."*

B In affirming the trial court's decision the court below (per Onalaja, JCA) who wrote the leading judgment, held as follows:-

*"The above fully endorsed and confirmed the reasoning and approach in this judgment as to what constitute the locus standi required of a plaintiff. The learned trial Judge rightly in my assessment considering the facts, evidence and the law, was right to have granted the LO-CUS STANDI for the Respondents.*

D From the forgoing and the following authorities, the trial court and the court below were, in my firm view, right in holding that the Respondents had the LOCUS STANDI to institute this action<sup>1</sup> vide Chief Irene Thomas & 5 ors.v. The Most Rev. T.O.Olufosoye (1986)<sup>1</sup> NWLR (Part 19) page 669; Odeneye v. Efunuga (1990) 1 NWLR (part 164) 618; Anambra State v. Eboh (1992) 1 NWLR (part 218) 491. (p. 2401 B)

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### ***Injunctions - Relief sought***

3. As an injunction follows the natural cause of events in a case, having found from the evidence that there was no eighth village contrary to the assertion of the Appellants and in view of the fact that their continued insistence of the existence of the said village might cause a breach of the peace, it was only meet and proper to grant the said injunction. There is therefore, in my opinion, no new wider relief granted suo motu by the learned trial Judge in favour of the Respondents different from the one claimed by them in the action leading to this appeal and the court below was accordingly right, in my judgment, to have affirmed the same. (p. 2405 A)

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H <sup>1</sup> The Supreme Court held that the plaintiffs have locus to sue in the following cases: Evbuomwan v. Elema (1994) 11 KLR 323 and Erejuwa II v. Kperegbeyi (1994) 8 KLR 31 but held that there was no locus to sue in NDIC v. FMB Ltd (1997) 5 KLR (pt 51) 924 and Lawson v Ajibulu (1997) 6 KLR (pt 52) 1135

**Pleadings - Evidence**

4. As the Appellants' evidence was at variance with their pleadings on the issue of creation of the village, both courts below had no difficulty in holding that evidence adduced was at variance with their pleadings on this issue and I so hold. See Ajide v. Kelani (1985)3 NWLR (Part 12) B 248. It is now firmly settled that issues are tried on parties' pleadings and the parties are bound thereby. See Lewis & Peat (NRI) Ltd v. Akhimien (1976)1 All NLR 460 at 465. (p. 2408 H)

**Constitutional law - Freedom of association**

5. Consequently, the case of the parties in the instant appeal was not fought on the constitutional right of freedom of association but on whether an eighth village known as and called Dike na Ofeiyi had been created after due customary processes for creating a new village. Accordingly, the case of His Highness V.A. Otitoju v. Governor of Ondo State & ors. (1994) 4 NWLR (Part 340) 518, is on all fours with the instant case. On the issue of section 37 of the 1979 Constitution, this court further held (per Kutigi, JSC) that:-

*"There is nothing in the provisions of Section 37 of the 1979 Constitution as amended which suggests that town quarter or group rights to association would not be recognised if and when one is shown to exist. On the contrary the provision recognises the right of a community such as Omuo - Oke people in the instant case as a quarter or group to associate or not to associate with the rest of Omuo. Individuals in Omuo - Oke may likewise do the same. But it is the right of individuals that is of primary concern. It is only when individuals join together or gang up to exercise their common rights together that one talks of group or quarter rights as such. But as rightly stated above the 1976/1979 notices do not in any way interfere with the freedom of association of Omuo - Oke people while the government reserves the right to treat them as part of Omuo for its own administrative purposes. That is how it should be. And I believe that is how it has been."*

This case in pith and substance amply summarises the Appellants' case which, in my opinion, is worsened by the fact that one unit out of the

two - Ofeiyi, is unanimous that she is not interested in either the mushroomed merger or the secession. (p. 2409 C)

***Concurrent findings of fact***

- B 6. On the authorities of Ariche v The State (1993)6 NWLR (part 302) 752 at 762; Abisi v. Ekwealor (1993) 6 NWLR (part 302) 643 at 688 and Alom v. Amenger (1997)7 NWLR (part 514) 578, this court is loath to interfere with the concurrent findings of fact by the two courts below which have neither been shown to amount to a miscarriage of justice nor demonstrated to contain any error in procedure or indeed, in anyway perverse. (p. 2410 H)

**REPRESENTATION**

- D A. E. Obiekwe Esq., for the Appellants.  
Prince E.T. Nsofor, with him A.O. Opara Anozie, for the Respondents.

**CASES REFERRED TO**

- E Lewis & Peat (NRI) Ltd. v. A.E. Akhimien (1976)7 SC. 157;  
Cardoso v. Daniel (1986)2 NWLR (Part 20)1  
Meridian Trade Corporation Ltd. v. Metal Construction (W.A) (1998)4 NWLR (Part 544)1 at page 13  
F Thomas v. Olufosoye (1986)1 NWLR (Part 19) page 669  
Odeneye v. Efunuga (1990) 1 NWLR (part 164) 618  
Anambra State v. Eboh (1992)1 NWLR (part 218) 491  
Ariche v The State (1993)6 NWLR (part 302) 752 at 762  
Abisi v. Ekwealor (1993) 6 NWLR (part 302) 643 at 688  
G Alom v. Amenger (1997)7 NWLR (part 514) 578  
Otitoju v. Governor of Ondo State (1994) 4 NWLR (Part 340) 518

**STATUTES & RULES REFERRED TO**

- H High Court Rules, Cap. 61 of the Law of Eastern Nigeria 1963 applicable to Imo State Order iv  
1979 Constitution of amended by Decree No. 1 of 1984, s. 37  
Evidence Act, Cap. 112 Laws of the Federation of Nigeria, 1990, s. 136

**LEAD JUDGMENT BY ONU JSC**

This is an appeal from the decision of the Court of Appeal holden at Port Harcourt (Coram: Katsina-Alu, Edozie and Onalaja, JJ.CA) which on the 6th day of December, 1994 upheld the judgment of the High Court of Imo State, Mbano-Etiti Judicial Division holden at Etiti to the effect B that the Plaintiffs/Respondents had proved their case on the balance of probability.

The case which was ostensibly not contested on the constitutional rights of freedom of association but rather based on a hybrid of facts involving C the customary law as to whether a new Village, apart from the seven existing ones known and called Dike na-Ofeiyi, had been created after due customary processes by excising same from the old (existing) Village constituting an autonomous Community of Osu Owerre Community Council in Mbano Division of Imo State. The Respondents herein, called D Ezihe Development Union, applied for leave of the trial court pursuant to Order IV, High Court Rules, Cap. 61 of the Laws of Eastern Nigeria, 1963 applicable to Imo State to institute the action leading to the appeal herein, for themselves and as representatives of Ezihe Development Union E in the trial court presided over by Pats -Acholonu, J. (As he then was), against the Appellants herein, then the three sets of Defendants -the first set being sued for themselves and as representing the purported Dike -na -Ofeiyi Development Union, the second set as representing the Oha-Ndi F Nze Osu Owerre while the third were sued for themselves and as representing the Osu Owerre Development Union.

Shortly put, Plaintiffs/Respondents who I shall in the rest of this judgment refer to simply as Respondents, claimed the following reliefs G against each set of Defendants/Appellants (herein after called appellants) jointly and severally for:-

*"(1) A declaration that Umudike and Ofeiyi are Kindreds and Wards 10 and 12 respectively in Ezihe (formerly Umuokpukpara) village in Osu Owerre Autonomous Community of Imo State. H*

*(2) A declaration that there is no eight (sic) Village known as and called Dike-na-Ofeiyi Osu-Owerre Autonomous Community of Imo State which consists of seven villages.*

(3) *Perpetual injunction restraining the Defendants by themselves, through their servants and/or agents from the eight (sic) village known as and called Dike-na Ofeiyi in Osu -Owerre Autonomous Community.*"

B Both parties applied and were granted leave to amend the Statements of Claim and Defence respectively, while the Reply to the Statement of Defence was subsequently filed.

C Ten witnesses in all testified for the Respondents while three witnesses were called in support of the Appellants' defence. Several documents were tendered as exhibits in support of the cases of both parties at the hearing of the Suit, following which, in what I consider to be a well considered judgment dated the 8th day of October, 1990, the learned trial Judge entered judgment against the Appellants for all three D reliefs claimed by the Respondents.

Appellants being dissatisfied with the trial High Court's judgment, appealed to the Court of Appeal, Port Harcourt Division (hereinafter in the rest of this judgment referred to shortly as the court below). E On 6th December, 1994, as hereinbefore stated, the court below, in a considered judgment, dismissed the Appellant's appeal by affirming the decision of the learned trial Judge. The Appellants being further dissatisfied with this decision, filed an appeal against the lower court's decision F on three grounds of appeal contained on pages 597 to 601 of the Records of Appeal herein.

The parties later duly filed and exchanged briefs of argument as required by the rules of this court. The Appellants in their brief, in consonance with their grounds of appeal and at the instance of their counsel, G submitted the following three issues (the same which Respondents in their brief adopted) as arising for the determination of this court in this appeal. They are:

H "(a) *Whether the Court of Appeal was right in holding that the Respondents had locus standi to institute the action in the High Court having regard to the failure by the Respondents (Ezihe Development Union) to fulfil the conditions precedent for their action to lie in a representative capacity and the capacity in which the said Respondents actually pros-*



ecuted their claim to judgment in the trial court leading to the present appeal.

(b) Whether the Court of Appeal was right in affirming the trial court's decision awarding *suo motu* to the Respondents injunctive relief of wider scope to that claimed by the Respondents. B

(c) Whether the Court of Appeal's decision was right in law having regard to:

(i) the provisions of section 37 of the 1979 Constitution as Amended relating to the group rights to association of the Appellants herein. C

(ii) the Supreme Court's decision in SC. 269/90: His highness V.A. Otitoju v. Governor of Ondo State & 2 ors. delivered on 29th April, 1994."

At the hearing of this appeal on 7th of July, 1998, A.E. Obiekwe D Esq. of counsel for the Appellants, after referring us to the Appellants' Brief dated and filed on 15th September, 1995, adopted the same and urged us to allow the appeal. Learned counsel for the Respondents, Prince E.T Nsofor, similarly adopted the Respondents' Brief dated 3rd E November, 1997 and filed on 16th May, 1998.

I will now proceed to consider the appeal on the issues formulated in order of sequence as follows:-

#### ISSUE NO.1

It is indisputable that the action leading to the appeal herein was F instituted by the Respondents in their individual capacities by and on behalf of the Ezihe Development Union as a body wherefore in paragraphs 1, 2 and 3 of their Amended Statement of Claim, they pleaded G thus:-

"1. The plaintiffs are at all material times members of Ezihe formerly (Umuokpukpara) Community and of the 7 (seven) communities that make up Osu Owerre Autonomous Community in the FIRST SCHEDULE of the Defunct East Central State of Nigeria, Divisional Administration Edict 1971 being instrument Establishing Community Councils within Mbano Division in the Imo State of Nigeria. H

2. The Plaintiffs and or Ezihe formerly (Umuokpukpara) Com-

community hereafter called plaintiffs' community are made up of six wards known and called in the aforementioned instrument as

- (a) Obinekiti Ezihe formerly (Umuokpukpara ward) 9
- (b) Umudike Ezihe formerly (Umuokpukpara Ward) 10
- (c) Eziukwu Ezihe formerly (Umuokpukpara ward) 11
- (d) Ofeiyi Ezihe formerly (Umuokpukpara ward) 12
- (e) Mbara Ezihe formerly (Umuokpara ward) 13
- (f) Umuzohu Ezihe formerly (Umuokpukpara ward) 14."

3. The 1st and 2nd Defendants were the President and the Secretary respectively representing members of Wards 10 in the Plaintiff's community until 1975 when they and some elements of Ward 12 also in the Plaintiffs' community for no apparent reasons unilaterally constituted themselves into the purported Dike-na-Ofeiyi community and styled themselves as the 8th village in Osu Owerre Autonomous Community."

The above pleadings were clearly admitted by the Appellants in their paragraphs 2 and 3 of the Amended Statement of Defence to the following effect :

"2. Save to the extent of admitting that the plaintiffs were members of Ezihe Community the Defendants deny the rest of the (sic) paragraph 1 of the Statement of Claim and aver that there was no Osu Owerre Autonomous Community in the Divisional Administration Edict of 1971 of the defunct East Central State.

3. The Defendants admit that Umuokpukpara was made up of six Community Council Wards under the Divisional Administration Edict of 1971 as averred in paragraph 2 of the Statement of Claim, but the Defendants aver that Wards, as created by a political statute, is different from villages where origin is always traditional or customary as in the case of Dike na Ofeiyi as shall be shown hereafter."

At paragraph 3 of the Respondents Statement of Claim, they pleaded as follows:-

"The first and second defendants are the President and Secretary respectively representing members of Ward 10 in the Plaintiffs' commu-

nity until 1975 when they and some elements of ward 12 also in the Plaintiffs' community, for no apparent reasons, unilaterally constituted themselves into the purported Dike na Ofeiyi community and styled themselves as the eight (sic) Village in Osu Owerre Autonomous Community."

The above pleading was admitted by the Appellants in paragraph 4 of their Amended Statement of Defence and the same, notwithstanding the fact that the Respondents had filed their Amended Statement of Claim on 11/11/88 and served on the Appellants. Irrespective of this, the Appellants proceeded to aver further in the same paragraph 4 of the Amended Statement of Defence that "the Defendants further contend that neither the Dike na Ofeiyi Development Union nor the Oha Ndi Nze Osu Owerre are legal personalities that can be sued." It was this misconception on the part of the Appellants that pervaded throughout their defence to this suit as will be demonstrated hereafter.

The Respondents also pleaded the consensus change of name from Umuokpukpara to Ezihe in paragraph 10 of their Amended Statement of Claim. This was admitted by the Appellants in paragraph 27 of their Amended Statement of Defence. This change of name as advertised in the Renaissance Newspaper of Friday, March 21, 1975, was received in evidence at the trial court as Exhibit 'D'. Thus, in my view, there were material facts pleaded to support or sustain the representative capacity under which the Respondents instituted the action on behalf of Ezihe Development Union. In 1974, Umudike Ward nursed the ambition to create an eighth village and so used the name Dike-na-Ofeiyi as opposed to the usual name they all bore of Ezihe Umuokpukpara. See paragraph 6 of the Amended Statement of Claim wherein the Respondents pleaded that:

*"The first and second defendants and their members claim of being the purported eight (sic) community under the so called dike na Ofeiyi was based on the following:-*

*(a) Purported document signed by members of Plaintiffs' Community authorising the first and second Defendants as the eight (sic) Village in Osu Owerre Autonomous Community under the so called Dike Na Ofeiyi Community.*

(b) *Purported recognition of the so called Dike Na Ofeiyi Community by the defunct Osu owerre Development Union on 23rd March, 1974.*

(c) *Purported recognition letter of 23rd March, 1974 by the defunct Osu Owerre Development Union.*

(d) *Purported memorandum by the so called Dike Na Ofeiyi dated 16th August, 1974 to themselves showing their viability as a village.*

(e) *Purported resolution of Osu Owerre Councillors on 4th September, 1974 recognising them as the so called Dike Na Ofeiyi Community.*

(f) *Purported recognition letter by Osu Owerre Traditional Title Holders dated 20th September, 1974.*

(g) *Purported Nze Traditional Chiefs of Osu Owerre Autonomous community letter of recognition dated 7th October, 1984 and sent to the Eze Ebere Nweme the Odu 1 of Osu Owerre Autonomous Community.*

(h) *The joint memorandum by Traditional Members, Clan and Amala of Osu Owerre recognition letter dated 20th August, 1975.*

(i) *Publication in Renaissance issue of 9th April, 1975, purported to be by Dike Na Ofeiyi Community.*

(j) *Payment of N3,246.00 Airport Appeal Fund vide receipt No. 003086 dated 8th August, 1986.*

(k) *Payment by the purported branch Union of the so called Dike Na Ofeiyi in Lagos of N250.00 Airport Appeal Fund vide receipt No. ISA.AF 0010311 dated October, 1986."*

To exemplify how Ezihe wards or kindreds are so closely knit and have the same customs and development projects to make it impossible to bulkanise them, the Respondents pleaded in paragraph 19 of the Amended Statement of Claim as follows:-

"19. The plaintiffs aver that the illegal action of the first and second defendants, their servants or agents going under the purported name of Dike Na Ofeiyi, is embarrassing to the Plaintiffs' Community in that the whole Ward 9 to 14 had at all material times, had one common

*market Orié Ezihe, one traditional Colobration (sic) of Aruro, inhabited one landmass, owned and occupied by the Plaintiffs' great ancestors, enjoyed drinking from streams namely Okwaraugo, Iyi, Ama, Arihi, Oramirikwa, Isi Iyi all in Ezihe."*

In reply to the pleading above, the Appellants averred in paragraph 33 of their Amended Statement of Defence thus:

*"33. Paragraph 18 is a admitted and it is further averred that customary decisions are never gazetted. But paragraphs 19,20,21 and 22 are denied." (Underlining is mine for emphasis).*

**Surely, the above averment, especially in the underlined portion, does not, in my opinion, constitute a proper traverse vide Order 25 rules 9 and 14 of the High Court (Civil Procedure) Rules of Imo State, 1988. See Lewis & Peat (NRI) Ltd. v. A.E. Akhimien (1976)7 SC. 157; Cardoso v. Daniel (1986)2 NWLR (Part 20)1 and Meridian Trade Corporation Ltd. v. Metal Construction (W.A) (1998)4 NWLR (Part 544)1 at page 13, wherein it is a well settled proposition of law that the defendant must deny specifically each allegation of fact in the plaintiff's statement of claim. Every allegation if not specially or generally denied, or by necessary implication stated to be not admitted, shall be taken as established at the hearing.**

Now, what are theses allegations of fact of the Respondents which the Appellants never traversed in paragraphs 19,20,21 of the Amended Statement of Claim? These, in the main, consist of facts that (i) the whole wards 9 and 14 had at all material times owned in common a market (Orié Ezihe), one traditional deity, inhabited one land mass etc., that the land mass belong to the great ancestors of the Respondents the first and the second Appellants and their servants and agents are so interwoven as to make demarcation for autonomy or separate existence impossible. That in the alternative, where the first and the second Appellants denied the averments therein, contained, they ought to forfeit their tenancy etc.

On whether the Respondents had the requisite locus standi to sue the Appellants in a representative capacity, it is the Appellants' contention that since Ezihe Development Union had no authority to sue on

behalf of Ezihe Community the action leading to this appeal is incompetent in law. It is submitted in addition that there is a grave miscarriage against Umudike and Ofeiyi Communities. Whose interest had been adversely affected even though they were not parties. Furthermore, it is argued, Dike Na Ofeiyi Development Union did not have the authority of the two kindreds to represent their interest. Several cases were cited to buttress the contention namely, 1. Afolabi & ors. v. Adekunle & Anor. (1983) NSCC vol.14 page 398; (1983)3 SC.98;2. Onwunalu & ors. v. Osademe (1971) All NLR pages 15 -17 (Reprint) 3. Idise v. Williams International Ltd (1995)1 NWLR (Part 370) pages 142-145 and 4. Amachree v. Newington, 14 WACA 97.

It is common ground from the pleadings and evidence led at the trial that five of the said Kindreds including Ofeiyi resisted the secessionist move giving amongst other reasons, that they were not consulted. After series of protests both orally and in writing of the five Kindreds out of the six members/Kindreds or wards of Ezihe, the Respondents instituted the action culminating in this appeal seeking the reliefs in their statement of claim. It is in the light of the above that the cases cited above do not support the Appellants' case. For instance, in case No.1 above, Afolabi v. Adekunle (supra), the High Court had non-suited the plaintiff's claim brought by the family head for declaration in a land dispute. In the words of Obaseki, JSC in this Court where the appeal ultimately terminated:

*"This court has held times without number that once the pleadings and evidence show conclusively a representative capacity and the case was fought throughout in that capacity, the trial court can justifiably properly enter judgment for and against the party in that capacity, even if amendment to reflect that capacity had not been applied for and obtained ..... It would be otherwise if the case is not made out in a representative capacity."*

The court further held that the appeal court had power in the interest of Justice to amend the plaintiffs' capacity in the writ of summons and to enter judgment for them accordingly. In case No.2: Onwunalu v. Osademe (supra), the plaintiff on his writ expressed himself as suing on behalf of himself and the people of Umuolu and the defendant was expressed to

have been sued on behalf of himself and the people of Okpokrika. Pleadings were ordered and filed by both parties and the capacities in which the parties appeared on the writ were confirmed in their pleadings. At the hearing, however, only one witness gave evidence out of all the defendants. He said the land in dispute belonged to him and the Onwunalu family and not communal land that belonged to the whole Okpokrika people. The trial Judge held that both sides had deviated from their pleadings. Instead of non-suiting the plaintiff, the judge amended the writ to read the defendants for "themselves and on behalf of Onwunalu family."

It was held by the Supreme Court which struck out the case, that "in this case it was clear that the Onwunalu family was never a party to the present proceedings and eo ipso it would be wrong to give judgment against them in these proceedings." In case No.3: Idise v. Williams International Ltd (supra), the plaintiffs/appellants - members of the Owevwen Community of Agbaiha in Delta State - instituted the action leading to the appeal therein jointly for themselves and on behalf of the said Owevwen Community Agbaiha against the defendant/respondent in the High Court of former Bendel State sitting in Ughelli. They were claiming N500,000.00 as general damages for negligence resulting from damages to the only road leading from Owevwen to Ughelli, Agbaiha, Otor road, rendering it impassable to vehicular as well as pedestrian traffic.

It was held on requirements for suing in a representative capacity thus:

*"For an action to lie in a representative capacity the following must exist :-*

- (a) *there must be a common interest;*
- (b) *there must be a common grievance;*
- (c) *the relief claimed must be beneficial to all.*

*In the instant case, there is no doubt that the cause of complaint is common to the Community but the injury suffered by each member and its extent is different. Thus, the wrong is only the common platform upon which the individual members of the community can bring an action."* In case No.4: Amachree v. Newington (supra) which was cited with

approval at page 152 of the case Idise v. Williams International Ltd (supra), *what this court (per Wali), JSC) said was:*

"Indeed the interests revealed in this case are not only varied, but rather variegated, ranging from the separate and distinct farming and trading activities of individual members of the community on the one hand, to physical injuries as well as personal inconveniences alleged to have been suffered by some individual members of the Community on the other hand."

And at pages 148-149 of the same Report, the learned Justice remarked thus:

"The argument of the learned counsel for the respondent is valid only to the extent that all the members of the Community who built that foot path into a road had interest in protecting that road against any damages. In other words if the action of the respondents in the instant case was for damages done to the road simpliciter the respondents herein might have a common cause since all of them had interest in keeping the road in a motorable manner."

Indeed, it has been held in Woodford & ors. v. Smith & Anor. (1970)1 WLR 806; (1970)1 All E.R 1091 that the "wrongful deprivation of the plaintiffs' right to vote at a meeting of a mere private association is in my judgment no trivial matter." Compare Oragbade v. Onitiju (1962) 1 All NLR 332.

In consequence, the learned trial Judge in ascertaining whether in the action leading to the appeal hereof was right when he held that the Respondents had a standing to sue the Appellants and upon taking a look at the pleading, particularly with reference to paragraphs 1, 2 and 3 of the Amended Statement of Claim, found inter alia as follows:-

"The Plaintiffs are therefore saying that the Defendants particularly first and second being of the same village with them cannot and ought not be allowed to lead the other members of kindreds to secede from their village and become an entirely new autonomous village district and different from Ezihe which all rightly belong. What interest then are they seeking to thwart? From the pleadings it would seem that they are bent to persuade the court that as members of the same village



they are entitled to and are competent to prevent Dike na Ofeiyi from seceding. I think in determining the plaintiffs are interested partly or have the requisite interest as to be entitled to maintain the action for a declaratory judgment, the principle of law governing suits generally in determining whether a Plaintiff is a person interested and therefore authorised to bring the action applies and the phrase any interested person or party merely re-iterates the ordinary requirement that a Plaintiff in a cause of action must show an adequate interest."

Concluding on the point, **the learned trial Judge held as follows:-**

*"To determine whether one has a locus, the court would have to look at the course of action in deciding whether there is a locus. Can it in all honesty be contended that the Plaintiffs by going to court based on the facts averred in the pleadings have no protectible interest i.e no locus standi in the matter between them. I do not agree. I think they have a ready present interest in a raging controversy as to whether or not the Dike Na Ofeiyi was created in 1974 and should be allowed to go. I therefore hold that they have the necessary locus standi."*

**In affirming the trial court's decision the court below (per Onalaja, JCA) who wrote the leading judgment, held as follows:-**

*"The above fully endorsed and confirmed the reasoning and approach in this judgment as to what constitute the locus standi required of a plaintiff."*

As stated above to grant the Respondents the action must be justiciable and there must be a dispute between the parties. In the present appeal the action arose out of the controversy as to the number of villages forming EZIHE Village. Whilst the Respondents contend EZIHE village is made up of seven, the Appellants contend that DIKE NA OFEIYI is the 8th so the court has to resolve the issue thereby making it justiciable and as to whether it is seven or eight villages as contested by the Appellants that DIKE NA OFEIYI is the eighth village created a dispute between the parties.

**The learned trial Judge rightly in my assessment considering the facts, evidence and the law, was right to have granted the LOCUS STANDI for the Respondents.**

*The answer as to the issue posed by the Appellants to resolve the issue of the LOCUS STANDI of the Respondents in the negative is hereby rejected and confirm in the affirmative that having regard to the circumstances of this appeal the respondents to be heard in appearance by the competent court - the High Court of Imo State to resolve the controversy between the eighth village in EZIHE in OSU OWERRE Community of Imo State."*

In his contribution Edozie, JCA observed as follows:-

*"In the case in hand , it is clear from the respondents' amended Statement of claim that both parties were members of one village formerly known as and called Umuokpukpara, later changed to Ezihe. The village has six constituent Kindreds units or wards. In 1974, the appellants sought to create a separate village out of two of the kindred units to be known as Dike Na Ofeiyi. In consequence, five of the kindred units took out action claiming that they were not consulted and so did not give their consent to this action of secession and that their land customs are so interwoven to make the split impossible.*

*In paragraphs 19, 20, 21, 24 and 29 of the amended Statement of Claim, the respondents spelt out copiously their interest and grievance in instituting action to resist the dismemberment of their village. In my view, the learned trial Judge was right in holding that the respondents had the locus standi to maintain the action. Related to the question of locus standi was the issue as to whether the respondents were entitled to judgment entered in their favour. The central issue for determination in the case was whether the disputed village Dike na Ofeiyi was in existence in 1974 as alleged by the appellant and denied by the respondents. The learned trial Judge heard evidence on that and after a painstaking evaluation thereof, he came to the conclusion, quite rightly, in my view, that the allegation of the existence of the village had not been established."*

**From the forgoing and the following authorities, the trial court and the court below were, in my firm view, right in holding that the Respondents had the LOCUS STANDI to institute this action vide Chief Irene Thomas & 5 ors. v. The Most Rev. T.O.Olufosoye (1986)1 NWLR (Part 19) page 669; Odeneye v. Efunuga (1990) 1 NWLR**

(part 164) 618; **Anambra State v. Eboh** (1992)1 NWLR (part 218)

491. The decision of the court below on this issue is not only very exhaustive and comprehensive but indeed, irresistible. See Elendu v. Ekwoaba (1995) 3 NWLR (part 386) 704. Consequently, I hold that the two courts below had the requisite locus standi. The issue herein argued B is accordingly resolved against the Appellants.

## ISSUES NO.2

This issue which asks whether the court below was right in affirming the trial court's decision in granting the injunction sought by the Respondents was couched in the Respondents' third relief vide their Writ of Summons dated 8th September, 1987, thus: C

*"Perpetual injunction restraining the Defendants by themselves, through their servants and/or agents from asserting the existence of an eight (sic) village known as and called Dike na Ofeiyi in Osu -Owerre Autonomous Community." (Underlining is mine).* D

The learned trial Judge in the last of three consequential orders he ultimately made held as follows:

*"With respect to the 3 claims, I find it difficult to restrain people E from thinking whatever they like or pretending the existence of something that is not there. However, I state that:*

*(c) The Defendants are restrained from treating Umudike and Ofeiyi (kindreds as though they in unison constitute a village in Osu owerre.' (Underlining is mine for emphasis).* F

The court below affirmed this decision on the ground that being a discretionary remedy, the trial court exercised its discretion judicially and judiciously on sound legal principles; hence, the court below should not disturb that order. See Solanke v. Ajibola (1968) 1 All NLR 46; Kudoro v. Alaka (156)1 FSC. 86; Demuren v. Asuni (1967) 1 All NLR 94 and Eronini v. Iheuko (1989)2 NWLR (part 101) 46 at 64. Learned counsel for the Appellants after expounding the definitions of the words "assert" and "treat" as set out in the above extracts and contained at pages 56 and 105 respectively in the New Lexicon Websters Dictionary of English Language Deluxe Encyclo-pedic Edition, to wit : (i) "to state as true, to assert one's innocence, to maintain and (ii), "it behave towards someone G H

or something." submitted that these definitions are crystal clear that what the Respondents claimed was for the trial court to stop:

(i) Dike na Ofeiyi Development Union

(ii) Oha-Ndi Nze Osu Owerre

B (iii) Osu Owerre Development Union, from maintaining or stating as true the existence of an eighth village known as Dike na Ofeiyi in Osu Owerre Autonomous Community.

C With utmost due respect to learned counsel for the Appellants, his argument here savours of mere semantics - a distinction without a difference - as both in effect mean the same thing. The injunction by the trial court therefore was to restrain the members of the above-mentioned bodies from acting or behaving towards Umudike na Ofeiyi as if it constitutes an eighth Community.

D See Ballentines Law Dictionary, Third Edition at page 1297 wherein the word treat is further defined as "To act or behave toward another in a certain manner."

E It is in the light of the above that I view that this is not a case of granting a relief not sought for vide Ekpenyong & 3 ors. v. Nyong & 6 ors.(1975) NSCC Vol.9 pages 28-32 and the authority does not therefore avail them. In that case, the plaintiffs filed a motion for an interim injunction commanding the defendants to be restrained from alienating any portion of the property by sale or otherwise and to pay all moneys received in respect of the property into court. The learned trial Judge in his ruling ordered that the management of the funds be removed from the hands of the defendants. He went further to create a committee to handle the matter, suspended the village council and appointed the Senior Divisional Officer to take charge of the committee.

G It was held that "a Judge has no power to award a claimant more than he claimed. Likewise, he is not competent to award a relief which was not claimed. Thus, the learned trial Judge acted ultra vires in suspending the village council, as he had no power to do so and courts should desist from making orders which will be unenforceable." See also Union Beverages Ltd. v. M.A. Owolabi (1988)1 NWLR (Part 68)128; Unilag v. Dada (1971)1 All NLR (Part 111) 344 at 349; Bonny v. Yougha

(1969)1 All NLR 396 at 402 and Awijo v. Olunlade (1975) 1 NMLR 82.

As an injunction follows the natural cause of events in a case, having found from the evidence that there was no eighth village contrary to the assertion of the Appellants and in view of the fact that their continued insistence of the existence of the said village might cause a breach of the peace, it was only meet and proper to grant the said injunction. There is therefore, in my opinion, no new wider relief granted suo motu by the learned trial Judge in favour of the Respondents different from the one claimed by them in the action leading to this appeal and the court below was accordingly right, in my judgment, to have affirmed the same.

This issue is also resolved against the Appellants.

### ISSUES NO.3

This issue which is concomitant with Appellants' issue 2 (C) and founded upon grounds 3 (C) of the Notice of Appeal dated 3rd March, 1995 questions whether the decision of the Court below was right in law having regard to:

(i) the provisions of Section 37 of the 1979 Constitution as amended relating to the group rights to association of the Appellants herein and;

(ii) the supreme Court's decision in SC.269/90:

His Highness V.A. Otitoju v.. Governor of Ondo State & Ors. delivered on 29th April, 1994.

The issue here is clearly not one of freedom of association. That indeed is a misconception of the case of the parties. Albeit, the said issue being a new point and having neither been taken in the trial court nor in the court below, the Appellants' application by way of leave to introduce such a new point and canvass arguments thereon by the parties adversely affected, this court has a discretionary power and is competent to entertain the point of law vide Olusanya v. Olusanya (1983) 3 SC. 4 at 55-57; Inua v. Nta (1961)1 All NLR 57 and Okhideme v. Toto (1962) ANLR H 307, 309 and allow same. That being what transpired in the instant case, the provisions of Section 37 of the 1979 Constitution, as amended by the Constitution (Suspension and Modification) Decree No.1 of 1984 relied

on, pertinently provide as follows:-

*"Every person shall be entitled to assemble freely and associate with other persons, and in particular he may form or belong to any trade union or any other association for the protection of his interest."*

B Now the case of the Appellants was that by the year 1953 there were only six villages in Osu Owerre viz: Okohia, Mbeke, Umuaro, Umuelemai, Umuoshi and Umuokpukpara.

C It was several years later that Umuekebi matured and was created and recognised out of Mbeke village. Prior to 1953 Umuaro had also matured and was created and recognised out of the same Mbeke village. That was how Osu Owerre became seven villages. See paragraphs 10 and 11 of the Amended Statement of Defence. Continuing, the Appellants pleaded in the same paragraph 11, "the same customary procedure that gave birth D to Umuaro and Umuekebi was applied in the creation and recognition of the eighth village Dike na Ofeiyi. The point of disagreement was that while the Respondents asserted that there was no eighth village, the Appellants asserted that there was one."

E At paragraph 12 of their Amended Statement of Defence, the Appellants pleaded thus:

*"Even Igbo Community has its own custom of or recognising the emergence or maturity of new "Ama" (Village)."*

F In the Osu Owerre Autonomous Community the custom goes as follows:

(a) The unit that feels that it has qualified for independence informs the larger unit to which it belongs by presenting cola and drinks to the meeting of the community.

G (b) If the larger unit gives consent, the intending unit then takes its request to the members of the Oha Ndi Nze Osu Owerre which is the body that examines the cultural implication of the move.

(c) If the Oha Ndi Nze okays it then it goes to the Osu Owerre H Development Union. Once this body recognised the decision of the Oha Ndi Nze Osu Owerre, the unit becomes a village.

Because of the political setting at the time Dike na Ofeiyi requested recognition and complied with the procedure, and more."

In the light of the foregoing, since both sides agreed that as at 1974 there were only seven villages in Osu Owerre Autonomous Community, the evidential burden of the existence of an eighth village lay on the Appellants vide Section 136 of the Evidence Act, Cap.112 Laws of the Federation of Nigeria, 1990. That Section provides: B

*"136. The burden of proof in a suit or proceeding lies on that person who will fail if no evidence at all were given on either side."* See Sogunle & ors. v. Akerele (1976) NMLR 58 ; Oke v. Atoloye (1986)1 NMLR (Part 15)24 and Odulaja v. .H.A. Haddad (1973)11 SC 357, the latter in which Irikefe, JSC stated the law thus:- C

*"It is trite law that a civil case is decided on the preponderance of probabilities and that the onus of adducing further evidence is on the person who would fail if such evidence were not produced."* I am of the firm view therefore that the Appellants failed to discharge this D burden for the following reasons:

A member each of the five kindreds or wards including Ofeiyi gave evidence that they were not consulted and so did not consent to the creation of the said village. Apart from the sole defence witness from Umudike - D.W3, Lawrence Elendu - nobody from the other Appellants including Ofeiyi testified, not even an eye-witness when the larger unit was informed of their intention to constitute a new village. D.W1 and D.W 2 were 4th and 5th defendants respectively and no independent or F non-party members testified. Neither was there a witness who testified that he was present at the meeting when the larger unit was informed of their intention to constitute a new village. At paragraph 15 of the Appellant's Statement of Defence, they pleaded that Umuokpukpara gave its consent G per document dated 2/3/74. Unfortunately, this was not tendered at the hearing of this case. A very crucial issue was the date their said village was created or became a reality. It was at first shown to be in 1974 vide paragraph 5 of the Amended Statement of Defence.

Umuokpukpara protested against the idea of creating it vide Exhibit 'C'. H The reply of the said letter dated 22/7/75 from the Cabinet Office, Enugu confirmed that no such village was ever created as exemplified in Exhibit 'B' At paragraphs 23,24 and 25 of the Appellants' Statement of Defence

they pleaded that the issue was put to rest by the Eze's Certificate of recognition dated 4/9/87. However, Exhibit "NN" - the recommendation from the Ad hoc Committee on Dike na Ofeiyi's autonomy dated 13th February, 1987 urging the Eze, Ebere Nwaoha 1, Odu of Osu Owerre not only to sign the document of its recognition as the eighth autonomous village but no nominate six persons to serve as witnesses of the villages. Another letter dated 10/8/87 from Osu Owerre Development Union Exhibit "OO" repeated the same request while the formal affirmation letters were received as Exhibits S and T - the former undated and the latter dated 4/9/87 respectively. The same Eze had in a letter dated 11/2/87 to the Chairman/Administrator Mbano Local Government, Imo State of Nigeria to wit: Exhibit "Q" which was a reply to a letter dated 19/1/87, stated that after a through investigation, "there was no 8 (eight) village (sic) or town in Osu Owerre Autonomous Community known as Dike na Ofeiyi." The Eze testified as P.W 2 on 16/3/89 and in examination--chief said inter alia:

*"I received a document to the effect that there has been a formal affirmation that Dike na Ofeiyi is now the 8th village in Osu Owerre Community. To the best of my knowledge there is no village known as Dike na Ofeiyi in my Autonomous Community."* (Underlining is mine) Contrary to the ways pleaded for the passing of a resolution for creating a new village, the Appellants tendered Exhibit "DD - a resolution passed on 4th September, 1974 which "recommended to the local authority that Dike -na - Ofeiyi be recognised as a separate village in Osu Owerre." Ironically, there was no document which shows that the Local Authority recognised the said village.

DW3, Lawrence Elendu, in his evidence in chief did not state how the new village was created and along with the evidence of other defence witnesses, there were discernible various contradictions in this witness's evidence. Thus, **as the Appellants' evidence was at variance with their pleadings on the issue of creation of the village, both courts below had no difficulty in holding that evidence adduced was at variance with their pleadings on this issue and I so hold. See Ajide v. Kelani (1985)3 NWLR (Part 12) 248; Adimora v.**



**Ajufo (1988)3 NWLR (part 80)1 and Balogun v. Akanji (1988)1 NWLR (Part 70)301.**

**It is now firmly settled that issues are tried on parties' pleadings and the parties are bound thereby. See Lewis & Peat (NRI) Ltd v. Akhimien (1976)1 All NLR 460 at 465; Otuaha Akpapuna & ors. v. Obi Nzeka 11 (1983)2 SCNLR 1 at 14; Rowland Omoregie & 2 ors. v. O.Idugiemwanye & ors.(1985)6 SC.150 at 183; Eunice Aguocha (Mrs.) v. Madam Elechi Aguocha (1986)4 NWLR (part 37) 566 and Adimora v. Ajufo & ors. (Supra).**

**Consequently, the case of the parties in the instant appeal was not fought on the constitutional right of freedom of association but on whether an eighth village known as and called Dike na Ofeiyi had been created after due customary processes for creating a new village. Accordingly, the case of His Highness V.A. Otitoju v. Governor of Ondo State & ors. (1994) 4 NWLR (Part 340) 518, is on all fours with the instant case.** In that case, the plaintiff who was later the appellant in both the Court of Appeal and the Supreme Court, claimed in his writ a declaration that Omuo-Oke is a distinct town in Ondo State separate from and not forming part of Omuo town. The High Court, the Court of Appeal and the Supreme Court held in a row that the plaintiff failed to prove this assertion.

This court further held (per Kutigi, JSC) at page 531 of Report, paragraphs B-C; 533, paragraphs C- E) as follows:-

*"It has, time and again, been emphasised as being well settled that, when the High Court and the Court of Appeal have examined issues of fact and made concurrent findings thereon, the Supreme Court would not disturb the findings of facts of the lower court unless such findings are not in accord with the evidence before the trial court or if in evidence they were not lawfully received or are perverse or the error on the face of the record occasioned a miscarriage of justice. Thus, if findings of facts made by the trial court are affirmed by the Court of Appeal, the Supreme Court will not disturb such findings except in the special circumstances enumerated above. In the instant appeal all the findings of facts by the trial court as affirmed by the Court of Appeal are amply supported by*

evidence, therefore there is no basis for the Supreme Court to disturb them. (Arisa v. State (1988)3 NWLR (part 83) 286; Kimdey v. Military Governor of Gongola State (1988)2 NWLR (part 77) 445; Dosunmu v. Joto (1987)4 NWLR (Part 65) 297; Okonkwo v. Okolo (1988)2 NWLR (part 79) 632; Chukwuogor v. Obuora (1987)3 NWLR (part 61) 454; Akilu v. Fawehimi (No.2) (1989)2 NWLR (Part 102)121; Chinwendu v. Mbamali (1980) 5-7 SC.42; Overseas Construction Ltd. v. Creek Enterprises (1985)3 NWLR (Part 13) 40; Fasoro v. Abdallah (1987)3 NWLR (part 59) 143; Okonkwo v. Adigwu (1985)1 NWLR (part 4) 694 referred to and followed."

I adopt the reasoning and conclusions as well as the authorities cited above.

On the issue of section 37 of the 1979 Constitution, this court further held (per Kutigi, JSC) that:-

"There is nothing in the provisions of Section 37 of the 1979 Constitution as amended which suggests that town quarter or group rights to association would not be recognised if and when one is shown to exist. On the contrary the provision recognises the right of a community such as Omuo - Oke people in the instant case as a quarter or group to associate or not to associate with the rest of Omuo. Individuals in Omuo - Oke may likewise do the same. But it is the right of individuals that is of primary concern. It is only when individuals join together or gang up to exercise their common rights together that one talks of group or quarter rights as such. But as rightly stated above the 1976/1979 notices do not in any way interfere with the freedom of association of Omuo - Oke people while the government reserves the right to treat them as part of Omuo for its own administrative purposes. That is how it should be. And I believe that is how it has been."

This case in pith and substance amply summarises the Appellants' case which, in my opinion, is worsened by the fact that one unit out of the two - Ofeiyi, is unanimous that she is not interested in either the mush vaunted merger or the secession. On the authorities of Ariche v The State (1993)6 NWLR (part 302) 752 at 762; Abisi v. Ekwealor (1993) 6 NWLR (part 302) 643 at 688 and Alom v. Amenger

**(1997)7 NWLR (part 514) 578, this court is loath to interfere with the concurrent findings of fact by the two courts below which have neither been shown to amount to a miscarriage of justice nor demonstrated to contain any error in procedure or indeed, in anyway perverse.**

B

This issue being of no avail to the Appellants is also accordingly resolved against the Appellants.

The appeal having therefore failed, is hereby accordingly dismissed with N10,000.00 costs to the Respondents.

C

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### UWAIS CJN

I have had the opportunity of reading in draft the judgment read by my learned brother Onu, JSC. I agree entirely with his reasoning and conclusion. Accordingly, I too will dismiss the appeal.

D

The appeal is hereby dismissed with N10,000.00 costs to the Respondents against the Appellants.

E

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### BELGORE JSC

I find no merit in this appeal and I adopt the reasons in the judgment of my learned brother, Onu, J.S.C., as mine in dismissing it with N10,000.00 costs to respondents.

F

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### MOHAMMED JSC

I have had the privilege of reading the judgment just delivered by my learned brother, Onu, JSC, in the draft and I agree with him that this appeal is devoid of any merit and ought to be dismissed. The issues canvassed in this appeal have been considered fully in the judgment and I have nothing more to add. The appeal is dismissed with costs as assessed in the lead judgment.

G

H

**IGUH JSC**

I have had the privilege of reading in draft the leading judgment just delivered by my learned brother, Onu, J.S.C. and I am in entire agreement that this appeal is devoid of merit and ought to fail.

B Accordingly the same is hereby dismissed with costs as assessed in the leading judgment.

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