

SUPREME COURT OF NIGERIA
19TH OF JUNE, 1998. SC. 202/1993
CORAM:- M. L. UWAI CJN, A. B. WALI, E. O. OGWUEGBU,
U. MOHAMMED, S. U. ONU, JJSC.

SADIKU OSHO & ANOR. DEFENDANTS/APPELLANTS
AND
MICHAEL APE PLAINTIFF/RESPONDENT

***APPEALS** - Fresh point - Raising of fresh point not previously raised at the lower courts - Will not be allowed at the Supreme Court - Unless no further evidence is required and the point arose from an issue raised in the pleadings.*

***APPEALS** - Evaluation of evidence - Where the trial judge rightly summarized and evaluated the evidence which was upheld by the Court of Appeal - This will not be disturbed unless shown to be perverse.*

***LAND LAW** - Identity - Of the land in dispute - Where it is well known to both sides - The issue of proof of same goes to no issue.*

***LAND LAW** - Forfeiture - Remedy for - Would only arise if the trespass alleged by the respondent - Is in respect of the area granted to appellant's father*

***LAND LAW** - Boundary - Issue of there being no defined boundary - And the court drawing one - Does not arise in this case.*

***PLEADINGS** - Evidence - Plan - Being a piece of evidence does not require detailed pleadings.*

***PRACTICE AND PROCEDURE** - Amendment - Leave to file an amended plan - What stood before the filing of the amended plan in the statement of claim is no longer material before the court - And no longer defines the issues to be tried.*

PRACTICE AND PROCEDURE - Amendment - Made with the consent of both counsel for the parties - Objection to its admissibility in evidence is of no avail - As the evidence is not by law inadmissible in all circumstances.

FACTS

In the High Court of the former Ondo (Now Ekiti) State holden at Ado-Ekiti, the plaintiff now respondent, sued the original defendant, Salami Osho, for; a declaration of title to a piece or parcel of land situate and being along Iworoko Road, Ado-Ekiti, damages for trespass and injunction. It is the respondent's case that the land in dispute has belonged to his family from time immemorial. The respondents ancestor migrated from Ife and settled on the land in dispute. Members of the respondent's family planted tree crops on the land. They also put tenants on the land. During the life time of the respondents father he gave part of the land in dispute to the original appellant's father for the purpose of farming; it was not an absolute grant. After the death of the original appellant's father his children continued to farm on the land. The respondent subsequently discovered some people digging foundation on his family land and upon enquires it was revealed that the original appellant sold portions of the land to the people. Consequently, the respondent brought this action. The case for the appellant on the other hand is that the land in dispute forms part of a larger area belonging to the appellants' family. The original appellants' ancestor, one Egbedi Owu, it is Stated, migrated with Awamaro, the first Ewi and both settled at Ado-Ekiti. That it was Awamaro who granted the land in dispute to Egbedi Owu and since the grant it was members of Egbedi Owu family who have been in possession of the land in which they made their farms.

At the conclusion of hearing, the learned trial judge found in favour of the respondent. Dissatisfied with the judgment, the original appellant appealed to the Court of Appeal, Benin Division. Meanwhile the original appellant died and by leave of the court, the present appellants were substituted. The Court of Appeal dismissed the appeal. The appel-

lants have further appealed to the Supreme Court raising six issues.

ISSUES FOR DETERMINATION

(1) Whether the court of Appeal could rely on Exhibit 'A' which was not pleaded in reaching its decision on the identity of the land in dispute and the area thereof trespassed on.

(2) Whether without Exhibit 'A' the Court of Appeal would have found as it did in favour of the plaintiff / Respondent on the claim of title to the land.

(3) Whether when a portion of the boundary is not certain and there is no plan on which the court could base its finding on the true identity of the land in dispute or the portion of it trespassed upon the finding of the court should not be a dismissal of the claim or alternatively a non-suit.

(4) Whether it will be equitable to allow the plaintiff/Respondent to benefit from his own delict.

(5) Whether where there is no defined boundary, the court on his (sic) own can draw one in order to arrive at his (sic) decision.

(6) Whether in reaching his findings of fact in this case and in reaching his conclusion the learned trial Judge has fairly put the case for the parties on an imaginary scale of justice.

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

Appeals - fresh point

1. I think the respondent is right for this court has stated and re-stated the principle in many cases, prominent among which are Fadiora v. Gbadebo (1978)3 SC. 219; Enang v. Adu (1978)11 SC.25; to mention but a few, where this court held that a fresh point will not be entertained by it if it had not the benefit of the views of the Justices of the lower court.⁸ It is for this reason that this court has further held that it is the duty of a party who wishes to raise a new point or points not previously

⁸ See Igbongidi v. Umelo (1993) 12 KLR 70; Anatogu v. Iweka (1995) 9 KLR 1834 But see Effiom v. The State (1995) 1 KLR 7 on when new point of law can be raised.

raised in accordance with settled principles in a number of cases on the question or questions of raising new points not previously raised in the lower courts, to satisfy the Supreme Court that no further additional evidence is required on the issues to be considered. See Abaye v. Ofili B (1986)1 SC. 231; A.G. of Oyo State v. Fairlakes Hotel Ltd. (supra). (p.1584 B)

Leave to file amended plan

C 2. I am fully satisfied that the court below was rightly entitled to receive Exhibit "A" in evidence since in paragraph 4 of the Statement of Claim (the motion to amend same having been withdrawn and struck out) the respondent pleaded as follows:-

D "4. *The plaintiff's family have common boundaries with the following families- Olomo, Alamoji, Odunro and Edemo as shown on plan No. AB7873 which is to be filed with the Statement of Claim.*"

E While it is clear that it was not plan No. AB7873 that was received in evidence as an exhibit, by an application dated the 17th day of July, 1975, the respondent sought leave of court to file an amended plan. It is on record that the respondent complied by filing plan No. AB7873A within 7 days permitted on 11/11/75 vide page 26 of the Record of Proceedings. The effect of the above amended plan is that what stood before the filing F of the amended plan in paragraph 4 of the Statement of Claim is no longer material before the court and no longer defines the issues to be tried. (p. 1585 E)

Amendment - Made with the consent of both counsel

G 3. Nor can the amendment made with the consent of both counsel for the parties in the circumstances be held to constitute inadmissible evidence which goes to no issue. See Owonyin v. Omotosho (1961)1 All NLR 304 and N.I.P.C. Ltd v. Thompson Organisation Ltd (1969) (supra). H The consent expressed by both counsel for the parties for the receipt of Exhibit 'A' (supra) not being for nothing, the appellant's objection to the admissibility of Exhibit 'A' is of no avail and it is accordingly discounted. Where, however, the evidence complained of is by law inadmis-

sible in any court and in all circumstances, it ought never to be acted upon by any court of law, it is immaterial that its admission in evidence was by the consent of the other party or his default in raising objection at the proper time to its admissibility. In this latter category of cases, the evidence cannot be acted upon even if the parties admitted it by consent and the Court of Appeal will entertain a complaint on the admissibility of such evidence by the trial court although the evidence was admitted in the trial court without objection. (p. 1587 A/1589 D)

Land law - Identity - Of the land in dispute

4. Be it noted that the area of land in dispute is identical in both plans Exhibits 'A' and 'B' respectively and there is no dispute on this fact. On it, the trial court said:-

"The area verged green on Exhibit 'B' is identical with the area verged red in Exhibit 'A' and this is the area claimed on both plans to be in dispute."

There has been no appeal on this very important issue of fact. If the area of land in dispute is well known to both sides, as indeed it is, the issue of proof of same goes to no issue and the court below could not possibly reach a conclusion that the area claimed by the respondent is not certain. In circumstances such as in this case the land cannot be described as anything but certain.⁹ See Garba v. Akacha (1966) NMLR 62; Alhaji Etiko v. Aroyewun (1959)4 FSC 129. (p. 1589 G)

Pleadings - Evidence

5. The rules of court do not require evidence to be pleaded once the facts have been sufficiently pleaded. Exhibit 'A' being a piece of evidence does not require detailed pleading.¹⁰ It is little wonder then that learned counsel for the appellants presented no opposition to its receipt in evidence

⁹ See other similar authorities Evbuomwan v. Elema (1994) 11 KLR 321; Okedare v. Adebara (1994) 11 KLR 105

¹⁰ See also Ipinlaiye v. Olukotun (1996) 6 KLR (pt 42) 1000

from its hitherto identification alphabetical marking 'X' to 'A' by consent of counsel on both sides. Failure therefore to mention 'A' after the plan No.AB.7873 to make it AB.7873A, is in my respectful view, not fatal to the case of the respondent. Besides, no miscarriage of justice has been occasioned in my view in the receipt of plan No. AB.7873A as an amendment to the record. I venture to say too that even without Exhibit A, the respondent had proved his case. (p.1591 D)

Land Law - forfeiture

6. The appellants' assertion that the respondent did not state what portion of the land in dispute his father gave to the appellants but it is to be noted that the area was not part of the area, on which the judgment was founded the area in dispute having been verged Red in Exhibit 'A'. Thus, the remark of the court below to the effect that:

"Counsel for the appellant obviously did not advert his mind to Exhibit 'A' which sets out distinctly the area granted to appellant's father verged yellow (Far north) and the area (of trespass in dispute verged blue (south) and abutting the Ado-Ekiti, Iworoko Road. They are far apart and clearly delineated. This document was pleaded in paragraph 4 of the Statement of Claim and admitted by consent. It is therefore not entirely correct to state, as is set out in the ground of appeal, that the area over which the defendant's father was permitted to farm was not specified in the statement of claim."

On the issue of the remedy for possession or forfeiture this would only arise, in my view, if the land in dispute is in respect of the area verged yellow. (p. 1592 H)

Land law - Boundary

7. On the issue whether where there is no defined boundary, the court on its own can draw one in order to arrive at its conclusion, I agree with the submission of the respondent that this does not arise in view of the meticulous review of the evidence adduced before it which it accepted, followed by a confirmation of same by the court below. Moreover, it is submitted, there being no misdirection on the parts of the two courts

below, there was evidence from the appellant which supported the respondent's case. (p. 1593 G)

Appeals - Evaluation of evidence

8. In the instant case where the learned trial Judge, rightly, in my view, B summarized and evaluated the evidence of the respondent and the appellants¹¹ and the learned Justices of the court below upheld the decision arrived at therein by him, I see no reason to interfere with the concurrent findings, the same not having been shown to be perverse. See Enang v. C Adu (supra). (p. 1594 H)

REPRESENTATION

C. R. A. Adedji for the Appellants

A. Fajuyi for the Respondent

D

CASES REFERRED TO

Chidiak v. Laguda (1964) NMLR 123

Fadiora v. Gbadebo (1978) 3 SC

Enang v. Adu (19978) 11 SC. 25

Oredoyin v. Arowolo (1989)4 NWLR (part 114)

Oniah v. Onyia (1989)1 NWLR (part 99) 514

A.G. of Oyo State v. Fairlakes Hotel Ltd (1988)12 SCNJ 1

Shell Development Co. Nigeria Ltd v. Abedi (1974)1 All NLR1

Dweye v. Iyomahan (1983)2 SCNLR 135

Owonyin v. Omotosho (1961) 1 All NLR 304

Garba v. Akacha (1966) NMLR 62

Etiko v. Aroyewun (1959)4 FSC 129

Arabe v. Asanlu (1980)5-78 -90

Ekretsu v. Oyobebere (1992) 9 NWLR (part 266)438)

E

F

G

H

¹¹ See also Oro v. Falade (1995) 5 KLR 1201; Gbafé v. Gbafé (1996) 6 KLR (pt 42) 1144; Yesufu v. Kupper Int. Nv. (1996) 4 KLR (pt 40) 599

LEAD JUDGMENT BY ONU JSC

In the High Court of the former Ondo (now Ekiti) State holden at Ado-Ekiti (Coram: Ogundare, J (as he then was) the plaintiff now respondent,

B sued the original defendant, Salami Osho, for:

"(a) Declaration of title to a piece or parcel of land situate and being along Iworoko Road, Ado-Ekiti.

(b) N500.00 (five hundred Naira) being general damages for
C *trespass.*

(c) Injunction restraining the defendant, his servant or agents from committing further act or acts of trespass on the said piece of land.

Pleadings were ordered and filed by the parties with the plaintiff subsequently amending his Statement of Claim. The case which was
D filed on 24th October, 1973 after suffering some adjournments proceeded to hearing on 25th of September, 1978. In a well considered judgment delivered on 24th November, 1978 the learned trial Judge found in favour of the respondent.

E Being dissatisfied with the judgment, the original /appellant appealed to the Court of Appeal, Benin Division (hereinafter referred to as the court below) premised on two original and later, with leave of the court below, six additional grounds. Meanwhile, the original / appellant
F died and by leave of the court below, Sadiku Osho and Sule Omotuyi were substituted to enable them prosecute the appeal. The court below dismissed the appellants' appeal on 30th of January, 1989 and this has led to the filing of a further appeal by them to this court dated 28th March, 1989.
G

For a better appreciation of the facts giving rise to this case a review of the cases of the parties becomes imperative.

For the plaintiff, they may be summarized briefly as follows:-

H That the land in dispute shown on plan Exhibit 'A' produced by one Mr. Apatira, a Licensed Surveyor, at the instance of the respondent, has belonged to the respondent's family from time memorial. That the respondent ancestor migrated from Ife and settled on the land in dispute. Members of the respondent's family have crops on the land such as palm

trees, rafia palms, Kolanuts and cocoa. That the respondent's father during his life time put tenants on the land and after his death, the respondent had in turn also put some tenants on the land. Also, during the life time of the respondent's father, he gave a part of the land in dispute to the original / appellant's father, Egbedi Fatayi for the purpose of farming; it was not an absolute grant. The respondent's father and the original / appellant's father were friends. After the death of the original / appellant's father, the original / appellant and other children of the same father continued to farm on the portion which the respondent's father allotted to their father.

About seven years before the inception of the action giving rise to this appeal, the respondent noticed that some people were digging for foundation on his family land. Enquiries he made revealed that it was the original / appellant who sold portions of the land to the people who were in the process of erecting buildings thereon. Upon the respondent enquiring personally from the original / appellant the latter told him that he had no share in the land. Consequently, the respondent instituted this action.

The case for the defence on the other hand is that the land in dispute forms part of a larger area belonging to the appellant's family. The original / appellant's ancestor, one Egbedi Owu, it is stated, migrated with Awamaro, the first Ewi and both settled at Ado-Ekiti. That it was Awamaro who granted the land in dispute to Egbedi Owu and since the grant, it was members of Egbedi Owo family who have been in possession of the land on which they made their farms. Further, that during the life of Egbedi Fatayi, the respondent's father, Akaraja was struck with leprosy and it was the original / appellant's father who permitted a herbalist known as Okunrinkute to build a hut on the land in dispute where the respondent's father was kept for curing his leprosy and that neither the respondent nor Akaraja's son ever farmed on the land in dispute. It was maintained that members of the original / appellant's family have farms on the land in dispute as they had tenants thereon. Parts of the land, it was shown, were sold to purchasers by the family while the original / appellant and two other members of the family executed conveyances in

favour of the purchasers. The plans prepared on behalf of the respondent and the original /appellant were tendered and received by consent as Exhibits 'A' & 'B' respectively.

B On 4th October, 1993, when the appeal came up for hearing before this court, the appeal was struck out on the ground that neither the leave of the court below nor that of this court was obtained before the grounds of appeal which were of facts or of mixed law and facts, were filed.

C The present appellants later sought and were granted leave to filed fresh grounds of appeal and these were filed on 9th March, `1994. The parties subsequently refilled and exchanged briefs of argument in accordance with the Rules of this Court. The appellants for their part submitted six issues for the resolution of this court, namely.

D (1) Whether the court of Appeal could rely on Exhibit 'A' which was not pleaded in reaching its decision on the identity of the land in dispute and the area thereof trespassed on.

E (2) Whether without Exhibit 'A' the Court of Appeal would have found as it did in favour of the plaintiff / Respondent on the claim of title to the land.

F (3) Whether when a portion of the boundary is not certain and there is no plan on which the court could base its finding on the true identity of the land in dispute or the portion of it trespassed upon the finding of the court should not be a dismissal of the claim or alternatively a non-suit.

(4) Whether it will be equitable to allow the plaintiff /Respondent to benefit from his own delict.

G (5) Whether where there is no defined boundary, the court on his (sic) own can draw one in order to arrive at his (sic) decision.

H (6) Whether in reaching his findings of fact in this case and in reaching his conclusion the learned trial Judge has fairly put the case for the parties on an imaginary scale of justice.

The respondent for his part has identified three issues as arising for determination, to wit:

1. Whether the Defendant who consented to the admission of a

document in a civil case can later complain about it on appeal.

2. Whether it will be equitable to allow the Defendant / Appellant to benefit from his own delict.

3. Whether the amendment of Plan No. AB. 7873 to AB. 7873A by the plaintiff was an amendment of the pleadings.

The appellants as later transpired argued issues 1, 2. and 3 together and issues 4, 5 and 6 together in their brief. In so far as the respondent adopted the same method in arguing the appeal in his brief albeit that he later therein argued the last three issues (4, 5 and 6) separately I shall adopt the appellants approach which sufficiently cover the three issues identified by the respondent in my consideration of the appeal.

ISSUES 1,2, AND 3 :

In seeking to impugn the decision of the court below and bearing in mind the purports of the above issues, the appellant's brief sets out two extracts from the judgment of the court below where it held:

"The second ground of appeal is entirely misconceived. One of the specific findings of fact made by the trial Judge in his judgment is that members of the defendants family including the defendant have been selling parts of the land in dispute along Iworoko Road and outside the area granted to their Father, to others without the consent of the plaintiff and his family." and

"I entirely agree with the learned trial judge's finding of fact and his treatment of the claim for trespass as set out. I think it takes care also of the basis of the complaint on Ground 2 - Counsel for the Appellant obviously did not advert his mind to Exhibit 'A' which sets out distinctly the area granted to appellant's Father verged yellow (far North) and the area of trespass in dispute verged blue (South) and abutting the Ado-Ekiti Iworoko Road. They are far apart and clearly delineated. This document was pleaded in paragraph 4 of the Statement of Claim and admitted by consent.

It is therefore not entirely correct to state, as set out in the ground of appeal, that the area over which defendants Father was permitted to farm was not specified in the Statement of Claim."

The above, it is contended, shows clearly that without Exhibit 'A' the

area of the entire land in dispute was not certain and that also the area said to have been trespassed upon was not certain. It is further contended that contrary to the statement of the court below set out above, Exhibit 'A' was not pleaded in paragraph 4 of the Statement of claim.

B What was pleaded in the Statement of claim was plan No. AB. 7873 and NOT plan No. AB7873A, adding that what was pleaded was not admitted in evidence. Rather, it is argued, what was admitted in evidence was plan No. AB.7873A which was not PLEADED vide paragraph 4 of the Statement of claim. The respondent, it is pointed out, after filing a motion, C paragraphs 5 and 6 of whose affidavit in support sought for leave to file an amended plan within seven days, leave was granted and the plan was filed on 11/11/75 accordingly. On 26/9/77, the respondent filed yet a motion for leave to file an amended Statement of claim probably to include Exhibit 'A'. To the motion he attached an Amended Statement of Claim which he intended to file with leave of court but which he later withdrew and was accordingly struck out, with the result that-

(1) The amended statement of Claim was not before the lower E court for consideration.

(2) The only Statement of Claim which was before the court was the one dated 3/10/74.

(3) Exhibit 'A' i.e., the Amended plan was not pleaded by the F respondent.

We were next urged to expunge exhibit 'A' from the record since it was not pleaded and so could neither form the basis of the decision of the trial court nor that of the court below.

G And since the court below made reference to it and so tied its decision to it in grounds 2-5 of the grounds of appeal before that court, that court firstly, misdirected itself in law and thereby came to a wrong decision vide Chidiak v. Laguda (1964) NMLR 123. Secondly, that the decision was based on extraneous matter. Vide Sierra Leone Development Co. Ltd V. M. Taylor 14 WACA 137. Thirdly, that parties are bound by their pleadings and evidence on matters not pleaded goes to no issue. A court must admit and so act only on admissible evidence. Where inadmissible, H evidence is tendered, the court, it is maintained may, in civil cases reject

such evidence even if a party fails to object to the admissibility of such evidence. The case of Kasali A. Raimi v. Moshudi F. Ogundana & Anor.. In re: Akintoye (1986)3 NWLR (part @^)97, was cited in support of the proposition.

It was further maintained that as the boundaries of the land in B dispute as a whole and the area trespassed upon cannot be described with certainty, judgment in law should be in favour of the appellants. The following tens cases were called in aid thereof, to wit:

- (1) Rotimi v. Macgregor (1977) NMWL 289. C
- (2) Epi v. Aigbedion (1973) NMLR 31.
- (3) Ogundare v. Okanlawon (1963) All NLR 138.
- (4) N.C. & Anor . v. L. Bellow (1970)2 All NLR 138.
- (5) Kwadzo v. Adjei 10 WACA 274.
- (6) Owon v. Udon & Ors . 12 WACA 72. D
- (7) Alade v. Dina 17 NLR 32.
- (8) Ebeyan v. Ayigo 16 NLR 30
- (9) Okolo & Ors. v. Nwani & ors.(1973) NMLR 321
- (10) Udofia .v. Afia 6 WACA 216. E

For the proposition of law that a plaintiff is bound by his pleading, the case of Oduka & Ors. v. Kasumu & Ors. (1968) NMLR 28 was called in aid, while it was further argued, that as Exhibit 'A' is clearly not pleaded but what is pleaded is plan No. AB 7873, the Respondent is bound by F plan AB. 7873 which is not before the court. It is submitted in addition that as the court below tied its decision to a plan not pleaded by the Respondent and as that decision cannot stand without Exhibit 'A' which should be expunged, the judgment is bad in law and must be overturned. G The case of Awote & ors. v. S.K. Owodunni & Anor. (1987) 5 SC. 1 was also relied on. For a situation like in the instant case in which counsel for the appellant submitted that respondent as plaintiff was not called upon to state his case but that the trial court and the court below received unpleaded evidence, the case of Akinbi v. Military Governor of Ondo H State (1990)3 NWLR (part 140) 525 at 533 was called in aid to have the decision arrived at set aside. Finally, on inadmissible evidence, the case of O.A. Usefowokan v. Sule Salami Idowu & Anor. (1969) All NLR

125 was cited in support of the proposition.

In reply, the respondent has submitted that Issues 1, 2 and 3 as formulated by the appellants relate essentially to the admissibility of Exhibit 'A' i.e plan No. AB7873A tendered by him (respondent) at the trial.

B It is then contended that as it is in a matter in an area where the law is recondite, it is a matter which the court below was in a more advantageous position to deal with. **I think the respondent is right for this court has stated and re-stated the principle in many cases, prominent among which are Fadiora v. Gbadebo (1978)3 SC. 219; Enang v. Adu (1978)11 SC. 25; Akpene v. Barclays Bank of Nigeria Ltd (1977)1 SC. 47; Kate Enterprises Ltd v. Daewoo Nigeria Ltd (1985)2 NWLR (part 5)116; Adegoke Motors v. Adesanya (1989)3 NWLR (part 109)250 and Ajuwon v. Adeoti (1990)2 NWLR (part 132)271, to mention but a**
D **few, where this court held that a fresh point will not be entertained by it if it had not the benefit of the views of the Justices of the lower court. It is for this reason that this court has further held that it is the duty of a party who wishes to raise a new point or**
E **points not previously raised in accordance with settled principles in a number of cases on the question or questions of raising new points not previously raised in the lower courts, to satisfy the Supreme Court that no further additional evidence is required on the issues to be considered. See Abaye v. Ofili (1986)1 SC; 231; A.G. of Oyo State v. Fairlakes Hotel Ltd. (supra); Oredoyin v. Arowolo (1989) 4 NWLR (part 114) 172; Uor v. Loko (1988) 2 NWLR (part 77) 430; Edokpolo & Co. Ltd v. Sem- Edo Ltd (1989) 4 NWLR (part 116)473 at 494 and Oniah v. Onyia (1989)1 NWLR (part 99)514 where Oputa, JSC**
G **at page 540 re-stated the principle of law as follows:-**

"Another objection which was taken in the Plaintiffs/Respondents' Brief was that these two "Issues" were not raised and agitated in the court below. This may well be But from a long line of cases, it is
H *evident that this court as a court of last resort, has been quite liberal and magnanimous in entertaining new points not taken in the court below if no further evidence would be needed for the resolution of these issues and also if that will help in ensuring that the real question or questions in*

controversy between the parties to the trial are ultimately determined, thus preventing an obvious miscarriage of justice. The dictates of justice definitely far outweigh the requirements of mere rules of practice. This court had opportunity to review and re-enunciate its attitude towards new points being urged before it for the first time in the recent case of A.G. of Oyo State v. Fairlakes Hotel Ltd. (1988)12 SCNJ 1." B

Now, the principle adumbrated above presupposes that the new point or points arose from an issue raised in the pleadings which in effect means that it will not be allowed where it will produce grave injustice as appellants will be setting up in an appeal, a case which they neither made in their pleadings nor could have made at the trial. See Shell Development Co. Nigeria Ltd v. Abedi (1974)1 All NLR 1; N.I.P.C. Ltd v. Thompson Organisation (1969) NMLR 99 and Dweye v. Iyomahan (1983) 2 SCNLR 135. However, the argument proffered by the appellants as I understand it, is that Plan No. AB7873A received at the trial court as Exhibit "A" should be discountenanced since it constitutes an unpleaded evidence. And where an unpleaded evidence as alleged in the instant case is admitted, the receipt of such unpleaded evidence goes to no issue as inadmissible evidence. The cases of Ajayi v. Fisher 1 FSC 90; Esso West Africa Incorporation v. Alli (1968) NMLR 414 at 425 and Amiekhial v. Okwilage (1962)2 All NLR 3 were cited in support thereof. C D E

I am fully satisfied that the court below was rightly entitled to receive Exhibit "A" in evidence since in paragraph 4 of the Statement of Claim (the motion to amend same having been withdrawn and struck out) the respondent pleaded as follows:- F

"4. The plaintiff's family have common boundaries with the following families- Olomo, Alamoji, Odunro and Edemo as shown on plan No. AB7873 which is to be filed with the Statement of Claim." G

While it is clear that it was not plan No. AB7873 that was received in evidence as an exhibit, by an application dated the 17th day of July, 1975, the respondent sought leave of court to file an amended H plan. Hereunder are the notes made by the trial court on 6th November, 1975:

"Folayan for Plaintiff/Appellant. Adededeji for the Defendant/

Respondent, not opposing. Court: Leave granted to plaintiff to file an amended plan within 7 days hereof. There will be N15.00 costs to the Defendant / Respondent. Substantive case adjourned to 14/1/76

(Signed)

B *C. A. Piper,
Judge.
6/11/75."*

It is on record that the respondent complied by filing plan No. AB7873A within 7 days permitted on 11/11/75 vide page 26 of the Record of Proceedings. The effect of the above amended plan is that stood before the filing of the amended plan in paragraph 4 of the Statement of Claim is no longer material before the court and no longer defines the issues to be tried. See Warner v. Sampson & anor (1959)1 Q.B. 297 at page 321 (per Hodson, L.J), a case referred to by this court in Col. Rotimi & Ors. v. Macgregor (1974)11 SC. 133. When it is borne in mind therefore that the court at any stage of the proceedings may amend the proceedings of the parties to an action vide Okeowo v. Migliore (1979) 11 SC.138, the amendment to paragraph 4 of the Statement of Claim (ibid) made long before the case actually went to trial cannot be impeached. It has been held by this court in Afolabi & ors. v. John Adekunle & ors. (1993) 8 SC.98 at 117 that there can be no doubt that not only is a court entitled to make formal amendments (such as the one in hand) it indeed has a duty to do so and this duty remains whether there is a formal application before the court or not and whether it is in the trial court or any of the courts of Appeal. See also Chief Fagbayi Oloto v. The Attorney General (1957) 2 FSC.74. It is more so as in the instant case when the action has been properly constituted from commencement. See Jeddo & Anor v. Imiko (1972)1 All NLR (part 1) 260 at 268. Thus, in the case of Onogigere & ors. v. Itietie & Anor. (1972) 5 SC.334 at 340 -342 this court approved the amendment of the designation (capacity) of the plaintiffs to reflect their case as set out in the statement of claim. Under no guise therefore, in my respectful view, can the amendment of plan No. AB.7873A in paragraph 4 of the respondent's Statement of Claim be wrongful admission of evidence vide

Chief Emmanson Inyang & ors. v. Chief David Eshiet & Anor. (1990)5 NWLR (part 149)178.

Nor can the amendment made with the consent of both counsel for the parties in the circumstances be held to constitute inadmissible evidence which goes to no issue. See Owonyin v. Omotosho (1961)1 B All NLR 304 and N.I.P.C. Ltd v. Thompson Organisation Ltd (1969) (supra).

Thus, as indeed eventually transpired at the hearing of the case before the trial court on 23rd October, 1978, at page 54 of the Records of proceedings, by consent of both counsel for the parties, plan No. AB7873A previously marked X for identification and plan No. FA3531, were admitted in evidence and marked Exhibits 'A' and 'B' respectively. The appellants having consented to the admission of Exhibit 'A' in evidence, they cannot now in this court, in my respectful view, assert that the plan Exhibit 'A' was inadmissible. See Akinbiyi v. Anike (1959) WNLR 16 at 17; Abubakar v. The State (1969) All NLR 344 at 348 and Ekpe v. Fagbemi (1978) 3 SC. 209 at 213. The consent of the appellants at the trial, to my mind, was an undertaking that they had permanently waived their right to object to the document at any later stage and thereby precluded themselves from raising any complaint on the same appeal. See Olukade v. Alade (1976) All NLR 67. Exhibit 'A' was therefore very much before the trial court, so also was it before the court below and indeed now live before this court.

In saying all I have said above, I am not oblivious of the fact that it is not the law that once a document is received in evidence without objection by a party, then such a party is forever automatically estopped, even in the appellate court, from raising the issue of its admissibility. Thus, if a document is unlawfully received in evidence at the trial, an appellate court has inherent jurisdiction to exclude and discountenance the document even though counsel at the trial court did not object to its going into evidence. Accordingly, although a document was unlawfully received in evidence without objection by or on behalf of an appellant, it would still be open to him in the appellate court, particularly where such an appellant has in fact suffered injustice as a result, or a miscarriage of

justice is thereby occasioned, to object to it since it is the duty of the appellate court to exclude inadmissible evidence which was erroneously received in evidence during the trial. See Yaya v. Mogoga (1947)12 WACA 132 at 133; Ajayi v. Fisher (1956) SCNLR 279; Esso West Africa Incorporated v. Alli (1968) NMLR 414 at 423; Akunne v. Ekwuno (1952)14 WACA 59; Olukade v. Alade (supra); Etim v. Ekpe (1983)1 SCNLR 120; Yassin v. Barclays Bank D.C.O. (1968) 1 All NLR 171; Owonyin v. Omotosho (supra); Alase v. Olori-Ilu (1964) 1 All NLR 390 at 397 and Ipinlaye 11 v. Olukotun (1996)6 NWLR (part 453)148. As Iguh, JSC rightly stated the law at pages 167-168 in the Ipinlaye 11's Case (supra):

"In this connection, it has to be stressed that a court of law is expected in all proceedings to admit and act only on evidence which is admissible in law. Consequently, if a court inadvertently admits inadmissible evidence, it has a duty, generally not to act upon it. Where, however, inadmissible evidence is tendered, it is the duty of the other party or counsel on his behalf, to object immediately to the admissibility of such evidence. But where such other party fails or neglects to raise any objection as aforesaid, the trial court in civil cases may (and in criminal cases must) reject such evidence exproprio motu. On appeal, however, provided the evidence complained of is one which by law, is admissible, under certain conditions and the other party did not object to its admissibility at the trial court, or by implication, consented to its admissibility or the evidence was legitimately used, say for the purpose of cross-examination although the conditions precedent to its admissibility were not complied with in the Court of Appeal. In other words, in the cases where the evidence complained of is not law in all circumstances inadmissible, a party may by his own conduct at the trial be precluded from raising objection to such evidence on appeal. In this category of civil cases, if the evidence was admitted in the trial court without objection or by the consent of the parties or was used by the opposite party (e.g. for the purpose of cross-examination) then it would be within the competence of the trial court to act on it and the Court of Appeal will not entertain any complaint on the admissibility of such evidence. In this

class of cases, Cotton L.J. in Gilbert v. Endean (1878)9 ch.D.269 succinctly explained the situation as follows:-

"But I must add this: where in the court below, the evidence not being strictly admissible, court can properly act, if the person against who it is read does not object, but treats it as admissible the before the Court of Appeal, in my judgment, he is not at liberty to complain of the order on the ground that the evidence was not admissible." (Underlining above is for emphasis).

My learned brother Iguh, JSC then proceeded to express his respectful agreement with the above observations of Cotton, L.J. So do I must respectfully. See too Akunne v. Ekwunno (supra); Olukade v. Alade (supra) and Chief Bruno Etim & ors. v. Chief Okon Udo Ekpe & Anor. (supra).

The consent expressed by both counsel for the parties for the receipt of Exhibit 'A' (supra) not being for nothing, the appellant's objection to the admissibility of Exhibit 'A' is of no avail and it is accordingly discountenanced. Where, however, the evidence complained of is by law inadmissible in any court and in all circumstances, it ought never to be acted upon by any court of law, it is immaterial that its admission in evidence was by the consent of the other party or his default in raising objection at the proper time to its admissibility. In this latter category of cases , the evidence cannot be acted upon even if the parties admitted it by consent and the Court of Appeal will entertain a complaint on the admissibility of such evidence by the trial court although the evidence was admitted in the trial court without objection. See too Olukade v. Alade (supra); Owonyin v. Omotosho (supra); Yassin v. Barclays Bank D.C.O (supra) Alashe v. Olori - Ilu (supra) and Ipinlaye 11 v. Olukotu (supra)

Be it noted that the area of land in dispute is identical in both plans Exhibits 'A' and 'B' respectively and there is no dispute on this fact. On it, the trial court said:-

"The area verged green on Exhibit 'B' is identical with the area verged red in Exhibit 'A' and this is the area claimed on both plans to be in dispute."

There has been no appeal on this very important issue of fact. If the area of land in dispute is well known to both sides, as indeed it is, the issue of proof of same goes to no issue and the court below could not possibly reach a conclusion that the area claimed by the respondent is not certain. In circumstances such as in this case the land cannot be described as anything but certain. See Garba v. Akacha (1966) NMLR 62; Alhaji Etiko v. Aroyewun (1959)4 FSC 129; Arabe v. Asanlu (1980) 5-7 SC. 78 at 90 and Alade v. Olukade (supra). The issue of the certainty of the boundaries was not raised in the two courts below. See Fadiora v. Gbadebo (1978)3 SC. 219 and Emodi v. Kwentoh (1996) 2 NWLR (part 433) 391. The complaint of the appellants on this issue can be regarded as a mere after thought which should be resolved against the appellants. .

On boundarymen, the court below also found as did the trial court that the respondent pleaded his boundarymen in paragraph 4 of the Statement of Claim, three of whom (Chief Joel Afe- PW1, Disu Obaidu - pw2 and Joseph Alamoji pw3) came physically to testify in support of the respondent's case. In respect of the fourth boundarymen, the trial court, rightly in my view, relied on the evidence of the appellants which supported the respondent's case vide Akinola v. Oluwo (1962)1 ANLR 224 at 227 and Akunniyili v. Ejidike (1996)5 NWLR (part 449) 381 at 402 and found for the respondent.

It is significant to point out here too that the court below found that the failure to mention one boundaryman whose land is not indicated in Exhibit 'A' cannot even without recourse to the appellants' evidence, prevent the learned trial Judge from being satisfied that the boundaries have been sufficiently proved. What is more, the writer of the lead judgment (Omo, JCA as he then was) which concurred in by Musdapher and Salami, JJ.C.A., made the following re-inforcing and irreversible finding:

"After all, in a civil matter proof is by a preponderance of evidence which does not mean that every single item in the pleadings must be proved to the hilt. It is wrong, as appellant's counsel has submitted that this failure to mention Edomo family makes the finding descriptably as fixing an "imaginary boundary ." That is not as set out in Exhibit A

which the trial Judge held to be the more accurate plan, the deficiencies of Exhibit B (the respondent's plan) having been exposed. In addition, it is to be noted that the Olomo and Odunro families which the appellant set out in Exhibit B to be his boundarymen testified through their accredited representatives that the land in dispute belonged to the respondent who they have a boundary thereon with. As appellant's counsel has also submitted, relying on Chidiak v. Laguda (1964) NMLR 123, a Judge misdirects himself if he misconceives the issues or summarizes the evidence inadequately or incorrectly, or makes a mistake on the law. The learned trial Judge, in my view, has not been guilty of any of these "errors" and has therefore not misdirected himself here."

I cannot agree more.

I am of the firm view therefore that even without Exhibit 'A' the trial court could still validly have found for the respondent as it did by entering judgment for him based on the pleading and evidence given in support of his claim.

At any rate, the rules of court do not require evidence to be pleaded once the facts have been sufficiently pleaded. Exhibit 'A' being a piece of evidence does not require detailed pleading. It is little wonder then that learned counsel for the appellants presented no opposition to its receipt in evidence from its hitherto identification alphabetical marking 'X' to 'A' by consent of counsel on both sides. Failure therefore to mention 'A' after the plan No. AB.7873 to make it AB.7873A, is in my respectful view, not fatal to the case of the respondent. Besides, no miscarriage of justice has been occasioned in my view in the receipt of plan No. AB.7873A as an amendment to the record. I venture to say too that even without Exhibit A, the respondent had proved his case.

I have no hesitation therefore in answering the three issues argued together severally or jointly in the affirmative .

ISSUES NOS. 4, 5 & 6

On the question whether it will be equitable to allow the respondent to benefit from his own delict, it is manifest from the totality of the evidence adduced at the trial court, that the respondent neither commit-

ted any illegality nor failed to establish any point crucial to his case. His claim against the appellant was for trespass and injunction. To this end he led evidence that his family some land on which to cultivate towards the Northern part in the area of Ofin Stream. Of this, the learned trial Judge, B in one of eight findings of fact he made, said:

"(c) That Akamuja gave the Northern part of the land in dispute in the area of Ofin Stream to defendant's father, Egbedi to farm."

He further led evidence to show that members of the original appellant's family including the original appellant himself had been selling parts of C the land in dispute along Iworoko Road and outside the area granted to them to farm without his consent. This was confirmed by the original appellant himself when he said:

"I did not give anyone part of the land in dispute to build but my D family did."

He further held that:

"The Plaintiff did not give permission to anyone to dig gravel on the land in dispute but I gave permission to Francis Ajayi and the son E of Adeyanju and others to dig for gravel on the land."

After expressing preference for the respondent's case as against that of the appellants' upon meticulously reviewing the evidence of the parties, he stated as follows:

"On the whole, therefore, having regard to the evidence of the F boundarymen and the findings made by me above, I am satisfied that the plaintiff has established his family's title to the land in dispute by acts of user sufficiently enough to justify the inference that his family are the exclusive owners of the land in dispute."

G The appellants' contention that the respondent never called any evidence of acts of possession by him is certainly not correct. All the respondent's witnesses including respondent himself gave evidence of long possession and use of the land. For instance, PW4 gave evidence that the H respondent gave him a portion of the land to farm as well as to others.

In this wise, **the appellants' assertion that the respondent did not state what portion of the land in dispute his father gave to the appellants' but it is to be noted that the area was not part of the**

area, on which the judgment was founded the area in dispute having been verged Red in Exhibit 'A'.

Thus, the remark of the court below to the effect that:

"Counsel for the appellant obviously did not advert his mind to Exhibit 'A' which sets out distinctly the area granted to appellant's father verged yellow (Far north) and the area (of trespass in dispute verged blue (south) and abutting the Ado-Ekiti, Iworoko Road. They are far apart and clearly delineated. This document was pleaded in paragraph 4 of the Statement of Claim and admitted by consent. It is therefore not entirely correct to state, as is set out in the ground of appeal, that the area over which the defendant's father was permitted to farm was not specified in the statement of claim."

On the issue of the remedy for possession or forfeiture this would only arise, in my view, if the land in dispute is in respect of the area verged yellow. In quoting the trial Court in extenso to underscore this point, it proceeded to observe as follows:-

"There is also no substance in the Ground 3. The proposition therein stated, that only the remedy of forfeiture/possession is available to the respondent in this case, will only be true if the trespass alleged (to which the claim applies) is in respect of the area verged yellow in Exhibit 'A' ".

In the light of the above, it is not true, to say that the trial court did not state that the respondent gave no evidence of use. All that was said that in respect of the specific averment in paragraph 5 of the Statement of Claim, the respondent led no evidence on the issue of a tenant harvesting palm fruit on payment of Ishakole or owning an Eku on the land. Indeed, the respondent led evidence on various acts of user of the land all of which the trial court accepted.

On the issue whether where there is no defined boundary, the court on its own can draw one in order to arrive at its conclusion, I agree with the submission of the respondent that this does not arise in view of the meticulous review of the evidence adduced before it which it accepted, followed by a confirmation of same by the court below. Moreover, it is submitted, there being no misdi-

rection on the parts of the two courts below, there was evidence from the appellant which supported the respondent's case. To exemplify this, reference was made to the evidence of DW1 wherein the latter witness had said:

B *"Edemo has land inside Odunro's land." Thus, I agree with the submission that the assertion in appellant's brief that there was no evidence that Edemo has no land distinct and separate from Odunro's land is certainly false. This because in appeals on findings of fact, the attitude of an appellate court is that of caution and of reluctance in interfering with facts found by the trial court vide Ekresu v. Oyobebere (1992)9 NWLR (part 266)438; (1992) 11/12 SCNJ 189 at 206. It being undisputed that the court below made a correct appraisal of the findings of fact relating to boundaries and that the trial court did not of its own fix*
 C *the boundaries arbitrarily, there has been two concurrent findings of fact with which this court will be reluctant or cautious to interfere therewith vide Stool of Abina Abina v. Enyimadu 12 WACA 171 and Iroegbu v. Okwordu (1990)6 NWLR 643 at 659."*
 D

E On whether on reaching the findings of fact and its conclusion, the learned trial Judge has put the case of the parties on an imaginary scale of justice, it is settled law that where there is ample evidence and the trial Judge failed to evaluate it and make correct findings, the Court of
 F Appeal is at liberty to evaluate such evidence and make proper findings unless the findings rest on the credibility of witnesses. Indeed, findings of fact are matters peculiarly within the province of and reserved for the trial court. See Chief Patrick Abusomwan v. Mercantile Bank of Nigeria Ltd (1987) 3 NWLR (part 60) 196 at 207-208; Military Governor of Western State v. Afolabi Laniba & Anor. (1974) 1 All NLR (part 2) 179; Ebba v. Ogodo (1984)4 SC.84; Woluchem v. Gudi (1981)5 SC.291 at 309; Shell B.P. Development of Nigeria v. His Highness Pere-Cole & ors. (1978)3 SC.183 and Ogundulu v. Philips and ors. (1973) 2 SC.71
 G
 H at 80. **In the instant case where the learned trial Judge, rightly, in my view, summarized and evaluated the evidence of the respondent and the appellants and the learned Justices of the court below upheld the decision arrived at therein by him, I see no reason to**

interfere with the concurrent findings, the same not having been shown to be perverse. See Enang v. Adu (supra) while it is in my view true to say that more pages of the proceedings were devoted to considering the evidence of the appellants, it is equally true that there was more in his evidence that called for comment. The appellants have failed B to show that the appraisal of specific issues was wrong, moreso if it is noted that respondent's evidence covered five pages of the Record of proceedings while the appellants' covered ten pages. It has not equally been demonstrated that the trial court gave unnecessary prominence to C the demeanour of the witnesses in a matter hinging on traditional history. For as rightly found by the court below, what the learned trial Judge did was to restrict himself to the consideration of non-traditional evidence, especially that he (trial Judge) did not give judgment to the respondent on D the basis of his traditional evidence which he found to be "rather sketchy and inconclusive" and therefore rather insufficient and unsatisfactory to justify a declaration of title being made in his favour- a view upheld by the court below.

Thus, the learned trial Judge could not possibly have preferred E the evidence of the appellants and their witnesses which was self-contradictory and unreliable for the following reasons:-

(a) In the Statement of Defence, the appellants never called the respondent AKARAJA but AKAMUJA which is the family name of the F respondent vide paragraphs 4 and 10 of the Statement of Defence. However, in his evidence in court, the original appellant's father called the respondent's father Akaraja, a name which he invented in order to pervert the course of justice.

(b) The appellant said he never heard of Akamuja chieftaincy in G Ado-Ekiti but his younger brother, Pius Idowu Oriola Apempe, his 1st witness, said that Akamuja is a chieftaincy title in Ado-Ekiti.

(c) The evidence of Chief Odunro and Disu Obaidu from Olomo family, the two families with whom the appellant claimed that his family H has boundaries is that they, Odunro and Olomo families, have boundary with AKAMUJA family and that they have no boundary with the appellants' family. This shows clearly that there is AKAMUJA family in Ado-

Ekiti and that the appellant lied.

(d) The appellants' second witness, Thomas Ogunleye said at page 61 of the Record that he did not know Oke-Efon on Iworoko Road, adding that Oke Efon is at Ila area of Ado-Ekiti. Chief Olotin, Dw3, on the other hand said that he knew Oke-Efon on Iworoko Road to be a former village and that he never knew that there was Akamuja chieftaincy in Ado-Ekiti. The learned trial Judge ought not therefore to be blamed for preferring the evidence of the respondent and his witnesses to that of the appellants and his witnesses. Moreover, Odunro and Olomo families whom the appellants claimed as their boundarymen in paragraph 5 of the Statement of Defence denied this and claimed they are boundarymen to the respondent.

It is for the above reasons that the above issues are jointly and severally resolved against the appellants.

In the result, this appeal fails and it is accordingly dismissed with N10,000.00 costs to the respondent.

E

UWAIS CJN

I have had the opportunity of reading in draft the judgment read by my learned brother Onu, JSC. I entirely agree with the reasoning and conclusions therein. I have nothing to add.

Accordingly the appeal is hereby dismissed with N10,000.00 costs to the Respondent.

G

WALI JSC

I have read before now, the lead judgment of my learned brother Onu, JSC and I agree with the reasons given therein for dismissing the appeal. I also hereby dismiss it for want of merit with N10,000.00 costs to the Respondent.

OGWUEGBU JSC

I had the advantage of reading in draft the judgment just delivered by my learned brother Onu, J.S.C I agree with his reasoning and conclusions. B

Exhibit "A" (the amended plan) having been filed with the leave of court without any opposition from the defendants/appellants and admitted in evidence with the consent of the opposite party, a court of law should be able to act on it despite the absence of a formal application to amend the statement of claim to reflect the amendment. C

What was left (if any) after the filing of the amended plan was the addition of the letter "A" to the figures 7873 in paragraph 4 of the statement of claim. Since the appellants were not put into any disadvantage by the admission of Exhibit "A" in evidence with their consent, it will amount to paying slavish respect to procedural regularity to uphold their contention that plan No. 7873A was not pleaded. This is a case where the court must do substantial justice, technicalities notwithstanding. D

I would also dismiss the appeal and endorse all the orders in the judgment of my learned brother Onu, J.S.C E

MOHAMMED JSC

I have had the privilege of reading the lead judgment, just read by my learned brother, Onu, J.S.C. and I agree with him that this appeal has failed. My learned brother has considered all the issues canvassed in the appeal and I have nothing to add to his opinion therein. The appeal is from concurrent findings of the two lower courts and the appellants have not established any convincing legal argument which would occasion my interference with those decisions. The appeal is dismissed. I abide by all the consequential orders made in the lead judgment. F

G
H

B

C

D

E

F

G

H