

SUPREME COURT OF NIGERIA

17TH JULY, 1998. SC. 227/1991

CORAM:- S. M. A. BELGORE, I. L. KUTIGI, E. O. OGWUEGBU, U. MOHAMMED, A. I. IGUH, JJSC.

JACOB OVENSERI & ANOR. DEFENDANTS/APPELLANTS
(Alias Jacob Idada Osagiede)

AND

OJO OSAGIEDE & ANOR. PLAINTIFFS/RESPONDENTS

APPEALS - *Locus standi* - Where the defendants did not cross-appeal in the Court of Appeal - It is late to raise the issue in the Supreme Court.

JUDGMENTS - *Verdicts* - That the trial court can give - In a case properly before the court.

JUDGMENTS - *Dismissal order* - What could be dismissed - Is only an action legally and procedurally before the court.

JUDGMENTS - *Appeal* - Against an order of dismissal - The Court of Appeal was right to make the order which the trial court ought to have made - By applying s. 16 Court of Appeal Act.

FACTS

The Plaintiffs/respondents instituted an action in the Benin High Court claiming against the defendants/appellants jointly and severally, inter alia, a declaration that the house, land and premises in dispute is the family property of Joel Idada Osagiede family who is late and until his second burial ceremony and subsequent distribution of his estate are performed in accordance with Bini Customary Law, the sale or purported sale of the said property by the 1st defendant to the 2nd defendant is completely void and of no effect. The plaintiffs in evidence contend that the second plaintiff was the elder child of the deceased, Joel Idada Osagiede and that the first defendant was his step son. The second plaintiff testified that he lived in lagos all the time but as the first defendant was disposing of certain parts

of the land in dispute, he never raised any protest because P.W. 1 their mother appealed to him to overlook it. It was when the place of abode of their father was being sold to the second defendant, a complete stranger to the family that he had to sue together with his uncle, the first plaintiff. The first defendant, however claimed he was the brother of full blood with the second plaintiff. He admitted the first plaintiff as his uncle. He claimed he was the eldest child and was entitled to have the property in question.

At the close of hearing, the trial judge found that by Bini native law and custom, the first plaintiff being older than his deceased brother, could not join the second plaintiff in administering the estate and neither could he jointly act as plaintiff. As the second burial had not taken place, the estate could not vest. He then dismissed the claim. Against this, the plaintiff appealed to the Court of Appeal. That court held that the decision of the trial court dismissing the action was erroneous. After holding there was no capacity to sue the trial court was incompetent to dismiss what was not before it legally. Applying section 16 of Court of Appeal Act, it substituted the order of striking out the suit for dismissing it. The defendants have now appealed to the Supreme Court raising two issues.

ISSUES FOR DETERMINATION

"1. Was it right for the justices of the court of Appeal to strike out the case instead of dismissal having held that " the learned trial judge has dismissed the entire case he was functus officio with regard to the case from when he made the pronouncement.

2. Whether the justices of the appeal court were right in failing to pronounce on the issue of locus standi canvassed before them."

Judgments - Verdicts

1. In a case properly before the Court, at the end of the hearing and addresses the trial Court can give any of the following verdicts:

1. give judgment in favour or against the plaintiff i.e.

(a) he can dismiss the claim, or

(b) he can allow the claim, or

(c) he can enter non-suit if the parties are given a hearing on non-

suit.

or 2. strike out the suit because the Court had no jurisdiction to try the case, or the parties in Court are incompetent or not juristic persons, or have no locus standi to sue. (p. 1925 E)

Judgments - Dismissal

2. What obtained in the case at the trial Court was that the first plaintiff, Ojo Osagiede, had no locus standi to sue. Secondly, even though not seriously addressed,⁵ as second burial was yet to take place there could be nobody to sue. Thus, the case was not properly before that Court and it could not be dismissed. What could be dismissed is an action legally and procedurally before the Court. Otherwise this was a matter to strike out. (p. 1925 H)

Judgments - Appeals

3. The plaintiffs appealed against the order of dismissal but the defendants never cross-appealed. The Court of Appeal was thereof right to make the order which the trial Court ought to have made by applying Section 16 Court of Appeal Act. (p. 1926 A)

Appeals - Locus

4. As the defendants never cross-appealed in the Court of Appeal it is late in the day for them to raise the issue of locus standi here. I find no substance in this issue. (p. 1926 B)

NOTABLE POINTS OF INTEREST

IGUH JSC

1. When a suit in a representation capacity would be appropriate

I think I ought to start by restating the well settled principle of law that

⁵ An order of dismissal was upheld in *Obawole v. Williams* (1996) 12 KLR (pt 46) 2123 but was not upheld in *Bomor v. Ekiyor* (1997) 7 KLR (pt 54) 1571

given a common interest and a common grievance, a suit in a representative capacity would be appropriate if the relief sought is, by its nature, beneficial to all whom the plaintiffs purport to represent. The rule regulating

the institution of an action in a representative capacity as laid down under the provisions of Order 7 Rule 9 of the High Court Civil Procedure Rules of Bendel State, Cap. 65 stipulates as follows -

"Where there are numerous persons having the same interest
B in one cause or matter, one or more of such persons may sue or may be authorized by the Court or Judge to defend in such cause or matter on behalf or for the benefit of all persons so interested."

It was long settled that a representative action is only permissible if more
C persons than one have a common interest in a suit and the persons interested in suing have given the authority to the named plaintiff or plaintiffs to sue on their behalf. See Melifonwu v. Egbuji (1982) 9 S.C. 145 at 163, Adegbite v. Lawal 12 W.A.C.A. 393 at 399 etc. The common interest referred to in the said Rule of court must, without doubt, be real. Where,
D however, several plaintiffs or defendants have no common interest and grievance in the subject matter of an action, they cannot sue as co-plaintiffs, or defend as co-defendants, on behalf of or for the benefit of the persons they purport to represent. (p. 1930 E)

E 2. *Superior Court of record - Has inherent jurisdiction to amend its judgment*

Although, there does not appear to be any provision in the High Court (Civil Procedure) Rules of Bendel State, Cap. 65 which is in pari materia
F with the said Order 5 Rule 3 of the Court of Appeal Rules, the then Bendel State High Court, like any other superior court of record, had an inherent jurisdiction to amend or vary its own judgment or order in order to carry out its own meaning and to give effect to its plain or manifest intention. See Thynne v. Thynne (1955) P. 272, Pearlmon (Veneers) S.A. (Pty) v. Bartels (1954) 3 ALL E.R. 659, Olurotimi v. Ige (1993) 8 N.W.L.R. (Part 311) 257 at 274 etc. (p. 1934 A)
G

3. *Limitations on the inherent power of the court to amend its judgment*

H It is however necessary to point out that this inherent power of the court to amend or vary its judgment is limited only to situations where:-

(i) there is a clerical mistake in the judgment or order; or

(ii) there is an error arising from an accidental slip or omissions;
or

(iii) it is necessary to do so to carry out its own meaning and to make its intention plain.

Such error or omission must be an error in expressing the manifest intention of the court, as in the present case. It has also to be stressed that this inherent power does not extend to the court's mistake of law even where this is apparent on the face of the order or judgment nor can it be invoked where the order or judgment correctly expresses the court's intention. See MacCarthy v. Agard (1933) 2 K.B. 417, Asiyanbi v. Adeniji (1967) 1 ALL N.L.R. 82 at 90 etc. (p. 1934 E)

REPRESENTATION

Both parties absent and not represented

CASES REFERRED TO

Obiode vs Oxewere (1982) 9 S.C. 145

Okafor vs Ifiony (1978) 4 S.C. 1

Anatogu vs A.G., East Central State of Nigeria (1976) 11 S.C.109, 123, 124

Melifonwu v. Egboji (1982) 9 S.C. 145 at 163

Adegbite v. Lawal 12 W.A.C.A. 393 at 399

Thynne v. Thynne (1955) P. 272

Pearlmon (Veneers) S.A. (Pty) v. Bartels (1954) 3 ALL E.R. 659

Olurotimi v. Ige (1993) 8 N.W.L.R. (Part 311) 257 at 274

MacCarthy v. Agard (1933) 2 K.B. 417

Asiyanbi v. Adeniji (1967) 1 ALL N.L.R. 82 at 90

STATUTES AND RULES REFERRED TO

Court of Appeal Act, s. 16

Court of Appeal Rules, Order 3 Rule 23, order 5 Rule 3

High Court Civil Procedure Rules of Bendel State, cap. 65, order 7 Rule 9

LEAD JUDGMENT BY BELGORE JSC

The first plaintiff, Ojo Osagiede, is the "Okaegbe" (Head of Family) of Osagiede family of Uselu Quarters, Binin and he was the senior brother of late Joel Idada Osagiede, the father of the second plaintiff, Reuben Idada Osagiede. The first defendant, Jacob Ovenseri, alias Jacob Idada Osagiede, claimed he was the eldest child of the late Joel Idada Osagiede and senior brother of the second plaintiff (both being of the same mother) but the second plaintiff claimed he (the first defendant had a different father in that his mother (first witness for the plaintiff) carried his pregnancy to the late Joel Idada's house on marriage as a result of postnuptial clandestine sexual intercourse with a soldier from Ondo. The matter in dispute is as contained in the statement of claim in paragraph 15 thereof, reading as follow:

"(a) A declaration that the house, land, premises situate at or being generally known or referred to as No. 7, Benin/Ifon Road, Uselu Quarters, Benin City particulars delineated in pink on Plan No. MG 252/75 is the family property of Joel Idada Osagiede family, Benin City until the second burial ceremony of late Joel Idada Osagiede and subsequent distribution of the estate of the latter are performed in accordance with Bini Customary Law and that the sale or purported sale of the said property by the 1st Defendant to the 2nd Defendant is completely void and of no effect.

(b) An Order of Court setting aside the said sale or purported sale of the said property by the 1st Defendant to the 2nd Defendant, or in the alternative declaring the sale of the said landed property as null and void.

(c) A perpetual injunction restraining the Defendants, their servants, agents and privies from entering and/or in any way intermeddling with the said property in any manner inconsistent with the interests of the plaintiffs."

The plaintiffs in evidence based on their pleading contend that the second plaintiff was the elder child of the deceased, Joel Idada Osagiede and that the first defendant was his step son. P.W1, Elizabeth Idada, said so much also in her evidence as did the 1st plaintiff, the elder brother of

the deceased. Copious evidence was given by the plaintiffs of Bini Native Law and Custom as to the administration of the estate of a deceased person. According to them, when a man dies he has what is called first burial. After this all his children take charge of the estate pending the second burial. The eldest son performs the second burial and it is after this that his eldest son succeeds to his "usual abode" in his life time, the "Igiogbe". It seems there is no time limit to the performance of this second burial. The second plaintiff testified that he lived in Lagos all the time but as the first appellant was disposing of certain parts of the land in dispute, he never raised any protest because P. W 1, their mother appealed to him to overlook it. It was when the place of abode of their father was being sold to the second defendant, a complete stranger to the family that he had to sue together with his uncle, the first plaintiff. However, their evidence, uncontroverted, revealed the following facts:

1. the estate of the deceased could not vest in any of the children for division except the second burial has been performed, not even in the eldest son.

In this case, as the second burial is yet to be performed neither the first defendant (who claims to be the eldest son) nor the second plaintiff who makes a similar claim could administer the estate or succeed to the estate. It means of course there can be no litigation until this important second burial has been performed.

2. the first plaintiff, being older than his deceased brother, cannot participate in the deceased's burial and cannot have any part in the administration of his estate.

This means that the first plaintiff cannot sue even if the time to sue was ripe after the second burial. It also means he cannot join in suing as he has done.

3. The second burial of Joel Idada Osagiede had not been performed and hence the action taken in this matter was incompetent under Bini Native Law and Custom.

The 1st defendant, however, claimed he was the brother of full blood with the second plaintiff. He admitted the first plaintiff as his uncle. He claimed he was the eldest child and was entitled to have the property in question.

But in reality he claims he was the one that had the money for procuring the allotment of the land from the Land Allocation Committee in 1946 issued in his father's name and when he died he asked for allocation to him as the owner and also as the eldest child. He claimed to be a Christian of Jehovah Witness sect and found the belief and the practice of second burial paganistic and repulsive to his faith. Counsel then addressed and the issue of competency was adverted to.

The trial judge found that by Bini Native law and custom, the first plaintiff could not join the second plaintiff in administering the estate and neither could he jointly act as plaintiff. As the second burial had not taken place, the estate could not vest. He then dismissed the claim. Against this the plaintiffs appealed to the Court of Appeal. It is however pertinent to set out the learned trial judge's conclusion in dismissing the case:

"I have deliberately declined from making any findings of fact and the effect of my judgment therefore and for the avoidance of doubt is to put the parties in status quo ante, except is one regard that the first plaintiff cannot again join any of late Idada's children in any action touching his estate but this action as it is now constituted is dismissed, without prejudice for example, if the second plaintiff or any of the children of late Idada, Idada Osagiede, wishes to institute any action against the defendants in respect of the said building and premises situate at No. 7 Urelu Road, Benin City provided the first plaintiff is not joined as a party."

The Court of Appeal then considered the appeal. It must be pointed out that the defendants never cross-appealed, especially on the issue of incapacity to sue in a representative capacity. The decision of the Court of Appeal, after considering many authorities [Obiode vs Oxewere (1982) 9 S.C. 145; Adegbite vs Lawal XII WACA 393, 399; Okafor vs Ifiony (1978) 4 S.C. 1; Anatogu & Ors. vs A.G., East Central State of Nigeria & Ors. (1976) 11 S.C. 109, 123, 124]. Was that the decision of the trial Court dismissing the action was erroneous. After holding there was no capacity to sue the trial Court was incompetent to dismiss what was not before it legally. Applying Section 16 of Court of Appeal Act, it substituted the order of striking out the suit for dismissing it. The defendants have now appealed to this Court.

In this case the following issues have been formulated for determination by the appellants:

"1. Was it right for the justices of the court of Appeal to strike out the case instead of dismissal having held that" the learned trial judge has dismissed the entire case he was *functus officio* with regard to the case from when he made the pronouncement. B

2. Whether the justices of the appeal court were right in failing to pronounce on the issue of locus standi canvassed before them."

The parties and their counsel, despite service of Hearing Notices on them never appeared at the hearing of this appeal. The respondents also never filed any brief of argument. The appeal, according to the Rules of this Court, was therefore heard on the defendants'/Appellants' brief alone. C

On the first issue it must be pointed out **in a case properly before the Court, at the end of the hearing and addresses the trial Court can give any of the following verdicts:** D

1. give judgment in favour or against the plaintiff i.e.

(a) he can dismiss the claim, or

(b) he can allow the claim, or E

(c) he can enter non-suit if the parties are given a hearing on non-suit.

or 2. strike out the suit because the Court had no jurisdiction to try the case, or the parties in Court are incompetent or not juristic persons, or have no locus standi to sue. F

What obtained in the case at the trial Court was that the first plaintiff, Ojo Osagiede, had no locus standi to sue. Secondly, even though not seriously addressed, as second burial was yet to take place there could be nobody to sue. Thus, the case was not properly before that Court and it could not be dismissed. What could be dismissed is an action legally and procedurally before the Court. Otherwise this was a matter to strike out. The plaintiffs appealed against the order of dismissal but the defendants never cross-appealed. The Court of Appeal was thereof right to make the order which the trial Court ought to have made by applying Section 16 Court of Appeal Act. G H

As the defendants never cross-appealed in the Court of Appeal

1926 Ovenseri v. Osagiede (1998) 7 KLR Belgore JSC
it is late in the day for them to raise the issue of locus standi here. I find no substance in this issue.

This appeal therefore lacks merit and I dismiss it. There will no award as to costs.

B _____

KUTIGI JSC

I read in advance the judgment just delivered by my learned brother, Belgore, JSC. I also find no substance in the appeal. It is dismissed with no order as to costs.

D OGWUEGBU JSC

I have read in advance the judgment just delivered by my learned brother Belgore, J.S.C I agree that the appeal lacks merit and ought to be dismissed.

E The plaintiffs instituted an action leading to this appeal in the Benin Judicial Division of the High Court of the then Mid-Western State of Nigeria. In paragraph 15 of their joint statement of claim, they claimed jointly and severally from the defendants as follows:

F *"(a) A declaration that the house, land, premises situate at or being generally known or referred to as No. 7, Benin/Ifon Road, Uselu Quarters Benin City particularly delineated in Pink on Plan No. MG 252/75 is the family property of Joel Idada Osagiede family Benin City until the second burial ceremony of late Joel Idada Osagiede and subsequent distribution of the estate of the latter are performed in accordance with Bini Customary Law AND that the sale or purported sale of the said property by the 1st Defendant to the 2nd Defendant is completely void and of no effect.*

G *(b) An Order of Court setting aside the said sale or purported sale by the 1st Defendant, or in the alternative declaring the sale of the said landed property as null and void.*

H *(c) Perpetual injunction restraining the Defendants, their servants, agents and privies from entering and or in any way intermeddling*

with the said property in any manner inconsistent with the interests of the plaintiffs."

Pleadings were ordered, filed and exchanged and at the hearing and in the course of the examination-in-chief of the 1st plaintiff, he testified that he is the head of Osagiede family and a brother of the half blood of late Joel Idada Osagiede. He said:

"As the Okeagba of the family I had no hands in the control of the property left behind by Idada according to Benin Customary Law. But the children take charge and control of the said property until the performance of the second burial. This is so because I was older than the deceased. But in accordance with our Benin custom I was expected to take charge of all the property of late Idada if he were my elder brother until the performance of the second burial In this case when late Idada was a younger man, the eldest surviving son who is the 2nd Plaintiff takes charge and control of the property left by late Idada Osagiede before the performance of the second traditional rites."

At the close of hearing, the learned trial judge came to the conclusion that the plaintiffs were not competent to sue in a representative capacity having no common interest and grievance in the subject matter having regard to the evidence of the 1st plaintiff. He made the following findings:

"Having regard to the capacity under which they sued as co-plaintiffs, and relating this to the evidence of the first plaintiff, I hold that the plaintiffs as presently constituted are incompetent to institute this action as co-plaintiffs against the Defendants and the Plaintiffs' entire claim is hereby dismissed."

I have deliberately declined from making any findings of fact and the effect of my judgment therefore and for the avoidance of doubt is to put the parties in status quo ante, except in one regard that the first plaintiff cannot again join any of late Idada's children in any action touching his estate but this action as it is now constituted is dismissed, without prejudice for example, if the second plaintiff or any of the children of late Idada Osagiede wishes to institute any action against the Defendants in respect of the said buildings and premises situate at No. 7 Urelu Road, Benin City provided the first plaintiff is not joined as a party. In

the circumstance this action would have been struck out for lack of jurisdiction." (Underlining is for emphasis).

B The defendants appealed to the Court of Appeal against the decision of the learned trial judge. Their appeal succeeded on the issue of costs and the court below made an order striking out the action instead of the order of dismissal. Against this decision, the appellants have further appealed to this court. Two issues were formulated by the appellants for our determination in this appeal. They are:-

C *"1. Was it right for the Justices of the Court of Appeal to strike out the case instead of dismissal having held that the learned trial judge has dismissed the entire case he was functus officio with regard to the case from when he made the pronouncement.*

2. Whether the Justices of the Appeal Court were right in failing to pronounce on the issue of locus standi canvassed before them."

D The court below in its judgment observed as follows:

"I agree, however, with the submission of the learned counsel that once the learned trial judge had dismissed the entire claim, he was functus officio with regard to the case from when he made the pronouncement. He should not have proceeded further with the case as he did. The next question that I would however wish to consider though briefly is whether he made the proper order having regard to the reasons he gave for the dismissal of the entire claim. It must follow that the learned trial judge having formed the view that the respondents, whether rightly or wrongly, were not competent to sue in a representative capacity, he should only strike out their claims and not dismiss them."

G From the evidence of the plaintiffs, the learned trial judge found that the plaintiffs had no common interest and a common grievance and therefore could not sue in a representative capacity. While dismissing the entire claim he entered a caveat as to the institution of future action in respect of the subject matter of the present proceedings. There is however no cross-appeal by the plaintiffs on the issue of dismissal of their action. The proper order which the learned trial judge should have made was to strike out the claim and not to dismiss it. The order dismissing the claims did not carry out the intention of the judgment which is undoubtedly in

favour of striking out the claims. See Okafor & Ors. v. Ifonu & Ors. (1977-78) 11 NSCC 216.

The court below is vested with powers to make all such orders as the trial court could have made. See section 16 of the Court of Appeal Act, Cap. 75 Laws of the Federal Republic of Nigeria, 1990 and Order 3 B rule 23 of the Court of Appeal Rules which provides:

"The Court shall have power to give any judgment or make any order that ought to have been made, and to make such further or other order as the case may require including any order as to costs. These powers may be exercised by the court, notwithstanding that the appellant C may have asked that part only of a decision may be reversed or varied, and may also be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have appealed from or complained of the decision." D

I am therefore satisfied that the Court of Appeal rightly struck out the action and having decided the issue of competence of the plaintiffs to institute the action and making a consequential order in respect thereof, the failure of the court below to pronounce on the issue of locus standi E did not affect the conclusion reached by that court.

For the reasons I have given above, in addition to the more detailed reasons in the judgment of my learned brother Belgore, J.S.C., with which I have already signified my agreement, I hereby dismiss the appeal and F make no order as to costs.

MOHAMMED JSC

I agree with my learned brother, Belgore, J.S.C., that this appeal G has no merit and for the reasons given in my Lord's judgment which I adopt as mine I hereby dismiss the appeal. I affirm the decision of the Court below. Since neither the respondents nor their counsel appeared during the hearing of this appeal I award no costs to them. H

IGUH JSC

I have had the privilege of reading in draft the judgment just de-

livered by my learned brother, Belgore, J.S.C. and I am in total agreement with him that this appeal is devoid of substance and should be dismissed.

It is clear to me that the main question that arises for determination in this appeal is whether the Court of Appeal was right to have struck out the appellant's suit, having regard to all the circumstances of the case.

The argument was that the court below, having held that the learned trial Judge was functus officio after he had dismissed the appellants' suit, erred in law by affirming the subsequent qualification of this order by the same court thus whittling down the effect of the said order of dismissal.

I think I ought to start by restating the well settled principle of law that given a common interest and a common grievance, a suit in a representative capacity would be appropriate if the relief sought is, by its nature, beneficial to all whom the plaintiffs purport to represent. The rule regulating the institution of an action in a representative capacity as laid down under the provisions of Order 7 Rule 9 of the High Court Civil Procedure Rules of Bendel State, Cap. 65 stipulates as follows -

"Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or may be authorized by the Court or Judge to defend in such cause or matter on behalf or for the benefit of all persons so interested."

It was long settled that a representative action is only permissible if more persons than one have a common interest in a suit and the persons interested in suing have given the authority to the named plaintiff or plaintiffs to sue on their behalf. See Melifonwu v. Egbuji (1982) 9 S.C. 145 at 163, Adegbite v. Lawal 12 W.A.C.A. 393 at 399 etc.

The common interest referred to in the said Rule of court must, without doubt, be real. Where, however, several plaintiffs or defendants have no common interest and grievance in the subject matter of an action, they cannot sue as co-plaintiffs, or defend as co-defendants, on behalf of or for the benefit of the persons they purport to represent.

The primary issue that the trial court considered in the present case was whether the first plaintiff/respondent had common interest, real or otherwise, in the subject matter of the action with the second plaintiff/respondent to entitle them to sue jointly as co-plaintiffs, for themselves and as representing members of the Idada Osagiede family of Uselu Quarters,

In this regard, it was the finding of the learned trial Judge that both plaintiffs, on the evidence before the court, and in accordance with Bini customary law, had no common interest to pursue in the subject matter of the suit to entitle them to sue jointly as co-plaintiffs. The reason given was that the property in dispute devolved customarily on the death of the late Joel Idada Osagiede on his eldest son, the 2nd plaintiff/respondent, and that the 1st plaintiff/respondent under Bini customary law had no title or interest whatever in the said property. In other words, it was his finding that the 1st plaintiff/respondent had no locus standi to institute the action. The learned trial Judge then concluded -

"Having regard to the capacity under which they sued as co-plaintiffs, and relating this to the evidence of the first Plaintiff, I hold, that the Plaintiffs as presently constituted are incompetent to institute this action as co-plaintiffs against the Defendants and the plaintiffs' entire claim is hereby dismissed."

But he went on to add -

"I have deliberately declined from making any findings of fact and the effect of my judgment therefore and for the avoidance of doubt is to put the parties in status quo ante, except in one regard that the first plaintiff can not again join any of late Idada's children in any action touching his estate, but this action as it is now constituted is dismissed, without prejudice for example, if the second plaintiff or any of the children of late Idada Osagiede wishes to institute any action against the Defendants in respect of the said building and premises situate at No. 7 Urelu Road, Benin City provided the first plaintiff is not joined as a party."

On appeal to the Court of Appeal, Benin Division, the decision of the trial court dismissing the respondents' claims was set aside and, in substitution thereof, an order striking out the suit was entered. The defendants/appellants have further appealed to this court. The question is whether in all the circumstances of the case, the court below was right to have substituted an order of striking out for that of the dismissal of the suit.

It seems to me well settled that where plaintiffs were not authorized to sue by the persons they purport to represent or to sue on their

behalf or where the competency or locus standi of the plaintiffs to sue in a representative capacity is effectively and successfully challenged by the defence, the proper order would be to strike out such a claim and not to dismiss it. So, in Okafor and others v. Ifionu and others (1978) N.S.C.C. 216 at 220, Sowemimo, J.S.C., as he then was, explained the position as follows -

"We have considered the arguments and submissions made before us, as well as the cases cited by Chief F.R.A. Williams, and although we have some misgivings as regards the course taken by the learned trial judge, we hold however that since he (the learned trial judge) had come to the conclusion rightly or wrongly, as there is no cross-appeal on the issue, that the plaintiffs have no authority of the Agunwaja family to sue on their behalf, he should only have struck out the claims and not dismissed them."

I therefore agree that the learned trial Judge, having arrived at the conclusion that the respondents, whether rightly or wrongly, were not competent to sue jointly in a representative capacity in respect of the landed property in issue, he should only have struck out their claims and not dismissed them.

Additionally, it is on record that the learned trial Judge after dismissing the appellants' claims proceeded to qualify his order in the passage of his judgment earlier on reproduced. Indeed, at the tail end of his judgment, the learned trial Judge reemphasized his said qualification when he concluded thus -

"As I had expressed the view, that I would put the parties directly concerned in this dispute into a position, where it would be regarded as if no litigation had ever taken place, I am not inclined to award any cost in this case. Each party shall bear his own costs and accordingly I make no orders as to costs."

It seems to me plain that by the said qualifications and the general tenor of the observations of the learned trial Judge after his purported dismissal of the suit that he did not in fact intend to dismiss the suit on the merits. A close study of his observations leaves one in no doubt that the dismissal in issue was not on the merits of the case and may not therefore constitute a bar to any future proceedings. I agree entirely with the Court of Appeal

that there was an error of law in the judgment of the learned trial Judge by his seeming dismissal of the plaintiffs/respondents' suit. The next question for consideration is whether the court below was right in substituting an order of striking out in place of that of the dismissal of the suit.

Order 3 Rule 23 of the Court of Appeal Rules provides as follows - B

"The Court shall have power to give any judgment or make any order that ought to have been made, and to make such further or other orders as the case may require including any order as to costs. These powers may be exercised by the Court, notwithstanding that the appellant may have asked that part only of a decision may be reversed or varied, and may also be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have appealed from or complained of the decision." (Underlining supplied for emphasis) C

There is also the provision of Order 5 Rule 3 of the Court of D
Appeal Rules which stipulates as follows -

"The Court shall not review any judgment once given and delivered by it save to correct any clerical mistake or some error arising from any accidental slip or omission, or to vary the judgment or order so as to give effect to its meaning or intention." (Underlining supplied for emphasis) E

Although, there does not appear to be any provision in the High Court (Civil Procedure) Rules of Bendel State, Cap. 65 which is in pari materia F with the said Order 5 Rule 3 of the Court of Appeal Rules, the then Bendel State High Court, like any other superior court of record, had an inherent jurisdiction to amend or vary its own judgment or order in order to carry out its own meaning and to give effect to its plain or manifest intention. See Thynne v. Thynne (1955) P. 272, Pearlmon (Veneers) S.A. (Pty) v. Bartels (1954) 3 ALL E.R. 659, Olurotimi v. Ige (1993) 8 N.W.L.R. (Part 311) 257 at 274 etc. See too Hatton v. Harris (1892) A.C. 560 where Lord Watson in dealing with the power of a court to amend errors in its order or judgment, in appropriate cases, explained thus - G

"..... when an error of that kind has been committed, it is H
always within the competency of the Court, if nothing has intervened which would render it inexpedient or inequitable to do so, to correct the

1934 Ovenseri v. Osagiede (1998) 7 KLR Iguh JSC

record in order to bring it into harmony with the order which the judge obviously meant to pronounce."

It is however necessary to point out that this inherent power of the court to amend or vary its judgment is limited only to situations where:-

- B (i) there is a clerical mistake in the judgment or order; or
(ii) there is an error arising from an accidental slip or omissions;
or

(iii) it is necessary to do so to carry out its own meaning and to make its intention plain.

C Such error or omission must be an error in expressing the manifest intention of the court, as in the present case. It has also to be stressed that this inherent power does not extend to the court's mistake of law even where this is apparent on the face of the order or judgment nor can it be invoked where the order or judgment correctly expresses the court's intention.

D See MacCarthy v. Agard (1933) 2 K.B. 417, Asiyanbi v. Adeniji (1967) 1 ALL N.L.R. 82 at 90 etc.

There is finally the provision of Section 16 of the Court of Appeal Act, 1976 which confers jurisdiction on the court below to make, inter
E alia, any order necessary for determining the real question in controversy in an appeal and to amend any defect or error in the record of appeal and generally to have full jurisdiction over the whole proceedings as if the proceedings had been instituted in the Court of Appeal as a court of first
F instance and may rehear the case in whole or in part. There can therefore be no doubt that the Court of Appeal, upon a consideration of the totality of all the foregoing principles of law and Rules of Court, had ample jurisdiction to vary the order of dismissal made by the trial court to that of the striking out of the suit, notwithstanding the fact that the respondents had not appealed against the same. The case was clearly not properly
G before the court and it would be idle to dismiss such an action which, to all intents and purposes, was incompetent and therefore only liable to be struck out. Issue 1 is therefore resolved against the appellants.

H It is for the above and the more detailed reasons contained in the leading judgment of my learned brother, Belgore, J.S.C. that I too dismiss this appeal.

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