

SUPREME COURT OF NIGERIA

16TH JULY, 1988. SC. 261/1990

**CORAM:- M. L. UWAIS CJN, S. M. A. BELGORE, A. B. WALL,
M. E. OGUNDARE, E. O. OGWUEGBU, JJSC**

1. EMMANUEL BABAYEJU

(Head of Babayeju's family)

2. ELIJAH AYO BABAYEJU APPELLANTS

(For themselves and on behalf of Babayeju's
family of Ishagatedo)

AND

CHIEF EMMANUEL OYEDELE

ASHAMU & ANOR. RESPONDENTS

ACTIONS - Parties - Necessary party to an action - Is one whose presence is necessary - And should be bound by the result of the action.

LAND LAW - Family land - Conveyance - By one Principal member out of three - And without the head of the family joining - Is void ab initio.

FACTS

The plaintiffs/appellants instituted an action for themselves and as representing Babayeju family of Ilausmaja Ishagatedo in the Ikeja District of Lagos State against the respondents in respect of a parcel of land which was agreed by both parties to be the property of Babayeju family. The land was sold to Konibaba Babayeju by the Iyewo family. It was the plaintiffs' case that on the death of Konibaba Babayeju the Igewo family conveyed the legal interest in the land to Thomas, David and Sadiku who were the only children of Konibaba Babayeju. That the plaintiffs and the 2nd defendant are the children of Thomas, David and Sadiku which constitute the only sub-families of Babayeju. That the land in dispute was sold and conveyed to the 1st defendant by the 2nd defendant in conjunction with other persons who are not members of Babayeju family without

the approval of the 1st plaintiff who is the head of the Babayeju family and without the consent of the 2nd plaintiff who is like the 2nd defendant a principal member of the family. The 2nd defendant on his part contended that Babayeju Konibaba had seven children and not three as claimed by the plaintiffs, that the seven children comprised three males and four females. And that the other Vendors of the conveyance to the 1st defendant are the descendants of the female children of Babayeju.

At the close of hearing, the learned trial judge found for the plaintiffs and ordered in their favour, inter alia, a declaration of statutory right of occupancy to the piece of land in dispute. The defendants being dissatisfied appealed successfully to the Court of Appeal, Lagos Division. The decision of the trial court was set aside and an order striking out the suit was made in its stead. The plaintiffs who were aggrieved have now appealed to the Supreme Court. The appeal was decided on a lone issue.

ISSUE FOR DETERMINATION

" Whether the Court of Appeal was right in holding that all the other seven signatories to the conveyance must be parties to this action before the Plaintiffs can rightly take up the action inspite of the strong, unassailable and valid finding of the trial court that the sale of the family land was made without the consent of the 1st plaintiff, who is the head of the family."

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

Family land- Conveyance

1. The 1st plaintiff, 2nd plaintiff and the 2nd defendant are respectively the first sons of Thomas, David and Sadiku, who were the only surviving children of Babayeju Konibaba. The said 1st plaintiff, 2nd plaintiff and 2nd defendant having been found to be principal members of Babayeju family, with the 1st plaintiff as the head, the sale by 2nd defendant alone without the concurrence of the 1st plaintiff is void. It would still be void even if 2nd plaintiff joined 2nd defendant in the conveyance (Exhibit "E") without 1st plaintiff joining. See Agbeloe v. Sappor 12 W.A.C.A. 187.

The conveyance in this case undertaken by one principal member out of three principal members and without the head of the family joining is void ab initio.² (p. 1870 C)

Actions - Parties

2. Since the sale by the 2nd defendant to the 1st defendant is null and void, I am unable to see which other party the court below required for the action to be properly constituted. The necessary parties were before the trial court and a necessary party is someone whose presence is necessary as a party. The only reason which makes it necessary to make a person a party to an action is that he should be bound by the result of the action, and the question to be settled therefore must be a question in the action which cannot be effectually and completely settled unless he is a party. See Amon v. Rapheal Tuck & Sons Ltd. (1956)1 Q.B.D. 357 at 380. (p.1871 D)

NOTABLE POINTS OF INTEREST

OGWUEGBU.JSC

1. The seven other signatories to the conveyance are not desirable parties
The seven other signatories to Exhibit "E" (the conveyance to the 1st defendant/respondent) are not even desirable parties. The main issue here is whether Babayeju family comprised only the descendants of Thomas, David and Sadiku and if that question is answered in the affirmative, as the learned trial judge rightly did, there can be no other inquiry as to whether the other seven signatories to the deed of conveyance to the 1st defendant (Exhibit "E") are descendants of Babayeju or not. Even if the other seven signatories to Exhibit "E" were members of Babayeju family, the sale would still be void ab initio having regard to the findings of the learned trial judge which have not been set aside. (p. 1871 G)

² See also *Odekilekun v. Hassan* (1997) 12 KLR 2026 and *Salako v. Dosumu* (1997) 7 KLR (pt 53) 1476 on the same point.

OGUNDARE.JSC

2. Non joinder of the seven persons would not defeat the action

Even if the seven persons were necessary parties, their non-joinder would not defeat the action. I refer to order 13 rule 19 of the High Court of Lagos State (Civil Procedure) Rules, cap 52 Laws of Lagos State 1973 (applicable at the time of this action). Surely, if the Defendants thought the seven persons were necessary parties, it was their duty to point this out at an early stage of the proceedings so that the trial Court could direct the plaintiffs to apply to have them joined as co-defendants - see: Onayemi v. Okunubi (1965) 1 All NLR 362; If their Lordships of the court below had adverted their minds to the relevant rule of court dealing with non-joinder, they would not have arrived at the conclusion they did striking out the suit. They were clearly wrong. (p. 1875 E)

REPRESENTATION

Parties are absent and not represented

CASES REFERRED TO

Agbeloe v. Sappor 12 W.A.C.A. 187

Amon v. Rapheal Tuck & Sons Ltd. (1956)1 Q.BD. 357 at 380

Oduola v. Coker (1981) 5 SC.197

Uku v. Okumagba (1974) 3 SC.35

Melifonwu vs. Egbuyi (1982) 9 S.C. 145

Olowosogo vs. Adebanjo (1988) NWLR (pt 88) 275

Orogan vs. Soremekun (1986) 5 NWLR (pt.44) 688)

Onayemi v. Okunubi (1965) 1 All NLR 362; 365, (1965) ANLR 378;

Bohsali v. Arikpo (1966) 1 All NLR 161, 165, (1966) ANLR 153

Adewuyi vs. Ishola (1958) WRNLR 110

Odeneye vs. Efunnuga (1990) 7 NWLR (pt 164) 618, 622, 6231.

Onayemi v. Okunubi (1965) 1 All NLR 362; 365, (1965) ANLR 378;

Bohsali v. Arikpo (1966) 1 All NLR 161, 165, (1966) ANLR 153

RULES REFERRED TO

Supreme Court Rules, order 6 rule 8 (7)

High Court of Lagos State (Civil Procedure) Rules Cap 52 Laws of Lagos State 1973

LEAD JUDGMENT BY OGWUEGBU JSC

The plaintiffs who are the appellants in this court instituted an action for themselves and as representing Babayeju family of Ilasamaja Ishagatedo in the Ikeja District of Lagos State against the respondents in respect of a parcel of land which was agreed by both parties as the property of Babayeju family. It was common ground that the founder of the family was one KONIBABA otherwise known as BABAYEJU. It was also common ground that the parcel of land in dispute was sold absolutely by IYEWO Family to the said Konibaba Babayeju.

The plaintiffs/appellants' case was that on the death of Konibaba Babayeju, the Iyewo family by a Dead of Conveyance dated 23rd August, 1950 conveyed the legal interest in the said land to Thomas, David and Sadiku who were the only children of Konibaba Babayeju. That the plaintiffs and the 2nd defendant are the children of Thomas, David and Sadiku and only the sub-families of Thomas, David and Sadiku constitute Babayeju family. It was the plaintiffs' case that at no time did Babayeju family validly divest itself of their interest or title in the parcel of land and that the 2nd defendant in conjunction with other people who are not members of Babayeju family sold and conveyed the said family land to the 1st defendant without the approval of the 1st plaintiff who is the head of Babayeju family and without the consent of the 2nd plaintiff who is like the 2nd defendant a principal member of Babayeju family.

The 2nd defendant on his part contended that Konibaba had seven children and not three as claimed by the plaintiffs, that the seven children comprised three males namely, Thomas, David and Sadiku and four females namely, Titilola, Folaranni, Omiyale and Ibilola and that the other vendors of the conveyance to the 1st defendant are the descendents of the female children of Babayeju.

The 1st defendant claimed that he duly purchased the said land

from the family in 1975 and that he obtained the Deed of conveyance from the family in 1976.

Pleadings were ordered, filed and exchanged and at the close of hearing, the learned trial judge found for the plaintiffs and ordered as follows:

(a) *A declaration of statutory right of occupancy in favour of the plaintiffs (Babayeju family) to that piece or parcel of land situate, lying and being at Ilasamaja, Mushin in the Lagos State of Nigeria and more particularly described and edged "Red" and "Green" on plan No. OGEK66/73 dated 12th June, 1973.*

(b) *The sum of N500 against the 1st defendant in favour of the plaintiffs as general damages for trespass committed by 1st defendant on the land.*

(c) *An injunction restraining 1st defendant, his servants and/or agents from further trespassing or continuing to trespass on the said land.*

(d) *An order setting aside the deed of conveyance for the sale of the land in dispute dated 5th May, 1976 executed by 2nd defendant and seven others in favour of 1st defendant and registered as No.58 at page 58 in volume 1560 of the lands Registry in the office at Lagos."*

The defendants were dissatisfied with the judgment of the trial court and appealed to the Court of Appeal, Lagos Division. Their appeal was successful. The decision of the trial court was set aside and in its place, an order striking out the suit was made. The plaintiffs who were aggrieved by the decision of the court below appealed to this court.

The plaintiffs as appellants in this court filed a brief of argument on 23:11:90. The respondents filed no brief. At the hearing of the appeal, the parties were absent and not represented by counsel. Pursuant to Order 6, rule 8(7) of the Supreme Court Rules, the appeal was argued on the appellants brief.

In the appellants' brief the only important question for determination in the appeal is:

" Whether the Court of Appeal was right in holding that all the other seven signatories to the conveyance must be parties to this action before the Plaintiffs can rightly take up the action inspite of the strong,

unassailable and valid finding of the trial court that the sale of the family land was made without the consent of the 1st plaintiff, who is the head of the family."

It was submitted in the appellants' brief that the learned trial judge appreciated the evidence adduced before him in respect of the roles B played by the 1st plaintiff as head of Babayeju family when he held as follows:

"After the death of David in 1960 1st Plaintiff became family head and was exercising control over the land. In 1971 when the 2nd C Defendant left the land he gave permission to P.W.3 to farm on part of the land. P.W.3 was also harvesting the fruits of nut (sic) trees on the land bringing the proceeds to the 1st Plaintiff.

It was further submitted by the appellants that the sale of family land by members of a family without the consent of the family head is D void ab initio and the following cases were cited and relied upon:

- (a) Ekipendu v. Erika (1959) 4 F.S.C. 29;
- (b) Abike & Ors. V. Adedokun (1986) 3 N.W.L.R. (Pt.30) 548 at 559; E
- (c) Lukan v. Ogunsusi (1972) 5 S.C. 40;
- (d) Lahan & Ors. V. Layoyatan (1968)2 All N.L.R. 307.

It was also submitted that the sale of family land by the 2nd respondent in conjunction with some other persons without the consent F of the 1st appellant (the head of Babayeju family) was void ab initio and that the court did not interfere with this finding because it was not an issue before it.

It was the contention of the appellants in their brief that the court below was wrong when it considered the other seven signatories G (Vendors) to Exhibit "E" as necessary parties. It was argued that necessary parties are those who are not only interested in the subject matter of the proceedings but also who in their absence, the proceedings cannot be fairly dealt with. The case of Green v. Green (1987)3 N.W.L.R. (pt.61) H 480 was cited. The court was referred to the recital in Exhibit "B" which stated that the land in dispute was conveyed only to the three male children - Thomas, David and Sadiku in fee simple. It was contended that

the trial court found that the land in dispute belongs to the descendants of Thomas, David and Sadiku as members of Babayeju family to the exclusion of any other relations, that Emmanuel (1st plaintiff), Elijah (2nd plaintiff), Liadi (2nd defendant) are respectively the first sons of Thomas, David and Sadiku and are also the principal members of Babayeju family, that the 1st plaintiff was appointed the head of the family in 1960, he also became so by operation of law being the oldest. In the family and that the land was sold without the consent of the two plaintiffs. It was finally submitted that the sale was void ab initio and that the findings of the learned trial judge not having been held to be perverse remain valid. The court was referred to the cases of Chinwendu v. Mbamali (1980)3-4 S.C. 32 and Okagbue v. Romanie (1982)2 S.C. 113 at 170.

It was submitted that the action cannot be defeated because of non-joinder of the other seven vendors who joined the 2nd respondent in conveying the land to the 1st respondent because the trial court could successfully determine the rights and interests of the parties actually before it.

The appellants in the court below who are respondents in this court identified the following issues for the determination of the court below:

"(1) Whether all the parties interested in the action were before the court,

(ii) Whether the Babayeju Family comprises only the descendants of Thomas, David and Sadiku (as plaintiffs contend) or whether it also includes the descendants of Ibilola, Folaranmi, Titilola and Omiyale. If the court finds that the action is not properly constituted then proper order to make is to strike it out. See Oloride v. Oyebe (1984)1 SCNL 390. However if, but only if the court finds otherwise, then further questions will arise for determination, namely:-

(iii) Is the first plaintiff the Head of the Babayeju Family?
(iv) Were the two plaintiffs infact authorized by the members of the Babayeju Family to bring this action?

(v) Did the conveyance of the legal estate in the property in dispute to Thomas, David and Sadiku vest in them an estate for their

own benefit or as trustees for the Babayeju Family.

(vi) *Did the Babayeju family agree to sell the property in dispute to the 1st Defendant?*

(vii) *If the answer to Question (vi) is in the affirmative what is the legal consequence of such an agreement in relation to the reliefs claimed by the plaintiffs in the action."* B

With the greatest respect to the court below, it felt the substance and chased the shadow when it declined to decide the first limb of the second issue identified by the appellants before it.

The determination of that issue namely, whether Babayeju family comprises only the descendants of Thomas, David and Sadiku in the affirmative would have rendered unnecessary the consideration of any other issue formulated by the appellants in that court. C

The learned trial Judge found as follows after a careful review D and evaluation of the evidence adduced before him:-

"(a) *The land in dispute was sold by Iyewo family to Babayeju Konibaba in 1932 but it was not conveyed before he died.*

(b) *Babayeju Konibaba died in 1934 and was survived by only E three children, Thomas, David and Sadiku.*

(c) *After the death of Babayeju Konibaba in 1934 Thomas head of the family and had been in physical control of the land.*

(d) *In 1950 the Iyewo family conveyed the land to the three F children of Babayeju Konibaba in fee simple and the land was vested in their family.*

(e) *The land now belongs to the descendants of Thomas, David and Sadiku known as Babayeju family to the exclusion of any other relations.* G

(f) *Emmanuel 1st plaintiff, Elijah 2nd plaintiff and Liadi 2nd defendant are respectively the first sons of Thomas, David and Sadiku and are also principal members of Babayeju family.*

(g) *Emmanuel 1st plaintiff was appointed as head of the family H in 1960 and he also became so by operation of law being the oldest and most educated person in the family.*

(h) *The land in dispute was sold and conveyed to 1st defendant*

without the consent of the two plaintiffs and they did not also sign the conveyance Exhibit E.

(i) the sale was void.

(j) 2nd defendant spent part of N42,000.00 paid for the land rebuilding the family houses without agreement of the two plaintiffs.

(k) Babayeju family has since 1932 been in continuous possession of the land; and

(l) the 1st defendant trespassed on the land."

With the above clear findings, which are supported by the evidence, the court below had no reason to prevaricate. **The 1st plaintiff, 2nd plaintiff and the 2nd defendant are respectively the first sons of Thomas, David and Sadiku, who were the only surviving children of Babayeju Konibaba. The said 1st plaintiff, 2nd plaintiff and 2nd deferent having been found to be principal members of Babayeju family, with the 1st plaintiff as the head, the sale by 2nd defendant alone without the concurrence of the 1st plaintiff is void. It would still be void even if 2nd plaintiff joined 2nd defendant in the conveyance (Exhibit "E") without 1st plaintiff joining. See Agbeloe v. Sappor 12 W.A.C.A. 187. In Lukan v. Ogunsusi (supra) this court restated the position on the sale of family property as follows: per Ademola, C.J.N.**

"1. Bello Adedubu & Anor. v. Makanjuola, 10 W.A.C.A. 33 laid down the principle that the head of the family cannot dispose of family property without the consent of the family. The sale will be voidable.

2. Adewuyin v. Ishola (1958) W.R.N.L.R. 110 went further to say that Bello Adedubu & Anor. v. Makanjuola (supra) must not be taken to mean that every member of the family has to give his consent. It is enough if majority of the members give this consent.

We need to point out here that "majority" does not mean that members of the family will be counted by head, it means no more than majority of the accredited representatives or principal members of the family.

3. Where however the head of the family as against all the prin-

principal members of the family refused the sale of family property, It is submitted that the head of the family cannot unreasonably withhold his consent for such a sale as against all members of the family.

4. Ekpendu v. Erika 4 F.S.C.79 where Esan v. Faro 12 W.A.C.A. 135 and Agbloee v. Sappor 12 W.A.C.A 187 were both considered. The joint effect of the two cases is that the sale of family land by the head of the family without the concurrence of the principal members of the family is voidable whilst a sale by principal members of the family in which the head of the family does not concur is void ab initio.

5. The case Agbloee v. Sappor (supra) in itself makes it clear that the principal members of the family cannot give any title in the conveyance of the family, without the head of the family joining in the conveyance even if he may be in agreement."

From the above principles, **the conveyance in this case undertaken by one principal member out of three principal members and without the head of the family joining is void ab initio**. Since the sale by the 2nd defendant to the 1st defendant is null and void, I am unable to see which other party the court below required for the action to be properly constituted. The necessary parties were before the trial court and a necessary party is someone whose presence is necessary as a party.

The only reason which makes it necessary to make a person a party to an action is that he should be bound by the result of the action, and the question to be settled therefore must be a question in the action which cannot be effectually and completely settled unless he is a party. See Amon v. Rapheal Tuck & Sons Ltd. (1956)1 Q.BD. 357 at 380. See also Green v. Green (supra).

The seven other signatories to Exhibit "E" (the conveyance to the 1st defendant/respondent) are not even desirable parties. The main issue here is whether Babayeju family comprised only the descendants of Thomas, David and Sadiku and if that question is answered in the affirmative, as the learned trial judge rightly did, there can be no other inquiry as to whether the other seven signatories to the deed of conveyance to the 1st defendant (Exhibit "E") are descendants of Babayeju or not. Even

if the other seven signatories to Exhibit "E" were members of Babayeju family, the sale would still be void ab initio having regard to the findings of the learned trial judge which have not been set aside.

On the whole, the appeal is allowed and the judgment of Hotonu, J. delivered on 14th July, 1980 is hereby restored. I make no order as to costs.

UWAIS CJN

I have had the opportunity of reading in draft the judgment read by my learned brother Ogwuegbu, J.S.C. I entirely agree. For the reasons so ably stated by him, I too hereby allow the appeal. The decision of the Court of Appeal is hereby set aside with no order as to costs.

BELGORE JSC

The rationale employed by the Court of Appeal on lack of Locus Standi cannot have support in view of the various decisions of the Courts over the years. In Yoruba native law and custom, the alienation of family land without the consent of the head of family is null and void; on the other hand the head of family can only alienate to a certain extent i.e. if he alienates without the consent of the principal members of the family it is not void but avoidable. The head of family must have with him not all the members of the family- they may number thousands- but the principal members so that it will be clear there has been substantial concurrence of the principal members of the family (See Adewuyi vs Ishola (1958) WRNLR 110; Odeneye vs Efunnuga (1990) 7 NWLR (pt 164) 618, 622, 6231.

Then the question comes to: who can once the family property is being wrongly alienated? The answer is that the member of the family whose interest is threatened by the alienation or wrongful interference with the family property. Any member of the family can sue to protect his interest whether with the consent or without the consent of the other members of the family for he does not act he may find himself being held

to be standing by when his rights were being taken away. (Odeneye vs Efunuga (supra) ; Melifonwu vs. Egbuyi (1982) 9 S.C. 145; Olowosogo vs Adebajo (1988) NWLR (pt 88) 275; Orokan vs. Soremekun (1986) 5 NWLR (pt.44) 688). The appellants in this case have clearly shown their descent from a common ancestor and their land was threatened by wrongful alienation; they do not have to call the entire crowd in the family to be able to enforce their right. I therefore find merit in this appeal and I also allow it for the forgoing reasons and the fuller reasons in the judgment of my learned brother, Ogwuegbu, J.S.C. I also make no order as to costs.

WALI JSC

I have read in advance the lead judgment of my learned brother Ogwuegbu, JSC and I entirely agree with his reasoning and conclusion for allowing the appeal.

The learned trial judge, after a meticulous consideration and evaluation of the evidence before him came to the unimpeachable conclusion that the land dispute was sold to Babayeju Konibaba in 1932 and after the latter's death in 1934, the vendor- Iyewo Family conveyed the same to the three surviving children of Babayeju to wit - Thomas, David and Sadiku who are the principal members of Babayeju Family. Emmanuel Babayeju Konibaba became the head of the Family both by appointment and operation of law, he being the eldest male member of the Family.

The land in dispute was sold and conveyed to the 1st defendant by the 2nd defendant without the consent or approval of the head and other principal members of the Babayeju konibaba Family. The land in dispute being a family land cannot be validly sold without the consent and approval of the Family head and other principal members. See Ekpendu v. Erika (1954) 4 FSC 79; Ofondu v. Onuoha (1964) NNLR 120 and Lukan v. Ogunsusi (1972) 5 SC 40.

From the unassailable finding of the learned trial judge, the principal members of Babayeju Konibaba Family are Thomas, David and Sadiku, the 1st being the head. These principal members of the Family

were equally represented by Emmanuel (1st plaintiff) Elijah (2nd Plaintiff) and Liadi (2nd defendant) respectively. These are the necessary parties in the present case. The Court of Appeal was in grave error to say that the necessary parties to the litigation were not before it. It is a representative action and it is not necessary that the other seven signatories to Exhibit E which is, in any event, void and conveyed nothing to the 1st defendant, even if they are members of the Babayeju Konibaba Family but are not principal members and their non-inclusion to the action is not fatal.

For these and the more elaborate reasons in the lead judgment of my learned brother Ogwuegbu JSC, I also allow the appeal set aside the decision of the Court of Appeal and restore the judgment and orders of the trial court.

I also make no order as to costs.

OGUNDARE JSC

I agree with the judgment just delivered by my learned brother Ogwuegbu JSC.

Ogwuegbu JSC has, in his lucid judgment, set out the facts of the case leading to this appeal and the main question we have to determine. He has, in my respectful view, answered that question correctly. The reason given by the court below for setting aside the judgment of the trial High Court and striking out the action of the plaintiff was the non-joinder of all those who joined the 2nd Defendant in 1976 in executing a deed of conveyance in favour of the 1st Defendant in respect of the land in dispute in this action. My learned brother has observed in his judgment, and quite rightly in my respectful view, that the seven persons concerned were not necessary parties to the determination of the issues raised in the pleadings upon which this action was filed, having regard to the findings of the learned trial Judge which have not, in any way, been faulted. The question: who is a necessary party for the effectual and complete adjudication of a matter, can be answered by applying the test set by Willmer J in THE RESULT (1958) P.174 at p.179 wherein the

learned Judge said:

"Having regard to the terms of the rule, it appears to me that the questions to be determined on this summons are these. First, is the cause or matter liable to be defeated by the non-joinder of the third parties as defendants? This, I think means in effect: Is it possible for the court to adjudicate upon the cause of action set up by the plaintiffs, unless the third parties be added as defendants? Secondly, are the third parties persons who ought to have been joined as defendants in the first instance? Thirdly, and alternatively, are the third parties persons whose presence before the court as defendants will be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter?"

See also Oduola v. Coker (1981) 5 SC.197. ; Uku & Ors. v. Okumagba & Ors. (1974) 3 SC.35. Having regard to the pleadings in this case, it cannot be said that the trial High Court could not adjudicate upon the plaintiffs' action unless those seven persons were added as defendants. The Court below was, with respect, in error to strike out the plaintiffs suit.

Even if the seven persons were necessary parties, their non-joinder would not defeat the action. I refer to order 13 rule 19 of the High Court of Lagos State (Civil Procedure) Rules, cap 52 Laws of Lagos State 1973 (applicable at the time of this action). It provided:

"No cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The Court or a Judge in Chambers may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court or Judge in Chambers to be just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out, and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added.

....."

Surely, if the Defendants thought the seven persons were necessary parties, it was their duty to point this out at an early stage of the proceedings so that the trial Court could direct the plaintiffs to apply to have them joined as co-defendants - see: Onayemi v. Okunubi (1965) 1 All NLR 362; 365, (1965) ANLR 378; Bohsali v. Arikpo (1966) 1 All NLR 161, 165, (1966) ANLR 153. If their Lordships of the court below had adverted their minds to the relevant rule of court dealing with non-joinder, they would not have arrived at the conclusion they did striking out the suit. They were clearly wrong.

For the reasons given above and the reasons given by my learned brother Ogwuegbu JSC I too allow the appeal, set aside the judgment of the court below and restore the judgment of the trial High Court. I abide by the order for costs made in the judgment of my learned brother.

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