

**SUPREME COURT OF NIGERIA**  
26TH NOVEMBER, 1999. SC. 167/1993  
**CORAM: A. G. KARIBI-WHYTE, I. L. KUTIGI, S. U. ONU,**  
**U. A. KALGO, S. O. UWAIFO, JJSC**

ONYIANWAGWU NGWU & 6 ORS. ... DEFENDANTS/APPELLANTS  
(For themselves and on behalf of the Umu Obinagu  
Family of Okwe Amankwo Ngwo in Udi Division)

AND

ANI OZOUGWU & ANOR. .... PLAINTIFFS/RESPONDENTS  
(For themselves and on behalf of the Umu  
Ozobu and Umu Ozo Omesu Families of Okwe  
Amankwo Ngwo Udi Local Government Area)

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**ACTIONS** - Consistency - In stating one's case - Must be maintained by a party - To make litigation meaningful.

**ACTIONS** - Estoppel by standing by - Joinder of parties - Where trial court has found that a party ought to be joined - Failure to join him may give rise to estoppel - In a future action.

**APPEALS** - Discretion - Joinder of parties - Discretion of trial Court to so order - Where not perverse - Should not be overturned by appellate court.

**PARTIES** - Joinder of parties - Necessary parties - Okwe Uwani people are necessary parties in this case - Court of Appeal is wrong in holding otherwise.

**APPEALS** - Non suit - Revaluation of evidence - Where trial courts findings of fact were not declared perverse - Appellate court should not embark on a revaluation of the evidence.

### **FACTS**

Before the High Court of the defunct Anambra State holden at Enugu the plaintiffs/respondents filed an action against the defendants/appellants. Respondents claimed declaration of title of communal ownership, N500 being general damages for trespass and perpetual injunction. Respondents, appellants and Okwe Uwani family (the later not being parties to the suit) have a common ancestor called Aguma Aneke, who in his life time did not share his lands (including the ones in dispute) among his sons. The 3 families are all descendants of the said Aguma Aneke. It was alleged that Okwe Uwani has taken a particular portion leaving the lands in dispute to communal ownership between the respondents and the appellants. It was appellant's trespass on the lands by installing boundary beacons thereon that led to this action.

The trial court called on the parties to address him on the issue of non suit as the Okwe Uwani people who should be joined in the suit were not a party thereto. The parties' counsel agreed that non suit was appropriate. The trial court made an order of non suit. Thereafter, respondents appealed to the court of Appeal which reversed the order of non suit and found in their favour granting all their claims save the claim for injunction. Being aggrieved, appellants have now appealed to the Supreme Court.

### **ISSUES FOR DETERMINATION**

*"(a) Whether the Court of Appeal was right - after the trial court had unquestionably evaluated the evidence, and ordered a non-suit in view of the fact that Okwe Uwani people were not joined, to have disturbed his findings, and held that Okwe Uwani's interest should not be considered?"*

*(b) Whether the Court of Appeal was right not to have considered the concession of Counsel on a non-suit in the trial court, retracted at the Court of Appeal?"*

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

***Appeals - Non suit - Revaluation of evidence***

1. Thus, what the learned justices of the court below did was no more than to review the evidence and proceeding to decide that if they were sitting as a court of first instance, they would have exercised their discretion otherwise by not ordering a non-suit of the respondents' claims. Since the court below did not declare the findings of the trial court at page 101 and pages 105 -106 perverse or wrong, namely by declaring the same as constituting "violation of some principles of law or procedure" in the way it arrived at its decision by ordering the non-suit, it was wrong of them to have embarked on a re-valuation of the evidence of PW5 and PW7 and use it as an excuse for interfering with the findings of the trial court. See Amasa & Ors. v. Kososi (1986) 4 NWLR (Part 33) 59. (p. 2818 C)

***Joinder of parties - Necessary parties***

2. The learned trial judge, in my view, was perfectly right to have considered what right or position was held by PW7 in Okwe Uwani for him to compromise his peoples' right over "Abali" and "Osusu" lands in a case in which his people were not parties.

From the foregoing, I am of the firm view that Okwe Uwani people are necessary parties whose joinder would effectively and finally determine the rights of the parties over "Osusu" and "Abali" lands in dispute. See Green v. Green (1987) 3 NWLR (Part 61) 480. It is therefore an error in law, in my view, for the court below to hold as follows:-

*".....I do not see how a third party must be considered. If the third party wants to fight both these parties in future about these lands, or either of them, it is in the future action that the issue of standing by as enunciated in..... will be considered" (pp. 2819C/2820 E)*

***Appeals - Discretion - Joinder of parties***

3. As a matter of fact, it is within a trial court's discretion to order a joinder and if the appellate courts should as a matter of practice, overturn

the exercise of such discretion when such exercise is not perverse, except that the appeal court would have thought otherwise then, it is farewell to the exercise of discretion by trial courts. Thus, as Obaseki, JSC lucidly put it in Saraki v. Kotoye (1990) 4 NWLR (part 143) 144 at 171, paragraphs E - G:

*"The proper role of a Court of Appeal where there is a proper exercise of discretion is not to interfere with the decision. To do so merely on the ground that the appellate court would have exercised the discretion differently is an assault on justice and not within the statutory powers of the appeal court."* (p. 2819 H)

***Estoppel by standing by***

4. In the instant case, the learned trial judge at page 105 of the Records had found, rightly in my view, as follows:-

*"It is clear from the evidence of the plaintiffs that they still consider all Aguma Aneke's land un-shared. If a declaration must be made, it must as of necessity include the Okwe Uwani..... It seems to me that the Okwe Uwani people are squarely people to be affected by any decision arrived at in this case."*

These findings were not faulted by the court below but they preferred to postpone the fate of Okwe Uwani people until a future action. This ought not to be allowed to have sway here because it will easily afford the respondents an escape route should a new action be embarked upon against them later by their having to rely on the doctrine of estoppel by standing by, which is but a specie of estoppel by conduct. Indeed, it is a kind of estoppel which is applied where because a party omitted to intervene in a pending action affecting his interest, he is precluded by the result of the action although he was not a party thereto. See Wytcherley v. Andrews (supra); Ojiako v. Ogueze (1962) 1 ALL NLR 58. (p. 2822G)

***H Consistency - In stating one's case***

5. For as Oputa, JSC stated the law in Ajide v. Kelani (1985) 3 NWLR (Part 12) 248 at page 269:-

*"A party should be consistent in stating his case and consis-*

*tent in proving it. He will not be allowed to take one stance in his pleadings; then turn somersault during the trial, then assume non-challant attitude in the Court of Appeal; only to revert to his case as pleaded in the Supreme Court. Justice is much more than a game of hide and seek."*

In other words, betting on both sides, to wit: hedging instead of remaining constantly steadfast by a party, ought to be deprecated while consistency in presentation is and remains the golden rule which a party must imbibe to make litigation meaningful. None of the principles as well as cases relied on by the respondents in my respectful view, avails them. The result of all I have been saying is that the appeal wholly succeeds and is accordingly allowed by me. (p. 2824 G)

## NOTABLE POINTS OF INTEREST

### KALGO JSC

#### *1. Client is bound by his counsel's decision*

It is also important to note that the learned counsel for the respondent has conceded before the trial court that a non-suit was appropriate in the circumstances of this case. In general, a client is bound by any decision taken by his counsel in a case as the counsel being in charge of the case given to him in trust is presumed to be working in the interest of his client and the client is thereby bound by such decisions unless the contrary is proved. See ADEWUNMI V PLASTEX NIG LTD (1986) NWLR (pt.32) 262. (p. 2827 B)

### UWAIFO JSC

#### *2. Parties' concession to non suit - Cannot be retracted*

But it should be realised that non-suit is not a matter of law simpliciter. It is a discretionary decision arising from a state of facts or the state of evidence presented or conceded before the court. If the concession of those facts, or the evidence, by the parties or counsel in the case upon which the court acted to order a non-suit should turn out not to be entirely warranted, such a party or his counsel who feels aggrieved cannot be permitted to dispute the effect of that concession, or to retract his concession. He remains bound by it. It will not be a

question whether the evidence supporting a non-suit order was clear enough or not; the question will simply be that a counsel having in his discretion conducted a case in a particular way will bind his client by the result: See Strauss v Strauss (1966) L.R.1 Q.B. 379 cited with approval by this court in Mosheshe General Merchants Ltd (supra). It follows, even from the concession made by appellants' counsel at the trial court, that the order of non-suit made thereby was not an appealable issue by the appellants. The court below was in error to have entertained it to set aside the said non-suit order. (p. 2834 B)

### **REPRESENTATION**

Nnaemeka Ngige Esq. for the Appellants.

P. I. N. Ikwueto Esq. with A. U. Ogakwu Esq., and Okey Obi Esq. for the Respondents.

### **CASES REFERRED TO**

- Adewunmi v. Plastex (Nig.) Ltd (1986) 6 S.C. 214 at 223
- Ajadi v. Okenihun (1985) 1 NWLR (part 3) 484 at page 492
- Demuren v. Asuni (1967) ALL NLR 94 at 101
- Saraki v. Kotoye (1990) 4 NWLR (pt. 143) 144 at 171
- Oroke v. Ede (1964) NNLR 118 at pages 119-120
- Amasa v. Kososi (1986) 4 NWLR (Part 33) 59
- Adimora v. Ajufo (1988) 3 NWLR (Part 80) 1
- Okafor v. Idigo (1984) 6 SC. 1
- Obodo v. Ogba (1987)2 NWLR (Part 54)1
- Ebba v. Ogodo (1984) 4 SCNLR 84 at 90
- Onibudo v. Akibu (1982) ALL NLR 207
- Okpala v. Ibeme (1989) 2 NWLR (Part 102) 208

### **RULES REFERRED TO**

- High Court (Civil Procedure) Rules of Anambra State 1988 O.48 r.1, O. 4 r. 5(1)

### **LEAD JUDGMENT BY ONU JSC**

The present two plaintiffs/respondents by a motion on notice dated the 14th day of September and filed in this court on the 15th day of September, 1999, prayed and their prayer was granted, for them to be substituted in place of the four original plaintiffs (now deceased) that initially sued the seven defendants/appellants in a representative capacity. In that suit which was tried by Nwokedi, J. (as he then was) in the High Court of the defunct Anambra State, holden at Enugu, the four original plaintiffs/respondents claimed against the seven defendants/appellants, also in a representative capacity in paragraph 25 of the formers', Statement of claim, as follows:-

"25 (a) *Declaration of title of communal ownership of the pieces and parcels of land know as "Abali" and "Osusu" situate at Okwe Amankwo Ngwo, Udi Division within the jurisdiction of this Honourable Court. The said parcels of land are more clearly shown and demarcated in plan No.MEC/752/74 of 13/11/74 attached to this Statement of Claim and verged pink therein.*

(b) *N500.00 (five hundred naira) being general damages for trespass committed by the defendants in their said lands.*

(c) *A perpetual injunction restraining the defendants, their servants, agents and/or privies from entering the lands in dispute or any manner whatsoever interfering or dealing with same without prior consent of the plaintiffs."*

In the ensuing trial where evidence was led on the lines pleaded and after addresses, the learned trial judge, on 12th May, 1980 following a copious review of evidence and specifically calling on counsel to address him on the desirability or otherwise of a non-suit or dismissal, proceeded to non-suit the respondents. The latter being aggrieved, appealed to the Court of Appeal (hereinafter in the rest of this judgment referred to for short as the court below) which on 14th December, 1987 allowed the appeal granting them all the reliefs prayed for except the claim for injunction. The court below proceeded to hold, inter alia as follows:-

*"Thus, the findings of fact by the judge about PW5 and PW7 are that these are respectable, reliable, old men, from the area" of*

the disputes whose testimonies he accepted as truthful. And these two stated that the two lands Osusu and Abali belong to the appellants and the respondents who have communal interest in them. The PW7 said categorically that the Okwe Uwani people, his own village, have no interest in these two lands, as they of Okwe Uwani, have their own land called Okeagu. Since the judge believed these two old men, PW5 and PW7, I fail to see how he could have difficulty in believing as a result of their testimonies that Okwe Uwani people have no interest in these two lands, and so there could be no need for joining them as parties in this suit. Surely, that conclusion must follow and flow from his acceptance of the evidence of PW5 and PW7. He did not need to speculate about the status of PW 7 in Okwe Uwani Village. Both PW5 and PW7 said that the two lands Osusu and Abali belong to both appellants and respondents, and this was the only issue between these two parties in dispute. I do not see how a third party must be considered. If the third party wants to fight both these parties in future about these lands, or either of them, it is then in the future action that the issue of Standing By as enunciated in the case of WHITCHERLEY V. ANDREWS (1871) LR.2 P & D. 327 will be considered. Reliance on EKPERE & ORS v. AFORIJE & ORS., (1972) 1 ANLR 220 again would afford no help in this appeal as long as the only quarrel between the parties is whether or not the appellants and respondents have communal interest in these lands. Where there is clear evidence which the trial judge believed and which established this community of interest in these two lands and in the two contestants, I believe that an order of non-suit does not lie; the declaration asked for ought to have been given. The Ground of Appeal alleging a misdirection in law non-suited the plaintiffs on the score of non-joinder of the Okwe Uwani Village therefore succeeds."

The defendants/appellants (hereinafter referred to as the appellants simpliciter), being aggrieved by the above decision have appealed to this court upon three grounds and later with leave, a fourth ground, attacking the decision.

Only the appellants filed a Brief of argument before the 29th June, 1999, the day we first heard this appeal. We did so upon the appellants'



Brief alone and hence we reserved judgment to 24th September, 1999. This was not to be because before judgment day arrived, learned Counsel for the respondents brought the motion referred to in the opening sentences of this judgment firstly, for substituting all four original plaintiffs (then deceased) with the present two respondents and secondly, to extend time for them to file their Brief of argument. After the prayers were accordingly granted as prayed, time was extended to the 4th day of October, 1999, for them to file their Brief of Argument subject to their payment of any outstandingly penalties. The appeal was thereupon adjourned to 20th October, 1999, for hearing with N1,000.00 costs to the appellants.

Further, before the date fixed for the hearing of the appellants' appeal arrived, namely, 20th October, 1999, learned Counsel for the appellants submitted that as on 29/6/99, he had abandoned his application to argue additional grounds of appeal, he was seeking leave to withdraw same while asking to file a Notice of Preliminary Objection. The latter having been withdrawn was accordingly struck out leaving the stage for the consideration of the premised on the issues submitted by the parties in their Briefs of Argument. The two issues we are now called upon by the appellants to determine in this appeal (issue (c) having been abandoned by learned counsel at the hearing on 29th June, 1999) are:-

"(a) *Whether the Court of Appeal was right - after the trial court had unquestionably evaluated the evidence, and ordered a non-suit in view of the fact that Okwe Uwani people were not joined, to have disturbed his findings, and held that Okwe Uwani's interest should not be considered?*

(b) *Whether the Court of Appeal was right not to have considered the concession of Counsel on a non-suit in the trial court, retracted at the Court of Appeal?"*

The respondents in the Brief of Argument 1 had herein-before alluded to proffered two identical issues to those formulated by the appellants. These Briefs were exchanged by the parties in accordance with the rules of court and in my consideration of them, I propose to adopt the appellants' as sufficient to dispose of the appeal. But first, the brief facts of the

case:-

The respondents as plaintiffs in suit No.E/118/74 in their 25 paragraphs Statement of Claim commenced in the High Court of former East Central State, averred that they - the respondents, the appellants and Okwe Uwani family (the latter being no parties to the suit herein) have a common ancestor called Aguma Aneke, who in his life time did not share his lands (including the lands in dispute) among his four sons by his two wives viz: Omesu, Enwene, Obu and Eze. Further, that the four sons lived together, worshipped common shrines, had a common play ground and a town hall. They alleged that their common ancestors' lands Abali, Osusu and "Okeagu" vested in the appellants and respondents and Okwe Uwani family on the death of Aguma Aneke aforesaid. The respondents further averred that Eze was the ancestor of Okwe Uwani and that fifteen years before the institution of the Suit giving rise to the action herein, the Okwe Uwani family in an unnamed Suit (not tendered at the trial concerned) successfully claimed ownership of "Okeagu" land leaving "Osusu" and "Abali" lands in dispute to the respondents and appellants. The respondents finally maintained that despite binding agreements between them to regard and enjoy they said "Abali" and "Osusu" lands in common, the appellants, without their consent in 1966, trespassed on the lands in dispute, by installing boundary beacons thereon thus giving the impression of exclusive ownership of the said lands.

The appellants for their part, countered in their 27 paragraphs statement of defence of averring that Aguma Aneke had three wives and that one of those wives begat Eze (the ancestor of Okwe Uwani who are not parties to this suit), the other wife begat Omesu and Obu the third, begat Enwene (the ancestor of the appellants). Further, that the original ancestor Aguma Aneke, shared his property including the land in dispute to his family on the basis of male children of one wife inherited per stirpes i.e. according to the stocks or by the number of families. It is also the appellants' case that Aguma Aneke shared his lands into three parts for his three branches that is one part to Okwe Uwani family (who are not a party to this case) another to the appellants and the other to the respondents. Finally, the appellants stated that the respondents and appellants

never enjoyed any property in common as family, as well as Okwe Uwani family had always had its own share from Aguma Aneke.

So much for the facts and background of the case giving rise to this appeal. I now wish to deal with the issues in their order of sequence taking cognisance of the oral submission made by learned counsel for the appellants in elaboration as follows:-

ISSUE (a)

This issue questions whether the court below was right after the trial court had unquestionably evaluated the evidence, and ordered a non-suit in view of the fact that Okwe Uwani people were not joined, to have disturbed his finding, and held that Okwe Uwani's interest should be considered.

It was the appellants' submission on this issue firstly, that the learned justices of the court below exceeded the bounds of their duty as an appellate court by copiously taking the proceedings of the trial court apart and quoting profusely the evidence and cross-examination of the witnesses especially PW5 at pages 162 to 165 of the Records. This submission, in my view, is justified in that a cursory look at those pages indicate clearly that the court below in quoting in extenso from the cross-examination of particularly the evidence of PW5 at the trial court, was thereby inquiring into the dispute rather than into the ways the dispute had in fact been tried and settled. For as Karibi-Whyte, JSC cautioned in Ajadi v. Okenihun (1985) 1 NWLR (part 3) 484 at page 492:-

*"It is of intrinsic relevance to the administration of justice in our legal system that the hearing of an appeal does not permit the Appeal Court to inquire into disputes, but to inquire into ways the disputes have been tried and settled."*

The above appears to be a re-echo of the immortal words of Hurley C.J. Sitting at the High Court of Northern Nigeria in the case of Igboke Oroke v. Chukwu Ede (1964) NNLR 118 at pages 119-120:-

*"It is the business of a trial court to decide disputes by trying cases. It is not the business of an appeal court to re-open disputes by trying cases again; an appeal court's duty is to see whether trial courts have used correct procedure to arrive at the right decisions. An appeal*

*court does not inquire into deposes, it inquires into the way in which disputes have been tried and decided. Since a dispute is to be decided by the trial court and not in the appeal court, each party must make the whole of his case in the trial court and call all his witnesses there, he should not be allowed to improve on his case in the appeal court....."*

As is apparent on the record, before the learned trial judge decided to non-suit the respondents, he applied the correct procedure by calling on counsel on either side to address him on the propriety of doing so. **Thus, what the learned justices of the court below did was no more than to review the evidence and proceeding to decide that if they were sitting as a court of first instance, they would have exercised their discretion otherwise by not ordering a non-suit of the respondents' claims.**

Since the court below did not declare the findings of the trial court at page 101 and pages 105 -106 perverse or wrong, namely by declaring the same as constituting "violation of some principles of law or procedure" in the way it arrived at its decision by ordering the non-suit, it was wrong of them to have embarked on a re-valuation of the evidence of PW5 and PW7 and use it as an excuse for interfering with the findings of the trial court. See Amasa & Ors. v. Kososi (1986) 4 NWLR (Part 33) 59; Adimora v. Ajufo (1988) 3 NWLR (Part 80) 1; Okafor v. Idigo (1984) 6 SC. 1; Obodo v. Ogba (1987)2 NWLR (Part 54)1; and Ebba v. Ogodo (1984) 4 SCNLR 84 at 90.

In his oral expatiation of the appellants' Brief on 20th October, 1999, learned counsel for them, Mr. Ngige submitted that the court below was in serious error in setting aside the order of non-suit entered by the trial court, adding that there is no way the case can be heard without the joinder of the co-owners, Okwe Uwani people and hearing them. The respondents, he argued, had said that the land they inherited from their forebears was never shared. We were referred to paragraph 7 of the Statement of Claim at page 5 of the Record and also the testimony of PW1 at pages 33 and 34 and his cross-examination at pages 37-38 of the

same Record. This story of the appellants that their ancestor never shared any of his land, it was argued, was believed vide page 86 of the Record, thus necessitating the Order of Non-Suit which became inevitable. The cases of Onibudo v. Akibu (1982) ALL NLR.207 (Green cover), and Okpala v. Ibeme (1989) 2 NWLR (Part 102) 208 were called in aid after pointing out the concession made by the respondents at pages 8, 86-87 of the Record and paragraph 15 of the Statement of Claim, the latter on which no oral evidence was given to explain it only an order of non-suit will accord with the justice in the instant appeal.

**The learned trial judge, in my view, was perfectly right to have considered what right or position was held by PW7 in Okwe Uwani for him to compromise his peoples' right over "Abali" and "Osusu" lands in a case in which his people were not parties.** See Order 48 Rule 1 of the High Court Rules applicable in the defunct Anambra State which provided that:-

*"(1) The Court may in any suit, without the consent of parties, non-suit the plaintiff, where satisfactory evidence shall not be given entitling either the plaintiff or defendant to the judgment of the court".* See also Enigwe v. Akaigwe (1992) 2 NWLR (Part 225) 505 at page 538 where this court (per Akpata, JSC) stated in an unambiguous language as follows:-

*"The order of a non-suit is a creation of statute. It is applied in accordance with the intendment of the provision of the relevant statute. The provisions for its application have been abrogated in a number of Common-Wealth jurisdictions, particularly in the High Court in England. It has ceased to be applied in Lagos State. The High Court of Anambra is still with the power to non-suit in proper cases".*

The opening phrase of Order IV Rule 5 (1) of the High Court Rules of Anambra State, Cap.61 which commences "if it shall appear to the court ..... " etc. provided for the joinder of persons who may be entitled to or who claim some share or interest in the subject matter of the suit etc. **As a matter of fact, it is within a trial court's discretion to order a joinder and if the appellate courts should as a matter of practice, overturn the exercise of such discretion when such exer-**

cise is not perverse, except that the appeal court would have thought otherwise then, it is farewell to the exercise of discretion by trial courts. Thus, as Obaseki, JSC lucidly put it in Saraki v. Kotoye (1990) 4 NWLR (part 143) 144 at 171, paragraphs E - G:

B *"The proper role of a Court of Appeal where there is a proper exercise of discretion is not to interfere with the decision. To do so merely on the ground that the appellate court would have exercised the discretion differently is an assault on justice and not within the statutory powers of the appeal court."*

C See also University of Lagos v. Olaniyan (1985) 7 NWLR (Part 1) 156 at 163; University of Lagos v. Aigoro (1985) 1 NWLR 143 at 148; Demuren v. Asuni (1967) ALL NLR 94 at 101; Solanke v. Ajibola (1968) 1 ALL NLR 46 at 52; Sonekan v. Smith (1967) ALL NLR 329; Niger Construc-  
D tion Co. Ltd. v. Okugbeni (1987) 4 NWLR 787; and the latest in the series of Nwabueze v. Nwosu (1988) 4 NWLR (Part 88) 257 at pages 262 and 266; Lauwers Import-Export v. Jozebson (1988) 3 NWLR (Part 83) 429 and In Re: Adewumi & Ors., (1988) 3 NWLR (Part 83) 483,  
E where this Court has laid down as well as re-stated the principle that discretion ought not to be reversed merely because an appellate court might think it quite plain that they would have adopted a different course.

From the foregoing, I am of the firm view that Okwe Uwani  
F people are necessary parties whose joinder would effectively and finally determine the rights of the parties over "Osusu" and "Abali" lands in dispute. See Green v. Green (1987) 3 NWLR (Part 61) 480. It is therefore an error in law, in my view, for the court below to hold as follows:-

G *"..... I do not see how a third party must be considered. If the third party wants to fight both these parties in future about these lands, or either of them, it is in the future action that the issue of standing by as enunciated in ..... will be considered"*

H That the court below was in serious error in making the above pronouncement can be seen in this Court's case of Alhaji A. Onibudo & Ors. v. Alhaji A.M Akibu & Ors. (1982) ALL NLR (2nd Edition) page 207 which is on all fours with the instant case. In that case, the Plaintiffs

brought an action against the Defendants seeking among other reliefs, a declaration to a certain piece of land, possession of the land, account of all monies collected by the Defendants as well as an injunction restraining the Defendants from collecting monies from the occupiers of the land in dispute. In the course of the trial, the name "Okoko Awo Muslim Community" kept featuring as a party to be affected one way or the other by the outcome of the case. Yet, none of the parties applied to join the Community. The learned trial judge after reviewing the evidence gave judgment to the Plaintiffs, which was later upturned by the Court of Appeal. On a further appeal to this Court, the issues of non-joinder of "Okoko-Awo Muslim Community" and the desirability or otherwise of an order of non-suit in consequence thereof were considered. It was held (per Aniagolu, JSC) as follows:-

*"The evidence clearly shows that the present Mosque was built by, and with the financial contributions of, the Okoko Awo Muslim Community. The said Okoko-Awo Muslim Community has undoubted interest in the said Mosque. They were not joined in the suit. But, ideally they ought to have been joined either by the plaintiffs at the institution of the claim or by the named defendants who, at some stage after the institution of proceedings could have applied to defend the action, in a representative capacity, for themselves and for and on behalf of Okoko Awo Muslim Community in accordance with Order 13 Rule 14 of the High Court of Lagos State (Civil Procedure) Rules, Cap. 52 ....."*

*"Not having joined the Okoko Awo Muslim Community in this suit and it being necessary, as I have said, that the interest of the Community should be adjudicated upon, it is now necessary to decide on what order to make in this appeal. Should this Court:*

(i) *Dismiss the appeal simpliciter and thereby confirm the judgment of the Court of Appeal dismissing the Plaintiffs' claim especially in view of the confused state of their evidence.....*

(ii) *Order a new trial of the case in the High Court before another judge; or*

(iii) *Non-suit the Plaintiffs; or*

(iv) *Simply strike out the case."*

After deliberating on the appropriate order to make in the circumstances, the learned justice continued thus:-

"To dismiss the appeal and thereby confirm the order of dismissal made by the Court of Appeal, of the Plaintiffs' case, will undoubtedly occasion injustice to the plaintiffs whose proprietary interest in some portion, even if undefined area of the land, could, in any subsequent claim over the land, or part thereof, be met with a plea of estoppel per rem judicatam. I am therefore of the view that a dismissal order is in all circumstances, inappropriate. On the issue of whether to order a new trial or strike the case out, Mr. Ajayi, in submission, would prefer an order for retrial, with liberty for the parties to apply for any amendments they may wish, while Chief Williams would prefer a striking out. Faced with:

- D (i) the non-joinder of the Oko-Awo Muslim Community;
- (ii) the inadequacy in the plaintiffs' pleadings;
- (iii) the confusion in the account given by the plaintiffs about their family lineage, and
- E (iv) the admission of the defence of item 7 of the brochure. EXHIBIT N, calling the Mosque "Alfa Sunmonu Onibudo" House.

I think the best order that would have met the justice of the case would have been one non-suiting the plaintiffs. This is because the plaintiffs, having regard to what I have already said about their proprietary interest in some portion, though undefined area of land, have not failed in toto and the Defendants would not themselves be entitled to judgment" (Underlining is for emphasis).

See also the case of Okpala v. Ibeme (supra) whose facts are not too dissimilar to those of the case under consideration and where this court held, rightly in my view, that an order of non-suit was the most appropriated to make in the circumstances.

In the instant case, the learned trial judge at page 105 of the Records had found, rightly in my view, as follows:-

"It is clear from the evidence of the plaintiffs that they still consider all Aguma Aneke's land un-shared. If a declaration must be made, it must as of necessity include the Okwe Uwani.....



*It seems to me that the Okwe Uwani people are squarely people to be affected by any decision arrived at in this case."*

These findings were not faulted by the court below but they preferred to postpone the fate of Okwe Uwani people until a future action. This ought not to be allowed to have sway here because it will easily afford the respondents an escape route should a new action be embarked upon against them later by their having to rely on the doctrine of estoppel by standing by, which is but a specie of estoppel by conduct. Indeed, it is a kind of estoppel which is applied where because a party omitted to intervene in a pending action affecting his interest, he is precluded by the result of the action although he was not a party thereto. See Wytcherley v. Andrews (supra); Ojiako v. Ogueze (1962) 1 ALL NLR 58; Ekpoke v. Usilo (1978) 6-7 SC. 187; Etiti v. Oguta (1976) 12 SC. 12; Ogundiani v. Araba (1978) 6-7 SC.55; Abuakwa v. Adanse (1957) 3 ALL R.R 559; Obodo v. Ogba (1987) 2 NWLR (Part 54) 1 at 15; Alase v. Olori Ilu (1964) 1 ALL NLR 390 at 396; Joe Iga v. Ezekiel Amakiri (1976) 11 SC. at 12-13; Onisango v. Akinkunmi (1955-56) WNLR 39 and Wilson Etiti v. Peter Ezeobibi (1976) 12 SC. 123 at 131. This issue is accordingly answered in the negative.

#### ISSUE (b)

The appellants' grouse in issue (b) is whether the court below was right not to have considered the concession of counsel on a non-suit in the trial court, retracted at the court below. To this end, our attention was adverted to page 87 of the records where the respondents' counsel conceded as follows:-

*"The non-joinder of Okwe Uwani is a technicality.....  
It is only fair that the plaintiffs should not be permanently shut out of their rights".*

The gravamen of respondents' case both in their written Brief and in oral submission in elaboration thereof as rendered by learned counsel for them, Mr. Ikwueto, may be put shortly as follows:-

*"That a cursory appraisal of what is contained at pages 4 and 5 (paragraph 16 of the latter) of the Record, the evidence of PW7 (a*

member of the Okwe Uwani family ) at page 56 as well as that of DW6 all pointing to the fact that the joinder of Okwe Uwani family in the suit is not necessary for its determination. The cases of Green v. Green (supra) and Onibudo v. Akibu (supra) were called in aid, adding that  
 B acting on the principle decided in the case of A.G. of Oyo State v. Fairlakes Hotel Ltd. (1988) 5 NWLR (Part 92) 1 at pages 22, counsel can agree to a non-suit and that such an agreement (in this case by concession) will be binding on his client."

C Albeit, the trial court proceeded to make the order asked for by the appellants when it accordingly entered a non-suit. Now, this Court in the case of Mosheshe General Merchants Ltd v. Nigeria Steel Products Ltd. (1987) 2 NWLR (part 55) 110 at 119; (1987) 1 NSCC 502 at 508, Aniagolu, JSC quoting from Strauss v. Strauss (1866) L.R. 1 Q .B. 379, observed as  
 D follows:-

"..... Counsel retained to conduct a case has general authority to decide, in his discretion, on how to conduct the case. Having retained Counsel, the client is bound by his conduct of his case  
 E subject to this that the client can repudiate his Counsel and withdraw brief from him, if he does not approve of Counsel's conduct of the case". See also Festus L. Adewunmi v. Plastex (Nig) Ltd. (1986) 6 S.C. 214 at 223 where Eso, JSC said; inter alia, thus:-

F "A lawyer is a professional, and vis a vis a client, he is on contract, and his professional skill, hired by the client, is to be employed at his discretion. Afterall, he is employed to deal with learned men, in learned surroundings, and he himself is learned, which the client, even if he is a lawyer himself, is not learned for the purpose of the case."

G For as Oputa, JSC stated the law in Ajide v. Kelani (1985) 3 NWLR (Part 12) 248 at page 269:-

"A party should be consistent in stating his case and consistent in proving it. He will not be allowed to take one stance in his  
 H pleadings; then turn summersault during the trial, then assume non-challant attitude in the Court of Appeal; only to revert to his case as pleaded in the Supreme Court. Justice is much more than a game of hide and seek."

**In other words, betting on both sides, to wit: hedging instead of remaining constantly steadfast by a party, ought to be deprecated while consistency in presentation is and remains the golden rule which a party must imbibe to make litigation meaningful. None of the principles as well as cases relied on by the respondents in my respectful view, avails them.**

**The result of all I have been saying is that the appeal wholly succeeds and is accordingly allowed by me.** There is hereby entered an order non-suiting the plaintiffs/respondents with N10,000.00 costs to the appellants.

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### KARIBI- WHYTE JSC

I have read the leading judgment of my learned brother S.U. Onu, JSC in this appeal. I agree entirely with his reasoning and conclusion that this appeal succeeds and is allowed. I agree also that in the circumstance an order non-suiting the plaintiffs/respondents, with the cost of N10,000.00 to the Appellants is the best in the circumstances.

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### KUTIGIJSC

I read in advance the judgment just rendered by my learned brother Onu J.S.C. I agree with his reasoning and conclusions. It is abundantly clear from pleadings and evidence led in the trial court that the Plaintiffs, the Defendants and one Okwe Uwani Family have a common ancestor called Aguma Aneke who in his life time did not share his lands (including the land now in dispute) amongst his children. For some unknown reasons, the Okwe Uwani Family have not been made parties to this suit. That much was realised by the trial court. In addition, the trial court was not satisfied that the said Okwe Uwani people were aware of the case. The learned trial judge in his judgment observed as follows-

*"It seems to me that under these circumstances, the Okwe Uwani people should have been joined as parties to this suit more appropriately as defendants. In the alternative evidence should have been forthcom-*

*ing from their accredited representative divesting themselves of whatever interest they may still have subsisting in the lands in dispute. That being so, I cannot grant the Plaintiffs the declaration they have sought for without prejudicing the Okwe Uwani people."*

B After considering the submissions of counsel on both sides on the appropriateness of a non-suit order, the court concluded thus-

*"In conclusion, I consider that in the interest of justice, the Plaintiffs should be non-suited in this suit and this is the order of this court."*

C I think the trial High Court was right and the Court of Appeal was wrong for no justifiable reason to have reversed that order.

I therefore, find merit in the appeal and hereby allow it. The judgment of the Court of Appeal is set aside while the one delivered by the trial High

D Court on 12th May 1980 is restored. The Appellants are awarded N10,000.00 costs against the Respondents.

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E **KALGO JSC**

I have had the advantage of reading in advance the judgment just delivered by my learned brother, Onu JSC and I entirely agree with his reasoning and conclusions.

F It is very clear from the evidence on record that the Okwe Uwani is one of the members of the Aguma Aneke family and as such entitled to share from the properties of Aguma Aneke. The lands now in dispute i.e "Abali" and "Osusu" belonged to Aguma Aneka and there is ample evidence that it had not been shared, partitioned and allocated to the mem-

G bers of the family. It is alleged also that the Okwe Uwani group fought and won a case in respect of one part of Aguma Aneke's land called Okeagu and since then held it to themselves. But there is no convincing evidence on record to show that the Okwe Uwani group had surrendered  
H their entitlement to share from the other properties of Aguma Aneke even though 'Okeagu' was under their control. Nor is there any evidence to show that the other two groups of the Aguma Aneke family had no more rights over the 'Okeagu' land. They could have challenged the Okwe

Uwani group on this as they are entitled to do but did not. It appears to me therefore that the fact that Okwe Uwani held 'Okeagu' land to themselves did not mean that was the only land of Aguma Aneke they could hold or are entitled to from Aguma Aneke's land. Therefore the learned trial judge was right to no-suit the respondents to allow Uwani to come in B and litigate on the other pieces of Aguma Aneke's land since they are entitled to do so. This would have the effect of settling all the issues involved and reduce the multiplicity of litigation in respect thereof.

It is also important to note that the learned counsel for the respondent has ceceded before the trial court that a non-suit was appropriate C in the circumstances of this case. In general, a client is bound by any decision taken by his counsel in a case as the counsel being in charge of the case given to him in trust is presumed to be working in the interest of his client and the client is thereby bound by such decisions unless the D contrary is proved. See ADEWUNMI V PLASTEX NIG. LTD (1986) NWLR (pt.32) 262. P.W.5 and PW7 though coming from Okwe Uwani family gave evidence in their personal and not representative capacities. There was no evidence to show that they were sent to testify on behalf E of the Okwe Uwani family. Therefore whatever they said did not bind Okwe Uwani family and could not be taken as evidence given against that family's proprietary interest.

For the above reasons and the more detailed reasons given in the F leading judgment, I also find merit in the appeal. I dismiss it and restore the decision of the trial court. I make the order of costs as in the leading judgment.

G

### UWAIFO JSC

This appeal ought to be essentially considered upon the relevant averments on the pleadings of the parties and the evidence led. I think that makes it easy to appreciate why an order of non-suit made by the H learned trial judge meets the justice of the case.

The ancestor of the parties, Aguma Aneke, who owned what the plaintiffs/respondents call agu land of which the parcels of land they

named abali and osusu form part, had two wives, according to the plaintiffs. The plaintiffs and the defendants/appellants descended from the first wife who had three sons. The second wife had one son from whom the present Okwe Uwani Ngwo descended. There is no dispute that all  
 B four sons were entitled to inherit from agu land. The plaintiffs aver that agu lands were never divided among the four sons by their ancestor.

The defendants averred that their ancestor had three wives. One begat a son from whom Okwe Uwani family descended. Another wife  
 C begat two sons from whom the plaintiffs descended, and the third wife begat a son from whom the defendants descended. The defendants call the land in dispute isiofia and that it is their share of the land owned by Aguma Aneke; the plaintiffs got their share and Okwe Uwani family also got their share. The defendants allege that this apportionment into three  
 D parts was done based on each of the three wives.

The plaintiffs in paras. 11,12,13,14,15 and 19 pleaded their case to the effect that Aguma Aneke's land was jointly owned by themselves, the defendants and Okwe Uwani (not made a party to the suit); that these  
 E three families enjoyed and exercised maximum acts of ownership and possession until about 1960 (i.e. 15 years from the time the statement of claim was filed in December, 1974) when "the people of Okwe Uwani in a suit against all Ngwo, successfully claimed ownership of Okeagu land  
 F leaving Osusu and Abali lands in dispute to plaintiffs and defendants.

The defendants however joined issue with the plaintiffs on the said averments as reflected also in paras. 11,12,13,14, 15 and 19 of their statement of defence. As already said, they claim that Aguma Aneke shared his land into three portions, giving each party's share: thus Osusu  
 G land (as shown in the defendant's plan) belongs to the plaintiffs; isiofia land to the defendants; and agbassa land to Okwe Uwani.

The plaintiffs also claim that okwe uwani descended directly from Eze, Eze being one of the sons of Aguma Aneke. I shall refer to  
 H some passages in the evidence of p.w.1, p.w.3 and p.w.7. In his evidence, p.w.1 Ugwu Onuigbo, said:

*"when Aguma Aneke was alive he owned three farmlands namely 'osusu', 'abali' and 'okeagu'. Aguma did not share these lands to his*

sons. *I have economic crops on this land. We also farm these lands. Okeagu land now belongs to the descendants of Eze. They were sued sometime ago by the Ngwo people over the said okeagu land. The Eze descendants won the case against Ngwo people and then claimed the land. After taking over 'okeagu', the defendants and ourselves continued to farm and own 'abali' and 'osusu' land".* B

On his part p.w.3, Ozo Onu Ude, said in his evidence:

*"The land in dispute was owned by Aguma children in common. Besides abali and osusu lands our great grandfather had other lands known as 'okeagu' or 'ogbessa'. Our ancestor left for his sons three farm lands namely abali, osusu, okeagu. He left these lands to his four sons. The descendants of Eze are the Okwu Uwani people. of the said three pieces of land, the descendants of Eze have taken ogbessa land also known as 'okeagu' land. There was a land case against the okwe Uwani people descendants of Eze by Ngwo people. The Okwu Uwani people won the case. The case was about okeagu or ogbessa land. We joined in the action against Okwu Uwani people. After they won the case they appropriated the okeagu land. After losing the okeagu land, we of the three brothers continued to own abali and osusu lands together."* C D E

The evidence of p.w.7, Ogbu Nwagu, is significant in the sense that as a member of Okwe Uwani he appeared to have given evidence which would appear capable of disentitling Okwe Uwani from the lands put in dispute by the plaintiffs. He said: F

*"The lands in dispute belong to the three families in this case. We of the different mother have our own pieces of land. Our own land has a common boundary with the land in dispute. Our common father Aguma did not share his lands to his sons before he died. After our said father's death, some time ago, the people of Ngwo as a whole sued us for declaration of title to okeagu land. We fought this action. The Ngwo people were joined by the three families of Umuozobu, Umu Omesu and Obinagu i.e. the parties in this suit (sic: The Ngwo people joined the three families.....). We won the case and took the land to ourself. (Emphasis added)." G H*

It is true that the learned trial judge accepted the evidence of

p.w.7 in these words:

*P.W.7 from okwe Uwani was totally unshaken in cross-examination and I am inclined to accept his evidence."*

P.w.5, Ogbodo Aru Ono's evidence is relevant only in respect really as regards the common boundary between his family land and the land in dispute. When d.w.5, Mathew Nnadi, was cross-examined, the following was recorded:

Q: If there is a dispute between your village and another, Ogbodo Aro Onoh will be relied upon to give the truth about the history of your people or their land?

A: Yes

Q: Your people will rely on him to tell the boundaries of your land in case of a dispute?

A: Yes. We will accept *his statements as to our boundaries.*

It was in this regard, the learned trial judge made finding thus:

*P.W.7 is from Umuaseh. He is a very old man. Even D.W.5 himself admitted that his evidence about the land umuaseh people can be relied upon. I prefer his evidence to that of d.w.5."*

It was these findings by the learned trial judge about p.w.5 and p.w.7 that the court below seized upon to attack the order of non-suit made by the judge. The court below *per* Ikwechegh JCA said inter alia:  
*"Thus, the findings of fact by the judge about p.w.5 and p.w.7 are that those are respectable, reliable old men, from the area of the disputes whose testimonies he accepted as truthful. And these two stated that the two lands Osusu and Abali belong to the appellants and the respondents who have communal interest in them. The p.w.7 said categorically that the okwe Uwani people, his own village, have no interest in those two lands, as they of Okwe Uwani, have their own land called okeagu. Since the Judge believed these two old men, p.w.5 and p.w.7, I fail to see how he could have difficulty in believing as a result of their testimonies that Okwe Uwani people have no interest in these two lands, and so there could be no need for joining them as parties in this suit.....*  
 Both p.w. 5 and p.w.7 said that the two lands Osusu and Abali belong to both appellants and respondents, and this was the only issue between



these two parties in dispute. I do not see how a third party must be considered..... I believe that an order of non-suit does not lie." (Emphasis added)

With due respect to the learned Justice of the Court of Appeal, I do not think that matter is as simplistic as he put it. It is clear to me that he read into the findings on the evidence of p.w.5 and p.w.7 beyond what they were really intended and what they truly are worth. That part of the evidence of p.w.7, for instance, which says "We won the case and took the land to ourself (sic)" cannot be overlooked. Does this imply that the land which was litigated upon remained part of the undivided land of Aguma Aneke? Under what colour can it be said that Okwe Uwani became the owner of that portion

Land simply because they were sued although the suit was eventually defended by all the families? Can any court indeed accept the oral evidence of the decision of a court when the judgment was not produced; or can it be even legally taken that there was such litigation as alleged when there is no admissible evidence, and when the party about whom this critical evidence was given was not made a party to these proceedings?

The reasoning of the learned trial judge on this issue must be carefully understood. He said inter alia:

*"It is clear from the evidence of the plaintiffs that they still consider all Aguma Aneke's land unshared..... It seems to me that the Okwe Uwani people are squarely people to be affected by any decision arrived at in this case. Would the plaintiffs consider them legitimate co-owners of the 'abali' and 'osusu' lands as well all portions of the Aguma Aneke homestead? It is not enough to state that they have now acquired 'oke-agu' or 'agbasa' land for themselves. On the plaintiffs' evidence, it is not clear if they have abandoned all claims to their undivided shares of ' abali' and 'osusu' lands....."*

*p.w.7 from Owe Uwani testified for the plaintiffs. I have no evidence before me to prove that he was testifying as a representative of the Okwe Uwani and with their consent. Whatever was his status or position in Okwe Uwani, was not established in evidence. I cannot therefore accept*

him as capable of compromising his people."

The learned trial judge thereafter referred to some aspects of the statement of claim and proceeded to say"

"It is then obvious from the pleadings that the plaintiffs are seeking to divest the Okwe Uwani people, with all finality, whatever interest they may have still subsisting in the lands in dispute. This was the burden of the evidence of the plaintiffs. It seems to me that under these circumstances, the okwe Uwani people should have been joined as parties to this suit more appropriately as defendants."

It can be seen that the learned trial judge may well have believed what p.w. 5 and p.w. 7 said in their evidence, but he considered the effect and consequences even in the face of that evidence. It is obvious from this case that the interest of Okwe Uwani is acknowledged by the plaintiffs in the land Owned by Aguma Aneke who was the ancestor of the parties to this suit as well as of Okwe Uwani. The plaintiffs' position is that that land was not shared among his children. But they rely on at best a doubtful circumstance under which they claim okwe Uwani descendants ceased to have interest in the present land in dispute having attached their interest to only a portion of it not in dispute. In other words, that they have divested themselves of the other portion now in dispute. I think the learned trial judge rightly held that a clearly satisfactory evidence would be needed to uphold such a divestment. The defendants also confirmed the Okwe Uwani's right to Aguma Aneke's land but alleged that the land was shared by Aguma Aneke and that okwe Uwani took their share. That again was not satisfactorily proved.

It seems what appears to be a kind of mock litigation was engaged in by the parties in court over the ownership of property in respect of which the interest of a third party Okwe Uwani, may still well subsist. It is no argument that the parties may have the issue arising from such litigation finally decided between them while the third party may take the option of asserting their right to the said property should the need arise in future. This is where joinder of parties, when it is seen to be necessary for the effectual and final determination of a matter in issue, becomes an appropriate procedure to adopt under the prevailing court rules.

Having regard to the assertion by p.w.7 that he belongs to the Okwe Uwani community, there is the danger, as noted by this court in Onibudo v Akibu (1982) 13 NSCC 199 in a similar situation, of Okwe Uwani being faced with the difficulty and implication arising from any subsequent suit by the plaintiffs or defendants over the ownership of the land in question as to why they stood by and allowed p.w 7 to knowingly take part in a prior litigation over the same land in which he denied the said Okwe Uwani's interest therein. This court, in that case, came to the conclusion that since the interest of a party not before the court was raised and challenged, the justice of the case would be met by an order of non-suit,

I certainly think that also applies to the present case. Such an order will provide Okwe Uwani the opportunity to be joined to defend their interest in the land, if any. I am satisfied that the court below was in error, upon an incorrect view it took of the essential circumstances of this case to have set aside the order of non-suit made by the learned trial judge. It was a discretion properly exercised by the learned trial judge which an appellate court will not ordinarily be entitled to interfere with even if it would have exercised it differently: see Demuren v Asuni (1967) All NLR 94 at 101; Solanke v Ajibola (1968) 1 All NLR 46 at 52; Saraki v Kotoye (1990) 4 NWLR (pt. 143) 144 at 171.

Learned counsel for the respondents has argued that the non-suit order to which counsel, who represented the respondents (as plaintiffs) in the trial court, conceded was not binding either on this court or on the respondents. The ground for this contention is that non-suit is a matter of law and that no one can properly concede a law which has been erroneously applied, nor can it be properly waived by a party who is aggrieved thereby. It is true that a party will not be held bound by his concession to a wrong meaning of a legal result or a wrong statutory interpretation if the occasion should arise again in the same or subsequent proceedings as to the true legal position. A party will only be held bound by facts admitted or conceded, or such other matters capable of being waived by a party in the course of proceedings. Such a concession or waiver can be made by a counsel on behalf of a party who re-

tained him to conduct a case under the general authority he has in respect of that case: see Adewunmi v Plastex (Nig) Ltd (1986) 6 S.C. 214 at 223; Mosheshe General Merchants Ltd v Nigeria Steel products Ltd (1987) 2 NWLR (Pt.55) 110 at 119.

B But it should be realised that non-suit is not a matter of law  
simpliciter. It is a discretionary decision arising from a state of facts or  
the state of evidence presented or conceded before the court. If the  
concession of those facts, or the evidence, by the parties or counsel in  
the case upon which the court acted to order a non-suit should turn out  
C not to be entirely warranted, such a party or his counsel who feels ag-  
grieved cannot be permitted to dispute the effect of that concession, or  
to retract his concession. He remains bound by it. It will not be a  
question whether the evidence supporting a non-suit order was clear  
D enough or not; the question will simply be that a counsel having in his  
discretion conducted a case in a particular way will bind his client by the  
result: see Strauss v Strauss (1966) L.R.1 Q.B. 379 cited with approval  
by this court in Mosheshe General Merchants Ltd (supra).

E It follows, even from the concession made by appellants' coun-  
sel at the trial court, that the order of non-suit made thereby was not an  
appealable issue by the appellants. The court below was in error to have  
entertained it to set aside the said non-suit order. This is apart from the  
F fact that the evidence in the present case, from the record, fully justified  
the discretion exercised by the learned trial judge in making the non-suit  
order. I therefore agree with my learned brother Onu, JSC that there is  
merit in this appeal in any event for the foregoing reasons and the further  
reasons he has given. I too allow the appeal and restore the order of non-  
G suit with costs of N10,000.00 to the appellants.

H