

SUPREME COURT OF NIGERIA
19TH FEBRUARY, 1999. SC. 183/1991
CORAM:- M. L. UWAIS CJN, S. M. A. BELGORE, I. L.
KUTIGI, S. U. ONU, A. I. IGUH, JJSC.

JOSEPH AGBAHOMOVO & 2 ORS. PLAINTIFFS/
(For themselves and on behalf of APPELLANTS
Esaledho family of Esaledho Street, Oleh)

AND

APATA EDUYEGBE & 6 ORS. DEFENDANTS/
(For themselves and on behalf of RESPONDENTS
Ofa family of Oleh)

BETWEEN: AND

APATA EDUYEGBE & 2 ORS. PLAINTIFFS/
(For themselves and on behalf of RESPONDENTS
Ofa family of Oleh)

AND

JOSEPH AGBAHOMOVO & 2 ORS. DEFENDANTS/
(For themselves and on behalf of APPELLANTS
Egero family of Oleh)

EVIDENCE - Admissibility - Under s. 90 (1) Evidence Act - The plans in the instant case - Were admissible under that section - When their maker was called as a witness

EVIDENCE - Documents - Admissibility of evidence - Depends on the purpose for which it is being tendered - The trial Court was wrong - To have rejected the plans sought to be tendered in this case.

FAIR HEARING - Denial - Of fair hearing - What amounts to such a denial.

FAIR HEARING - Right - To fair hearing - It is a right to be heard - At every material stage of the proceedings.

PLEADINGS - Amendment - Plans - Which has been amended with leave of court - Does not cease to exist - It still forms part of the proceedings.

FACTS

In two consolidated suits NO. HCO/17/82 and HCO/17X/82 in the defunct Bendel State High Court sitting in Oleh, the parties to the cross-actions sought the following reliefs; title to the land in dispute, forfeiture of customary tenancy, order for permission to redeem the said land, together with the consequential orders for recovery of possession as well as perpetual injunction. Pleadings were duly filed and exchanged and the case went to trial. The plaintiffs/appellants in the course of the proceedings amended the three survey plans filed by them with the leave of the court. On the three previous plans filed by the plaintiffs they showed boundarymen that agreed with those shown on defendant's plan. A fourth plan was then drawn and filed showing totally different boundary men. The defendants sought by way of cross-examination and the tendering of those previous plans to show the inconsistencies on the part of the plaintiffs. The learned trial judge refused to admit the plans in evidence and expunged from the records the evidence already elicited from the 3rd plaintiff under cross-examination in respect of the said plans. He also disallowed further questions relating to those plans during the trial. It was the view of the trial court that the said plans having been duly amended by the leave of court no more existed and were no longer material before the court.

At the end of the trial, the learned trial judge entered judgment substantially in favour of the plaintiffs/appellants. Being dissatisfied, the defendants/respondents appealed to the Court of Appeal, Benin Division. That Court was of the view that what the trial court did amounted to wrongful exclusion of evidence and deprived the defendants of a fair hearing. The Court accordingly set aside the judgment and orders of the trial court and ordered a retrial of the consolidated suits before another judge. Aggrieved, the plaintiffs have now appealed to the Supreme Court raising two issues. The defendants dissatisfied in part with the judgment

of the Court of Appeal to wit: the order sending the cases back to the High Court for retrial filed a cross - appeal with the leave of court.

ISSUES FOR DETERMINATION

1. *Whether the Court of Appeal was right in holding that it amounted to wrongful exclusion of evidence and lack of fair hearing occasioning miscarriage of justice for the learned trial Judge to have refused to admit, and indeed, to have expunged from the record, all evidence relating to three Survey plans which had been duly amended and abandoned beyond recall by the appellants.*

2. *Whether the Court of Appeal gave a fair hearing and/or hearing at all to the appellants whose case in this appeal was considered on the Survey plans aforesaid.*

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

Pleadings - Amendment

1. I agree with the respondents' proposition that a statement of claim or defence which has been amended with leave of court, as in the appeal under consideration, does not cease to exist. It still forms part of the proceedings and the court cannot shut its eyes against it. If it were a plan that was amended as contended by the appellants, can the court look at it and make use of it? MY answer is that it can as this court did in its recent decision in Salami & Ors. v. Oke (1987) 5 NWLR (Part 63) 1 at 9; (1987) 2 NSCC 1167 at 1173. From the above cited authorities, it is clear that the contention of the appellants that the three amended plans were no longer in existence and a fortiori abandoned has no legal support and ought therefore to be jettisoned. It follows that the learned trial Judge was completely wrong in law when he held that the plans which were amended were no longer before the court. The court below was therefore right in reversing the decision of the trial court. (p. 448 F)

Evidence - Documents

2. Admissibility of evidence, particularly documents, it ought to be borne in mind, depends on the purpose for which it is being tendered. See

section 6 of the Evidence Act, Cap. 112 Laws of the Federation of Nigeria and the case of Torti v. Ukpabi (1984) 1 SCNLR 214 and Ikabala v. Ojosipe (1988) 4 NWLR 119 at 127. As pleaded in paragraph 23 of the respondent's amended statement of defence, the respondent manifested an intention to tender the plans only to discredit the evidence of the appellants. This can legitimately be done by virtue of Section 198 of the Evidence Act, LFN 1990 Cap. 112. The respondents did not seek to tender the previous three plans to define the issue to be tried but rather to highlight the inconsistencies in the appellant's case and also to impugn their veracity. Compare this finding with that in Onobruhere v. Esegine (1986) 1 NWLR (Part 19) 799 at 808 where this court held that the court below was in error in holding that two plainly inadmissible documentary evidence were rightly admitted. The trial Judge in the instant case was therefore wrong to have rejected the plans when the respondents sought to tender them in evidence. The court below was justified, in my respectful view, to have set aside the decision of the trial court therefor. (p. 450 H)

E
Evidence - Admissibility

3. In the case of Oyetunji & Ors. v. Akanni & Ors. (1986) 5 NWLR (Part 42) 461 at 469, the Court of Appeal (per Omo, JCA as he then was) emphasized the point under consideration where it held inter alia even though allowing the appeal on other grounds that:-

"A statement oral or written (express or implied) made by a party in civil proceedings which is adverse to his case is admissible in the proceedings as evidence against him of the truth of the facts asserted in the statement....."

From the foregoing, it becomes clear that the three plans in the instant case were also admissible under Section 90(1) of the Evidence Act (ibid) when their maker PW11 (Surveyor - Chief Isikwe Umemezie) was called as a witness. He admitted on oath making these plans. The court below, in my respectful view, was therefore right in holding that the trial Judge was wrong in rejecting them. Reliance by the appellant on the principle decided in the case of Warner v. Sampson (supra) is, in my

respectful view, misconceived. (p. 451 F)

Fair hearing - Denial

4. On what really amounts to a denial of fair hearing, this Court held in Otapo & Ors. v. Sunmonu & Ors. (1987) 5 SCNJ 56 at 75 (per Obaseki, B JSC) as follows:-

A hearing can only be fair when all parties to the dispute are given a hearing or an opportunity of a hearing. If one of the parties is refused a hearing or not given opportunity to be heard, the hearing cannot qualify as fair hearing. Without fair hearing the principles of natural justice are abandoned." C

Thus, when in the instant case the trial Judge wrongfully, in my view, restrained the respondents from asking questions or giving evidence to the amended plans, he has breached the fundamental right of the respondents to be heard which tantamounts to a violation of one of the twin pillars of natural justice, namely the audi alteram partem principle. (p. 452 G) D

Fair Hearing - Right

5. The right to a fair hearing does not stop with the parties being present in court. It is a right to be heard at every material stage of the proceedings. Thus, in Ekuma v. Silver Eagle Shipping Agencies Ltd. (1987) 4 NWLR (Part 65) 472 at 486 Nnameka-Agu, JCA (as he then was) expressed it as follows:- E

"The rule of audi alteram partem postulates that the court or other tribunals must hear both sides at every materia stage of the proceedings before handing down a decision on that stage. It is a rule of fairness. A court cannot be fair unless it considers both sides of the case as may be presented by both sides." G

See also section 33(1) of the Constitution of the Federal Republic of Nigeria, 1979 and the case of Nwokoro v. Onuma (1990) 3 NWLR (Part H 136)22 at page 33 where this court held, inter alia that :-

"..... the principle of fair hearing not only demands but also dictates that the parties, to a case must be heard in the case formulated

by them."

Consequently, when the trial Judge restrained the respondents from asking questions at the crucial stage of the proceedings or giving evidence relating to the amended plans and indeed, went ahead to expunge the evidence already given from the records, he thereby denied the respondents a fair hearing. The court below, in my respectful view, was justified and perfectly within its rights in allowing the respondents' appeal on that ground and setting aside the judgment and orders of the trial court. (p. 453 B)

NOTABLE POINTS OF INTEREST

IGUH JSC

1. Original pleading which has been amended is no longer material

There can be no doubt that once pleadings are duly amended by the order of court, what stood before amendment is no longer material before the court and no longer defines the issues to be tried before the court. See Warner v. Sampson (1959) 1 Q.B 321. This, however, is as far as this proposition of law goes. It does not and has not laid down any such principle that an original pleading which has been duly amended by an order of court automatically ceases to exist for all purposes and must be deemed to have been expunged or struck out of the proceedings. The clear principle of law established is that such original pleading which has been duly amended is no longer material before the court in the sense that it no longer determines or defines the live issues to be tried before the court, not that it no longer exists. It does certainly exist and is before the court. It is however totally immaterial in the determination of the issues to be tried in the proceedings. It thus cannot be considered as the basis of one's case in any action. Nor may a court of law rely on any such original pleading which has been duly amended as the basis for its judgment in the suit. The issues to be tried will depend on the state of the final or amended pleadings. See Salami v. Oke (1987) 4 N.W.L.R (Part 63) at 9 and 12 and Agbaisi and other others v. Ebikorefe and others (1987) 4 N.W.L.R. (Part 502) 630 at 647- 649. (p. 456 D)

2. Consequences of wrongful rejection of relevant evidence

And where, as in the present case, the trial court had wrongly expunged from the record, evidence which ought to have been considered along with the other evidence led at the trial and further disallowed further questions relating to relevant evidence, an appeal court will have no option than to send the case back for a retrial to enable all the relevant evidence to be heard and determined by the trial court. See Adeyemo v. Arokopo (1988) 2 N.W.L.R. (Part 79) 703, Okoye v. Kpajie (1973) N.M.L.R. 84, Onyema Oke v. Thomas Eke (1982) 12 S. C. 218. That is exactly what the court below did in the present case. (p. 458 D)

REPRESENTATION

B. O. Olokor Esq. for the appellants

Respondents absent. Not represented.

CASES REFERRED TO

Salami v. Oke (1987) 4 N.W.L.R (Part 63) at 9 and 12

Torti v. Ukpabi (1984) 1 SCNLR 214

Ikabala v. Ojosipe (1988) 4 NWLR 119 at 127

Onobruhere v. Esegine (1986) 1 NWLR (Part 19) 799 at 808

Oyetunji v. Akanni (1986) 5 NWLR (Part 42) 461 at 469

Otapo v. Sunmonu (1987) 5 SCNJ 56 at 75

Nwokoro v. Onuma (1990) 3 NWLR (Part 136) 22 at page 33

Warner v. Sampson (1959) 1 Q.B 321

Agbaisi v. Ebikorefe (1987) 4 N.W.L.R. (Part 502) 630 at 647- 649

Adeyemo v. Arokopo (1988) 2 N.W.L.R. (Part 79) 703

Okoye v. Kpajie (1973) N.M.L.R. 84

Oke v. Eke (1982) 12 S. C. 218

STATUTES REFERRED TO

Evidence Act, Cap. 112 Law of the Federation of Nigeria 1990, ss. 6, 90 (1) and 198

Constitution of the Federal Republic of Nigeria 1979, s. 33 (1)

LEAD JUDGMENT BY ONU JSC

This appeal concerns the consequences of wrongful expurgation of documentary evidence by the trial court which decision the Court of Appeal set aside and the Supreme Court views of the aftermath thereof on further appeal thereto.

In the two consolidated suits No. HCO/17/82 and HCO/17x/82 in the defunct Bendel State High Court sitting in Oleh, the reliefs sought by the parties to the cross-actions were title to the land in dispute, forfeiture of customary tenancy, order for permission to redeem the said land, together with the consequential orders for recovery of possession as well as perpetual injunctions.

Pleadings having been ordered duly filed and exchanged, the case went to trial before Akpiroroh, J, (as he then was) sitting at Oleh in the defunct Bendel State High Court. At the end of the trial, the learned trial Judge entered judgment substantially in favour of the plaintiffs/appellants.

Being dissatisfied with this decision, the defendants/respondents appealed to the Court of Appeal, Benin Division sitting at benin city (hereinafter in this judgment referred to as the court below). The court below after considering the written as well as oral submissions of the counsel for both parties, held, allowing the appeal thus:-

".....Here, on 3 previous plans filed by the respondents they showed boundarymen that agreed with those shown on appellant's plan. A 4th plan was then drawn and filed showing totally different boundarymen. The appellants sought, by cross-examination and the tendering of those previous plans to show the inconsistencies on the part of the respondents. Such evidence, if allowed, would only go to the weight to be attached the evidence of the 3rd respondent and their new boundarymen as to who as between these new boundarymen and those the appellants claimed to be boundary men, were indeed boundarymen to the land in dispute. It is that opportunity the trial Judge had denied the appellants when he expunged from the record the admissions so far given on the point by the 3rd respondent and disallowed further questioning on the point and later rejected in evidence the first of the previous three

plans drawn by P.W. 11. In my respectful view, what the trial Judge did amounted to wrongful exclusion of evidence As frankly conceded by Chief Idigbe the proper order this Court ought to make in the circumstance is one of retrial of the consolidated suits The judgment of the court below given on 21/8/86, including the order for costs, is set aside. I order that the consolidated Suits Nos. HCO/17/82 and HCO/17x/82 be retried before another Judge of the High Court of Bendel State."

Aggrieved by the said decision of the court below, the appellants have now appealed to this court on two grounds.

The respondents supported the judgment of the court below only to the extent that it allowed the appeal and set aside the judgment and orders of the trial court, but are dissatisfied with the order sending the cases back to the High Court for retrial. Consequently they obtained leave of this court and filed a cross-appeal on two grounds.

The parties subsequently exchanged briefs of argument in accordance with the rules of this court - with this court granting an application for enlargement of time within which to file and serve the Appellants' brief dated 17th February, 1992 but filed on 23rd February, 1998 and regularized by being filed and served on 3rd March, 1998 as well as enlarging the time within which to file and serve the Respondents' brief of argument in the Cross-Appeal as well as the Reply to the respondents' brief dated 24th March, 1993 and regularizing and/or deeming same as properly filed and served on 3rd March, 1998 respectively.

The two issues which in the appellants' opinion arise for our determination are:-

1. *Whether the Court of Appeal was right in holding that it amounted to wrongful exclusion of evidence and lack of fair hearing occasioning miscarriage of justice for the learned trial Judge to have refused to admit, and indeed, to have expunged from the record, all evidence relating to three Survey plans which had been duly amended and abandoned beyond recall by the appellants.*

2. *Whether the Court of Appeal gave a fair hearing and /or hearing at all to the appellants whose case in this appeal was considered*

on the Survey plans aforesaid.

The respondents for their part proffered three issues as arising in the main appeal, to wit:

B (i) *Whether the Court of Appeal was right in holding that the refusal of the trial Judge to admit in evidence the previous amended plans was wrongful and it resulted in substantial miscarriage of justice.*

C (ii) *Whether or not the Court of Appeal was right in holding that the order of the trial court expunging from the record all evidence relating to the previous amended plans and the order restraining the respondents from asking questions or giving evidence relating to the amended plans amount to a denial of fair hearing.*

D (iii) *Whether the Court of Appeal was right in sending the consolidated cases back to the High Court Oleh for retrial when it is clear from the evidence that the appellants did not prove their title to the land in dispute.*

E When this appeal came up for hearing on 23rd November, 1998, B.O. Olorok Esq., the learned counsel for the appellants alone was present. He adopted the brief of the appellants hereinbefore alluded to and without more urged us to allow the appeal. The respondents whose counsel was absent were themselves absent from court. We took their brief earlier referred to as having been argued.

F In my consideration of the appeal hereunder, I intend to take the appellants' two issues seriatim and not the respondents' issue because the appellants issues clearly overlap the two grounds of appeal and accord with common sense. I will commence with the first issue first as follows:-

G ISSUE NO .1.

H The appellants' complaint here is whether the court below was right in holding that it amounted to wrongful exclusion of evidence and lack of fair hearing occasioning a miscarriage of justice for the learned trial Judge to have refused to admit, and indeed, to have expunged from the record, all evidence relating to three survey plans which had been duly amended and abandoned beyond recall by the appellants.

After asserting that the court cannot fall back on original plead-

ings after same had been duly amended and abandoned, it was contended on appellants' behalf that it is common ground, that the three survey plans in question were duly amended at several different times during the trial; to wit: plan No. LSU 5032 on 10/1/78; LSU 6646 on 7/2/79; plan No. LSU 7948 on 7/2/80; and plan No. LSU 2587 on 5/5/83.

That being so, it was further argued, the three earlier survey plans amended by the appellants as indicated and admitted on the respondents' brief in the lower court, ceased to be the basis or documents on which the appellants fought their case. The reason for this, it was further contended, is because the appellants had by their amendment of the three survey plans, abandoned the said amended survey plans.

Puts in another way, it was maintained, the argument here as stated in Rotimi v. Macgregor (1974) 11 SC. 133 at 152; (1974) 1 NMLR (Part 11) 325 at 430 quoting the English case of Warner v. Sampson & Anor. (1959) 1 QB. 297, that:-

"Once pleadings are amended, what stood before amendment is no longer material before the court and no longer defines the issues to be tried."

Other cases called in aid of the proposition include:-

1. Oguma Associated Companies (Nig.) Ltd. v. IBWA (1988)1 NWLR (Part 73) 658 at 673; (1988) SCNJ (part 1) 13 at 26.

2. Nwosu v. Imo Environmental Sanitation Authority & Ors. (1990)2 NWLR (Part 135) 688 at page 717; C-D and Nwokoro v. Onuma & Anor. (1990) 3 NWLR (Part 136) 22 at page 33, F -H to mention only a few.

In a way, it is further argued, it is really a matter of jurisdiction in the sense that the court has no jurisdiction to resuscitate and consider an issue which an amendment of the pleadings has rendered no longer an issue - that is, a non-issue. The case of Chief Abraham v. Olorunfunmi (1991) 1 NWLR (Part 165) 53 was cited to buttress the contention, adding that the court below was wrong in reversing the learned trial Judge who, quite rightly, rejected and expunged from the record evidence relating to the three survey plans which had been amended, and

indeed abandoned by the appellants.

It is further submitted that since the issue of the purported plans did not arise on the appellants' current/amended statement of claim, evidence relating to the said plans is inadmissible, albeit that such evidence was elicited from cross-examination, and without objection from counsel to the appellants vide Usefowokan v. Idowu & Anor. (1969) 1 All NLR (part 1) 125 at page 131 - 132. Nor can the said survey plans be revived, it is further argued, without their being pleaded by the respondents who did not appeal from the orders granting the amendments. The respondents in their further amended statement of defence dated 18th April, 1986, it is pointed out, pleaded the said three survey plans later abandoned by the appellants following the amendments duly effected with leave and by order of the trial court. It should however be pointed out also, argued the appellants, that there is nothing on record of appeal to show that the respondents lodged any appeals from the orders of the trial court granting the amendments sought in respect of the said three survey plans. Accordingly, it is contended, it was not open to the respondents to now put in issue the three survey plans in question. Reliance was one more placed on the case of Warner v. Sampson (supra) as well as Oguma Associated Companies (Nig) Ltd. v. IBWA Ltd. (1988) 1 NWLR (Part 73) 658; (1988) 3 SCNJ (Part 1) 13 following Sneade v. Weatherton etc (1904) 1 KB at 297. In conclusion, it is contended that the legal proposition stated here as regards the effect of amendment of a writ equally applies to the amendment of a survey plan, Mutatis Mutandis.

I agree with the respondents' proposition that a statement of claim or defence which has been amended with leave of court, as in the appeal under consideration, does not cease to exist. It still forms part of the proceedings and the court cannot shut its eyes against it. Thus in Salami v. Oke (1987) 4 NWLR (Part 63) 1 at page 9, Kawu, JSC who delivered the leading judgment of this court said inter alia :-

"I might as well deal with related argument about the Statement of Defence that was later amended by another Statement of Defence. It was contended that the trial Judge has no right to refer to the Statement

of Defence since it has been amended. This is not correct. Because it was amended does not mean it was expunged or struck out, and no longer part of the proceedings. The trial court cannot shut its eyes against it, although it cannot consider it as the basis of the defence in the action."

In his contribution to the above leading judgment Obaseki, JSC said:- B

"It is enough to say that the learned trial Judge did not use the original statement of defence as the basis of his judgment and the use he made of it was to highlight the important issues raised in the amended statement of defence"

That the point that an amended Statement of Defence of Claim (in the case in hand in relation to the amended plans) is not a novel point i.e. that it is still a part of the proceedings and can properly be looked at or referred to by the trial Judge in his judgment, was supported in an earlier judgment of the Federal Supreme Court in the case of Owonyin v. Omotosho (1961) All NLR (Part 11) 304. In that case, the plaintiff sued for - D

"A declaration that the land belongs both to the plaintiffs' family and the defendants' family according to native law and custom." E

Later, he amended the claim with leave of court to read that he was asking for declaration that the land belonged to his family only. In his leading judgment Bairamian, F.J. said:

"I have looked at the evidence for the defendant, and it is my view that it supports the plaintiffs' case as originally presented in his statement of claim that the land belongs to both families." F

This Court had of recent the occasion to decide a non-too-dissimilar case as this in Chief M.O.A Agbaisi & 3 ors. v. E. Ebikorefe & 6 Ors. (1997)4 NWLR (Part 502) 630, where the question that arose for resolution was which of two plans prepared by two named surveyors was that which the learned Justice of the Court of Appeal looked at while considering the appeal therein. I held at page 648 of the Report *inter alia* as follows:- G

"It is clear from the above quoted passage that the plan the learned Justice looked at is the plan prepared by PW1 Surveyor Chukwurah and not the one prepared by Surveyor Obianwu." H

The next logical question is whether he has a right to look at the

document in the file which was not tendered as an exhibit. My answer to this question is in the affirmative. See Ada v. Uku (1977) 5 FCA 218 at 227; Ogbuyiya v. Okudo & Ors. (1979) 3 LRN 318 at 324 and Ladunni v. Kukoyi (1972) 1 All NLR (Part 1) 133. The next pertinent question is: **if**

it were a plan that was amended as contended by the appellants, can the court look at it and make use of it? MY answer is that it can as this court did in its recent decision in Salami & Ors. v. Oke (1987) 5 NWLR (Part 63) 1 at 9; (1987) 2 NSCC 1167 at 1173 where Kawu, JSC quoted with approval the views taken by the Court of Appeal, Ibadan Division (Uche Omo, JCA (as he then was and Dosunmu and Omololu - Thomas JJ.C.A.) as follows:-

"I might as well deal with the related argument about the statement of defence. It was contended that the trial Judge has no right to refer to the Statement of Defence since it has been amended. This is not correct. Because it was amended does not mean it was expunged or struck out, and no longer part of the proceedings. The trial court (Appeal Court) cannot shut its eyes against it, although it cannot consider it has the basis of the defence in this action."

In this case, the court did not only refer to the amended statement of claim but in fact made use of it to the extent that the case presented by the plaintiff was in keeping with the original statement of claim and not in support of the new amended statement of claim. **From the above cited authorities, it is clear that the contention of the appellants that the three amended plans were no longer in existence and a fortiori abandoned has no legal support and ought therefore to be jettisoned. It follows that the learned trial Judge was completely wrong in law when he held that the plans which were amended were no longer before the court. The court below was therefore right in reversing the decision of the trial court.**

Admissibility of evidence, particularly documents, it ought to be borne in mind, depends on the purpose for which it is being tendered. Thus, in Kuruma v. R (1955) AC. 197 at 203, a case dealing with the general situation in civil or criminal matters in respect of admissibility, it was held as follows:

"In their Lordships' opinion the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained. There can be no difference in principle for this purpose between a civil and criminal case....."

See section 6 of the Evidence Act, Cap. 112 Laws of the Federation of Nigeria and the case of Torti v. Ukpabi (1984) 1 SCNLR 214 and Ikabala v. Ojosipe (1988) 4 NWLR 119 at 127. As pleaded in paragraph 23 of the respondent's amended statement of defence, the respondent manifested an intention to tender the plans only to discredit the evidence of the appellants. This can legitimately be done by virtue of Section 198 of the Evidence Act, LFN 1990 Cap. 112. The respondents did not seek to tender the previous three plans to define the issue to be tried but rather to highlight the inconsistencies in the appellant's case and also to impugn their veracity. Compare this finding with that in Onobruhere v. Esegine (1986) 1 NWLR (Part 19) 799 at 808 where this court held that the court below was in error in holding that two plainly inadmissible documentary evidence were rightly admitted. The trial Judge in the instant case was therefore wrong to have rejected the plans when the respondents sought to tender them in evidence. The court below was justified, in my respectful view, to have set aside the decision of the trial court therefor.

In the case of Oyetunji & Ors. v. Akanni & Ors. (1986) 5 NWLR (Part 42) 461 at 469, the Court of Appeal (per Omo, JCA as he then was) emphasized the point under consideration where it held inter alia even though allowing the appeal on other grounds that:-

"A statement oral or written (express or implied) made by a party in civil proceedings which is adverse to his case is admissible in the proceedings as evidence against him of the truth of the facts asserted in the statement....."

From the foregoing, it becomes clear that the three plans in the instant case were also admissible under Section 90(1) of the

Evidence Act (ibid) when their maker PW11 (Surveyor - Chief Isikwe Umemezie) was called as a witness. He admitted on oath making these plans. The court below, in my respectful view, was therefore right in holding that the trial Judge was wrong in rejecting them.

B Reliance by the appellant on the principle decided in the case of Warner v. Sampson (supra) is, in my respectful view, misconceived.

Issue 1 is accordingly answered in the affirmative.

ISSUES NO.2

C The query raised by issue 2 is whether the court below gave a fair hearing and/or hearing at all to the appellants whose case in this appeal was considered on the survey plans aforesaid.

D It is conceded that it is a fundamental principle and requirement of law that parties are entitled to be heard on the cases put forward by them before the court. Thus, the case of Nwokoro & ors. v. Onuma & Anor. (1990) 3 NWLR (Part 136) 22; (1990) 5 SCNJ 93 in which the Court of Appeal considered the appellants' case on the original brief of argument duly filed in court, this Court in allowing the appeal on the **E** ground that they were not given a fair hearing and/or hearing at all (per Karibi-Whyte, JSC), observed at pages 32-33, H-A and page 100 as follows:-

F *"A party is entitled as of right to the consideration of his case before the court. Thus, where the court has relied on the case abandoned by the litigant in the determination of his grievance before it, it will not only be a misuse of the expression that he has been given a fair hearing, it will also be more accurate to say that he was not heard at all."*

G Nnamani, JSC of blessed memory, in his contribution at page 35 and page 103 respectively of the report added:

"The right to be heard is so fundamental a principle of our adjudicatory process that it cannot be compromised on any ground."

H **On what really amounts to a denial of fair hearing, this Court held in Otapo & Ors. v. Sunmonu & Ors. (1987) 5 SCNJ 56 at 75 (per Obaseki, JSC) as follows:-**

A hearing can only be fair when all parties to the dispute are given a hearing or an opportunity of a hearing. If one of the parties is

refused a hearing or not given opportunity to be heard, the hearing cannot qualify as fair hearing. Without fair hearing the principles of natural justice are abandoned."

Thus, when in the instant case the trial Judge wrongfully, in my view, restrained the respondents from asking questions or giving evidence to the amended plans, he has breached the fundamental right of the respondents to be heard which tantamounts to a violation of one of the twin pillars of natural justice, namely the audi alteram partem principle. The right to a fair hearing does not stop with the parties being present in court. It is a right to be heard at every material stage of the proceedings. Thus, in Ekuma v. Silver Eagle Shipping Agencies Ltd. (1987) 4 NWLR (Part 65) 472 at 486 Nnameka-Agu, JCA (as he then was) expressed it as follows:-

"The rule of audi alteram partem postulates that the court or other tribunals must hear both sides at every materia stage of the proceedings before handing down a decision on that stage. It is a rule of fairness. A court cannot be fair unless it considers both sides of the case as may be presented by both sides."

See also section 33(1) of the Constitution of the Federal Republic of Nigeria, 1979 and the case of Nwokoro v. Onuma (1990) 3 NWLR (Part 136)22 at page 33 where this court held, inter alia that :-

"..... the principle of fair hearing not only demands but also dictates that the parties, to a case must be heard in the case formulated by them."

Consequently, when the trial Judge restrained the respondents from asking questions at the crucial stage of the proceedings or giving evidence relating to the amended plans and indeed, went ahead to expunge the evidence already given from the records, he thereby denied the respondents a fair hearing. The court below, in my respectful view, was justified and perfectly within its rights in allowing the respondents' appeal on that ground and setting aside the judgment and orders of the trial court.

In the result, the second issue argued herein is also answered in the affirmative.

CROSS APPEAL BY THE RESPONDENTS

In this Cross-appeal there is only one issue for determination. It is:

Whether the Court of Appeal is justified in failing or neglecting to dismiss the appellants' claim when it was clear from the argument presented by the respondents in their brief of argument under (b) Grounds 10 - issue 2 at pages 216-217.

In the light of the forgoing, coupled with the admonition of the court below to the effect that:

"In view of the conclusion I have just reached and in order not to prejudice the retrial to be ordered, I shall refrain from pronouncing on the other issue raised in this appeal."

the treatment of this issue to conclusion becomes non-sequitur.

The consequence of all I have been saying is that the appeal lacks merit and it is accordingly dismissed. The case is remitted to the High Court, Oleh, Delta State for trial de novo. There shall be costs assessed at N10,000.00 in favour of the respondents.

UWAIS CJN

I have had the advantage of reading in draft the judgment read by my learned brother Onu, J.S.C. I agree that the appeal lacks merit.

Accordingly it is hereby dismissed and I adopt the consequential order in the said judgment.

BELGORE JSC

I read in advance the lead judgment of my learned brother Onu, JSC, and for the reasons adumbrated therein, I also dismiss this appeal as totally lacking in merit. I award N10,000.00 (Ten Thousand Naira) as costs in this appeal.

IGUH JSC

I have had the privilege of reading in draft, the judgment just delivered by my learned brother, Onu, J.S.C. and I entirely agree that this appeal is without substance and should be dismissed.

The main issue that arises for consideration in this appeal is the wrongful exclusion of relevant evidence in a proceeding by a trial court. The complaint is that the learned trial Judge denied the respondents the opportunity of presenting their case fully before the court by refusing to admit in evidence three survey plans numbers LSU 5032 of the 10th January, 1978, LSU 6646 of the 7th February, 1979 and LSU 7948 of the 7th February, 1980 filed by the appellants in the suit but were subsequently amended by the order of court. It was the view of the trial court that the said plans having been duly amended by the leave of court no more existed and were no longer material before the court. The contention of the respondents is that if those three survey plans had been admitted in evidence, they would have thoroughly discredited the evidence of the appellants on the important issue relating to the boundary men of the land in dispute. It was submitted that the respondents were seriously prejudiced by the ruling of the learned trial Judge which not only rejected the plans in evidence but expunged from the records the evidence already elicited from the 3rd appellant under cross-examination in respect of the said plans and also disallowed further questions relating to those plans during the trial. Said the learned trial judge:-

"Plans Nos. LSU 5032 of 10/1/78, LSU 6646 of 7/2/79 and LSU 7948 of 7/2/80 were duly amended by leave of court and as such the only plan before the court in this case is plan No. LSF 2587 of 5/5/83 and no more. The only plan which to my mind is material to this court and defines the issue to be tried in so far as the instant case is concerned is plan No. LSF 2587 of 5/5/83 and any cross-examination outside it is irrelevant and should be disallowed.

Suffice to say that I am unable to accede to the submissions of learned counsel for the defendants that his line of cross-examination on the plans which were duly amended by leave of court is perfectly in order. The objection of learned counsel for the plaintiffs is sustained and fur-

ther cross-examination on plans Nos. LSU 5032 of 10/1/78 LSU 6646 of 7/2/79 and LSU 7948 of 7/2/80 is disallowed as they are no longer before the court in this action. The evidence already elicited from the 3rd plaintiff on the said plans is also expunged from the record of proceedings for the same reason."

The respondents contended before the court below and before us that by the above ruling, the learned trial Judge had prevented them from proving their case by discrediting the case of the appellants before the trial court.

The Court of Appeal was of the view that what the trial court did amounted to wrongful exclusion of evidence and deprived the respondents of a fair hearing. It also held that by this conduct on the part of the fair hearing. It also held that by this conduct on the part of the trial court, a grave miscarriage of justice was thereby occasioned. The court accordingly set aside the judgment and orders of the trial court and ordered a retrial of the consolidated suits before another Judge.

There can be no doubt that once pleadings are duly amended by the order of court, what stood before amendment is no longer material before the court and no longer defines the issues to be tried before the court. See Warner v. Sampson (1959) 1 Q.B 321. This, however, is as far as this proposition of law goes. It does not and has not laid down any such principle that an original pleading which has been duly amended by an order of court automatically ceases to exist for all purposes and must be deemed to have been expunged or struck out of the proceedings. The clear principle of law established is that such original pleading which has been duly amended is no longer material before the court in the sense that it no longer determines or defines the live issues to be tried before the court, not that it no longer exists. It does certainly exist and is before the court. It is however totally immaterial in the determination of the issues to be tried in the proceedings. It thus cannot be considered as the basis of one's case in any action. Nor may a court of law rely on any such original pleading which has been duly amended as the basis for its judgment in the suit. The issues to be tried will depend on the state of the final or amended pleadings. See Salami v. Oke (1987) 4 N.W.L.R (Part 63) 1 at 9 and 12 and Agbaisi and other others v. Ebikorefe and others

Dealing with the effect, if any, the relevant ruling of the learned trial Judge had in his determination of the suit, the Court of Appeal per the leading judgment of Ogundare, J.C.A., as he then was, posed the following questions:-

"The questions then arise: Are the respondents' 3 previous plans relevant in the circumstances of this case? And, was the learned trial Judge right in refusing to admit them in evidence for the purpose for which they were sought to be tendered by the defence? Was he also right in expunging from the record that part of the evidence of the 3rd respondent relating to the previous plans and tending to show inconsistencies on the part of the respondents as to who their boundary-men were?"

In answering the above questions, the court below stated:-

"Here, on 3 previous plans filed by the respondents, they showed boundarymen that agreed with those shown on appellants' plan. A 4th plan was then drawn and filed showing totally different boundarymen. The appellants sought, by cross-examination and the tendering of those previous plans, to show the inconsistencies on the part of the respondents. Such evidence, if allowed, would only go to the weight to be attached to the evidence of the 3rd respondent on their new boundarymen and as to who as between these new boundarymen and those the appellants claimed to be the boundarymen were indeed the boundarymen to the land in dispute. It is that opportunity the trial Judge had denied the appellants when he expunged from the record the admissions so far given on the point by the 3rd respondent and disallowed further questions on the point and later rejected in evidence the first of the previous three plans drawn by P.W.II. In my respectful view, what the trial Judge did amounted to wrongful exclusion of evidence. In my humble view, I cannot say that, had the trial Judge not ruled as he did, and the appellants had succeeded in establishing the inconsistencies on the part of the respondents as to the boundarymen to the land-in-dispute, his decision would have been the same. Indeed, by the course adopted by the learned Judge he had deprived the appellants of fair hearing and grave miscarriage of Justice had been occasioned thereby. As frankly conceded by Chief Idigbe

the proper order this Court ought to make in the circumstance is one of retrial of the consolidated suits."

I am in full agreement with the above observations of the Court of Appeal and fully endorse them. It seems to me that whilst the issues to be tried in a case will depend entirely on the state of the final pleadings, a party may nonetheless be cross-examined on any relevant issue with a view to impugning his evidence at the trial. I think that the learned trial Judge was in error when, in effect, he ruled that the three plans in issue were no longer before the court and could not therefore be used for whatever purpose. In my view, when the trial court restrained the respondents from cross-examining the 3rd appellant or giving evidence relating to the three plans and, indeed, proceeded to expunge the evidence already elicited from the records in respect of those plans, it denied the respondents a fair hearing. In my opinion, the Court of Appeal was quite right in allowing the respondents' appeal on that ground and in setting aside the judgment and orders of the trial court. And where, as in the present case, the trial court had wrongly expunged from the record, evidence which ought to have been considered along with the other evidence led at the trial and further disallowed further questions relating to relevant evidence, an appeal court will have no option than to send the case back for a retrial to enable all the relevant evidence to be heard and determined by the trial court. See Adeyemo v. Arokopo (1988) 2 N.W.L.R. (Part 79) 703, Okoye v. Kpajie (1973) N.M.L.R. 84, Onyema Oke v. Thomas Eke (1982) 12 S. C. 218. That is exactly what the court below did in the present case.

It is for the above and the more detailed reasons contained in the leading judgment of my leading brother, Onu, J.S.C. that I, too, dismiss this appeal and affirm the decision of the court below. I abide by the consequential orders including those as to costs made in the leading judgment.

KUTIGI JSC

Also greed with the lead judgment.