

**SUPREME COURT OF NIGERIA**  
26TH FEBRUARY, 1999. SC. 103/1994  
**CORAM:- S. M. A. BELGORE, A. B. WALI, I. L. KUTIGI,**  
**E. O. OGWUEGBU, U. MOHAMMED, JJSC**

THE SHELL PETROLEUM DEVELOPMENT ..... DEFENDANT/  
COMPANY OF NIGERIA LIMITED APPELLANT  
AND  
KWAMEH AMBAH ..... DEFENDANTS/RESPONDENTS  
(For himself and on behalf of Wesewese  
family of Ojobo in Burutu Local Government Area)

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***DAMAGES*** - *Special damages - Award of - Special damages not based on the facts pleaded - Cannot be allowed to stand.*

***DAMAGES*** - *The principle of restitution in integrum - Claim for total destruction of property - The measure of damages will be the value of the property - At the time of its destruction.*

***PLEADINGS*** - *Amendment - The principle of law - Relating to the amendment of pleadings - Is that it can be granted at any stage of the Proceedings - Provided it is not prejudicial to the other party.*

***PLEADINGS*** - *Amendment - To fall in line with the evidence adduced - The Court has always granted it - Even after the completion of the trial.*

***PLEADINGS*** - *Evidence - Which is not in line with the facts pleaded - Goes to no issue.*

**FACTS**

By a writ of summons filed in Warri High Court of the then Bendel State (now Delta State) the plaintiff/respondent brought an action against the defendant/appellant. In the further amended statement of claim the plain-

tiff for himself and on behalf of Wesewese family of Ojobo in Burutu Local Government Council Area claimed the sum of N300,000 (Three Hundred Thousand Naira) being special damages and N3,000 (Three Thousand Naira) being general damages suffered by them when the defendant caused their fish ponds, creeks, lakes and channels situate at ASEA OBA BUSH near the BENISEIDE OIL FIELDS in Burutu Local Government Council Area to be destroyed in 1977. The plaintiff averred that the defendant's agents and servants covered up fish ponds, fish lakes, fish channels and creeks of the plaintiff's family in the adjoining area with the mud dredged from the area actually acquired, causing the plaintiff and his family colossal loss of their only means of livelihood. And that the said properties have since become permanently destroyed. They gave particulars of their losses by way of special damages. It was as result of the defendant's failure, neglect and or refusal to pay reasonable and adequate compensation to the plaintiff and members of his family, despite repeated demands that they brought the action.

After the conclusion of trial, the trial judge reserved judgment for 11th June, 1987. On 7th May, 1987 learned counsel for the plaintiff filed a Motion on Notice dated 6th May, 1987 praying for an order amending the further Amended Statement of claim. The aim of the amendment was to make the pleading fall in line with the evidence adduced at the trial by the plaintiff which is to the effect that his family used to realize annually the various sums attached to the various sizes of fish ponds, fish lakes and fish channels, prior to their total destruction by the defendant. The amendment was to frame the statement of claim to reflect the fact that the fish yields were an annual event. The application was moved and granted despite strong opposition by learned counsel for the defendant. After the grant of the application the learned trial judge delivered his judgment on the same day in favour of the plaintiff and in line with the Still Further Amended Statement of Claim. Aggrieved, the defendant appealed to the Court of Appeal, Benin Division. The appeal was unanimously dismissed with a slight reduction of the amount awarded as special damages from N300,000 to N297,000. The defendant has further appealed to the Supreme Court raising two issues.

**ISSUES FOR DETERMINATION**

"i. Whether the learned Justices of the Court of Appeal were right in holding that the learned trial Judge was right in granting an amendment of the Respondent's pleadings at the stage he did.

ii. Whether having regard to the state of the pleadings, evidence and the law the learned Justices were right in awarding special damages of N297,000.00 at the rate of 27,000.00 for eleven years?"

**HELD** (Unanimously allowing the appeal in part per lead judgment of **WALI JSC**)

***Pleadings - Amendment***

1. The principle of law relating to the amendment of pleadings is that it can be granted at any stage of the proceedings provided it does not introduce a new cause of action, or will over-reach or is prejudicial to the other party. See Eshelby v. Fed European Bank (1932) 1 K.B 254; Lautfi v. Czarnikow (1952) 2 All ER 823. Akoh v. Abah (1976) 4 SC 69 and Order 14 of the Bendel High Court (Civil Procedure) Rules, 1976 (Cap 65). (p. 478 A)

***Amendment - To fall in line with the evidence adduced***

2. Where an amendment has become imperative by reason of variance between the statement of claim and the evidence adduced at the trial by the plaintiff, the court has always granted it even after the completion of the trial and judgment reserved. See A.C.B v. Ewarami (1978) All NLR 114 and Okafor v. Ikeanyi (1979) 3 and 4 SC 99 where in the latter case this court granted the amendment of the plaintiff / respondent's statement of claim to fall in line with his evidence, which was originally refused by the trial court. The grant of the application was therefore in order. The issue is resolved against the appellant. (p. 478 C)

***Pleadings - Evidence***

3. The evidence of the plaintiff and respondent are not in line with the Still Further Amended Statement of Claim and cannot be said to have

proved the special damage of N300,000. Both paragraph 7 of the Further Amended Statement of Claim and paragraph 7 of the Still Further Amended Statement of Claim fail to give particulars of special damage reflecting N300,000. The particulars in (a), (b), (c), (d) of paragraph 7 B merely state the number of items destroyed and the value of each with the addition thereto of the word "per annum". It was not stated therein from which year to which. The amended pleading did not aver that the respondent's claim is for the continual loss of income resulting from the C destruction of the items listed therein for the period 1976 - 1987. The claim still remains for compensation as a result of permanent destruction of the items by the appellant. Evidence given which is not in line with the facts pleaded goes to no issue and is of no help to the party that produces it. See Emegokwe v. Okadigbo (1973) 4 SC 113. Thompson D Organisation v. N.P.I.C. & Ors. (1969) NNLR 99. (pp. 481 F/483 C)

***Damages - The principle of restitution in integrum***

4. Where there is a claim for total destruction of property, the measure of E damages will be the value of the property at the time of its destruction. See Liesbosch Dredger v. S.S Edison (1933) AC 449 and Danefoh v. Skaran 7 WACA 113. This is based on the principle of restitution in integrum. (p. 483 E)

F  
***Damages - Special damages***

5. The total amount claimed by the respondent as compensation for the permanent destruction of items listed in the Still Further Amended Statement of Claim is N27,000. This has not been contested by the appellant G in this appeal. The amended sum of N297,000 awarded as special damage to the respondent by the Court of Appeal cannot be allowed to stand as it is not based on the facts pleaded by them.. It is inappropriate. For the reasons stated herein this appeal must succeed on the amount awarded H as special damage. It is accordingly allowed and the amount is reduced to N27,000 in line with the respondent's claim. (p. 483 F)

## NOTABLE POINTS OF INTEREST

### BELGORE JSC

#### *1. The court must award what a party claims not what he ought to claim*

The claim by the plaintiff is limited to the property destroyed, not for loss of fish anticipated to be caught annually. The Court must award what a party claims, not what in many cases he ought to claim, otherwise the court may find itself making case that a party has not made out. There was no claim for the period 1976-1987 and the courts below were in error to award for this period; perhaps they were swayed by counsel for the plaintiffs alluding to the issue and any issue on them should be discounted as the courts must decide cases on legally receivable evidence only. (Emegokwe v. Okadigbo (1973) 4 SC. 113; Thompson Organisation v. NPIC & Ors. (1969) NWLR. 99). (p. 484 B)

### OGWUEGBU JSC

#### *2. In a claim for total destruction of property the plaintiff is normally entitled to the market value*

This is a case of total destruction of property by the wrongful act of the defendant/appellant. The plaintiff is normally entitled to the market value. There is no market value of the items listed in the statement of claim but the plaintiff in his pleadings and evidence gave the amount of the annual income derived from each large and medium fish ponds, fish lakes and fish channels. He testified that he was claiming special and general damages he suffered. It is not the case of the appellant that the plaintiff did not suffer any damage. Their main contention is that the learned trial judge and the learned Justices of the Court of Appeal were in error in holding that special damages at the rate of N27,000.00 per annum for eleven years had been proved. There being no dispute that the plaintiff suffered damages for which he is entitled to compensation for the permanent destruction or in the words of the plaintiff "special and general damages" for the loss suffered. I am satisfied that he is entitled to the sum of N27,000.00 and no more. (p. 485 F)

**REPRESENTATION**

C. A. Ajuyah for the appellant

Chief A. O. Akpedeye, for the respondent

**B CASES REFERRED TO**

Eshelby v. Fed European Bank (1932) 1 K.B 254

Lautfi v. Czarnikow (1952) 2 All ER 823

Akoh v. Abah (1976) 4 SC 69

A.C.B v. Ewarami (1978) All NLR 114

**C** Okafor v. Ikeanyi (1979) 3 and 4 SC 99

Emegokwe v. Okadigbo (1973) 4 SC 113

Organisation v. N.P.I.C. (1969) NNLR 99

Liesbosch Dredger v. S.S Edison (1933) AC 449

**D** Danefoh v. Skaran 7 WACA 113

Foko v. Foko [1968] NMLR 441 at 446 - 44

**RULES REFERRED TO**

**E** Supreme Court Rules O.6 rr 1 and 2

Bendel State High Court (Civil Procedure) Rules Cap. 65, 1976. O. 14

**LEAD JUDGMENT BY WALI JSC**

**F** By a Writ of Summons filed in Warri High Court of the then Bendel State, (now Delta State), the plaintiff, Kwameh Ambah (for himself and on behalf of Wesewese family of Ojobo in Burutu Local Government Area) claimed for the following relief against the defendant, the Shell Petroleum Development Company:-

**G** **CLAIM**

*"The plaintiffs' claim for himself and on behalf of Wesewese family of Ojobo in Burutu Local Government Council Area is for the sum of N30,000.00 (Thirty thousand naira) being special and general*  
**H** *damages suffered by the plaintiff and members of his family when the defendant by their agents and or servants destroyed the first ponds, Creeks, lakes, and channels lying and situate at ASESAOBA near the BENISEIDE OIL FIELDS in Burutu Local Government Council Area, Bendel State*

of Nigeria in 1977 over which this Honourable court exercises jurisdiction.

The defendants have neglected, failed and or refused to negotiate and or pay reasonable and or adequate damage (compensation) to the plaintiff and members of his family, despite repeated demands, wherefore, the plaintiff claims N30,000.00 (thirty thousand naira) as damages." parties joined issues and exchanged pleadings.

In the Further Amended Statement of Claim and in paragraphs 6, 7, 8 and 9 thereof, the plaintiff averred as follows:-

"6. In complete disregard of the Plaintiff's letter referred to above, the Defendant's agents and servants covered up fish ponds, fish lakes, fish channels and creeks of the plaintiff's family in the adjoining area with the mud dredged from the area actually acquired, causing the plaintiff and his family colossal loss of their only means of livelihood, and in May, 1977, the plaintiff again wrote to the Defendant requesting it to send its officials to the area to assess the damage done to them by the Defendant. Defendant sent no reply neither did it take any steps to assess the said damage. Plaintiff shall at the hearing rely on the said letter dated 24th May, 1977.

7. Again on its August, 1977, plaintiff sent a reminder to the Defendant which also fell on deaf ears. The said fish ponds, fish lakes, creeks and channels have since become permanently destroyed. The property of the plaintiff's family so destroyed and or rendered useless by the Defendant and their value by way of special damage are:

a. Ten large fish ponds at N1,000.00 - per fish pond ..... = N10,000

b. Six medium size fish ponds - at N500 per fish pond ..... = N3,000

c. Eight big fish lakes at N500 - per fish lake ..... N4,000

d. Twenty long fish channels at N500 per fish channel .... N10,000

Plaintiff shall rely on the said letter dated 1st August, 1977 at the hearing.

8. Plaintiff and his family made several attempts by visits to the office of the Defendant at Warri to make the Defendant see reason for

*the assessment and payment of reasonable and adequate compensation to them, but without avail.*

9. *The Defendant has failed, neglected and or refused to pay reasonable and adequate compensation to the plaintiff and members of his family, despite repeated demands wherefore the plaintiff claims as follows namely:*

*"The plaintiff's claim for himself and on behalf of Wesewese family of Ojobo in Burutu Local Government Council Area is for the sum of N300,000 (Three Hundred Thousand Naira) being special damages and N3,000 (Three Thousand Naira) being general damage suffered by the plaintiff and members of his family when the Defendant by its agents and or servants destroyed the fish ponds, creeks, lakes and channels lying and situate at ASEA OBA BUSH near the BENISEIDE OIL FIELDS in Burutu Local Government Council Area, Bendel State of Nigeria in 1977 over which this Honourable Court exercises jurisdiction."*

After the conclusion of the trial court, the trial judge reserved judgment for 11th June, 1987. On 7th May, 1987, Chief A.O. Akpedeye learned counsel for the plaintiff filed a Motion on Notice dated 6th May, 1987 with the following prayer-

*"An order Amending the Further Amended Statement of claim hereto attached and marked Exhibit "A" ..... and that the Still Further Amended Statement of Claim be deemed as duly filed and served having paid the appropriate fees."*

In support of the application, Kwameh Ambah, the plaintiff, swore to an affidavit in which he deposed to the following facts in paragraphs 3, 4, 5 and 6 to wit:

*"3. That on the 9th day of October, 1986 I gave evidence before this Honourable Court in support of paragraph 7 of the further amended statement of claim that my family used to realize annually the various sums attached to the various sizes of fish ponds, fish lakes and fish channels, prior to the total destruction of the said fish ponds, fish lakes and fish channels, by the Defendants/Respondents, herein.*

*4. That I have since discovered that the said paragraph 7 of the*



*further amended Statement of Claim was not framed to reflect the fact that the fish yields were an annual event.*

5. *That my Counsel Chief A.O. Akpedeye has advised me and I verily believe in his advise that leave of this Honourable Court must be sought and obtained before the necessary amendments in the pleadings can be affected.*

6. *That the proposed amendment is underline [sic] in the Still Further Amended Statement of Claim annexed to this affidavit and marked as Exhibit 'A' ."*

On 11th June, 1987, the application was moved and granted despite strong opposition by learned counsel for the defendant. After the grant of the application Odita J delivered his judgment on the same day in favour of the plaintiff and in line with the Still Further Amended Statement of Claim. He concluded thus -

*"On the whole, the plaintiff succeeds in his claim for special damages and I therefore enter judgment for the plaintiff against the Defendant for the sum of N300,000.00 being special damages and/or compensation for the fish ponds, lakes and channels damaged by the Defendant outside the area acquired by the Defendant. They shall be costs of N1,000.00 of the plaintiff against the Defendant.*

*I shall not conclude this judgment without saying that the Defendant ought not to allow this case to go to Court. It is a matter they ought to have negotiated and settled out of court as it appears to me that they have no defence whatsoever to this action."*

aggrieved by the decision of the trial court, the defendant lodged an appeal against it in the Court of Appeal, Benin Division.

In its reserved judgment delivered by Akpabio JCA, with which Adio JCA [as he then was] and Ogbe JCA both agreed, dismissed the appeal with slight reduction of the amount awarded as special damages from N300,000 to N297,000.

The defendant has further appealed to this court.

In compliance with Order 6 rules 1 and 2 of the Supreme Court Rules, parties filed and exchanged briefs of argument. The defendant / appellant and the plaintiff/respondent will henceforth in this judgment be

referred to as the appellant and the respondent respectively.

In the brief of argument filed by the appellant two issues have raised for consideration and determination by this court. The two issues are:

B *"i. Whether the learned Justices of the Court of Appeal were right in holding that the learned trial Judge was right in granting an amendment of the Respondent's pleadings at the stage he did.*

C *ii. Whether having regard to the state of the pleadings, evidence and the law the learned Justices were right in awarding special damages of N297,000.00 at the rate of 27,000.00 for eleven years?"*

Respondent did not formulate any issue in his brief but adopted the two in the appellant's brief.

Under Issue (i) learned counsel for the appellant contended that D although Order 14 of the defunct Bendel State High Court [civil procedure Rules, 1976 provides for amendment of pleading at any stage of the proceedings before judgment, no such amendment will be allowed if it is meant to ambush, prejudice or overreach. He argued that the application E was made mala fide and that its grant had done injury to the appellant which no award of costs could compensate. He cited Chief Ojah Ojah & Ors v. Chief Eyo Ogboni & Ors. [1976] 4 Sc 69 at 76. He submitted that the very late amendment to the Further Amended Statement of claim had F changed the claim from one for the value of the fish ponds, lakes, and channels to that for loss of use or purported annual income without giving the appellant the opportunity of contesting the claim on the basis of loss of use. In support, the following cases were cited - Bello Adegoke Foko & Ors. v. Oladokun Agboola Foko & Ors. [1968] NMLR 441 at G 446 - 447.

In reply to issue (i) it was the submission of A.O. Akpedeye, learned counsel for Respondent that once pleadings are amended, the amended pleading relates back to the date the original pleading was filed H and replaces it. He argued that the amendment granted to the respondent was proper and in the futherance of the course of justice in order to bring the pleading in line with the evidence already received. Learned counsel further argued that the Respondent at no time made a claim for the value

of the damaged fish ponds, lakes and streams, but for the loss of income derivable from the damaged fish ponds, lakes and streams. Learned counsel cited several decided cases to buttress his submission amongst which are Warner v. Sampson [1959] 1 QB 297; Oguma v. I.B.W.A. (1988) 1 NNLR (Pt. 736) 58; Okafor v. Ikeanyi (1964) NMLR 55 (1964) 1 All NLR 176 and order 14 of the Bendel State High Court [Civil Procedure] Rules. B

On issue 2, it is the submission of learned counsel for the appellant that no where in the amended statement of claim did the respondent plead that he was claiming special damage for the period 1976 - 1978 or that the claim was for a continuing loss of income until judgment or that it was for a reasonable period of replacement. He claimed that there was no such evidence on these issues as it was the learned counsel for the respondent that raised them in his final address to the trial court. He submitted that having regard to the state of pleadings, the evidence and the law, both the trial court and the Court of Appeal were in error in holding that special damage at the rate of N27,000 per annum for eleven years had been proved. He referred to the evidence of P.W. 1 and contended that the witness did not give evidence of special damage with particulars but only that he was getting the sum stated in his evidence without stating any basis for the amount. Learned counsel reiterated that the respondent's claim is for compensation for the total destruction of the fish ponds and that the amended damages of N297,000.00 is erroneous in law as it was not based on the value of the land or property alleged destroyed or the diminution of its value. He urged this court to allow the appeal. E F

In reply learned counsel for the respondent submitted that the unchallenged evidence adduced by the respondent supported and was in line with the paragraph 7 of the Statement of Claim as Still Further Amended. It was argued that the loss of income suffered by the respondent was continuous and therefore the claim for an award of earning for a period of 11 {eleven} years cannot be said to be unreasonable. He cited decided cases in support of his submissions and urged the court to dismiss the appeal. G H

The first issue complained of the leave granted to the respondent to still amend, the Further Amended Statement of Claim at the very late stage it was applied for and granted by the learned trial judge.

**The principle of law relating to the amendment of pleadings is that it can be granted at any stage of the proceedings provided it does not introduce a new cause of action, or will over-reach or is prejudicial to the other party. See Eshelby v. Fed European Bank (1932) 1 K.B 254; Lautfi v. Czarnikow (1952) 2 All ER 823. Akoh v. Abah (1976) 4 SC 69 and Order 14 of the Bendel High Court (civil Procedure) Rules, 1976 (Cap 65). Where an amendment has become imperative by reason of variance between the statement of claim and the evidence adduced at the trial by the plaintiff, the court has always granted it even after the completion of the trial and judgment reserved. See A.C.B v. Ewarami (1978) All NLR 114 and Okafor v. Ikeanyi (1979) 3 and 4 SC 99 where in the latter case this court granted the amendment of the plaintiff / respondent's statement of claim to fall in line with his evidence, which was originally refused by the trial court. The grant of the application was therefore in order. The issue is resolved against the appellant.**

But this notwithstanding, are both the trial court and the Court of Appeal right in their findings that the evidence adduced successfully proved the respondent's claim as contained in the Still Further Amended Statement of Claim? I shall try to answer this poser by examining the Still Further Amended Statement of Claim and the evidence adduced in relation thereto.

The relevant paragraphs of the Further Amended Statement of Claim and the Still Further Amended Statement of Claim are paragraphs 6 and 7 respectively of the two pleadings. Paragraphs 6, 7 and 9 of the Further Amended Statement of Claim are as follows:-

"6. In complete disregard of the plaintiff's letter referred to above, the Defendant's agents and servants covered up fish ponds fish lakes, fish channels and creeks of the plaintiff's family in the adjoining area with the mud dredged from the area actually acquired, causing the plain-

tiff an his family colossal loss of their only means of livelihood, and in May, 1977, the plaintiff again wrote to the defendant requesting it to send its officials to the area to, assess the damage done to them by the Defendant. Defendant sent to reply neither did it take any steps to assess the said damage. Plaintiff shall at the hearing rely on the said letter B dated 24th May, 1977.

7. Again on 1st August, 1977, plaintiff sent a reminder to the Defendant which also fell on deaf ears. The said fish ponds, fish lakes, creeks and channels have since become permanently destroyed. The prop- C erty of the plaintiff's family so destroyed and of rendered useless by the Defendant and their value by way of special damage are:

- a. Ten large fish ponds at N1,000 per fish pond ..... N10,000.00
- b. Six medium size fish ponds at N500 per fish pond ..... N3,000
- c. Eight big fish lakes at N500 per fish lake ..... N4,000.00 D
- d. Twenty long fish channels at N500 per fish channel .....

N10,000

Plaintiff shall rely on the said letter dated 1st August, 1977 at the hearing.

9. The Defendant has failed, neglected and or refused to pay E reasonable and adequate compensation to the plaintiff and members of his family, despite repeated demands wherefore the plaintiff claims as follows namely:

"The plaintiff's claim for himself and on behalf of Wesewese F family of Ojobo in Burutu Local Government Council Area is for the sum N3,000.000 (Three Hundred Thousand Naira) being special damages and N3,000.00 (Three Thousand Nair) being general damage suffered by the plaintiff and members of his family when the Defendant by its agents and or servants destroyed the fish ponds, creeks, lakes and G channels lying and situate at ASEAOBA BUSH near the BENISEIDE OIL FIELDS in Burutu Local Government Council Area, Bendel State of Nigeria in 1977 over which this Honourable Court exercises jurisdiction. H

While paragraphs 6, 7 and 9 of the Still Further Amended Statement of Claim state thus:-

"6. In complete disregard of the plaintiff's letter referred to above,

*the Defendant's agents and or servants covered up fish ponds, fish lakes, fish channels and creeks of the plaintiff's family in the adjoining area with the mud dredged from the area actually acquired, causing the plaintiff and his family colossal loss of their only means of livelihood, and in May, 1977, the plaintiff again wrote, to the Defendant requesting it to send its officials to the area to assess the damage done to them by the Defendant sent no reply neither did it take any steps to assess the said damage. Plaintiff shall at the hearing reply on the said letter dated 24th May, 1977.*

*7. Again on 1st August, 1977, plaintiff sent a reminder to the Defendant which also fell on deaf ears. The said fish ponds, fish lakes, creeks and channels have since become permanently destroyed. The property of the plaintiff's family as destroyed and or rendered useless by the Defendant and their value by way of special damage are:-*

- (a) Ten large fish ponds at N1,000 per fish pond per annum = N10,000 per annum*
- (b) Six medium size fish ponds at N500 per fish pond per annum = N3,000 per annum*
- (c) Eight big fish lakes at N500 per fish lake per annum = N4,00 per annum*
- (d) Twenty long fish channels at N500 per fish channel per annum = N10,000 per annum*

*Plaintiff shall rely on the said letter dates 1st August, 1977 at the hearing.*

*9. The Defendant has failed, neglected and or refused to pay reasonable and adequate compensation to the plaintiff and members of his family, despite repeated demands wherefor the plaintiff claims as follows namely:-*

*"The plaintiff claim for himself and on behalf of Wesewese family of Ojobo in Burutu Local Government Council Area is for the sum of N300,000 (Three Hundred Thousand Naira) being special damages and N3,000 (Three Thousand Naira) being general damage suffered by the plaintiff and members of his family when the Defendant by its agents or servants destroyed the fish ponds, creeks lakes and channels lying and situate at ASEAOBA BUSH near the BENISEIDE OIL FIELDS in Burutu*

*Local Government Council Area, Bendel State of Nigeria in 1977 over which this Honourable Court exercises jurisdiction."*

The relevant part of the plaintiff evidence given by Mr. Kwameh Ambah who sued for himself and on behalf of Wesewese Family, reads as follows:-

*"We have 10 large fish ponds.*

*6 medium fish ponds.*

*8 big fish lakes.*

*20 long fish channels.*

*My family fish on the above property annually. We get a year N1,000 for each of the large fish pond.*

*The medium fish ponds gives us N500.00 per year.*

*For each of the 8 big fish lakes we get about N500.00 a year.*

*We get N500.00 per year for each of the long fish channel.*

*Since the damage in 1976, we have not been getting the income from these ponds, channels and lakes.*

*We are claiming N300,000 from the Defendant's company being special and general damages we suffered.'*

Under cross examination the witness further stated:-

*"We did not get a valuer to value it but we collect yearly these amount. We have fish ponds, fish lakes, fish channels there but all are now destroyed. We cannot fish again. My claim is very genuine."*

**The evidence of the plaintiff and respondent are not in line with the Still Further Amended Statement of Claim and cannot be said to have proved the special damage of N300,000. Both paragraph 7 of the Further Amended Statement of Claim and paragraph 7 of the Still Further Amended Statement of Claim fail to give particulars of special damage reflecting N300,000.**

**The particulars in (a), (b), (c), (d) of paragraph 7 merely state the number of items destroyed and the value of each with the addition thereto of the word "per annum". It was not stated therein from which year to which.**

From paragraph 3 of the Still Further Amended Statement of Claim, the respondent's complained of the total destruction of items stated

in paragraph 7 (a),(b), (c) and (d) without stating the period it was supposed to cover. The present action against the appellant was filed in court on 10th October, 1980. The claim, as I said earlier, never stated the number of years the special damage was supposed to cover.

B It is not seriously disputed that the respondent is entitled to damages for the permanent destruction of the fish ponds and lakes by the appellant; but what is being complained of is the sum of N300,000 originally awarded to the respondent as special damage which was slightly reduced by the Court of Appeal to N297,000. It is pertinent to state that C the plaintiff's claim in paragraph 7 supra of the Still Further Amended Statement of Claim is that "the said fish ponds, fish lakes, creeks and channels have since become permanently destroyed." The property of the plaintiff's family as destroyed and or rendered useless by the defendant and their value by way of special damage are: D

"(a) Ten large fish ponds at N1,000 per  
fish pond per annum ..... = N10,000

(b) Six medium size fish ponds at N500 per annum ..... = 3,000

E (c) Eight big fish lakes at N500 per fish lake per annum = 4,000

(d) Twenty long fish channels at N500 per fish channel per annum  
..... = 10,000."

The respondent's claim as averred is for compensation for the F permanent destruction of the value of the properties listed above. No where in the Still Further Amended Statement of Claim did the respondent claim for loss of use for any period of time. Their claim was for the value of the properties destroyed and not for the continual annual loss of catch of fish; and the addition of the words "per annum" to the items G particularized in paragraph 7 supra did not in my view, change the nature of the respondent's claim from that of such compensation for the value of their permanent destruction .

H The respondent did not claim in their pleading for the period covering 1976 - 1987 as computed by both the trial court and the Court of Appeal, for continuing loss of income. It was the learned counsel for the respondent that raised this in his final address as recorded on page 48 of the record thus: "Paragraph 7 sets out the various items destroyed and



the annual value realized from them before the destruction. Paragraph 9 is the cumulative value for 11 years since the destruction from 1976-1987." The evidence of Kwameh Ambah, the plaintiff, prompted the late application for the amendment complained of by the appellant. Unfortunately the amendment to paragraphs 6 and 7 as reflected in the Still Further Amended Statement of Claim was so badly and inadequately drafted that it could not be said to fall in line with the respondents' evidence. Paragraph 9 as amended also did not provide the particulars of the N300,000 special damage.

The amended pleading did not aver that the respondent's claim is for the continual loss of income resulting from the destruction of the items listed therein for the period 1976 - 1987. The claim still remains for compensation as a result of permanent destruction of the items by the appellant. Evidence given which is not in line with the facts pleaded goes to no issue and is of no help to the party that produces it. See Emegekwe v. Okadigbo (1973) 4 SC 113. Thompson Organisation v. N.P.I.C. & Ors. (1969) NNLR 99; Ikiw v. Samuel (1963) 2 AER 879 and Okafor v. Okitiakpo (1973) 2 SC 49.

Where there is a claim for total destruction of property, the measure of damages will be the value of the property at the time of its destruction. See Liesbosch Dredger v. S.S Edison (1933) AC 449 and Danefoh v. Skaran 7 WACA 113. This is based on the principle of restitution in integrum.

The total amount claimed by the respondent as compensation for the permanent destruction of items listed in the Still Further Amended Statement of Claim is N27,000. This has not been contested by the appellant in this appeal. The amended sum of N297,000 awarded as special damage to the respondent by the Court of Appeal cannot be allowed to stand as it is not based on the facts pleaded by them.. It is inappropriate.

For the reasons stated herein this appeal must succeed on the amount awarded as special damage. It is accordingly allowed and the amount is reduced to N27,000 in line with the respondent's

**claim.**

As the appeal only succeeds in part, I am not inclined to ward costs to the defendant/appellant. Each party shall therefore bear his own costs in this appeal.

B

### **BELGORE JSC**

C The claim by the plaintiff is limited to the property destroyed, not for loss of fish anticipated to be caught annually. The Court must award what a party claims, not what in many cases he ought to claim, otherwise the court may find itself making case that a party has not made out. There was no claim for the period 1976-1987 and the courts below were in error to award for this period; perhaps they were swayed by D counsel for the plaintiffs alluding to the issue and any issue on them should be discountenanced as the courts must decide cases on legally receivable evidence only. (Emegokwe v. Okadigbo (1973) 4 SC. 113; Thompson Organisation v. N.P.I.C. & Ors. (1969) NNLR. 99). This E appeal therefore succeeds in part on amount awarded as special damage. As my learned brother, Wali, JSC., held in the lead judgment, and with which I am in total agreement, I also reduce the damages to N27,000.00 in line with respondents' claim. I abide by the decision of Wali, JSC., in F the lead judgment in allowing the appeal in part. I made the same consequential order.

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### **KUTIGI JSC**

G I read before now the judgment just delivered by my learned brother Wali, JSC., I agree with his reasoning and conclusions. I endorse the orders made therein.

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### **OGWUEGBU JSC**

I have had the advantage of a preview of the judgment of my learned brother Wali, J.S.C. and I agree with him that the appeal suc-

ceeds in part.

There was no basis for the award of N300,000.00 "special damages and/or compensation" made to the plaintiff/respondent by the trial court or the sum of N297,000.00 for eleven years at the rate of N27,000.00 per annum awarded by the court below. The pleadings of the plaintiff B did not mention that the plaintiff was claiming "special damages and/or compensation" from 1976 to 1987 or that the claim was for continuing loss of income from 1976 when the cause of action arose until the date of judgment. The evidence of the plaintiff and his witnesses made no mention of those dates or years. There is no doubt that the eleven years C which the learned trial judge and court below imported into their judgments were facts not pleaded and not given in evidence by the parties. Both the learned trial judge and the court below were in gross error to have done so. Again, since the fish ponds, lakes, creeks and channels D were permanently destroyed, there was no way the plaintiff could have been awarded damages for eleven years.

I am, however, satisfied that the claim of the plaintiff is for compensation for permanent destruction of the properties. This was clearly E stated in paragraph 8 of the Still Further Amended Statement of Claim where the plaintiff averred as follows:

*8. Plaintiff and his family made several attempts by visits to the office of the Defendant at Warri to make the Defendant see reason for the assessment and payment of reasonable and adequate compensation to them but without avail."* F

This is a case of total destruction of property by the wrongful act of the defendant/appellant. The plaintiff is normally entitled to the market value. There is no market value of the items listed in the state- G ment of claim but the plaintiff in his pleadings and evidence gave the amount of the annual income derived from each large and medium fish ponds, fish lakes and fish channels. He testified that he was claiming special and general damages he suffered. It is not the case of the appel- H lant that the plaintiff did not suffer any damage. Their main contention is that the learned trial judge and the learned Justices of the Court of Appeal were in error in holding that special damages at the rate of N27,000.00

per annum for eleven years had been proved.

There being no dispute that the plaintiff suffered damages for which he is entitled to compensation for the permanent destruction or in the words of the plaintiff "special and general damages" for the loss suffered. I am satisfied that he is entitled to the sum of N27,000.00 and no more.

The appeal is accordingly allowed to the extent that the amount awarded by the court below is reduced to N27,000.00. I also make no order as to costs. The interference by this court with the amount of damages awarded by the court below is justified. See Flint v. Lovell (1953) 1 K.B 354 at 360 and Idahosa v. Orosaye (19 59) 4 F.S.C. 166.

D **MOHAMMED JSC**

I have had the privilege to read in draft the judgment of my learned brother, Wali, JSC, and I agree with him that the only amount of damages that could be awarded to the respondent is the actual amount claimed in the Statement of Claim. This amount is N27,000.00. The appeal therefore succeeds in part. I also make no order as to costs.

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