

SUPREME COURT OF NIGERIA

11TH JUNE 1999, SC.162/1991.

**CORAM:- S. M. A. BELGORE, M. E. OGUNDARE, O. ACHIKE,
U. A. KALGO, E. O. AYoola, JJSC**

NICHOLAS APUROSEIN OGIDI (DEAD) & ORS. .. DEFENDANTS/
(For themselves and as representing the APPELLANTS
Ogidi Family of Akipelai)

AND

CHIEF DANIEL B. IGBA & ORS. PLAINTIFFS/
(For themselves and as representing the RESPONDENTS
people of Emakalakala Village Community)

APPEALS - *Concurrent findings of fact - Where based on the parties pleadings and evidence - Supreme Court will not interfere.*

APPEALS - *Grounds of appeal - Where found to be based on facts - And no leave was obtained to file them - The grounds will be struck out as incompetent.*

EVIDENCE - *Exhibits - Where execution of Exhibit B is of no consequence to the court action - Alleged illegality and inadmissibility of that exhibit - Is of no use.*

LAND LAW - *Casus belli - Since the area covered by exhibit B was not the casus belli - Alleged illegality and inadmissibility of that exhibit - Is of no use.*

FACTS

Before the High Court of Rivers State the plaintiffs/respondents filed an action against the defendants/appellants claiming declaration of title, N2,000.00 damages for trespass and perpetual injunction in respect of the land in dispute, which is situate in the delta of River Niger. The respondents filed the action due to encroachments by the appellants on the eastern side of the land. After instituting the action, the respondents

executed a lease, Exhibit B on part of the land.

The trial court after reviewing all evidence before it and based on the parties' pleadings found in favour of the respondents. The appellant's appeal to the Court of Appeal was dismissed as that court affirmed the decision of the trial court. Being dissatisfied, appellants have further appealed to the Supreme Court.

ISSUE FOR DETERMINATION

"(a) Whether the Court of Appeal is justified in refusing to pronounce on the inadmissibility of Exhibit B in its interpretation of the ratio decidendi in NWADIKE VS IBEKWE (1987) 4 NWLR (Part 718) 67 and if not whether the wrongful admission of the said Exhibit and probative value ascribed thereto by the trial court occasioned serious miscarriage of justice?"

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

Casus belli - Exhibit B is of no consequence

1. In fact, the area covered by Exhibit B was not the casus belli because the appellants were never therein, it is the forested area to the east of Exhibit A where the appellants were felling trees and digging canals to transport the resultant logs that prompted the issuance of writ on 9th October, 1976. The execution of Exhibit B on 13th October, 1976 was therefore not of any consequence to the court action of the respondents as plaintiffs. Therefore refuge sought by appellants under Exhibit B's alleged illegality and inadmissibility as evidence is a big storm in a tea cup. (p. 1768 H)

Grounds of appeal

2. No leave was obtained to file the grounds of appeal based on facts not law. Only one ground is valid, and it is of no consequence as I have adverted already in this judgment concerning Exhibit B. The 2,3,4,5,6,7 and 8 grounds of appeal are therefore incompetent and are hereby struck out. (Golok v. Diyalpwan (1990) 3 NWLR (Pt. 139) 411 (p. 1770 A))

Concurrent findings of fact

3. The two lower courts have adequately adverted to the facts in this matter and made concurrent findings thereupon. Those findings are based on the parties' pleadings and evidence and are not perverse or repugnant and Supreme Court will not interfere with those findings of fact. (F.C.S.C. v. Laoye (1989) 2 NWLR (Pt. 106) 652 (p. 1770 C))

NOTABLE POINTS OF INTEREST**ACHIKE JSC*****1. Inadmissibility of Exhibit B - Failure to raise proper grounds of appeal***

In other words, I am still at one with the court below that the Appellants failed to raise a proper ground of appeal upon which the complaint of inadmissibility of Exhibit B could be canvassed, bearing in mind, as we had earlier noted, that complaint of any aspect of the court's judgment can only be entertained by the appellate court on well-founded ground of appeal. Anything short of this will prevent the vexed question looming large over Exhibit B from being properly ventilated or redressed. (p. 1794B)

2. Amendment of pleading was properly granted

I have closely examined the circumstances leading to the amendment sought and granted by the trial court. It is crystal clear that the trial court, in my view, correctly, on the authorities, granted the amendment which the Court of Appeal duly affirmed. I find myself unable to differ from them, both in principle and on the authorities. I neither find any injustice occasioned to the Appellants by the amendment nor is there any complaint that the amendment would occasion undue delay as to justify its refusal. See George v. Dominion Flour Mills Ltd. (1963) 1 ALL NLR 71. (p. 1795 G)

3. Notice of preliminary objection - Need to respond to it in a reply brief

It is not quite elegant for counsel for the appellants who was duly served with Notice of Preliminary Objection in the respondents' brief to formally ignore to respond to it in a Reply brief but only to do so at the oral

hearing. That is not good enough because in a seriously contested objection the Respondents who may be taken by surprise would seek adjournment to answer the Appellants' Reply to their Notice of Objection. Such approach may cause unnecessary delay because it makes nonsense of the formal Notice contained in the Respondents' brief. In a proper case, where the Court would be faced with a request for an adjournment to enable Respondents' counsel to prepare adequately to the oral and surprise response by the appellants, such request by the latter to make oral reply to the Notice may be stoutly refused by the Court to the chagrin of the Appellants. It is hoped that Appellants will take full advantage of the procedural provision for filing a Reply brief to novel issues raised in Respondents' brief and not take the wild chance of doing so at the oral hearing. (p. 1796 D)

AYOOLA JSC

4. View of appellate court in upholding findings of fact - Remains error of fact and not of law

It is clear that appellants' counsel laboured under a misconception when he described as "error in law" the view of the Court of Appeal upholding findings of fact made by the trial court. Where it is believed that an opinion of the appellate court merely upholding or concurring with a finding of fact made by the trial court is erroneous, such error or misdirection remains one of fact and not of law. An appellant will not be permitted to side-track the clear provisions of section 213(3) of the 1979 Constitution or 0.2 r. 32 of the Supreme Court Rules by framing grounds of appeal in such a way as to make an appeal which is in substance and form concurrent findings of facts by two courts as if it is one purely on question of law (p. 1798 A)

5. How to raise proper ground on admission of inadmissible evidence

It is not permissible for an appellant who wishes to argue that the trial court had admitted inadmissible evidence to argue such issue under a ground of appeal which complains of wrong evaluation of evidence or that the decision is against the weight of evidence. Such complaint may

be taken to have assumed that the evidence evaluated or weighed has been properly admitted. In this case the complaint (i.e. ground 4) that the Judge erred in law by placing heavy reliance on exhibit B goes more to the weight the trial Judge had ascribed to the document than to its admissibility. It is difficult to understand why if the appellants had wanted to complain about admissibility of Exhibit B, they did not clearly, distinctly and expressly say so. I hold that the Court of Appeal came to a correct decision on this issue. (p. 1799 C)

6. Amendment to bring pleadings in line with the evidence - Is not in bad faith ^C

An amendment of the pleadings made in order to bring the pleadings in line with the evidence, as in this case, cannot be said to have been made in bad faith. I venture to think that one rough and ready test in determining whether a discretion to grant an amendment of pleadings has been properly exercised or not, is to ask whether the fairness of the trial has been adversely affected by the amendment granted. Where an amendment has occasioned prejudice to the other party, it cannot be said that the trial is fair. Neither prejudice nor injustice has been occasioned to the appellants by the amendment made in this case. (p. 1799 F)

REPRESENTATION

Chief O. Ugolo for the Appellants.

R. A. Ogunwole, Esq., for the Respondent.

CASES REFERRED TO

Nwadike vs Ibekwe (1987) 4 NWLR (Part 718) 67

Ikeuye vs. Ofuwe (1985) 2 NWLR (Pt. 5) 1

Owoniyyin v. Omotosho (1961) 1 All NLR 304

Alashe v. Olori Ilu (1964) 1 All NLR 390

Yashin v. Barclays Bank (1968) 1 All NLR 171

Anyaebosei v. R.T. Briscoe Nigeria Ltd. (1987) 3 NWLR (pt. 59) 84, 109

Golok v. Diyalpwan (1990) 3 NWLR (Pt. 139) 411

Saraki v. Kotoye (1990) 4 NWLR (Pt. 143)

Onofade v. Olayiwola (1990) 7 NWLR (Pt. 161) 130

NNSC. v. Establishment sima of Vaduz (1990) 7 NWLR (Pt. 164) 526

Ayanboye v. Balogun (1990) 5 NWLR (Pt. 151) 392)

Oguntimehin v. Gubere (1964) 1 All NLR 176, 180; (1964) ANLR 164

B Okafor v. Ikeanyi (1979) 3-4 SC. 99, 106

In Cropper v. Smith (1884) 26 Ch. D 700 at 710 - 711

STATUTES & RULES REFERRED TO

C Constitution of the Federal Republic of Nigeria 1979 s. 213(3)

Supreme Court Rules 0.2 r.32

Evidence Act s.90 (3)

LEAD JUDGMENT BY BELGORE JSC

D The respondents in this court were also respondent at Court of Appeal, being victorious plaintiffs at the trial High Court claimed:

(i) *Declaration of title to the various adjoining lands known as IMOTI , AKIRIGBO, OPALLA, EKUN-OBIIYI, IWULA DUGBO and*
E *EDUMOMON situate in around Emakalakala village in Ogbia District of the Brass Local Government Area and more particularly delineated on plan. No. TJR 123LD filed with the Statement of Claim and thereon edged PINK.*

F (ii) *N2,000.00 (Two Thousand Naira) damages for trespass committed on the land dispute.*

(iii) *Perpetual Injunction restraining the Defendants, their servants and agents from further act of trespass on the said land."*

G The land in dispute is situate in the delta of River Niger and it is quite extensive. The land claimed as owners by plaintiffs/respondents extends on both sides of Brass River which runs North to South-West of the plan tendered by respondents. But the area of contention is on the east side of the Brass River. The appellants' own plan however avoided
H indicating this all important Brass River but indicated several minor creeks leading to other creeks which are tributaries of Brass River. This is not surprising because whereas the appellants' plan was based on scale 1: 2500', that of the respondents' is based on 1:5000'. Clearly shown on

respondents' plan are lands known as IMOTI, AKIRIGBO, OPALLA, EKUNOBIYI, IWULA DUGBO, and EDUMOMON all around the village of respondents of Emakalakala. All the lands aforementioned are of the kindred of Emakalakala. The defendants/appellants picked a small area and amplified it but without the benefit of the global view of the entire B land in relation to the land in dispute. The respondents had to sue due to encroachments on the eastern side of the land claimed by them, by the defendants. On that side the land is forested by various economic trees - "Alagba", "Olugbo", "Asiga", "Obho", "Ogbono" etc. Because the terrain C is swampy, these trees as logs could only be moved out through canals which the defendants/appellants were now digging in earnest. These incursions were particularly on Iwuladugbo and Opalia lands of Emakalakala kindreds. After instituting the action, the respondents executed a lease, Exhibit B on a part of the land. D

The trial court, after reviewing all evidence before it and based on the parties' pleadings, found in favour of plaintiffs. The trial court also found that evidence of some of the appellants' kindred supported the contention of the respondents. Against these findings of fact, the appellants E appealed to the Court of Appeal which affirmed the decision of the trial court. The Court of Appeal also found that there is nothing much in Exhibit B, whichever period it was made, to vitiate the solid and clear findings of fact in favour of the respondents. They have now appealed F to this court.

The appellants, based on their grounds of appeal, formulated the following issues for determination:-

"(a) Whether the Court of Appeal is justified in refusing to pronounce on the inadmissibility of Exhibit B in its interpretation of the ratio decidendi in NWADIKE VS IBEKWE (1987) 4 NWLR (Part 718) 67 and if not whether the wrongful admission of the said Exhibit and probative value ascribed thereto by the trial court occasioned serious miscarriage of justice?" G H

(b) Whether the Court of Appeal is justified in affirming crucial inferences and purported admissions said to have arisen from the pleadings and evidence adduced at the trial and so opined by the learned trial

Judge, when such inferences are contrary to the real issues joined in the pleadings and such evidence was at variance with the issues so joined and/or not supported by matters so pleaded?

(c) *Whether the Court of Appeal is justified in affirming the verdict of the trial court when such verdict was not a product of weighing together the cases of both parties and crucial defence evidence not being considered at all?*

(d) *Whether the Court of Appeal is correct in upholding the further amendment to the Amended Statement of Claim when such amendment was made mala fide and in terms completely outside the prayer therefor?"*

As against these issues, the respondents' own issues for determination are:-

"3. 01 *Whether admissibility or otherwise of Exhibit 'B' was covered by any issue properly raised by the Appellants before the Court of Appeal, if the answer is in the positive, whether or not failure to consider a miscarriage of justice.*

3.02 *Whether the Court of Appeal was right in upholding the decision of the learned trial judge that the Respondents have discharged the onus of proof that they are the owners of the land in dispute by relying on their traditional evidence and evidence of acts of possession admitted by the Appellants and/or their witness.*

3. 03. *Whether the Court of Appeal was right in upholding the decision of the learned trial judge granting leave to the respondents to further amend their Amended Statement of Claim."*

Much significance was placed on Exhibit B, the lease agreement on a portion of the land clearly marked out in respondents plan, Exhibit A, in yellow verge. The assignment was made on 13th October, 1976, by the respondents as beneficial owners to Itabai Emakalakala Union as farms under the Federal Government "Operation Feed the Nation" Programme. The respondents were certainly in possession of the entire area covered by Exhibit B. **In fact, the area covered by Exhibit B was not the casus belli because the appellants were never therein, it is the forested area to the east of Exhibit A where the appellants were**

fellings trees and digging canals to transport the resultant logs that prompted the issuance of writ on 9th October, 1976. The execution of Exhibit B on 13th October, 1976 was therefore not of any consequence to the court action of the respondents as plaintiffs. Therefore refuge sought by appellants under Exhibit B's alleged illegality and inadmissibility as evidence is a big storm in a tea cup. The cases of Ikeuye & Anor. vs. Ofuwe & Ors. (1985) 2 NWLR (Pt. 5)1, Owoniyin v. Omotosho (1961) 1 All NLR 304; Alashe v. Olori ilu (1964) 1 All NLR 390, Yashin v. Barclays Bank (1968) 1 All NLR 171; and Anyaeobosi v. R.T. Briscoe Nigeria Ltd. (1987) 3 NWLR (pt. 59) 84, 109, are not applicable to this matter.

As for the second issue for determination, learned trial judge in a most meticulous evaluation of evidence before him on which he made copious findings of fact arrived at the conclusion that not only were the respondents all along the defendants by their pleadings and evidence in court supported the plaintiffs' claim on the parcels of land in dispute. But the big issue here is the ground of appeal upon which this issue is based. It is entirely a ground of fact as it is couched as follows:-

"(2) ERROR IN LAW

The learned Justices of the Court of Appeal erred in law by upholding the decision of the trial court particularly at page 88 lines 33 to 37 of the record where the learned trial Judge held as follows:-

"The real essence of ownership lies in the power of alienation and it is the most conclusive incident of ownership, and it is by the virtue of such power that the Emakalakala people as owners leased out to the Union as evidenced in Ex. B."

(Underlining supplied)

The same shortcomings are in Grounds 4, 5, 6, 7 and 8 upon which other issues for determination are based. These grounds of appeal were filed without leave of the court. They are grounds of facts, the mere couching of the grounds as grounds of law cannot make them grounds of law. The constitution of the Federal Republic of Nigeria 1979 in section 213(3) thereof provides:-

"3. Subject to the provisions of Sub-section (2) of this section 1,

an appeal shall lie from the decisions of Court of Appeal to the Supreme Court with leave..... "

No leave was obtained to file the grounds of appeal based on facts not law. Only one ground is valid, and it is of no consequence as I have adverted already in this judgment concerning Exhibit B. The 2,3,4,5,6,7 and 8 grounds of appeal are therefore incompetent and are hereby struck out. (Golok v. Diyalpwan (1990) 3 NWLR (Pt. 139) 411; Saraki v. Kotoye (1990) 4 NWLR (Pt. 143); Onofade v. Olayiwola (1990) 7 NWLR (Pt. 161) 130; NNSC. v. Establishment sima of Vaduz (1990) 7 NWLR (Pt. 164) 526; Ayanboye v. Balogun (1990) 5 NWLR (Pt. 151) 392); Metal Construction (WA) Ltd. vs. Migliore, In Re Ogundare (1990) 1 NWLR (Pt. 126) 2999).

The two lower courts have adequately adverted to the facts in this matter and made concurrent findings thereupon. Those findings are based on the parties' pleadings and evidence and are not perverse or repugnant and Supreme Court will not interfere with those findings of fact. (F.C.S.C. v. Laoye (1989) 2 NWLR (Pt. 106) 652; Narumal & Sons Ltd v. NBTC Ltd. (1989) 2 NWLR (Pt. 106) 750; Afolayan vs. Ogunrinde (1990) 1 NWLR (Pt. 127) 369; Umeojiako vs. Ezenamuo (1990) 1 NWLR (Pt. 126) 253; Okonkwo vs. Adigun (1986) 1 NWLR (Pt. 4) 694).

In sum total, I find no substance in this appeal and I dismiss it with N10,000.00 costs to the respondents against the appellants.

OGUNDARE JSC

The Defendants/Appellants appealed to this court against the judgment of the Court of Appeal (Port-harcourt) Division which court had on the 12th day of June 1990 dismissed their appeal to it against the judgment of the trial High Court or Rivers State in Suit No. PHC/362/76. The plaintiffs/Respondents had sued the Defendants/Appellants (hereinafter are referred to as plaintiffs and Defendants respectively) claiming:

"(a) Declaration of title to the following parcels of land, namely, Imoti, Akirigbo, Opalia, Ekun-Obiyi, Iwula-Dugo, Edumomon, and

Obrufuro, situate between Emakalakala village and Akipilai village in Ogbia Division of the Rivers State;

(b) N2,000.00 (two thousand Naira) damages for trespass;

(c) Perpetual injunction restraining all the Defendants, their servants and agents from further acts of trespass on the said lands." B

By paragraph 24 of their amended statement of claim which was further amended at the trial in respect of claim (b), they finally claimed as hereunder:

"(a) Declaration of title to the various adjoining lands known as Imoti, Akirigbo, Opalia, Ekun-Obiyi, Iwula-Dugo, and Edumomon situate in and around Emakalakala village in Ogbia District of the Brass Local Government Area and more particularly delineated on plan No. TJR 123LD filed with the Statement of Claim and thereon verged pink." C

(b) N2,000.00 (Two thousand Naira) damages for trespass committed on the said land sometimes in October 1976. D

(c) Perpetual injunction restraining the defendants their servants and agents from further acts of trespass."

By the amended pleadings of the parties the dispute was narrowed down to part of the land in dispute. While plaintiffs averred in paragraph 3 of their amended statement of claim thus: E

"3. The lands owned by the plaintiffs, from time immemorial and for which declaration of the title is sought are various pieces or parcels of adjoining lands known as Imoti, Akirigbo, Opalia, Ekun-Obiyi, Iwula-Dugo and Edumomon. These are clearly delineated on survey plan TJR 123LD and thereon verged pink filed with the Statement of Claim. The said plan is prepared by Theophilus John, Licensed Surveyor. The plaintiffs will rely on the said plan at the hearing of this case." F G

The Defendants, on the other hand, pleaded in paragraph 3 of their amended statement of defence as follows:

"3. The Defendants deny paragraph 3 of the Amended Statement of Claim and say that the plaintiffs have no title to the said parcels of piece of land save what was granted to the plaintiffs ancestors by the Defendants' ancestor. In further answer to paragraph 3 of the Statement of Claim the Defendants aver that the pieces of land granted to the H

plaintiffs by the Defendants' ancestors are namely Imoti, Opalia and Akirigbo and these are clearly delineated by the Defendants' survey plan No. CABR/411/78LD drawn by Mr. M.N. Chukwura a licensed surveyor and verged red therein and filed with the first Statement of Defence now amended. The other parcels of land namely Ekunu-Obiyi, Iwuladugo and Edumomon belong to the Defendants family from the time immemorial. The Defendants will rely on this survey plan filed as hereinbefore mentioned. The Defendants further aver that the plaintiffs are making an expansionist now beyond the area granted their ancestors by the Defendants' ancestors."

At the trial evidence was led on both sides and after addresses by learned counsel, the learned trial Judge in his considered judgment found-

"From the totality of the evidence as adduced by the parties with their witnesses there are certain important issues which are already. They are these:

(1) plaintiffs alleged that defendants' ancestors left Ebela bush in search of a new settlement; they got to Akipelai and were received by Aki the founder of Akipelai where they were settled and where their descendants including the defendants still live, the defendants admitted that history; this suggests that defendants are in Akipelai by consent of Aki and his descendants so that the area or the land on which the defendants are settled in Akipelai appears only outwardly to belong to them because they are in possession; it stands to reason that the claim by the defendants that they gave land to plaintiffs is not claim any portion in Akipelai (sic);

(2) plaintiffs claim that as people of Emakalakala they own the parcels of land in dispute and they are also in possession, this claim is confirmed by the defendants who said that it is only Emakalakala that is on the land in dispute; so there it is not disputed that the plaintiffs are absolute and exclusive owners in possession of the parcels of land in dispute;

(3) the plaintiffs' plan, Ex. A. shows that the parcels of land in dispute are on one stretch of land apart from Edumomon which is on an island, this description of the area in dispute is accepted as correct by the

defendants;

(4) *plaintiffs claim that their ancestor Kalakala settled on a virgin land unoccupied by any person before their ancestor, the defendants did not dispute the claim, infact 3rd DW, Charles Dia Esua, 2nd defendant, said plaintiffs came from Ijaw to settle on the land in dispute, he did not say they the defendants allocated the settlement to the plaintiffs.*

These four important issues are all in favour of the plaintiffs and are sufficient to compel judgment for plaintiffs, but there are other issues to examine."

He examined these other issues and made the following findings of fact.

1. *"The evidence of Chief Aribo about the ancestral history of Emakalakala and the settlement on Emekalakala which is not challenged contains the facts and logic of the claim by the plaintiffs in this action. The defendants themselves admit that in ancient times villages were named after their founders, an admission which strengthens the claim that Emakalakala was so named after the founder and first settler, Kalakala."*

2. *"Plaintiffs gave evidence of acts of ownership within living memory; burial of the dead on their land, farming , fishing, cutting of timber, building, granting of lease; all these facts consists of possession for a long time which I hold are sufficient acts of ownership."*

3. *"Defendants said that at the time of making the land lease they protested to the Governor who passed their protest to the police, but they made no effort to get any person to give evidence of such protest. I am not convinced that there was any protest when the Emakalakala people leased their portion of land to the Itabai Emakalakala Union. The real essence of ownership lies in the power of alienation and it is the most conclusive incident of ownership, and it is by virtue of such power that the Emakalakala people as owners leased out land to the Union as evidence in Exhibit B."*

4. *"On the issue of trespass the plaintiffs allegation is not disputed. Plaintiffs claim in their evidence that their juju is on the land as also shown in Ex. A is not disputed; and the claim that the area where the juju is sacred to them has not been refuted by the defendants, which*

sacred claim justifies their demand for a declaration of title (See Mac Jaja v. Ibok (1947) 12 WACA 148."

5. *"I have examined Exhs. A and C, the two plans tendered in evidence. I am satisfied that Exh. A tendered by the plaintiffs clearly defines the extent of the boundary with certainty and accuracy and agrees with evidence led to explain the plan and as to what the area in dispute contains."*

6. *"On the whole I am satisfied that the traditional evidence of the plaintiffs in support of this claim to the area in dispute is credible and correct. I am also satisfied that the traditional evidence given by the plaintiffs and their witnesses about the defendants is true and correct. Plaintiffs have by their traditional evidence shown how the lands in dispute became vested in them and which their ancestor Kalakala occupied by natural right."*

7. *"I am also satisfied that defendants committed acts of trespass on plaintiffs land in 1976 for which plaintiffs are entitled to injunction and damages."*

Upon these findings, the learned Judge entered Judgment in favour of the plaintiffs for the declaration sought, N600 damages for trespass and an injunction.

The Defendants appealed unsuccessfully to the Court of Appeal and have now further appealed to this court on the following grounds of appeal.

"GROUNDS OF APPEAL

(1) ERROR IN LAW

The learned Justices of the Court of Appeal erred in law by failing to decide on the intrinsic inadmissibility of Exhibit B, being of an erroneous view that there was no ground of appeal to sustain such a decision as was expressed in the lead judgment of Hon .R. J. Jacks JCA when he said inter alia thus;

"It is pertinent to note here that the argument as to the admissibility or otherwise of Exhibit B can only be entertained if there is a ground of appeal to sustain it, for such a complaint is one of law on the authority of Nwadike v. Ibekwe (1987) 4 NWLR 718 (pt.67) There is no

such ground of law in this appeal. Besides, it is being argued under the umbrella of grounds 1 and 4 which complain of findings of facts and weight of evidence. This is not permissible. In view of this, I will discountenance it.'

(2) ERROR IN LAW

B

The learned Justices of the Court of Appeal erred in law by upholding the decision of the trial court particularly at page 88 lines 33 to 37 of the record where the learned trial Judge held as follows:-

'The real essence of ownership lies in the power of alienation and it is the most conclusive incident of ownership, and it is by virtue of such power that the Emakalakala people as owners leased out land to the Union as evidenced in Ex. B7

C

(3) ERROR IN LAW

The learned Justices of the Court of Appeal erred in law in affirming the decision of the trial court especially at page 87 lines 31 to 37 of the record where the learned trial judge held as follows:-

'plaintiffs claim that as people of Emakalakala they are also in possession, this claim is confirmed by the defendants who said that it is only emakalakala that is on the land in dispute; so there it is not disputed that the plaintiffs are absolute and exclusive owners in possession of the parcels of land in dispute.'

E

(4) ERROR IN LAW

The learned Justices of the Court of Appeal erred in law in upholding the decision of the learned trial Judge especially at page 88 lines 5 to 11 of the record where he held thus:-

F

'The plaintiffs claim that their ancestor Kalakala settled on a virgin land unoccupied by any person before their ancestor, the defendants did not dispute the claim, in fact 3rd DW, Charles Dia Esua, 2nd defendant, said plaintiffs came from Ijaw to settle on the land in dispute, he did not say that the defendants allocated the settlement to the plaintiffs.'

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H

(5) ERROR IN LAW

The learned Justices of the Court of Appeal erred in law by affirming the verdict of the trial court on the question about discharge of

onus of proof by the plaintiffs especially in that portion of the land judgment of the lower court where it held as follows:-

' the learned Judge had found as a fact about acts of ownership by the respondents and as to recent acts of ownership of part of the said parcels of land in dispute which was pleaded, supported by evidence and contained in Exhibit B.'

(6) ERROR IN LAW

The learned Justices of the Court of Appeal erred in law in holding that the trial court was right in finding in favour of the plaintiffs on traditional evidence when in the lead judgment the lower court held as follows:-

'The learned trial Judge at page 90 of the record found that the traditional evidence of the respondents in support of their claim to the area in dispute is credible and correct.'

(7) ERROR IN LAW

The learned Justices of the Court of Appeal erred in law in failing to hold that the trial court failed to give due consideration to the case properly put by the defendants at the trial and thereby occasioned serious miscarriage of justice against the appellants.

(8) ERROR IN LAW

The learned Justices of the Court of Appeal erred in law in upholding the further amendments of the Amended Statement of Claim at pages 62-64 of the record especially in view of the enrolled order made consequent thereon (q.v. p. 65 of the record) and the incorporation of the ruling in the final judgment at pp. 80-84 of the record) it being obvious that the plaintiffs acted MALA FIDE in seeking the amendment and further that the defendants were thereby highly prejudiced."

(The particulars to these grounds are omitted by me.) The parties, through their learned counsel filed and exchanged their respective briefs of argument. In the Respondents' Brief objection was taken to the competence of grounds 2, 3, 4, 5, 6 and 7 for the reason that they are grounds of mixed law and fact and as leave to appeal was not sought nor obtained, by the Defendants these grounds should be struck out. The Defendants did not file a reply brief in answer to the arguments by the Plaintiffs in

support of the objection. At the oral hearing before us, however, a feeble attempt was made by their counsel to make a reply. It is his submission that the said grounds of appeal are grounds of law. Learned counsel conceded it that the Defendants did not seek nor obtain the leave of either the Court below or of this Court to appeal on grounds other than of law alone. B

I have carefully examined the grounds of appeal to which objection is taken and their particulars and I am satisfied that none of them is a ground of law simpliciter, notwithstanding that each of them is described as "error in law". They all raise issues of disputed facts. Learned counsel for the Defendants admitted that his clients did not obtain the leave of either the Court below or of this court to appeal on grounds of mixed law and facts or of facts as required by section 213(3) of the Constitution. Consequently, I must hold that Grounds 2, 3, 4, 5, 6 and 7 are incompetent and are accordingly struck out by me. D

The Defendants raise four questions in their brief as calling for determination in this appeal. They are:

"(a) Whether the Court of Appeal is justified in refusing to pronounce on the inadmissibility of Exhibit B in its interpretation of the ratio decidendi in Nwadike v. Ibekwe (1987) 4 NWLR (pt. 718) 67 and if not whether the wrongful admission of the said Exhibit and probative value ascribed thereto by the trial court occasioned serious miscarriage of justice?" F

(b) Whether the Court of Appeal is justified in affirming crucial inferences and purported admissions said to have arisen from the pleadings and evidence adduced at the trial and so opined by the learned trial Judge, when such inferences are contrary to the real issues joined in the pleadings and such evidence was at variance with the issues so joined and/or not supported by matters so pleaded?" G

(c) Whether the Court of Appeal is justified in affirming the verdict of the trial court when such verdict was not a product of weighing together the cases of both parties and crucial defence evidence not being considered at all?" H

(d) Whether the Court of Appeal is correct in upholding the fur-

ther amendment to the Amended Statement of Claim when such amendment was made mala fide and in terms completely outside the prayer therefor?"

As questions (b) and (c) are predicated on the incompetent grounds of appeal just struck out by me, these questions are equally struck out too. We are now left with questions (a) and (d). These two questions are akin to Issues (1) and (3) raised in the brief of the Plaintiffs.

QUESTION (a):

In paragraph 18 of their amended statement of claim, the plaintiffs pleaded thus:

"18. In exercise of their right of ownership, (i) Chief Melford O. Okilo, Chief Clever Ige Edaba Aribio and Chief Okosigha Osain representing Emakalakala Village Community leased part of land in dispute to Itabai Emakalakala Union covered by a DEED of Lease, dated 13th of October, 1976 and registered as No. 48 at page 48 in Volume 44 of the Lands Registry in the Office at Port Harcourt. The said Union has been farming on the land without let or hindrance. This is clearly shown about the centre of the land in dispute. The Plaintiffs will rely on the Deed of Lease and the attached Plan No. ESA/R56 175 at the hearing of this case."

The Defendants joined issue with the Plaintiffs by averring in paragraph 9 of their amended statement of defence thus:

"9. In answer to paragraph 18 of the amended Statement of Claim, these educated and influential men of Emakalaka the Plaintiffs, intent on depriving the peasants of Ogidi Family of Akipelai of their God-given land began acts of trespass by not confining themselves as their forefathers did to their area of land but crossing over to the Defendants land and leasing such native lands to a tribal Union by purporting to register such native land in Port Harcourt Lands Registry, despite Defendants protests and reports to the Police and Government agencies."

The 4th Plaintiff gave evidence at the trial as PW2 and deposed, inter alia:

"In 1973 we the chiefs were authorized to lease the land to Itabai Emekalakala Union, we then executed a deed of lease of which I am a

signatory. *This is the deed of lease, admitted no objection, as exhibit B. The land on Exh. B is the area verged Yellow on Exh. A. The land is now a farmland.*"

It is this deed of lease which was admitted at the trial without objection and marked 'B'; this is now the subject matter of Defendants' complaint. B

In his judgment, the learned trial Judge observed:

"Defendants said that at the time of making the land lease they protested to the Governor who passed their protest to the police, but they made no effort to get any person to give evidence of such protest. I am not convinced that there was any protest when the Emekalakala people lease their portion of land to the Itabai Emekalakala Union. The real essence of ownership lies in the power of alienation and it is the most conclusive incident of ownership, and it is by virtue of such power that the Emekalakala people as owners leased out land to the Union as evidence in Ex.B." C D

On appeal to the Court of Appeal, the Defendants complained in their ground 4 of appeal thus:

"4. Misdirection and error in Law E

The learned trial Judge misdirected himself on the facts and issues arising from the pleadings as well as evidence adduced by the parties in that portion of his judgment where he resolved certain issues erroneously in favour of the plaintiffs after observing thus: F

'From the totality of the evidence as adduced by the parties with their witnesses there are certain important issues which are already resolved'

and also erred in law by placing heavy reliance on exhibit B (which ought to have been expunged or totally ignored) and failing to consider and weigh together the case for the plaintiffs alongside the case for the defendants before determining in whose favour the weight of evidence preponderates (as amended). G

In their brief of argument in that Court they formulated the following five H issues as calling for determination:

"(a) Were the plaintiffs entitled to judgment, having sued in a representative capacity, there being nothing on the record to show that

they obtained LEAVE?

(b) Did the learned trial Judge exercise his discretion judicially by allowing the plaintiffs to further amend their Amended Statement of Claim for the sole purpose of circumventing the argument by learned defence counsel in his final address that the plaintiffs' action was premature and not maintainable, having regard to the issues joined by the parties in their pleadings, the evidence adduced at the trial and the prejudicial position of the defence at the particular stage of the proceedings?

(c) In any event, did the plaintiffs succeed in establishing a cause of action entitling them to sue and maintain their claims against the defendants?

(d) Did the learned trial Judge dispassionately make his findings of facts (as he ought). By putting (or appearing to put) the totality of the evidence adduced at the trial on that imaginary scale, judicially balancing the evidence of the plaintiffs on the one side and weighing it together with the evidence of the defendants on the other side in order to determine the preponderance of the two; considering and ascribing thereto their probative values and drawing the right inferences therefrom?

(e) In any case, was the award of N600 as general damages for trespass not arbitrary and excessive?"

and argued, inter alia, thus:

"4.21 Moreover the trial court's holding that Exhibit B amounted to real manifestation of ownership by the plaintiffs and that it was tantamount to 'the most conclusive incident of ownership' is indefensible. This is because Exhibit B was made by the plaintiffs on 13th October 1976 after they filed the action in the above suit on 8th October 1976. The said document was clearly made by the plaintiffs for the sole purpose of prosecution their claim in the suit. Although the said exhibit was admitted without objection, it is submitted that by section 90(3) of the Evidence Act, it was legally inadmissible and accordingly it was the duty of the trial Judge to have expunged it suo moto. His verdict was heavily swayed by the said exhibit."

Commenting on this argument, Jacks, JCA who delivered the lead judgment with which Onu, JCA (as he then was) and Omosun JCA

agreed, said:

"Learned counsel for the appellants at page 20 of his brief submitted that although Exhibit B was admitted without objection, yet by reason of section 90(3) of the Evidence Act, it was legally inadmissible, consequently the learned trial judge ought to have expunged it suo moto. B It is pertinent to note here that the argument as to the admissibility or otherwise of Exhibit B can only be entertained if there is a ground of appeal to sustain it, for such a complaint is one of law on the authority of Nwadike v. Ibekwe (1987) 4 NWLR 718 (Pt. 67) and other decided C cases. There is no such ground of law in this appeal. Besides, it is being argued under the umbrella of grounds 1 and 4 which complain of findings of facts and weight of evidence. This is not permissible. In view of this, I will discountenance it."

This passage is under attack in this appeal. It is the contention of learned D counsel for the Defendants both in the Appellants' brief and oral argument that the Court below was in error to decline to pronounce on the admissibility of Exhibit B. The deed of lease which, according to learned counsel, is intrinsically inadmissible. Chief Ugolo, for the Defendants, in E oral argument submitted, rather strangely, that the issue of admissibility of evidence could be taken on the omnibus ground. He cited Abisi v Ekwealor (1993) 6 NWLR 643, 673D-E in support. Needless to point out that the said case does not support him. This Court in that case laid F it down what an appeal court will take into consideration where the finding or non-finding of facts is questioned in an appeal. Certainly the admissibility or otherwise of evidence is not one of the things to be considered.

I have carefully considered the submissions of learned counsel G on the issue of Exhibit B. With respect, I find no merit in them. I think the Court below was right in its view that the issue of the admissibility of Exhibit B was never raised as a ground of appeal in the appeal to it; the issue of Exhibit B only arose in the context of proof of acts of ownership. Surely, if the defendants wanted to question the admissibility of Exhibit B they should have done so clearly and as a separate issue and not H in the way they did. I, therefore, answer the first limb of Question (a) in

the affirmative and in view of this answer a consideration of the second limb does not arise.

QUESTION (d)

Claim (b) as in the amended statement of claim reads:

B *"N2,000 (Two thousand Naira) damages for trespass committed on the 15th and 17th October 1976."*

And in paragraph 23 of the amended statement of claim it is pleaded thus:

C *"Again on the 15th and 17th October 1976 the defendants without leave or licence of the Plaintiffs broke and entered parts of the Plaintiffs' said lands fell timber trees belonging to the Plaintiffs, dug canals on the said lands to evacuate the timbers. The matter was reported to the Police who warned the defendants but defendants continue their acts of trespass."*

D The action was taken out on 8th October 1976. In his evidence at the trial, the 4th Plaintiff testified thus:

E *In 1959 the defendants had a case with Ekon family and in trying to carry out a survey, they approached (sic) on our land and destroyed crops, plants and house, we reported the matter to the police, they were prosecuted and convicted.*

F *In 1976, they returned to the land, dug canals and cut timber, so we again reported to the police, they were warned, they did not keep to the warning so we restored to sue them as is in this case."*

In his final address before the High Court, learned counsel for the Defendants submitted as hereunder:

G *"Counsel said the second event that formed the action is contained in para. 23 of the amended Statement of Claim but the dates of 15th, 17th October pleaded as to N2,000.00 claim for damages were not specifically mentioned in evidence by the plaintiffs. He referred to evidence of 1st plaintiff who did not specifically mention these dates which were specifically pleaded.*

H *At the time the plaintiffs took this action there was no cause of action, he refers to particulars of claim filed by plaintiffs dated 8th October 1976, so the writ was taken out before the event that led to the action, therefore the plaintiffs cannot succeed. He said that the action is*

speculative."

After the final address of learned counsel for the plaintiffs judgment was reversed.

Before the date for judgment, learned counsel for the plaintiffs moved the Court to further amend paragraph 23 of the amended state-
ment of claim by deleting the words

"on the 15th and 17th"

and substituting therefore the words:

"sometime in"

and add the words:

"so the Plaintiffs resolved to sue them"

at the end of the paragraph. It was sought also to amend claim (b) in paragraph 24 by deleting the words:

"on the 15th and 17th"

and substitute therefore the words:

"on the said land sometime in."

The Defendants opposed the motion and after arguments by learned counsel for the parties, the learned trial Judge granted the motion and ordered that the amendments be made as prayed. The learned Judge reasoned -

"In my opinion the amendment sought is to regularize the proceedings in court as evidenced by the evidence which has been tested under cross-examination. I sought to say that 'evidence germane to the amendments sought had been led by the plaintiffs without any objections'

Indeed the amendment sought will not cause delay of the judgment, it will not entail injustice to the respondent; the applicants are not acting mala fide they still stick to their claim of trespass no more no less."

In their appeal to the Court of Appeal, the Defendants questioned the propriety of the amendment made. That Court, per Jacks JCA, observed:

"It is clear to me that the amendments are in relation to the specific dates of the alleged trespass in 1976. PW2 who is the 4th plaintiff on record in his evidence-in-chief at page 28 lines 31-34 testified thus:

'In 1976, they returned to the land, dug canals and cut timber, so we again reported to the police, they were warned, they did not keep to the warning so we restored to sue them as in this case.'

The witness was not cross-examined on the acts of trespass. It seems to me that the amendment was sought to bring (the pleadings) into line with the evidence already given as shown above. In EWARAMI v. A.C.B. LTD (1978) 4 SC. 99 the Supreme Court at pages 107-110 stated thus:

'.....The amendment made being one merely to bring the pleadings into line with evidence already given was clearly was within the competence of the learned trial Judge. Such an amendment to the pleadings supersede the claim on the writ. See Udechukwu v. Okwuoka 1 FSC p.70.'

The amendments made in the instant case did not show that the respondents were acting mala fide, or that it entailed injustice to the appellants who in no way were shown to be embarrassed. See Chief Ojah & Ors. v. Chief Eyo Ogboni & Ors. (1976) 1 All NLR 346 (Pt.1) applied correctly by the learned trial judge. The real controversy is declaration of title and trespass in the instant case, and an amendment made by deleting specific dates averred during the year of the alleged trespass cannot be said to prejudice the appellants who did not even challenge the evidence that the appellants committed acts of trespass on respondents land in 1976 and ignored the warning of the police when their acts were reported. The principle for the guidance of court in the exercise of its discretionary power to allow or refuse an amendment of pleading has been stated by the Supreme Court in several cases which were referred to in Adetutu v. Aderounmu (1984) 6 SC.92 at pages 108 to 109; (1984) 1 SCNLR 575 at page 523. Learned counsel for the appellants at already stated, correctly conceded that an amendment can be made at any stage of the proceedings. And since the amended statement of claim super-
H sedes the writ filed on 8/10/76, the issue as to when the cause of action was taken no longer arises. See also Rotimi v. Magregor (1974) 11 SC.113 at 157; Ewarami v. A.C.B. Ltd. (supra)."

The Defendants have again raised the same complaint in this appeal.

The main thrust of the submissions of learned counsel for the Defendants is that having regard to the facts that there was no cause of action for trespass at the date the action was taken having regard to the dates in paragraph 23 of the amended statement of claim, the application for amendment should not have been granted. Chief Ugolo cited Aina v. Jinadu (1992) 4 NWLR 91 at p.105 F-G in his support. B

I think her again the Defendants are not on terra firma. The power of a trial court to grant, in the interest of justice, an amendment of pleadings or proceedings at any stage before judgment is well recognized. Order 34 of the High Court Rules of Eastern Nigeria applicable in the Rivers State at the time of the hearing of this action in the High Court provided: C

"The Court may at any stage of the proceedings, either of its own motion or on the application of either party, order any proceedings to be amended, whether the defect or error be that of the party applying to amend or not; and all such amendments as may be necessary or proper for the purpose of elimination all statement which may tend to prejudice, embarrass, or delay the fair trial of the suit, and for the purpose of determining in the existing suit the real questions or question in controversy between the parties, shall be so made. Every such order shall be made upon such terms as to costs or otherwise as shall seem just." D
Coker JSC in Shell B.P Co. Ltd. v. Jammal Engineering Nigeria Ltd. (1974) 4SC.33 at 74-75; (1974) ANLR 489 at 516 stated the law thus: E
F

"The rules for granting amendments of pleadings or proceedings are very flexible and a great deal depends on the discretion of the judge or tribunal. Where there has been no breach of any relevant rule of law in that respect a party opposing the grant of leave to amend such pleadings or pleadings has a rather uneasy task and unless he can establish prejudice, unnecessary expense, irreparable inconvenience or lack of good faith, the hands of the court are free." G

See also: Oguntimehin v. Gubere (1964) 1 All NLR 176, 180; (1964) H ANLR 164; Okafor v. Ikeanyi (1979) 3-4 SC. 99, 106; Ubanga v. Usanga (1982) 5 SC. 103 at 126-127 and 130. In Cropper v. Smith (1884) 26 Ch. D 700 at 710 - 711 Bowen LJ observed:

"Now, I think it is a well established principle that the object of Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. Speaking for myself, and in conformity with what I have heard laid down by the other division of the Court of Appeal and by myself as a member of it, I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or of grace. Order xxviii. rule 1, of the Rules of 1883, which follows previous legislation on the subject, says that, 'All such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.' It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right."

This passage was approved by this Court in Ojah v. Ogboni (1976) 4 SC. 69; (1976) ANLR 277 where it was decided that an amendment will be granted where the purpose is to bring the pleadings in line with the evidence but not where it will entail injustice to the other party or where the party seeking amendment is acting mala fide or by his blunder, the applicant has done some injury to the respondent which cannot be compensated by costs or otherwise. In Aina v. Jinadu (supra) cited to us by learned counsel for the parties the Court of Appeal, per Tobi JCA, followed the above authorities, as it is bound to do. At page 105 of the report Tobi JCA observed:

"The law is commonplace that a court of law can grant an application for amendment at any time in the proceedings in the interest of justice. See James v. Smith (1891) 1 Ch. 384; Okafor v. Ikeanyi (1979) 3-4 SC. 99; Ajakaiye and Another v. Adedeji (1970) 7 NWLR (pt. 161) 192. Although an application for amendment could be granted after the close of address and before judgment is delivered, there must be very

good and strong justification for so doing. Such an amendment may be allowed where the matter involved has been raised in the course of the trial and counsel had addressed the court on it, since it will be mere incorporating in the pleadings that which has emerged in the course of the case as an issue between the parties. See *Akinyele v. Opere* (1967) 1 ALL NLR 302; *Ibanga v. Usanga* (1982) 5 SC. 103. It may also be allowed where the subject of the amendment has been referred to by counsel in opening and evidence about it has been given so as to enable the court to arrive at the view, if it thinks fit, that what is pleaded is a correct interpretation of the facts. See *Taiwo v. Akinwunmi* (1975) 6 SC. 143.

The court will also allow an amendment to enable the use of evidence that has been obtained for the purpose of settling the real controversy between the parties. See *Ojah v. Ogboni* (1976) 4 SC. 69; *Okeowo v. Migliore* (1979) 11 SC. 138. Where the amendment sought is a mere misnomer, a court will grant an application as a matter of course or routine. See *Esi v. Shell BP Petroleum Development Co. of Nig. Ltd.* (1958) SCNLR 384; (1958) 3 FSC. 94."

In the case on hand, the amendment granted only brought the Plaintiffs' pleadings in line with the evidence led in support of their case. I can see no breach of any rule of law that would disentitle the trial Judge in exercising his undoubted discretion in favour of the Plaintiffs. I agree with him that no evidence of male fide was shown by the Defendants. It is not correct to say that there was no cause of action when Plaintiffs instituted this action on 8/10/76. In respect of the claim in trespass the particulars of claim on the writ of summons read:

"N2,000.00 (two thousand Naira) damages for trespass."

This is suggestive that trespass had been committed by the Defendants before action was commenced. And as the learned trial Judge rightly observed, the Defendants did not deny going on the land in dispute and felling trees thereon - see paragraph 16 of the amended statement of defence. I can therefore, see no injustice or prejudice to them by the amendment granted by the trial Judge. I, therefore, resolve Issue (d) against the Defendants.

It is for the reasons stated herein that I agree with my learned

brother Belgore JSC that this appeal is lacking in merit. I accordingly dismiss it with N10,000.00 costs in favour of the Plaintiffs/Respondents.

B

ACHIKE JSC

I have had the privilege of reading the preview of the leading judgment just delivered by my learned brother, Belgore JSC. I agree with the reasoning and conclusion of the said judgment. I wish, however, to make an input on the questions of admissibility of Exhibit B and the amendment granted to the plaintiffs in respect of their pleading by the learned trial Judge. I shall consider them in that order.

C

Admissibility of Exhibit 8

D

This question was raised in the Appellants' brief as issue (a) and it ran as follows:

E

"Whether the Court of Appeal is justified in refusing to pronounce on the inadmissibility of Exhibit B in its interpretation of the ratio decidendi in NWADIKE VS IBEKWE (1987) 4 NWLR (part 718) 67 and if not whether the wrongful admission of the said Exhibit and probative value ascribed thereto by the trial court occasioned serious miscarriage of justice?"

F

The same question was postulated in the Respondent's issue as follows:

G

"3.01 Whether admissibility or otherwise of Exhibit 'B' was covered by any issue properly raised by the Appellants before the Court of Appeal; if the answer is in the positive, whether or not failure to consider a miscarriage of Justice."

In the Appellants' ground 1 of the Grounds of Appeal in this appeal to this Court, pursuant to which Appellants' Issue No. 1 was postulated, it read as follows:

H

"Grounds of Appeal

(1) Error in Law

The learned Justices of the Court of Appeal erred in law by failing to decide on the intrinsic inadmissibility of Exhibit B, being of an erroneous view that there was no ground of appeal to sustain such a

decision as was expressed in the lead judgment of Hon. R.J. Jacks JCA when he said *inter alia* thus:

'It is pertinent to note here that the argument as to the admissibility or otherwise of Exhibit B can only be entertained if there is a ground of appeal to sustain it, for such a complaint is one of law on the authority of Nwadike v. Ibekwe (1987) 4 NWLR 718 (pt. 67) There is no such ground of law in this appeal. Besides, it is being argued under the umbrella of grounds 1 and 4 which complain of findings of facts and weight of evidence. This is not permissible. In view of this, I will discountenance it.'

Clearly, this ground of appeal sheds some light on the controversy that raged in the Court of Appeal on the very same issue of admissibility in evidence of Exhibit 'B'. Now it may be asked, what was the real issue at the court below on the question of admissibility of Exhibit 'B' which obviously was resolved against the Appellants herein as Appellants in the court below?

It is now convenient to recapitulate what transpired in the two lower courts in relation to the point in controversy. Exhibit B was tendered at the trial court through 4th Plaintiff as PW2. Exhibit B was the deed of lease executed by the Respondents. It was expressly pleaded in the amended Statement of Claim paragraph 18 by the Respondents, herein as Plaintiffs, and answered to in paragraph 9 of the amended Statement of Defence. It is manifest from the said paragraphs of the parties pleadings that they joined issue on the question of this deed of lease, which as earlier stated, was admitted in evidence without any opposition and marked Exhibit B. Commenting on the very same land that comprised the land leased by the Respondents to the Appellants and which was described in the evidence of PW2 as the deed of lease that was admitted in evidence as Exhibit B, the learned trial Judge in his judgment referred to the very same parcel of land as follows:

"I am not convinced that there was any protest when the Emakalakala people leased their portion of land to the Itabal Emakalakala Union. The real essence of ownership lies in the power of alienation and it is by virtue of such power that the Emakalakala

people as owners leased out land to the union as evidence in Exh. B."

From the above excerpt of the judgment of the trial court, as well as the aforesaid parties' pleadings, it is clear that the parties' treatment of the issue in respect of Exhibit B and the effect of Exhibit B in the consideration and evaluation of evidence tendered by the parties in relation to the leased land, was accorded considerable prominence by the learned trial Judge.

But strangely, when the Appellants herein, as Appellants in the Court of Appeal, complained of the pride of place given to Exhibit B by the trial court, the attack was not frontal; indeed, it was oblique. The indirect complaint on the very same subject matter was manifest in ground 4 of Appellants' Grounds of Appeal. It ran thus:

"4. Misdirection and Error in Law

The Learned trial Judge misdirected himself on the facts and issues arising from the pleadings as well as evidence adduced by the parties in that portion of his Judgment where he resolved certain issues erroneously in favour of the plaintiffs after observing thus:

'From the totality of the evidence as adduced by the parties with their witnesses there are certain important issues which are already resolved'

and also erred in law by placing heavy reliance on exhibit B (which ought to have been expunged or totally ignored) and failing to consider and weight together the case for the plaintiffs alongside the case for the defendants before determining in whose favour the weight of evidence preponderates (as amended)."

In the Appellants' brief in the court below, their learned counsel identified five issues for determination. I have painstakingly examined these five issues, and for ease of reference, I reproduce them:

"(a) Were the plaintiffs entitled to judgment, having sued in a representative capacity, there being nothing on the record to show that they obtained LEAVE?

(b) Did the learned trial Judge exercise his discretion judicially by allowing the plaintiffs to further amend their Amended Statement of Claim for the sole purpose of circumventing the argument by learned

defence counsel in his final address that the plaintiffs' action was premature and not maintainable, having regard to the issues joined by the parties in their pleadings, the evidence adduced at the trial and the prejudicial position of the defence at the particular stage of the proceedings?

(c) *In any event, did the plaintiffs succeed in establishing a cause of action entitling them to sue and maintain their claims against the defendants?*

(d) *Did the learned trial Judge dispassionately make his findings of facts (as he ought) by putting (or appearing to put) the totality of the evidence adduced at the trial on that imaginary scale, judicially balancing the evidence of the plaintiffs on the one side and weighing it together with the evidence of the defendants on the other side in order to determine the preponderance of the two; considering and ascribing thereto their probative values and drawing the right inferences therefrom?*

(e) *In any case, was the award of N600 as general damages for trespass not arbitrary and excessive?"*

It is clear to me that none of these issues had any bearing on the question of admissibility of Exhibit B yet learned Appellants' counsel at the court below powerfully submitted on the erroneous admission of Exhibit B in evidence when that submission was not predicated upon any ground of appeal

Reacting to the counsel's submission in the Court of Appeal, Jacks, JCA, who delivered the leading judgment, and concurred to by Onu JCA (as he then was) and Omosun JCA, opined:

"Learned counsel for the appellants at page 20 of his brief submitted that although Exhibit B was admitted without objection, yet by reason of section 90(3) of the Evidence Act, it was legally inadmissible, consequently the learned trial Judge ought to have expunged it suo moto. It is pertinent to note here that the argument as to the admissibility or otherwise of Exhibit B can only be entertained if there is a ground of appeal to sustain it, for such a complaint is one of law on the authority of Nwadike v. Ibekwe (1987) 4 NWLR 718 (pt. 67) and other decided cases. There is no such ground of law in this appeal. Beside, it is being argued under the umbrella of grounds 1 and 4 which complain of find-

ings of facts and weight of evidence. This is not permissible. In view of this, I will discountenance it."

The Appellants' complaint in ground 1 of the Grounds of Appeal before this Court, and which has been reproduced earlier in this judgment is the bone of contention that Appellants have sought to agitate again. It is quite clear to me that a repetition of an argument that has no merit does not improve the argument. The contention of learned counsel for the Appellants, as I seem to understand him, is that the court below erred in failing to pronounce on the admissibility of Exhibit B, which learned counsel had argued is intrinsically inadmissible and the argument in respect thereof could be canvassed on the omnibus ground of appeal; he called in aid the authority of Abisi v. Ekwealor (1993) 6 NWLR 643.

Needless to say that the authority cited by the learned Appellants' counsel is not apposite and I say no more about it. Exhibit B was a vital document to respondents' case. The same was admitted without opposition at the trial court.

The law on admissibility of evidence is tolerably clear. The situation here, we may recall, was that Exhibit B was admitted in evidence without opposition and the same was acted upon by the learned trial Judge, as he may very well do since his attention was not called to any irregularity that made the document inadmissible. However, on the appeal stage, the treatment to be given to such admitted document is given a different consideration, and much will depend on whether the trial was in respect of civil or criminal case. Of course, we are here concerned with a civil case and I am to say that a slightly greater latitude is allowed by the law. This is a case, no doubt, where Exhibit B is ordinarily inadmissible because it offends the provisions of section 90 (3) of the Evidence Law. The complaint in this case, as agitated by the Appellants is that Exhibit B was prepared on 13/10/76 whereas the action leading to this appeal was filed on 8/10/76. In other words, the point being made is that Exhibit B was made by an interested party to the suit which was already pending - some seven or eight days earlier before Exhibit B was prepared. Prima facie, in my opinion that offends the provisions of section 90 (3) of the Evidence Act. But that is not the end of the matter.

Since the Appellants were, as it were, in slumber at the trial court, where they allowed Exhibit B to be admitted in evidence without opposition, the law permits that such a complaint of inadmissibility of document, (such as Exhibit B,) may be raised at will even at the appeal stage, and it is of no moment that it was admitted at the trial court without opposition. See B Alade v. Olukade (1976) 1 SC. 183. This is apparently what the Appellants sought to do in the Court of Appeal, and have further set out their complaint on the same matter in this Court. The question is, did they properly put their complaint of inadmissibility of Exhibit B before the Court of Appeal, and also squarely or by implication, before us, and accorded that Court as well as this Court the opportunity under the law to expunge, as it were, the apparent inadmissible evidence, i.e. Exhibit B? My summary on the matter which I think has some bearing on the proper ratio of Alade v. Olukade case is that if the evidence complained of is by law inadmissible in any event, failure to object at the trial court will not prevent its inadmissibility being raised on appeal. See also Omoniyi v. Omotosho (1961). All NLR 304 at p. 308 and Alashe v. Olori Ilu (1964) 1 ALL NLR 390 at p. 397. It is trite that any complaint, by way of appeal, can only be entertained by the appellate court, as enjoined by the law, if the said complaint is, first, predicated on a properly formulated ground of appeal, and secondly, an issue for determination is postulated from the said ground of appeal. Obviously, failure to scale these two contingencies will deny the complaint of right of being heard in respect of what is seemingly a grave error of law committed either solely by the trial court or jointly by the court and the complaining party, with the resultant injustice of incalculable magnitude being occasioned to the unsuspecting litigant.

I have earlier in this judgment reproduced what would appear to be Appellants' ground of appeal in relation to the question of inadmissibility of Exhibit B. How elegant is ground 4 of the grounds of appeal? Speaking for myself, I am of opinion that ground 4 of the grounds of appeal, as framed, is incompetent as a ground of "misdirection of law", because, at best, it is one of mixed law and facts. By an large, it may be a ground of facts questioning the weight of evidence, and in common

legal parlance, this ground of appeal is referred to as the "omnibus ground". Speaking in the same vein, the Court of Appeal on this vexed issue, the Appellants have further appealed to this Court, as their Ground 1, and raised the same complaint on the vexed question involving Exhibit B, and in fact comprised in their ground one of appeal and christened it "ERROR IN LAW". We have earlier in this judgment reproduced Ground 1 of the Grounds of Appeal and I do not intend to reproduce it again. I have given a second hard look at Ground 1 of the grounds of appeal. I remain unpersuaded to the contrary. In other words, I am still at one with the court below that the Appellants failed to raise a proper ground of appeal upon which the complaint of inadmissibility of Exhibit B could be canvassed, bearing in mind, as we had earlier noted, that complaint of any aspect of the court's judgment can only be entertained by the appellate court on well-founded ground of appeal. Anything short of this will prevent the vexed question looming large over Exhibit B from being properly ventilated or redressed. No doubt, this explains why Belgore, JSC in the leading judgment, castigated the controversy raised by the Appellants over Exhibit B as "a big storm in a teacup". I respectfully agree.

In the result, I am satisfied that the posture of the court below vis-a-vis Exhibit B is unassailable and accordingly I turn in an affirmative answer to Appellants' question to the first arm of Question (a). This, in turn, renders the question under the second arm of Question (a) irrelevant.

Amendment of the Statement of Claim

Ground 8 of the Grounds of Appeal, in essence, complained of error in law in granting of amendment by the trial court in respect of Appellants' pleading. Issue (d) in this appeal is distilled, from this ground of appeal. This issue raises the interesting point of law on the right to amend one's pleading - be it the plaintiff or the defendant - ever at the address stage of the proceedings at the trial court.

In this appeal, evidence had been led and completed by both parties. Indeed, both counsel had also delivered their addresses and routinely judgment was reserved. Before judgment was delivered, it became obvious to Appellants' counsel that there was some mix-up which ridicu-

lously portrayed that Plaintiffs'/Appellants' cause of action in relation to the relief on trespass was out of step with the evidence led because, in essence, the writ of summons predated the event leading to the cause of action. It is perhaps fair to delineate the fact that this anomolous situation only became evident from the address of learned counsel to the B Defendants. In consequence to this discovery, learned Plaintiffs/Appellants sought and was duly granted leave to amend Plaintiffs' pleading in line with the evidence led.

Appellants strenuously in the Court of Appeal contested the grant C of the amendment, particularly as it was made, as it were, belatedly after counsel's addresses. That court was satisfied that the amendment was competently made within the rules of practice and accordingly refused to accede to the Appellants' contention. Undaunted, the Appellants, as we D have already observed, have further appealed to the apex Court.

The power of grant an amendment to the parties' pleadings, or any amendment for that matter, is entirely a matter that resides in the discretionary jurisdiction of the court which as a rule, must be seen to be exercised judicially and judiciously. The exercise of such power may be E at any time or stage of the proceedings. The aim of such amendment, as has been stated, time without number, is to elicit the issue really in controversy between the parties and thereby avoid injustice that would arise in such circumstances but for the amendment, provided there is no over- F reaching on the adversary party and that the opposing party is justly compensated in costs. See Johannes England v. J. Mope Palmer 14 WACA 659, James Otuntimehin v. Gubere (1964) 1 All NLR 176 at 179-180 and Loutfi v. Czarnikew (1952) 2 All E.R. 823.

I have closely examined the circumstances leading to the amend- G ment sought and granted by the trial court. It is crystal clear that the trial court, in my view, correctly, on the authorities, granted the amendment which the Court of Appeal duly affirmed. I find myself unable to differ H from them, both in principle and on the authorities. I neither find any injustice occasioned to the Appellants by the amendment nor is there any complaint that the amendment would occasion undue delay as to justify its refusal. See George v. Dominion Flour Mills Ltd. (1963) 1 ALL NLR

71.

Accordingly, I resolve Issue (d) in favour of the Respondents.

Finally, and by way of completeness, I wish briefly to advert to the preliminary objection raised by learned Respondents' counsel with regard to the competence of grounds 2, 3, 4, 5, 6, and 7 of the grounds of appeal. Briefly put, Respondents' learned counsel contends in the Respondents' brief that the above grounds of appeal are incompetent because they are grounds of mixed law and fact and since no prior leave was sought and obtained to file and argue them by the Appellants, these grounds should be struck out. The Appellants filed no Reply brief in response to this objection although their learned counsel at the oral hearing was permitted to react to the objection. He argued that the grounds of appeal were good grounds of law. On the second arm of the objection, Appellants' learned counsel conceded that no prior leave of the court below or this Court to Appeal on grounds of mixed law and fact was sought and obtained.

It is not quite elegant for counsel for the appellants who was duly served with Notice of Preliminary Objection in the respondents' brief to formally ignore to respond to it in a Reply brief but only to do so at the oral hearing. That is not good enough because in a seriously contested objection the Respondents who may be taken by surprise would seek adjournment to answer the Appellants' Reply to their Notice of Objection. Such approach may cause unnecessary delay because it makes nonsense of the formal Notice contained in the Respondents' brief. In a proper case, where the Court would be faced with a request for an adjournment to enable Respondents' counsel to prepare adequately to the oral and surprise response by the appellants, such request by the latter to make oral reply to the Notice may be stoutly refused by the Court to the chagrin of the Appellants. It is hoped that Appellants will take full advantage of the procedural provision for filing a Reply brief to novel issues raised in Respondents' brief and not take the wild chance of doing so at the oral hearing.

Be that as it may, the concession by the learned counsel for the Appellant that he did not seek leave to argue the aforesaid grounds of

appeal is enough to dispose of the preliminary objection because although those grounds of appeal were prominently designated "error in law", nevertheless, after due consideration of the objection raised, I am satisfied that the objection is sustainable in respect of each of the said grounds of appeal. The result is that I hold that each of the said grounds, i.e. grounds B 2, 3, 4, 5, 6 and 7 is, at best, a ground of mixed law and facts and since no prior leave of the court below or this Court was sought and obtained in respect thereof, as stipulated under section 213 (3) of the 1979 Constitution, each and everyone of the said grounds of appeal is incompetent, C and accordingly, I strike them out.

Having resolved the main issues in this appeal against the Appellants, I accordingly dismiss it for the reasons set out in this judgment and the fuller reasons contained in the leading judgment of my learned brother, D Belgore JSC, I award N10,000.00 costs against the Appellants.

KALGO JSC

I have had the privilege of reading in draft the judgment of my E learned brother Belgore JSC just delivered and I agree entirely with the reasoning and conclusions reached therein. I agree that there is no merit in the appeal. I accordingly affirm the decisions of the courts below and dismiss the appeal with N10,000.00 costs in favour of the respondents. F

AYOOLA JSC

I have had the privilege of reading in advance the judgment delivered by my brother, Belgore JSC. I agree with his decision that this G appeal should be dismissed and with the reasoning by which that decision was arrived at.

The appellants raised on this appeal eight grounds of appeal of which six, namely: grounds 2, 3, 4, 5, 6 and 7, are incompetent and H should be struck out, those grounds being grounds of fact or, at best of mixed law and fact, which could not be argued without leave of this court. The appellants' counsel erroneously believing that they are grounds

of law, the appellants have not sought the requisite leave. It is clear that appellants' counsel laboured under a misconception when he described as "error in law" the view of the Court of Appeal upholding findings of fact made by the trial court. Where it is believed that an opinion of the
B appellate court merely upholding or concurring with a finding of fact made by the trial court is erroneous, such error or misdirection remains one of fact and not of law. An appellant will not be permitted to side-track the clear provisions of section 213(3) of the 1979 Constitution or
C 0.2 r. 32 of the Supreme Court Rules by framing grounds of appeal in such a way as to make an appeal which is in substance and form concurrent findings of facts by two courts as if it is one purely on question of law, 0.2 r. 32 provides that:

*"When, in an appeal to the court from the court below, the court
D below has affirmed the findings of fact of the court of first instance, any application to the court in pursuance of its jurisdiction under section 213 (a) of the Constitution for leave to appeal shall be granted only in exceptional circumstances."*

E In this case, the appellants who have not even made any application for leave to appeal under section 213 (a) of the Constitution are in a worse position.

The only issues that can validly be considered on this appeal are:

F (i) whether their Lordships of the Court of Appeal were right in their view that no issue as to the admissibility of Exhibit B, a deed of lease put in evidence by the respondent, arose in the appeal before them; and, (ii) whether that court was right in upholding the further amendment to the Amended Statement of Claim.

G In regard to the first of these issues the complaint in the relevant grounds of appeal in the appeal to the Court of Appeal was that the trial court "erred in law by placing heavy reliance on exhibit B (which ought to have been expunged or totally ignored)." It has been argued in the
H court below that "the trial court's holding that Exhibit B amounted to real manifestation of ownership by the plaintiffs and that it was tantamount to the most conclusive incident of ownership is indefensible" because Exhibit B was made by the plaintiffs after they had filed the suit and for the

purpose of prosecuting the claim in the court. It was argued that Exhibit B was inadmissible by virtue of section 90 (3) of the Evidence Act. The Court of Appeal was of the view that there was no ground of appeal to support the argument about the inadmissibility of Exhibit B. Jacks, J.C.A., who delivered the leading judgment of that court was of the view, in effect, that question of admissibility of evidence cannot be argued under the umbrella of grounds of appeal which complain of findings of fact and weight of evidence.

I feel no hesitation in agreeing with the view of the Court of Appeal. Question of admissibility of evidence is one of law which has to be distinctly raised by the grounds of appeal. It is not permissible for an appellant who wishes to argue that the trial court had admitted inadmissible evidence to argue such issue under a ground of appeal which complains of wrong evaluation of evidence or that the decision is against the weight of evidence. Such complaint may be taken to have assumed that the evidence evaluated or weighed has been properly admitted. In this case the complaint (i.e. ground 4) that the Judge erred in law by placing heavy reliance on exhibit B goes more to the weight the trial Judge had ascribed to the document than to its admissibility. It is difficult to understand why if the appellants had wanted to complain about admissibility of Exhibit B, they did not clearly, distinctly and expressly say so. I hold that the Court of Appeal came to a correct decision on this issue.

As regards the second issue, there is really no substance in the contention that the further amendment sought by the respondents was made in bad faith. An amendment of the pleadings made in order to bring the pleadings in line with the evidence, as in this case, cannot be said to have been made in bad faith. I venture to think that one rough and ready test in determining whether a discretion to grant an amendment of pleadings has been properly exercised or not, is to ask whether the fairness of the trial has been adversely affected by the amendment granted. Where an amendment has occasioned prejudice to the other party, it cannot be said that the trial is fair. Neither prejudice nor injustice has been occasioned to the appellants by the amendment made in this case. The Court of Appeal saw no reason to interfere with the exercise of discretion by

the trial Judge. Nothing useful has been urged on this appeal to show that the Court of Appeal was wrong.

For these reasons and for the fuller reasons contained in the leading judgment, I too would dismiss the appeal. I abide by the order B for costs made by my learned brother, Belgore JSC.

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