

**SUPREME COURT OF NIGERIA**  
18TH JUNE, 1999. SC. 161/1998  
**CORAM:- A. G. KARIBI-WHYTE, E. O. OGWUEGBU,**  
**U. MOHAMMED, A. I. KATSINA-ALU,**  
**A. O. EJIWUNMI, JJSC.**

1. PARTICK IZUAGBE OKOLO .....	APPELLANTS/
2. PACE INDUSTRIES NIGERIA LTD	APPLICANTS
AND	
UNION BANK OF NIGERIA LTD. ....	RESPONDENT/
	DEFENDANT

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***APPEALS** - Pleadings - Amendment - A party may amend his pleadings at any stage - And an appellate court can make such amendment - In so far as it will not occasion a miscarriage of justice.*

***PLEADINGS** - Amendment - Principles - That should guide a court - In deciding when and in what circumstances - A party may be allowed to amend his pleadings.*

***PLEADINGS** - Amendment - Application for amendment - Which intends to introduce a new cause of action - And if granted would be prejudicial to the other party - Will be refused.*

**FACTS**

The appellants/applicants by a Motion on Notice filed in the Supreme Court are asking inter alia, for an order granting leave to further amend the Amended Statement of Claim filed in the case in order to bring it in line with evidence already led and contained in the Record of Appeal particularly the evidence of the 1st appellant/applicant. A seven paragraph affidavit was filed in support of the motion. A counter-affidavit was filed in opposition to the application by the Solicitors to the Cross-appellant/Respondent. It was deposed in the said counter-affidavit that the amendment sought is over-reaching, prejudicial to the respondent if

granted and that the latter is bound to lead evidence to controvert or challenge the new averments. The learned senior counsel for the respondent submitted that the proposed further amendment had been pleaded in the amended statement of claim and that the appellants cannot be amending what were already pleaded. The appellants had pleaded in paragraph 18 (a) and (h) of their amended statement of Claim the failure of the defendant/respondent to transfer the foreign exchange or the currency equivalent of N239,143.00 to cover the goods supplied to them by their overseas customers which sum they made available to the defendant/respondent. This averment is contained in their Particulars of Negligence. That amount of money was not claimed in the said amended statement of claim. The Court of Appeal held that where no relief is claimed in the statement of claim, neither the High Court nor the appellate court has the power to grant it because the Court has no power to award a party what he has not claimed. In paragraph 2(b) of the proposed further amended statement of claim the applicants are claiming the refund of the said sum of N239,143.00 which they did not claim in the courts below.

#### **ISSUE FOR DETERMINATION**

*Whether it is proper to allow the applicants to further amend their pleadings before the main appeal is heard in this court.*

**HELD** (Unanimously refusing the application per lead ruling of **EJIWUNMI JSC**)

#### ***Pleadings - Amendment***

1. The principles that should guide a court in deciding whether an amendment to a Statement of Claim ought to be granted or not, have been the subject of several pronouncements by this court. Some of such cases are as follows:- Olu of Warri v. Esi (1958) S.C.N.L.R 384; Re-Pedro St. Mathew-Daniel (Deed) (1950) 19 NLR 73. From all these cases and others to which I have not referred to specifically, in this ruling, I think the following principles are discernible to determine when and in what circumstances a party may be allowed to amend his pleadings.

These are:-

(a) The Court must consider the materiality of the amendment sought and will not allow an inconsistent or useless amendment.

(b) Where the amendment would enable the court to decide the real matter in controversy, and without injustice.

(c) Where the amendment relates to a mere misnomer, it will be granted almost as a matter of course.

(d) The court will not grant an amendment to change the nature of the claims before the court.

(e) The court will not grant an amendment where it will create a suit where none existed.

(f) Leave to amend will not be granted if the amendment would not cure the defect in the proceedings.

(g) An amendment would be allowed if such an amendment will prevent injustice. Any amendment which will result in injustice to the other party or which will violate the rule of audi alteram partem will not be allowed. The rule will be infringed if an amendment is introduced at such a stage that the other side no longer has the opportunity of adducing its own answer to the point which the amendment has enabled the applicant to introduce.

(h) An amendment will not be granted on appeal where it would be inconsistent with the testimonies of witnesses on which both parties fought the case at the trial. (p. 1944 H)

### ***Appeals - Pleadings***

2. It is clear from the principles governing whether a party in a civil suit would be granted leave to amend his pleadings or not depends on a number of factors. The court in the process is required to maintain its neutral position and ensure that parties are bound by their pleadings. In effect, although parties must therefore ensure that in their pleadings, they set out clearly such facts upon which they rely for their case. It is also recognized that sometimes, to obviate ambiguity or to aver some more facts, a party may amend his pleadings upon some of the principles I have iden-

tified above. A party may therefore amend his pleadings before the end of hearing or judgment and sometimes on appeal. See Oguma v. International Bank for West Africa (1986) 2 NWLR (Pt. 20) 114; Salami v. Oke (1987) 4 NWLR (Pt. 63) 11; Ezeani v. Okwordi (1986) 4 NWLR (Pt. 33) 27. The appellate court can even make such amendment in so far as it will not be to the disadvantage of the other side or occasion a miscarriage of justice. Kate Enterprises Ltd v. Daewoo (Nig) Ltd (1985) 2 NWLR (Pt. 5) 116. (p. 1947 E)

C  
***Amendment - Application for amendment***

3. I am of the firm view that the proposed amendment, if accepted, would result in the changing of the nature of the action between the parties. It is evident as was submitted by the learned Senior Advocate of Nigeria for the respondent that the amendment if granted would be unfair to the respondent, and that contrary to the contention of the learned counsel to the applicants, fresh evidence would have to be called. The case of Osho v. Ape (1998) 8 NWLR (Pt. 502) 492 is certainly not in support of the proposition that amendments could be granted which would be to the disadvantage of the other party to the action. Indeed Wali, JSC made that point very clear in the case of "The Shell Petroleum Development Co. (Nig) Ltd v. Ambah (1999) 3 NWLR (pt. 593) 1 at 10, he said, inter alia, thus:-

"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 overreach or is prejudicial to the other party, See Eshelby v Fed European Bank (1932) 1 K.B. 254; Loutfi v Czarnikow Ltd (1952) 2 ALL ER 823; Alhoh v Abuh (1988)3 NWLR (Pt. 85) 696."

It follows from what I have said above that by this application the applicants clearly intended to introduce a new cause of action, and if granted it will over-reach and would be prejudicial to the other party. I will therefore refuse the application and it is accordingly refused with costs to the respondent in the sum of N1,000.00 only. (p. 1948 A)

**NOTABLE POINTS OF INTEREST****OGWUEGBU JSC***1. An amendment will be refused when it will lead to the calling of additional evidence*

An amendment will not be refused simply because it introduces a new case or a new relief as in this case but this court will refuse to do so where the amendment would necessitate the calling of additional evidence, entail injustice to the respondent, or change the action into one of a substantially different character. See Oguntimehin v. Gubere (1964) 1 All N.L.R. 176, Budding v. Murdoch (1875-76) 1 Ch. D. 42 and Hubbock v. Helms (1887) 56 L.J. Ch.539. The applicants by the proposed further amendment are seeking a new or additional relief which the respondent's counsel has argued will be prejudicial, over-reaching and which will lead to further evidence if granted. I do not agree with him that it will be over-reaching but I agree that it will lead to the calling of additional evidence by the defendant/respondent, if granted. (p. 1952 F)

*2. How orders sought from court should be stated*

Even though I have come to the conclusion that the grant of the amendment will lead to the calling of additional evidence, the applicants have not come out boldly to pray for an order to further amend their statement of claim by adding a new relief. i.e., the refund of the said amount by the defendants. Orders sought from courts must be explicitly stated. The court should see at a glance the exact nature of relief sought without the necessity of going through the entire proceedings to discover it as in this case. It should not be a game of hide and seek. I believe the appellants' counsel understands the point I am making here. (p. 1953 E)

**MOHAMMED JSC***3. The stage at which an amendment to pleadings may not be granted*

Generally, an amendment to pleadings for the purpose of determining the real issues in dispute between the parties ought to be allowed at any stage of the proceedings. However, in practice, an amendment of pleadings

should not be granted at too late a stage of the proceedings except where evidence had been given and the case had been fought on the footing that a particular subject-matter was in issue so that the amendment is just to incorporate the subject matter. (p. 1954 C)

B

**REPRESENTATION**

M. O. Mudiaga Odje, Esqr. for the Applicants/appellants

C Chief E. L. Akpofure, SAN with A. Izinyon Esqr. and Miss Josephine E. Ogbeide for Respondent

**CASES REFERRED TO**

Olu of Warri v. Esi (1958) S.C.N.L.R 384

D Abashi v. Labiyi (1958) WRNL 12

Foko v. Foko (1968) NMLR 441

Union Bank v Ogbob (1995) 2 NMLR (Pt. 380) 647

Oyenuga v Proncial Council of University of Ife (1965) NMLR 9

E Jessica Trading Co. Ltd v. Bendel Insurance Co. Ltd (1993) 1 NMLR (Pt. 271) 538

Salami v. Oke (1987) 4 NWLR (Pt. 63) 11

Ezeani v. Okwordi (1986) 4 NWLR (Pt. 33) 27

F Kate Enterprises Ltd v. Daewoo (Nig) Ltd (1985) 2 NWLR (Pt. 5) 116

Osho v. Ape (1998) 8 NWLR (Pt. 502) 492

Oguntimhin v. Gubere (1964) 1 All N.L.R. 176

Budding v. Murdoch (1875-76) 1 Ch. D. 42

Hubbock v. Helms (1887) 56 L.J. Ch.539.

G

**LEAD JUDGMENT BY EJIWUNMI JSC**

The unique question raised by this application is whether it is proper to allow the applicants to further amend their pleadings before the main appeal is heard in this court.

By a Motion on Notice dated 4th day of November, 1998 and filed in this court on the 19th November, 1998, the applicants are asking for the following order or orders:-

1. *"Granting Leave to further amend the Amended Statement of Claim filed in this case in line with evidence already led and contained in the records of Appeal as underlined in Red herein.*

2. *Deeming the attached proposed further amended Statement of Claim attached to the supporting affidavit herein and marked as Exhibit B 'P10' as duly filed and amended; the appropriate filing fees have been paid.*

3. *Directing the said pleadings to be part of the Records of appeal herein in place of the existing amended Statement of Claim at pages 42A - 42G and for such further Order or Orders as this Honourable Court may deem just and expedient to make in the circumstance."*

In support of this Motion, the applicants filed a seven paragraphed affidavit deposed to by one James Ukpanya, a litigation Clerk in the firm of Okiemute Mudiaga Odje & Co., who are the applicant's Solicitors. As I consider that paragraphs 2,3, 4,5, & 6 of the said affidavit are relevant, they are reproduced as follows:-

2. *"The appellants/applicants were unsuccessful at the Court of Appeal, Benin-City and expediently sought and successfully obtained the leave of that Court to appeal against that judgment of which records of Appeal the parties herein diligently assembled and had same transmitted to this Honourable Court.*

3. *Going through the said Records of Appeal, the Head Counsel of the said appellants/applicant's Solicitors, Okiemute Mudiaga Odje Esquire has informed me and I verily believe him, that there is an imperative need to further amended (sic) Statement of Claim filed in this case in order to bring it in line with in (sic) the evidence already contained in the Record of Appeal particularly the evidence of the 1st Appellant/Applicant at pages 50-60 of the said Records of Appeal.*

4. *I am still informed as aforesaid and I verily believe the same, that this Appeal can only be effectually and properly presented with full force and stem if the he proposed amendment for which no further evidence is required is granted by this Honourable Appellate Apexian Court. I attach hereto and mark as Exhibit "P10" a copy of the proposed further amended Statement of Claim.*

5. *I am still further informed as aforesaid and I verily believe that having regard to the evidence on record for which this amendment is brought in line with, the Cross-Appellant/Respondent will suffer no injustice whatsoever and can always be assuaged in costs to enable this last*  
B *court completely, effectually and fully adjudicate upon the Real and Live issues in this appeal.*

6. *The 1st appellant/applicant has informed me and I really believe him that the appellants/applicants are anxious, enthusiastic, willing and able to pursue this appeal to its logical conclusion of this appeal if*  
C *and when this Honourable Apexian Court grants the order humbly sought on the attached motion paper."*

Before I refer to the proposed amendment, it is necessary to set down the relevant paragraphs of the Counter Affidavit filed in opposition  
D to this application. This Counter-Affidavit was deposed to by one F.I. Agboroh Esq, Legal Practitioner in the Law firm of E.L Akpofure (SAN) & Co. Solicitors to the Cross-appellant/Respondent. The relevant paragraph of the said Counter-Affidavit reads Thus:-

E "3. *That my principal Chambers, Chief E.L. Akpofure SAN, had gone through the entire record and has informed me and I verily believed that:-*

(a) *The amendment sought is over reaching.*

F (b) *The cross-appellants/respondents will be prejudiced if this application is granted.*

(c) *The cross-appellants/respondents herein shall be duty bound to lead evidence to controvert or challenge the new averments and the new reliefs sought to be amended by the appellants.*

G (d) *That the said amendment is an attempt to rewrite both the judgment of the trial court and the Court of Appeal.*

(e) *That the amendment sought in the proposed amended Statement of Claim at this stage is not in line with evidence as claimed by the*  
H *appellant.*

(f) *That the gravity of the said application will automatically lead to the respondent herein amending their own Statement of defence, and thereafter calling oral evidence.*



(g) *It will be in the interest of justice for this application to be refused at stage."*

At the hearing of the application, E.L. Akpofure Esq, SAN for the respondent opened his argument by referring to the Counter-Affidavit he had filed on behalf of the respondent to oppose the application. B The learned Senior Advocate for the respondents then referred the court to paragraphs 13, 18(j), 21(d), of the amended Statement of Claim to support his submission that by those paragraphs, the applicants had pleaded and given evidence on the suspense account they were operating with the respondent. (See page 42 at lines 6-27 of the record of Proceedings). C

Then he referred us to paragraph 21(b) of the proposed further Amendment to the Amended Statement of Claim which was attached as Exhibit "P10" to the application. He then submitted that by the proposed amendment, the applicants are trying to set up a new case, and he urged that this court should not allow the applicants to do so. He further contended that if the amendment was granted, it will be necessary to call evidence. D In particular, he argued that both sides would have to lead evidence on the nature of interest chargeable by the Central Bank in connection with the date when judgment was delivered in the matter in the trial court. In support of his submissions he cited the case of Jessica Trading Company Ltd v. Bendel Insurance Company (1993)1 NWLR (Pt.271) 538 at 547. He finally submitted that the application be refused. F

For his part, Learned counsel for the applicants, O. Mudiaga Odje, Esq, urged that the application be granted. He contended that the application was brought merely to bring the pleadings in line with the evidence already on record. In his view the applicants would not need to call any further evidence. But he urged that the Court could take judicial notice of the interest rates fixed by the Central Bank as deemed relevant. G The learned counsel for the brought to the attention of the court some authorities in support of his contention, and also referred particularly to Osho v Ape (1998) 8 NWLR (Pt. 564) 492 at 502. I will in the course of this ruling refer to them as I consider necessary for the determination of the question raised by this application. H

In order to make the point clear I will set out the paragraph 21(b) as pleaded in the Amended Statement of Claim, and as it is now subject to be amended.

Paragraph 21(b) of the Amended Statement of Claim reads thus:-

B "An order for account of all monies paid into and debited against  
2nd plaintiff's Account or Accounts with the Defendant from 1986 till  
date and reversal of all wrongful and illegal debits made by the Defen-  
dant on the said accounts from 1986 till date and payment over to the  
2nd plaintiff of all monies excessively debited with interest at present  
C Bank Rate."

Paragraph 21(b) as averred in the proposed Further Amended Statement of Claim reads thus:-

D "An Order of Court directing the Defendant to refund the sum  
of N239,143.00 (Two hundred and thirty nine thousand, one hundred and  
forty three Naira) plus accrued interests from 1982 up to date of judg-  
ment and/or payment at the ruling Bank rate from year to year as stipu-  
lated by the Central Bank of Nigeria and/or in the alternative."

E It is manifest from a careful reading of paragraph 21(b) of the  
proposed Further Amended Statement of Claim that is totally different in  
its terms from the paragraph 21(b) of the Amended Statement of Claim  
upon which the case was heard and determined. As a matter of fact it is  
also clear that the original paragraph 21(b) was also included in the pro-  
posed Further Amended Statement of Claim as its paragraph 21(b) a. So  
F strictly paragraph 21(b) as proposed is in fact a new averment upon  
which the applicants would want the appeal to be heard and determined.

G In the course of his address, learned counsel for the applicants  
had sought to assure the court that he would not need to call fresh evi-  
dence to justify this new averment and that the other side would not be  
embarrassed in any way should the amendment be granted. The position  
of the learned counsel for the respondent E.L. Akpofure SAN, is dia-  
H metrically opposed to that of counsel for the applicants. His view is  
clearly to the effect that if the amendment was granted, fresh evidence  
would have to be called with the consequent result that would flow from  
such an exercise. **The principles that should guide a court in decid-**

ing whether an amendment to a Statement of Claim ought to be granted or not, have been the subject of several pronouncements by this court. Some of such cases are as follows:- Olu of Warri v. Esi (1958) S.C.N.L.R 384; Re-Pedro St. Mathew-Daniel (Deed) (1950) 19 NLR 73; Abashi v. Labiyi (1958) WRNL 12; Foko v. Foko (1968) NMLR 441; Union Bank v Ogboh (1995) 2 NMLR (Pt. 380) 647; Oyenuga v Proncial Council of University of Ife (1965) NMLR 9; Jessica Trading Co. Ltd v. Bendel Insurance Co. Ltd (1993) 1 NMLR (Pt. 271) 538. B

From all these cases and others to which I have not referred to specifically, in this ruling, I think the following principles are discernible to determine when and in what circumstances a party may be allowed to amend his pleadings. C

These are:- D

(a) The Court must consider the materiality of the amendment sought and will not allow an inconsistent or useless amendment.

(b) Where the amendment would enable the court to decide the real matter in controversy, and without injustice. E

(c) Where the amendment relates to a mere misnomer, it will be granted almost as a matter of course.

(d) The court will not grant an amendment to change the nature of the claims before the court. F

(e) The court will not grant an amendment where it will create a suit where none existed.

(f) Leave to amend will not be granted if the amendment would not cure the defect in the proceedings. G

(g) An amendment would be allowed if such an amendment will prevent injustice. Any amendment which will result in injustice to the other party or which will violate the rule of audi alteram partem will not be allowed. The rule will be infringed if an amendment is introduced at such a stage that the other side no longer has the opportunity of adducing its own answer to the point which the amendment has enabled the applicant to introduce. H

**(h) An amendment will not be granted on appeal where it would be inconsistent with the testimonies of witnesses on which both parties fought the case at the trial.**

In the instant case, the applicants are seeking an amendment to their pleadings in this court, and their learned counsel has argued that the amendment would not adversely affect the interest of the respondent. It is also contended for them that the evidence required to support the new amendment has been given by the 1st applicant in the course of his evidence on record. This court had to consider an application similar to that brought by the applicants in this case in Jessica Trading Co. Ltd v. Bendel Insurance (supra). In that case like the present, the applicants therein sought for an amendment to their pleadings in this court. In that case, Kutigi, JSC said at page 548 thus:-

"In the instant case it is evident from the Writ of Summons and the Statement of Claim that plaintiff/applicant's claim was for N319,884.19 (See para 38 & 39 of the Statement of Claim (which superseded the writ herein). At the trial court judgment was for N277,513.18 was entered for it. That judgment was then set aside by the Court of Appeal, hence the appeal to this court. What was claimed in paragraph 39(i) of the Statement of Claim was N319,884.19 being damages for breach of contract of 3/4/79 only. There was no claim for interest of 13 years at the rate of 13% as now sought to be amended. There was equally no claim for general damages either equally no claim for general damages either in the writ or in the Statement of Claim. The applicant is also now seeking to amend the figures N319,884.19 wherever they appear in paragraphs 38 and 39 of the Statement of Claim to \$207,250.50 plus 10% interest. In addition while the original claim was based simply on breach of contract, it is now being amended and expanded to include an action in negligence thus - the defendant was negligent breaking also its Statutory duties under Insurance Act 1976."

Now returning to the instant case, the applicants by their amended Statement of Claim at paragraph 21(b) merely asked for "Account of all monies paid into the debited against 2nd plaintiff's Account or Account with the Defendant from 1986 till date and reversal of all wrongful and

illegal debits made by the defendant on the said account from 1986 ....."  
Where by the proposed amendment the applicants are seeking for "an  
order of court directing the defendant to refund the sum of 239,143.00  
plus accrued interests from 1982 up to date of judgment and/or payment  
at the ruling Bank rate from year to year as stipulated by the Central Bank  
of Nigeria and/or in the alternative." B

It does not need any special knowledge to recognize that the  
proposed amendment to paragraph 21(b) of the amended Statement of  
claim is totally different from the original paragraph 21(b). By this amend-  
ment the applicants are now seeking for the refund of the sum of C  
N239,143.00 which was not pleaded originally, and interests from 1982  
up to date of judgment. They have not even pleaded the rate of interest  
that would apply, but a general averment that interest would be as stipu-  
lated by the Central Bank. D

While it is evident from the records that the 1st applicant did  
give evidence concerning the refund of N239,143.00, there was no evi-  
dence concerning interest rates on the said sum and that it would be from  
1982, (not 1986), as previously pleaded. E

**It is clear from the principles governing whether a party in  
a civil suit would be granted leave to amend his pleadings or not  
depends on a number of factors. The court in the process is re-  
quired to maintain its neutral position and ensure that parties are F  
bound by their pleadings. In effect, although parties must there-  
fore ensure that in their pleadings, they set out clearly such facts  
upon which they rely for their case. It is also recognized that some-  
times, to obviate ambiguity or to aver some more facts, a party G  
may amend his pleadings upon some of the principles I have iden-  
tified above. A party may therefore amend his pleadings before  
the end of hearing or judgment and sometimes on appeal. See  
Oguma v. International Bank for West Africa (1986) 2 NWLR (Pt.  
20) 114; Salami v. Oke (1987) 4 NWLR (Pt. 63) 11; Ezeani v. Okwordi H  
(1986) 4 NWLR (Pt. 33) 27. The appellate court can even make  
such amendment in so far as it will not be to the disadvantage of  
the other side or occasion a miscarriage of justice. Kate Enter-**

prises Ltd v. Daewoo (Nig) Ltd (1985) 2 NWLR (Pt. 5) 116.

From all I have said above, I am of the firm view that the proposed amendment, if accepted, would result in the changing of the nature of the action between the parties. It is evident as was submitted by the learned Senior Advocate of Nigeria for the respondent that the amendment if granted would be unfair to the respondent, and that contrary to the contention of the learned counsel to the applicants, fresh evidence would have to be called. The case of Osho v. Ape (1998) 8 NWLR (Pt. 502) 492 is certainly not in support of the proposition that amendments could be granted which would be to the disadvantage of the other party to the action. Indeed Wali, JSC made that point very clear in the case of "The Shell Petroleum Development Co. (Nig) Ltd v. Ambah (1999) 3 NWLR (pt. 593) 1 at 10, he said, inter alia, thus:-

*"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 overreach or is prejudicial to the other party, See Eshelby v Fed European Bank (1932) 1 K.B. 254; Loutfi v Czarnikow Ltd (1952) 2 ALL ER 823; Alhoh v Abuh (1988) 3 NWLR (Pt. 85) 696."*

It follows from what I have said above that by this application the applicants clearly intended to introduce a new cause of action, and if granted it will over-reach and would be prejudicial to the other party. I will therefore refuse the application and it is accordingly refused with costs to the respondent in the sum of N1,000.00 only.

#### KARIBI-WHYTE JSC

I have read in draft the judgment of my learned brother A.O. Ejiwunmi in this appeal. I agree entirely with his reasoning and the conclusion that the application fails and should be refused. I also hereby refuse the application.

Applicant shall pay N1,000 as costs to the Respondent.

**OGWUEGBU JSC**

I have had the advantage of a preview of the draft of the ruling just delivered by my learned brother Ejiwunmi, J.S.C. and I agree that this application fails and should be refused.

The appellants/applicants who were plaintiffs in the High Court brought this motion on notice praying the court for the following orders:-

*"1. Granting leave to further amend the amended statement of claim filed in this case in line with the evidence already led and contained in the RECORDS OF APPEAL as underlined in RED herein;*

*2. Deeming the attached proposed further amended statement of claim attached to the supporting affidavit herein and marked as EXHIBIT "P10" as duly filed and amended; the appropriate filing fees having been paid.*

*3. Directing the said pleadings to be part of the RECORDS of appeal herein in place of the existing amended statement of claim at pages 42A - 42G ....."*

Only paragraph 3 of the affidavit in support of the application appeared to offer a reason for the amendment sought. It reads:

*"3. Going through the said Records of Appeal, the Head Counsel of the said Appellants/Applicants' Solicitors, Okiemute Mudiage Odje Esquire has informed me and I verily believe him, that there is an imperative need to further amended the statement of claim filed in this case in order to bring it in line with the evidence of the 1st Appellant/Applicant at pages 50 to 60 of the said Records of Appeal."*

The amendment statement of claim on which the plaintiffs fought their case in the court of trial was filed on 26- 6-92. It is that statement of claim which the plaintiffs/appellants want to further amend. Its paragraph 21 read:

*"21. Wherefore the plaintiffs claim against the Defendant as follows:-*

*(a) A Declaration that the defendant by herself, her servants and or agents is not entitled to sell, auction or deal in any other manner with 1st plaintiff's property lying and situate at plot 16 Kodesoh Layout,*

*Effurun and registered as No. 45; at page 45 in volume 273 at the Lands Registry in Benin City in purported exercise of power of Sale conferred under a Mortgage Deed between the 1st plaintiff and the Defendant registered as instrument No. 45 page 45 in volume 523 at the Lands Registry Benin City in that the prior consent of the Military Governor was not obtained before the Mortgage was effected in compliance with the Land Use Act, 1978 consequently the same is null and void and unenforceable.*

*(b) An order for Account of all monies paid into and debited against 2nd plaintiff's Account or Accounts with the Defendant from 1986 till date and reversal of all wrongful and illegal debits made by the Defendant on the said accounts from 1986 till date and payment over to the 2nd plaintiff of all monies excessively debited with interest at present Bank Rate.*

*(c) An order of perpetual injunction restraining the Defendant by herself, her servants and or agents or otherwise howsoever from auctioning selling, disposing of or in any way interfering with 1st plaintiff's title to possession over the property lying and situate at plot 16 Kodesoh Layout, Effurun.*

*(d) The sum of N1,000,000.00 being damages suffered by the plaintiffs.*

*(e) The sum of #5,155.35 (or its current equivalent in Naira) including the current Bank interest rate of 30%, which said sum the Defendant have failed, refused or neglected to refund to plaintiffs despite repeated demands.*

The further amendment sought in this application is contained in paragraph 21(b) of the Proposed Further Amended Statement of Claim annexed to the affidavit in support of the application as Exhibit "P10". The proposed paragraph 21(b) is as follows:

*"(b) AN ORDER OF COURT DIRECTING THE DEFENDANT TO REFUND THE SUM OF N239,143.00 (TWO THOUSAND AND THIRTY NINE THOUSAND, AND HUNDRED AND FORTY THREE NAIRA) PLUS ACCRUED INTERESTS FROM 1982 UP TO DATE OF JUDGMENT AND/OR PAYMENT AT THE RULING BANK FROM*



*YEAR TO YEAR AS STIPULATED BY THE CENTRAL BANK OF NIGERIA AND/IN THE ALTERNATIVE .....* "

While moving the motion, Mr. Odje referred the court to the cases of Laguro v. Toku (1992) 2 N.W.L.R. (Pt. 223) 278 at 28 - 295 and Osho v. Ape (1998) 8 N.W.L.R. (Pt. 562) 492 at 496. Chief Akpofure, B S.A.N. in opposing the application referred to the counter-affidavit of Mr. Agboroh, legal practitioner in the law firm of Akpofure & Co., Solicitors. It was deposed in the said affidavit that the amendment sought is over-reaching, prejudicial to the respondent if granted and that the latter is bound to lead evidence to controvert or challenge the new averments and the new reliefs sought by the applicants. Chief Akpofure, S.A.N referred the court to paragraph 18 of the amended statement of claim where the plaintiffs pleaded the suspense account and paragraphs 18 (j) and 21(e) of the proposed further amended statement of claim and paragraph 21(e) of the amended statement of claim at page 42H of the record of appeal. He submitted that all these had been pleaded in the amended statement of claim and that the plaintiffs cannot be amending what were already pleaded. He finally submitted that if the amendment is granted both parties will call witnesses and the nature of evidence will radically change the rate of interest from 1982 to the date of judgment. We were referred to the case of Jessica Co. Ltd. v. Bendel Insurance Co. Ltd. (1993) 1 N.W.L.R. (Pt. 271) 538 at 547-549.

The first prayer of the plaintiffs/appellants/applicants has been reproduced at the beginning of this ruling and I refer to it at this stage. In paragraph 3 of the affidavit in support of the motion, James Ukpanya, a Litigation Clerk in the office of appellants/applicants' counsel deposed that he was informed by the appellants' counsel that there is an imperative need to further amend the statement of claim filed in this case in order to bring it in line with the evidence led and contained in the record of appeal. If as was averred in the affidavit that the amendment sought is one merely to bring the pleadings in line with the evidence already given, it is clearly within the competence of this court to do so. But it is not. Section 22 of the Supreme Court Act, 1960 and Order 8, rule 12(1) of the Supreme Court Rules empower this court to grant an amendment

which is within the competence of the trial court. See Ojah & Or. v. Ogoni & Ors. (1976) 4 S.C. 69 at 75-81, Ewaremi v. A.C. B. Ltd. (1978) 4 S.C. 99 at 107 and Osunrinde & Ors. v. Ajamogun & Ors. (1992) 6 N.W.L.R. (Pt. 246) 186 at 192. Again, amendments are normally granted in the interest of justice and if a refusal to do so would cause injustice, it is granted however late the proposed amendment may be. See Afolabi 7 Ors. v. Adekunle & Ors. (1983) 8 S.C. 98 at 103-104 and England v. Palmer 14 WACA 659.

In this case, the appellants/applicants pleaded in paragraph 18(a) and (h) of their amended statement of claim the failure of the defendant/respondent to transfer the foreign exchange or the currency equivalent of N239,143.00 to cover the goods supplied to them by their overseas customers which sum they had made available to defendant. This averment is contained in their Particulars of Negligence. That amount of money was not claimed in the said amended statement of claim. The court below held that where no relief is claimed in the statement of claim, neither the High Court nor the appellate court has the power to grant it because the court has no power to award a party what he has not claimed. See Otanioku v. Alli (1977) 11- 12 SC 9 and Ekpenyong v. Nyong (1975) 2 SC 71 In paragraph 2(b) of the proposed further amended statement of claim the applicants are claiming the refund of the said sum of N239,143.00 which they did not claim in the courts below.

An amendment will not be refused simply because it introduces a new case or a new relief as in this case but this court will refuse to do so where the amendment would necessitate the calling of additional evidence, entail injustice to the respondent, or change the action into one of a substantially different character. See Oguntimehin v. Gubere (1964) 1 All N.L.R. 176, Budding v. Murdoch (1875-76) 1 Ch. D. 42 and Hubbock v. Helms (1887) 56 L.J. Ch.539.

The applicants by the proposed further amendment are seeking a new or additional relief which the respondent's counsel has argued will be prejudicial, over-reaching and which will lead to further evidence if granted. I do not agree with him that it will be over-reaching but I agree that it will lead to the calling of additional evidence by the defendant/

respondent, if granted.

Furthermore, in paragraph 2(b) a of the proposed further amended statement of claim, the appellants/applicants claimed an alternative relief thus:

"21 WHEREFORE for plaintiffs claim against the defendant B  
as follows:

(a) .....

(b) an order of court directing the defendant .....  
and/or in the alternative.

(b) a. An order for Account of all monies paid into and debited C  
against 2nd plaintiff's Account or Accounts with the Defendant from  
1986 till date and reversal of all wrongful and illegal debits made by the  
Defendant on the said accounts from 1986 till date and payment over to  
the 2nd plaintiff of all monies excessively debited with interest at present D  
Bank Rate."

This alternative relief for account in the proposed further amended statement of claim is precisely the same relief as contained in paragraph 21(b) of the amended statement of claim. Even though I have come to E the conclusion that the grant of the amendment will lead to the calling of additional evidence, the applicants have not come out boldly to pray for an order to further amend their statement of claim by adding a new relief. i.e., the refund of the said amount by the defendants. Orders sought F from courts must be explicitly stated. The court should see at a glance the exact nature of relief sought without the necessity of going through the entire proceedings to discover it as in this case. It should not be a game of hide and seek. I believe the appellants' counsel understands the G point I am making here.

For the above reasons and the fuller reasons contained in the ruling of my learned brother Ejiwunmi, J.S.C. I also refuse the applica-  
tion and subscribe to the order as to costs made by him.

H

### MOHAMMED JSC

I agree that by the proposed amendment the applicants are trying to set up a new case and it will definitely change the nature of claims before the court. This application is for amendment of pleadings before the appeal is heard in this court. In the case of Osinupebi v. Saibu (1982) 7 S.C. 104 this court held that it would not grant an amendment to pleadings which will alter the character of the case as considered by the courts below.

Generally, an amendment to pleadings for the purpose of determining the real issues in dispute between the parties ought to be allowed at any stage of the proceedings. However, in practice, an amendment of pleadings should not be granted at too late a stage of the proceedings except where evidence had been given and the case had been fought on the footing that a particular subject-matter was in issue so that the amendment is just to incorporate the subject matter.

I agree with the opinion of my learned brother, Ejiwunmi, JSC., in his ruling, that the amendment applied will clearly introduce a new cause of action. At the appeal stage such an application should not be granted. I therefore refuse the application. I also award N1,000.00 costs in favour of the respondent.

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### KATSINA-ALU JSC

I have read in draft the ruling of my learned brother Ejiwunmi, JSC. I am in complete agreement with his reasoning and conclusion. I therefore would refuse the application with costs of N1,000.00 to the respondent.

H