

SUPREME COURT OF NIGERIA

25TH JUNE, 1999. SC. 248/1990.

**CORAM:- A. B. WALI, I. L. KUTIGI, A. I. IGUH, A. O.
EJIWUNMI, E. O. AYoola, JJSC.**

EZEKIEL OYINLOYE APPELLANT
AND

1. BABALOLA ESINKIN
2. CHIEF AWOTUNDE AFOLAYAN
3. CHIEF ARANSI ODODE
4. CHIEF OLEREWAJU OLUKOTUN
5. CHIEF EZEKIEL AYORINDE RESPONDENTS

***APPEALS** - Judgment - Court of Appeal - Speculating upon issues not pleaded - Is wrong - But it is not important - Where the learned trial judge did not depend on any such evidence - To determine the suit between the parties.*

***APPEALS** - Miscarriage of justice - Misdirection - That would justify a holding that a miscarriage of justice had occurred - What constitutes such a misdirection - And who has the burden of proving it.*

***COURTS** - Judgment - Misdirection - When a court can be said to have misdirected itself.*

***JUDGMENTS** - Pleadings - Mistake by the trial court - Of referring to the original pleadings in the face of the amended pleadings before the court - Is erroneous - But did not occasion miscarriage of justice in the present case.*

FACTS

In the Omu-Aran Judicial Division of the High Court of Kwara State the plaintiff/appellant, sought for a declaratory order that he is the rightful Ejemu of Rore and for an injunction prohibiting the 2nd to 5th

defendants/respondents from appointing or installing the first defendant/respondent as Ejemu of Rore. The appellant belonged to the Idii-Orii Eledidi family and the 1st respondent a member of Olowo- Okere family. The appellant claimed that the chieftaincy title of Ejemu of Rore was founded by his ancestor Adeoye Asola. And that after the death of Dada the son and successor of Adeoye Asola the stool was lent to Fasenu of Makin Oro compound who was succeeded by his son Bamigbewu. After the reign of Bamigbewu the stool was lent to Timothy Aworinde also referred to Ajiboye of Olowo - Okere compound and it was with agreement that the stool, would be returned to the appellant's house thereafter. However, on the demise of Ajiboye the appellant was not nominated to ascend the stool, rather, the 2nd-5th respondents surprisingly nominated the 1st respondent for the stool.

The respondents on the other hand contended that the first Ejemu of Rore was Ayimola Akara the founder of Olowu-Okere family (or Ayimola Akara family). Under the Native Law and custom of Rore a chieftaincy title could be loaned by a family to another family provided the title is not held by any one. Subsequently, Bogunjuko Ibuolasi, one of the successors of Ayimola Akara, as the head of Olowo-Okere family married Madam Faponle, the daughter of Loyoofo who hailed from Idii-Orii Eledidi. Later the title of Ejemu was loaned to Loyoofo so that his children could give him a decent burial. Chief Ejemu Osopo of Makin Oro family held the title for a brief period of three months as a result of which his son Bamigbewu was allowed to succeed him as Ejemu. Following Bamigbewu's death, a misunderstanding arose between the Makin Oro family and the Olowo Okere family as to whose right it was to present a candidate for the vacant Ejemu chieftaincy title. The respondents claimed that the dispute was resolved in the favour of Olowo-Okere family with the appointment of Timothy Ajiboye as the Ejemu of Rore.

At the end of the hearing the learned trial judge dismissed the claim of the appellant. Dissatisfied he appealed to the Court of Appeal, which court dismissed the appeal. He has further appealed to the Supreme Court raising two issues.

"3. 02 (i) *Whether the learned Justices were right to have classified grounds 2, 3, and 5 of the appeal to the Court of Appeal as being omnibus in nature.*

3. 03 *Whether the learned Justices were right to have speculated on any issue of Native Law and Custom."*

HELD (Unanimously dismissing the appeal per lead judgment of **EJI-WUNMI JSC**).

Courts - Judgment

1. It is therefore clear from the authorities that a Judge sitting without a jury misdirects himself if he (a) misconceives the issues, (b) summarizes the evidence inadequately, and (c) makes a mistake of law. It must also follow that it is a misdirection for a court of appeal to raise issues which the parties did not raise at the trial or during the hearing of the appeal. It will similarly be misdirection for a Court of Appeal to ignore or fail to advert to the issues raised by the parties for the determination of the appeal. See Kate & Anor v. Jibowu & Anor (1972) 1 ALL NLR (pt. 2) 180 at 192. (p. 1965 B)

Judgment - pleadings

2. The learned Justice of the Court below in my humble view considered very carefully whether a miscarriage of justice occurred by the reference made by the trial court to the original statement of claim in the face of the amended statement of claim before the court. I have also considered the pleadings and the judgment of the trial court. It is very clear that the learned Justice of the Court of Appeal was right in the conclusion reached that no miscarriage of justice was caused to the appellant. It is undoubtedly settled law that parties are bound by their pleadings and that once a pleading is amended the original pleading no longer has any effect in the proceedings. See Salami v. Oke (1987) NWLR (Pt. 63) 1; Emegokwe v. Okadigbo (1973) 4 SC 113 at 117. The learned trial judge, was found by the court below to have made that mistake of referring to the original pleading of the appellant, but found quite correctly that on the amended pleadings and the pleadings of the respondents including the evidence led

at the trial that the person who featured in the original and the amended pleadings was the last Ejemu V. Therefore the contention of the appellant on that issue in my respectful view lacks merit. (pp. 1967B/1968 E)

B Appeals - Judgment

3. There can be no doubt that the learned counsel for the appellant was right in his submission that a court is not allowed to speculate upon issues not pleaded before it. However, what is more important is that the learned trial judge did not depend on any such evidence to determine the suit between the parties. While it is true that the court below quite clearly adverted to matters that were not pleaded in the course of its judgment, it did certainly uphold the judgment of the trial court. In upholding that judgment the court below said thus:-

D *"Finally, in the findings of the learned trial judge, he reminded himself of the correct use of the proverbial judicial scale and in his judgment at pages 60 and 61 of the record concluded that the plaintiff's evidence was short of that required for a declaratory judgment. Can a Court of Appeal interfere in the findings of the learned trial judge in the circumstances? The short answer is not. (p. 1969 C)*

Appeals - Miscarriage of Justice

F 4. But as I have also noted already the misdirection that would justify a holding that a miscarriage of justice had occurred would be that which substantially affected the merits of the case for the appellant. And it remains the duty of the appellant to show that this case was so affected. See Ezeudu v. Obiagwu (1986) 2 NWLR (Pt. 21) 208 at 215; Mogo Chinwendu v. Mbamali (1980) 3 SC 31. As it is my humble view from all the reasons I have given that the appellant had not discharged that burden for me to overturn the judgment of the court below, this appeal fails. (p. 1971 E)

H

REPRESENTATION

The Appellant not represented

The Respondents not represented

CASES REFERRED TO

Anyaoke v. Adi (1986) 3 NWLR (Pt. 31) 731 at 742

Umeojiko v. Emanuo (1990) NWLR (pt. 126) 253 at 273

Salami v. Oke (1987) NWLR (Pt. 63)1

Obasuyi v. Obasuyi (1986) N.N.L.R. 121 at 132-133

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Shopitan v. Ogunleye (1961) W.N.L.R. 119 at 121

Chidiak v Luguda (1964) 1 All NLR 160

Kate v. Jibowu (1972) 1 ALL NLR (pt. 2) 180 at 192

Akinola v. Oluwo (1962) 1 ALL NLR 224

C

Woluchem v. Gudi (1981) 5 SC. 291 per Idigbe JSC at 294

Emegokwe v. Okadigbo (1973) 4 SC 113 at 117

NIPC Ltd. v. Thompson Organization (1969) NWLR 99 at 104

LEAD JUDGMENT BY EJIWUNMI JSC

D

This appeal is from the judgment of the court below following an appeal to that court from the High Court of Kwara State in the Omu-Aran Judicial Division. In that court the plaintiff, who is now the appellant, sought for a declaratory order that he is the rightful Ejemu of Rore and for an injunction prohibiting the second to fifth defendants/respondents from appointing or installing the first defendant/respondent as Ejemu of Rore. E

At the trial court pleadings were ordered, filed and served, and with the leave of the court, the appellant amended his claim. In the course of the trial, the appellant did not himself testify, but he called three witnesses in support of his claim. For the respondents five witnesses testified in support of their case. At the end of the hearing and addresses by learned counsel, the learned trial judge dismissed the claim of the appellant. As he was not satisfied with that decision, he appealed to the Court of Appeal. As his appeal was dismissed in that court, he has now appealed to this court. F G

Pursuant to his appeal to this court, his learned counsel filed six H grounds of appeal. I do not deem it necessary to reproduce them here as they are sufficiently reflected in the issues framed in the appellant's brief for the determination of the appeal.

The issues are as follows:-

"3. 02 (i) Whether the learned Justices were right to have classified grounds 2, 3, and 5 of the appeal to the Court of Appeal as being omnibus in nature.

B *3. 03 Whether the learned Justices were right to have speculated on any issue of Native Law and Custom."*

C These issues have been criticized by learned counsel for the respondents in the respondents' brief on the ground that they have not been formulated in general practical terms and tailored to the real issues in controversy. I do not think that that criticism should necessarily invalidate the issues as formulated, though the respondents have also in their own brief formulated two issues for determination of the appeal. I will consider the merits of this appeal upon the issues identified in the D Appellant's brief. I must observe that at the hearing of this appeal, both parties and their learned counsel were absent. The appeal was therefore treated as having been argued in accordance with Order 6 Rule 8 of the Rules of this court.

E The facts that gave rise to this appeal deserve to be stated though briefly, for a better understanding of the argument proffered by learned counsel for the parties upon the issues raised in the appeal. It is common ground between the parties that the appellant belonged to the Idii-Orii F Eledidi family and the 1st respondent a member of Olowo-Okere family.

G The appellant's case appears to be that the chieftaincy title of Ejemu of Rore was founded by his ancestor, Adeoye Asola before he went to Ajo, and that Dada, son of Adeoye Asola, ascended the stool at Ajo. He then claimed that on the death of Dada, the stool was lent to Fasenu of Makin H Oro compound. Fasenu reigned for about 3 (three) months. Because of the brief period of his reign, it is alleged that his son, Bamigbewu succeeded him, and he reigned for some 50 (fifty) years. After the reign of Bamigbewu, it is claimed that the stool was lent to Timothy Aworinde of H Olowo-Okere compound. That compound, it is further claimed, had no chieftaincy title. The appellant also claimed that when Aworinde, who in the pleadings is also referred to as Ajiboye was lent the stool, it was with agreement that the stool, would be returned to the appellant's house there-

after. However, on the demise of Ajiboye the appellant was not nominated to ascend the stool of Ejemu of Rore. Rather, the 2nd - 5th respondent, surprisingly nominated the 1st respondent for the stool. This, he claimed, was in spite of the fact that they had received from his family the sum of N100.00 being the customary title fee. B

For the respondent, their case may be put thus - The 1st respondent was alleged to be the Head of Ayimola-Akara family now known as Olowo-Okere family while the second respondent is the Oba of Ireore, otherwise called Oniire of Ireore and he hailed from Idii-Orii ward from Ile Oba Ile Olowo compound. The third respondent hailed from Idii-Orii ward and also from Ile Oba Ile Olowo compound. The fourth and fifth respondents hailed respectively from Makin Oro and Meja-Oba wards, both in Rore. It is the contention of the respondents that the first Ejemu of Rore was Ayimola Akara, a title he held from when he was in Oyo. It was when Chief Ejemu Ayimola Akara and his followers were coming from Oyo through Rore that he was persuaded to stop at Rore with his followers. He was then given the honorary title of Essa of Rore for agreeing to stay at Rore. It is alleged that under the Native Law and Custom of Rore a Chieftaincy title could be loaned by a family to another family provided that title is not held by any one. Bogunjoko Ibu Olasi later became the head of Ayimola Akara family following the death of Essa Emeso, who had earlier succeeded Ayimola Akara. Bogunjoko Ibu Olasi, as the head of the Olowo-Okere family married Madam Faponle, the daughter of Loyoofo who hailed from Idii-Orii Eledidi. Later as it was the custom that a person who had no chieftaincy title could not be given a ceremonial burial in Rore, the title of Ejemu was loaned to Loyoofo the father of Faponle so that his children could give him a decent funeral. And as chief Ejemu Osopo of Makin Oro held the title for a brief period of three months, his son Bamigbewu was allowed to succeed him as Ejemu. He held the title until he died sometime in 1964 or 1965. Following his death, a misunderstanding apparently developed between the Makin Oro family and the Olowo Okere family, both in Rore as to whose right it was to present a candidate for the Ejemu Chieftaincy title that then became vacant. The respondents claimed that the dispute was resolved C D E F G H

with the appointment of chief Timothy Ajiboye or Ajiboye from Olowo-Okere family as the Ejemu of Rore in 1968, and he occupied the stool until he died in 1985. The respondents denied that they received the sum of sixty Naira (N60.00) and forty Naira (N40.00) customary title fee
B from the appellant or from anyone in Idii-Orii Eledidi family.

As had been stated previously in this judgment, the learned trial judge held that the appellant's claim was not made out. The court below also came to that conclusion and affirmed the judgment of the trial court.

C In this court, the first issue argued for the appellant is that the court below wrongly classified grounds 2, 3 and 5 of the appeal before that court as omnibus grounds. It is therefore argued for the appellant that with regard to the case for the appellant, the wrong classification of his grounds of appeal had occasioned a miscarriage of justice.

D It is further contended for the appellant that each of the grounds, namely 2, 3 and 5 raised specific questions of law and of facts which demanded individual consideration by the court below. For instance, It is argued that the 2nd ground was for the court to consider whether it was
E proper for the learned trial judge to have disbelieved the evidence of the 3rd defendant (respondent) which clearly supported the appellant's case. And the court below, in the view of learned counsel for the appellant, cannot ignore evidence favourable to the appellant when considering the
F merits of the appellant's appeal. In support his contention, the learned counsel for the appellant referred to the following cases - Anachina Anyaoke & Ors v. Dr. Felix Adi (1986) 3 NWLR (Pt. 31) 731 at 742; Umeojiko v. Emanuo (1990) NWLR (pt. 126) 253 at 273.

G With regard to the 3rd ground, it is submitted for the appellant that the ground is certainly not omnibus. What it seeks to portray is that it was improper for the learned trial judge to resort to the original pleading when same has been amended. In support of that submission, reference was made to Salami v. Oke (1987) NWLR (Pt. 63)1. And in respect of
H ground 5 of the appellant's ground of appeal in the court below, it is submitted for the appellant that the question raised in that ground was a question of law. The court below ought to have resolved the question raised in that ground in favour of the appellant. That question was sim-

ply whether it was right for the learned trial judge to have held that the failure of the appellant to call material witnesses to support his case was fatal to his case. Then argued, appellant's counsel, it is trite law, that a party is not under any obligation to call any particular witness for his case to succeed. A single credible witness he submits, has also been B considered sufficient to ensure the success of a case. For that submission, he cited, Salami v. Oke (1987) NWLR (Pt. 63)1.

The respondents, on this first issue countered the submission made for the appellant by contending that the statement of the learned C Justice of the Court below that the five grounds of appeal which were in essence omnibus in that they primarily attack the brief or disbelief of witnesses by the lower court is mere obiter, and it did not affect the conclusion of the case. It is next submitted for the respondent by their D learned counsel in the respondents brief, that for an appeal to succeed on the ground of misdirection, it must be shown that the misdirection has resulted in a substantial miscarriage of justice and that the appellant had indeed lost a chance of success which was fairly open to him. In support of his submissions, he referred to the following cases; Obasuyi & Anor v. Obasuyi (1986) N.N.L.R. 121 at 132-133; N. O. Ogunbiyi v. Abdulkadir (1996) 38 L.R.N.C. 824 at 831 - 832; Shopitan v. Ogunleye (1961) W.N.L.R. 119 at 121. Upon that premise, learned counsel for the respondents then submitted that the appellant has not shown that the F alleged misdirection, which he is not conceding has resulted in a substantial miscarriage of justice and that he has lost a chance of success which was fairly open to him, upon a substantial part of the case. The question that must first be determined is whether learned counsel for the appellant was right in his contention that Ogundere JCA, misdirected himself in the G course of his Judgment when he observed that :-

"that the 1st defendant appealed to this court of five grounds of appeal which were in essence omnibus in that they primarily attack the belief or disbelief of witnesses by the lower court." H

Grounds 2, 3 and 5 which had been the main thrust of the criticism of the learned counsel for the appellant on the above quoted observation of Ogundere JCA would be reproduced hereunder. They read:-

"Ground (2) The learned judge erred in law in disbelieving the 3rd defendant's evidence which was in favour of the plaintiff.

Particulars of error in law

The rule in Akinola & Anor v. Oluwo & Ors (1962) 1 All NLR (pt. 2) 221 especially at page 227 ought to have been invoked by the learned trial judge.

(3) The learned trial judge erred in law in referring to the original Statement of Claim to disbelieve the plaintiff's case."

i. An amendment notionally wipes off on original averment.

ii. An amended pleading supersedes the original pleading and the original pleading is notionally not in existence.

(5) The learned trial judge erred in law in complaining that the plaintiff did not call any witness from Makin-Oro family.

Particulars of Error in Law:

No law says that a party must call any particular witness."

Now, learned counsel for the appellant has advanced argument that each of the above grounds of appeal raised questions of law and the learned Justice of the Court below should not have described them as omnibus ground. For so describing them, he has asked this court to hold that a miscarriage of justice has occurred in respect of the case for the appeal. The first question then is when can it be said that a court has misdirected itself. It is, I think useful to being with the consideration of this question by referring to old case of Bray v Ford (1896) A.C. 44, where at 49 Lord Watson said inter alia:-

"The only question, therefore, which your Lordships have to consider is, whether the miscarriage has been substantial"

Every party to a trial has a legal and constitutional right to have the case which he has made, either in pursuit or in defence, fairly submitted to the consideration of that tribunal."

This court in Chidiak v Luguda (1964) 1 All NLR 160, quoted with approval the above dictum of Lord Watson, per Taylor JSC, delivering the judgment of the court at page 162, and His Lordship went further to say thus:-

"A misdirection therefore occurs when the issues of fact, the case

for the plaintiff or for the defence, or the law applicable to the issues raised are not fairly submitted for the consideration of the Jury, where, however, the Judge sits without a Jury, he misdirects himself if he misconceives adequately or incorrectly or makes a mistake of law, but provided there is some evidence to justify a finding it cannot properly be described as a misdirection." B

It is therefore clear from the authorities that a Judge sitting without a jury misdirects himself if he (a) misconceives the issues, (b) summarizes the evidence inadequately, and (c) makes a mistake of law. It must also follow that it is a misdirection for a court of appeal to raise issues which the parties did not raise at the trial or during the hearing of the appeal. C

It will similarly be misdirection for a Court of Appeal to ignore or fail to advert to the issues raised by the parties for the determination of the appeal. See Kate & Anor v. Jibowu & Anor (1972) 1 ALL NLR (pt. 2) 180 at 192; Dahiru Saude v. Alhaji Haliru Abdullahi (1989) 7 SCNJ 216, 230 - 231; (1989) 4 NWLR (pt. 116) 387. D

The next question that has to be determined is whether it can be said that the learned Justice of the court below failed to advert and or consider the issues raised in the grounds of appeal filed by the appellant. As I have earlier in this judgment set down these grounds of appeal and what the learned counsel for the appellant said of them with regard to the success of his appeal, I do not intend to repeat them here. However, I will now examine whether the learned Justice of the Court of Appeal considered them in the course of delivering his leading judgment. E

After that observation concerning the omnibus nature of the grounds of appeal, the learned Justice of the Court of Appeal then reviewed the argument of counsel for the parties before the court below, Thereafter his Lordship said thus:- F

"I have considered most carefully the pleadings, the evidence, H and the findings of the trial court, as well as the briefs and arguments of counsel on either side of this appeal in relation to the issues thereof. It is trite law that a declaration is a discretionary remedy, but a plaintiff seek-

ing it has the same legal burden of proof as well as evidential burden under sections 134 to 136, Evidence Act, as in any other civil case, namely, proof by a balance of probability, sometimes styled preponderance of evidence. How then does a trial court decide evidence is preponderance? In Mogaji & Ors v. Odofin & Ors (1978) 4 SC 91 at 93-95 the Supreme Court per Fatayi-Williams JSC, gave us the following guidelines.

"In short, before a Judge before whom evidence is adduced by the parties before him in civil case comes to a decision as to which evidence he accepts and which evidence he rejects, he should first of all put the totality of the testimony adduced by both parties on that imaginary scale; he will put the evidence adduced by the plaintiff on one side of the scale and that of the defendant on the other side and weigh them together. He will then see which is heavier, not by the number of witnesses called by each party, but by the quality or the probative value of the testimony of those witnesses. This is what is meant when it is said that a civil case is decided on the balance of probabilities."

It is also settled law that a plaintiff must succeed on the preponderance of evidence he led, and on the strength of his own case, not by the weakness of the defence unless of course he finds in the evidence of the defence facts which strengthen his own case. See Akinola & Anor v. Oluwo & 2 Ors (1962) 1 ALL NLR 224 per Unsworth F.J. at 227; Woluchem & Ors. v. Gudi & Ors (1981) 5 SC. 291 per Idigbe JSC at 294.

The learned Justice for the Court of Appeal then turned to the vexed question as to whether the learned trial judge was right to have adverted to the original statement of claim when there has been filed an amended Statement of Claim in the proceedings.

The learned Justice of the Court of Appeal began with the consideration of this question by setting down the relevant pleadings that had provoked the criticism of the judgment of the learned trial judge as follows:-

Original

"4. Ajiboye, son of Aworinde, a maternal offspring of Dada,

was lent the stool with clear agreement that the stool would be returned to the plaintiff's house thereafter."

As Amended:

"4. Thereafter the stool was lent to Timothy Aworinde of Olowo-Okere compound, which compound had no chieftaincy title with clear agreement that the stool would be returned to the plaintiff." B

The learned Justice of the Court below in my humble view considered very carefully whether a miscarriage of justice occurred by the reference made by the trial court to the original statement of claim in the face of the amended statement of claim before the court. C
The learned Justice of the Court of Appeal on that point said thus:-

"Agreed, it was obvious that Ajiboye son of Aworinde as originally pleaded is the same person as Timothy Aworinde as pleaded in the amended statement of claim. Indeed the genealogical trees pleaded by both parties show that the son of Aworinde, Timothy Aworinde, Alias Timothy Ajiboye was Ejemu v and the last to held the title. The minor mistake made by the lower court was not an issue in the case, both parties having agreed that he was the last Ejemu v. The evidential issue was whether in the first place Timothy was from Olowo-Okere family, secondly whether there was an agreement between Olowo-Okere and the plaintiff's families that after their Timothy as Ejemu, the title would revert to plaintiff's family Idi-Orii Eledidi family which averment, in paragraph 4 of the statement of claim the defendants made a general traverse of in paragraph 1 of the statement of defence. But in paragraph 24, of the statement of defence the defendants stated that rather, there was a misunderstanding between Makin Oro family and their family Olowo-Okere as to who had a right to present a New Ejemu and that, by implication, they won and presented Timothy Ajiboye from the Olowo-Okere family as Ejemu of Rore in 1968. On that issue, the learned trial judge held that the agreement pleaded in paragraph 4 of the statement of claim was not proved, rather the defendants proved the disagreement Olowo-Okere, their family and Makin Oro family to whom they had lent Ejemu title twice, Osopo Ejemu 111, and Bamigbewu Ejemu 1v. and that D
E
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Olowo-Okere won."

The learned Justice of the Court of Appeal then went on to hold thus:-

"Therefore, there is not miscarriage of justice occasioned by the minor mistake of the lower court, which term was defined in Mora & Ors v Nwalusi & Ors (1962) 1 All NLR 681 at 687 by the Privy Council per Lord Evershed, adopting Lord Thankerton's definition in Devi v. Roy (1946) AC 508 at 521 and 522, inter alia, thus:-

"Miscarriage of justice means such a departure from the rules which permeate all procedure as to make that which happened not in the proper sense of the word judicial procedure at all the violation of some principles of law of procedure must be such an erroneous proposition law that if that proposition be correct the finding cannot stand; or it may be the neglect of some principle of law or procedure, whose application will have the same effect. The question whether there is evidence on which the courts could arrive at their finding is such a question of law."

There was therefore enough evidence supporting the finding by the lower court on the issue in question and the complaint of the appellant in that regard must fail."

I have also considered the pleadings and the judgment of the trial court. It is very clear that the learned Justice of the Court of Appeal was right in the conclusion reached that no miscarriage of justice was caused to the appellant. It is undoubtedly settled law that parties are bound by their pleadings and that once a pleading is amended the original pleading no longer has any effect in the proceedings. See Salami v. Oke (1987) NWLR (Pt. 63) 1; Emegokwe v. Okadigbo (1973) 4 SC 113 at 117; George Dominion Flour Mills Ltd. (1963) 1 SCNLR 117; African Continental Seaways Ltd. v. Nigerian Dredging Roads & General Works Ltd. (1977) 5 SC 235 at 248; NIPC Ltd. v. Thompson Organization (1969) NWLR 99 at 104.

The learned trial judge, was found by the court below to have made that mistake of referring to the original pleading of the appellant, but found quite correctly that on the amended pleadings and the pleadings of the respondents including the evidence led at the trial that the person who featured in the original and the amended

pleadings was the last Ejemu v. Therefore the contention of the appellant on that issue in my respectful view lacks merit.

The next issue which has to be considered is whether the court below was right to have said in the course of its judgment per Ogundere JCA, that:-

"It is against Yoruba custom for a family to produce the Oba of the Town and another High ranking Chief"

It is the contention of learned counsel for the appellant that the Court of Appeal cannot as it has done in that statement, speculate on any issue of Native Law and Custom for a community, as it was not pleaded and no evidence was led thereon. **There can be no doubt that the learned counsel for the appellant was right in his submission that a court is not allowed to speculate upon issues not pleaded before it.**

However, what is more important is that the learned trial judge did not depend on any such evidence to determine the suit between the parties. This is manifest from the approach of the learned trial judge to the evidence of the 3rd respondent who had towards the end of his evidence at the trial said that the appellant was denied the title of Ejemu because he and other Chiefs had a prejudice against him. The learned trial judge however took the view that the evidence did not damage the case for the respondents, having also formed the view that the third defendant as the Oba or natural ruler of the town, from the same family as the appellant, could not have supported the respondents against his own family's interest. Though the court below upheld that view of the learned trial judge.

I think that in order to appreciate what the court below said in connection with the evidence of DW 3, it is desirable to refer to the judgment of the trial court, where the learned trial judge said:-

It is equally surprising that the 3rd defendant come (sic) to the unexpected conclusion in his evidence that he and the other chiefs were prejudiced against the plaintiff in their move or decision to award the 1st defendant the Ejemu title of Rore. That piece of evidence can only come from a confused and not from an alert mind having regard to all his previous concrete testimony in favour of the defendants, including him-

self *If all his evidence is rejected as being contradictory, inconsistent and incredible, there will still be enough evidence to warrant a finding for the defendants. It seems that the position will remain the same if the court accept his main evidence as credible and disregards his last piece of evidence which is more of conclusion or an opinion from an inalert mind than evidence from alert mind."*

It is manifest from the above extract from the judgment of the learned trial judge that he did not place much reliance on the evidence of the 3rd defendant to dismiss the claim of the appellant. What he said about the decision to appoint the 1st respondent as the Ejemu as against the appellant because of any prejudice was in any event discounted by the learned trial judge. It therefore must follow that the importance attached to the evidence of the 3rd defendant on that point by the appellant was unnecessary to the decision of the learned trial judge.

While it is true that the court below quite clearly adverted to matters that were not pleaded in the course of its judgment, it did certainly uphold the judgment of the trial court. In upholding that judgment the court below said thus:-

"Finally, in the findings of the learned trial judge, he reminded himself of the correct use of the proverbial judicial scale and in his judgment at pages 60 and 61 of the record concluded that the plaintiff's evidence was short of that required for a declaratory judgment. Can a Court of Appeal interfere in the findings of the learned trial judge in the circumstances? The short answer is not. It is also trite law, but nevertheless a consent pitfall for Court of Appeal, that the findings of a trial court based on the credibility of witnesses, should not be interfered with by a Court of Appeal unless such findings are obviously perverse. The narrow opening left for an appeal court is that from findings of undisputed facts including findings based on the credibility of witnesses made by a trial court, the Court of Appeal may draw proper conclusions which may be different from such conclusions made by the trial court - Kodiliye v. Odu 2 WACA 335; Akinloye v. Eyiola (1968) NMLR 92 at 95; Asani Balogun & Ors. v. Alimi Agboola (1974) 10 SC. 111, at page 117-119. In Akinola & Anor v. Oluwo & Ors. (1962) 1 ALL NLR 224

at p. 227 a decision of the Supreme Court, it was held per Unsworth F.J, thus:-

"I am always reluctant to differ from a trial judge on a finding of fact but a distinction must be drawn between findings based on the credibility of witnesses and findings based on an evaluation of evidence which has been accepted. In the latter case a Court of Appeal is in as good a position to evaluate the evidence as weight to the opinion of the trial judge. (See Benmax v. Austin Motor Co. Ltd. (1955 1 ALL E.R. 326)."

Before concluding this judgment, I must refer to the question I have raised at its beginning. This is whether the observation of Ogundere JCA, that all the grounds of appeal filed by the appellant are omnibus grounds, was a misdirection and which had affected the consideration of the case of the appellant. It seems to me that that observation by itself did not affect the consideration by the court below of the issues raised in the appeal. I have, however, noted above that if there be a misdirection it was with regard to the allusion of native law of custom of Rore which was not pleaded and upon which issues were not joined by the parties. **But as I have also noted already the misdirection that would justify a holding that a miscarriage of justice had occurred would be that which substantially affected the merits of the case for the appellant. And it remains the duty of the appellant to show that this case was so affected. See Ezeudu v. Obiagwu (1986) 2 NWLR (Pt. 21) 208 at 215; Mogo Chinwendu v. Mbamali (1980) 3 SC 31; Ukpe Ibodo & Ors v. Emerofia & Ors (1980) 5-7 SC 55; Lukoyi v. Olojo (1983) 8 SC 61 at 68-73; Balogun v. Amubikahun (1989) 3 NWLR (Pt. 107) 18.**

As it is my humble view from all the reasons I have given that the appellant had not discharged that burden for me to overturn the judgment of the court below, this appeal fails. I will however not award costs as the parties and their counsel were not in court at the hearing.

WALI JSC

I have been privilege to read before now, the lead judgment of my learned brother Ejiwunmi, JSC and I agree with his reasoning and conclusion that this appeal lacks merit.

B Both the trial court and the Court of Appeal considered the essential and fundamental issues raised in this case vis-a-vis the evidence adduced and arrived at the correct decision that the appellant as plaintiff had failed to prove his claim for a declaration that he is the rightful Ejemu of Rore as contained in paragraph 9 of his Amended Statement of Claim.
C The minor slips by both the trial court and the Court of Appeal complained of by the appellant and which were adequately treated in the lead judgment of my learned brother Ejiwunmi, JSC did not occasion any miscarriage of justice to warrant interference by this court. The
D concurrent findings of the trial court and the Court of Appeal are hereby affirmed.

The appeal is dismissed with N10,000.00 costs to the respondents.

E _____

KUTIGI JSC

I read in advance the judgment just rendered by my learned
F brother Ejiwunmi, J.S.C. I agree with him that there is no merit in the appeal. It accordingly fails. It is hereby dismissed with N10,000.00 costs in favour of the Respondents.

G **IGUH JSC**

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

H The claim before the court is for a declaration that the plaintiff/appellant is the rightful Ejemu of Rore and for an order prohibiting the 2nd-5th defendants/respondents from appointing and/or installing the 1st defendant/respondent as the Ejemu of Rore.

From the pleadings filed and the evidence before the trial court, it is clear that the whole case is based entirely on facts. The trial court after a careful evaluation of the evidence accepted the case of the defendants/respondents as more credible than that of the plaintiff/appellant. Said the learned trial Judge.

"All in all, after carefully weighing or comparing the credible and admissible evidence adduced in support of the plaintiff's case on one side of the imaginary scale of justice and the evidence proffered by the defendants and their sole witness to support their case on the other, it becomes very clear that the plaintiff had failed to prove his case by preponderance of evidence."

A little later in his judgment, the learned trial Judge went on:-

"This is to say that the totality of the evidence of D.W. 1 and of the 2nd, the 4th and 5th defendants which not only unequivocally confirms (1) Olowo-Okere family to be the owner of Ejemu chieftaincy title in Rore and (2) the settlement of the misunderstanding between Makin Oro family and Olowo-Okere family in 1968 in favour Oluwo-Okere family before Timothy Awotunde became Ejemu but also firmly denies the agreement for lending Ejemu title to Olowo-Okere family by Idi-Orii-Eledidi family as alleged by the plaintiff is of such a high probative value that should tilt the scale of justice in favour of the defendants; and it does. This is so as nothing appeared to me questionable in the demeanours of the defendants. I regard them as men of intergrity whose evidence is most credible. Of particular interest to the court is the clear unmistakable evidence of Chief Olarewaju, the Olukotun of Rore, the 4th defendant from Makin Oro family, aged 100 years which puts the owner of the ownership of Ejemu title beyond dispute. By calling him, the defendants gave a very unique opportunity to the plaintiff to cross-examine him on the agreement alleged; but the plaintiff never seized that chance and left him alone. In my opinion his evidence settles many of the essential issues preponderantly against the plaintiff."

He accordingly dismissed the plaintiff's claims against the defendants in their entirety.

On appeal, the Court of Appeal after a thorough consideration of

the facts as found by the trial court concluded thus:-

"Finally, in the findings of the learned trial judge, he reminded himself of the correct use of the proverbial judicial scale and in his judgment at pages 60 and 61 of the record concluded that the plaintiff's evidence was short of that required for a declaratory judgment. Can a Court of Appeal interfere in the findings of the learned trial judge in the circumstances? The short answer is no."

That court accordingly affirmed the findings of the trial court and dismissed the plaintiff's appeal.

It is trite law that this court will not interfere with the concurrent findings of both the trial High Court and the Court of Appeal on essentially issues of fact except there is established a miscarriage of justice or a violation of some principles of law or procedure. See National Insurance Corporation of Nigeria v. Power and Industrial Engineering Co. Ltd. (1986) 1 N.W.L.R. (Part 14) 1 at 36, Enang v. Adu (1981) 11-12 S.C. 25 at 42, Mora v. Okonkwo (1987) 3 N.W.L.R (Part 60) 314 at 321, Igwego v. Ezeugo (1992) 6 N.W.L.R. (Part 249) 561 at 574 etc. The said concurrent findings of fact by both courts below have neither been established to be perverse nor unsupported by evidence. They were also not arrived at as a result of a wrong approach to the evidence or a wrong application of any principle of substantive law or procedure. This court is therefore not prepared to interfere with them. See too Woluchem v. Gudi (1981) 5 S.C. 291 at 326.

In the result, the appellant having failed to establish any error on the part of the Court of Appeal that has substantially and materially affected its decision, this appeal fails and it is hereby dismissed by me. I abide by the order for costs made in the leading judgment.

AYOOLA JSC

I have had the advantage of reading in draft the judgment of my learned brother, Ejiiwunmi, JSC and for the reasons he gives, I too would dismiss this appeal with costs as ordered by him.