

SUPREME COURT OF NIGERIA
10TH NOVEMBER, 2000. SC. 120/1996
CORAM:- A. G. KARIBI-WHYTE, M. E. OGUNDARE, S. U. ONU,
O. ACHIKE, A. O. EJIWUNMI, JJSC.

1. ALSTHOM S. A.
2. SOCIETE GENERALE BANK APPELLANTS/APPLICANTS
AND
CHIEF DR. OLUSOLA SARIKI RESPONDENT

***APPEALS** - Amendments - Fresh issue - Motion for amendments in this matter - Did not raise any fresh issue.*

***APPEALS** - Interlocutory applications - It is neater to dispose of all interlocutory applications- Before embarking on appeal.*

***COURTS** - Amendment - To bring the pleadings in line with the evidence already led - Will be granted by the Supreme Court - Where justice so demands.*

***PRACTICE & PROCEDURE** - Amendment of legal process - Purpose and method of - Amendment will be granted - To bring out the real matter in controversy.*

***PRACTICE & PROCEDURE** - Amendment of process - Can be granted by the court - At any stage of the proceedings.*

FACTS

Before the Supreme Court, the appellants/applicants in a Motion filed on 19/4/2000 sought to amend their amended writ of summons and 2nd further amended statement of claim. The amendment needed is to state wherever applicable in US Dollars their claim for \$9,747, 914.44 hitherto expressed in Nigerian naira equivalent of N45,387,204.42. The amendment is for the purpose of bringing the pleadings in line with the

evidence already led. The motion is supported by an affidavit and further affidavit, to which several exhibits are attached. Defendants/Respondents opposed the application placing reliance on their counter affidavit.

The Supreme court after hearing counsel on both sides had to determine whether the amendment should be granted.

HELD (Unanimously granting the application per lead ruling of **ACHIKE, JSC**)

Appeals - Interlocutory applications

1. It is clearly neater to dispose of all interlocutory applications in an appeal before seriously embarking on the appeal properly so called. Be that as it may, the above authority cited in this regard is demonstrably unhelpful to the submission made by learned counsel. The same is accordingly discountenanced. (p. 2926 C)

Amendment - Fresh issue

2. There is yet another submission by respondent's learned counsel to the effect that the applicant's application is a surreptitious way of raising a fresh or new issue not addressed at the two lower courts which ought not be allowed. I do not accept this submission. The procedure to allow a party to an appeal to canvass a new issue not raised at the lower court is firmly established. The present application is not even remotely similar to it. (p. 2926 E)

Amendment of legal process

3. In law, to amend any legal process affords a party - whether a plaintiff or defendant and even the appellant or respondent on appeal - to correct an error in the legal document. Such correction can be made informally where the process is yet to be served. After service, however, correction on legal process may be effected, depending on the prevailing rules of court, either by consent of both parties or upon motion on notice, like the case in hand; such corrections are common place. Amendment enables the slips, blunders, and inadvertence of counsel to be corrected, in the interest of justice, ensuring always that no injustice is occasioned to

the other party. The weight of judicial authorities leans in favour of a allowing a party to amend its legal processes whenever the need arises in order to ensure that the real matter in controversy between the parties, shorn of manifest errors, mistakes and slips, is adequately brought to focus and determined, with the proviso, however, that the right of the adversary party is neither unduly compromised nor unredressed. (p. 2927 H)

Amendment of process - Can be granted at any stage

4. The last point that is necessary to be made in this regard is that once the justice of the case so demands, the court can grant an amendment at any stage of the proceedings. (p. 2928 D)

Amendment - To bring pleadings in line with evidence

5. No doubt it was clear to the trial judge and discernible from his judgement that the loan agreement although exclusively transacted in US Dollars was, however, by some slip claimed in Naira for which the court felt obliged to enter judgement as it did. It will wreak unprecedented havoc and grave injustice for this court - the court of last resort-to deliberately shut its eyes to the obvious inequity that would result therefrom. No evidence would be required to effect the amendment sought. The aim of the amendment is to bring the pleadings in line with the evidence already led. It has not been suggested that the amendment will take the respondent by surprise or prejudice him or cause an undue delay. It seems to me that the circumstance are manifestly compelling that the amendment be granted. (p. 2928 H)

NOTABLE POINTS OF INTEREST

KARIBI-WHYTE JSC

1. Errors should be amended before hearing

All outstanding errors which can be cured by amendment likely to confuse in the hearing of the substantive action should be amended before the hearing of the appeal. This is because to leave the error so discovered uncorrected will without doubt lead to the doing of injustice to the

party who will suffer injury if it remained uncorrected. (p. 2932 F)

2. *Principle governing granting of leave to amend*

The basic principle governing the granting of leave to amend is for the purpose of determining the real issue or issues in controversy between the parties. See Cropper v. Smith (1884) 26 Ch. D 710. The courts have always followed the established principle that the fundamental object of adjudication is to decide the rights of the parties, and not to impose sanctions merely for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights-See A.V. Amadi v. Thomas Aplin & CO. (1972) 1 All N.L.R. (Pt. 1) 409. (p. 2932 G)

3. *Leave to amend can be granted at any stage*

It is well settled that leave to amend may be made and granted at any stage of the proceedings. See Totty v. Effiong & Anor. (1966-67) 10 E.N.L.R.45. It is however important to seek such leave as soon as the defect in the proceedings is detected. Notwithstanding this guide an amendment may be sought and, if appropriate, granted on appeal if it is to amend the record of the trial court in line with the facts proved before the trial court and the decision. This power is to be exercised to prevent the occurrence of substantial injustice.- See Metal Construction (W.A.) Ltd. & ors v. Migliore & Anor. (1979) 6-9 S.C. 163, 171-172. (p. 2934 F)

4. *Principles that determine granting of amendment*

The principles taken into account in considering whether an application for amendment should be granted are, inter alia, the attitude of the parties, the nature of the amendment sought in relation to the suit, the question in controversy and the time when the amendment was being sought. Of course where the amendment was being sought mala fide or if the amendment even if granted will not cure the defect in the proceedings the court will not grant it - see Lagunju Abasi v. Raji Labiyi (1958) W.R.N.L.R. 12. It is essential to the grant of an application for amendment for the applicant to show the materiality of the amendment sought - See Oyenuga v. Provisional council of the University of Ife (1965)

N.M.L.R.9. The courts will not easily grant an application for amendment which if granted will unduly delay the hearing of the suit and unfairly prejudice either party to the suit. See Dominion flour Mills Ltd. v. Abimbola George (1960) LL.R. 53. (p. 2935 G)

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5. When course of justice will demand amendment

The aim of the amendment in the application before us is to bring the pleadings in line with the evidence on record. There is no suggestion that any new evidence is being sought or will be required on either side because of the amendment. There is also no question of undue delay to the proceedings or prejudice to the respondent. There is no doubt therefore the course of justice demand the grant of this application. I therefore accordingly so order. (p. 2936 H)

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REPRESENTATION

H. O. Ajumogobia, Esq., with him, I. O. Okusanya Esq., for the appellants.

M. B. Idris Kutigi for the respondent.

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CASES REFERRED TO

Okolo & Ors v Nwamu (1973) All N.L.R. 101

Government v Adedeji Balogun & Co. (1991) 1 N.W.L.R. (Pt 166) at p. 157

Adekeye v. Akin Olugbade (1987) vol 18 N.S.C.C. 865 at 871

Rainy v. Alexander Bravo (1872) L.R. 4 P.C. Appeal 287

J. Oguntimehin v. K. Gubere & Anor. (1964) 1 All N.L.R. 176

Okolo & Ors v. Nwamu (1973) All N.L.R. 101

Adekeye v. Akin-Olugbade (1987) vol. 18 N.S.C.C. 871

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LEAD JUDGMENT BY ACHIKE JSC

The appellants/applicants in a motion dated and filed on 19/4/ 2000 prayed the court that their amended Writ of summons and the 2nd further amended statement of Claim be amended as follows:-

1. That the indorsement in the amended Writ of Summons and

paragraph 17(a) of the 2nd Further Amended Statement of Claim be amended to read as follows:

"The plaintiffs claim jointly and severally from the defendant the sum of US\$9, 747,914 .44 (Nine Million Seven Hundred and Forty-Seven Thousand, Nine Hundred and Fourteen US Dollars Forty-Four Cents) being outstanding debt owing to the plaintiffs as a result of a loan granted by the 1st plaintiff's to the defendant at his request which debt in the sum of US \$9, 747,914.44 (Nine Million seven hundred and forty-seven thousand, nine hundred and fourteen US Dollars forty-four cents) the naira equivalent of which was N45,387,204. 42k (forty-five million three hundred and eight-seven thousand, two hundred and four naira, forty-two kobo) as at 31st July 1987 converted to naira at the prevailing exchange rate on 31st August 1987 of US \$1.00 to N4.6561"

2. That the RELIEF SOUGHT contained in paragraph 4 of the Notices of appeal of the 1st and 2nd appellants/applicants be amended to read as follows:

"Allow the appeal, set aside the majority decision, uphold the minority decision giving judgement to the 2nd appellant/applicants with the variation that the judgement of the Honourable Justice A.B. Adeniji in the high court of Lagos State be varied by substituting the sum of US \$9, 747,914.44 (nine million seven hundred and forty-seven thousand, nine hundred and fourteen US Dollars forty-four cents) being the outstanding debt owing to the 2nd appellant/applicant or the naira equivalent thereof, for the sum of N45,387,204.42 contained therein"

In moving the applicant's motion, their learned counsel H.O. Ajumogobia, Esq. said that the motion is supported by an 18 paragraph affidavit and a further affidavit of eight paragraphs to which are attached Exhibits I.B.I. I BIA, 1 B2 1B3 and 1 B4 as averred in paragraph 5 of the further affidavit. Exhibit 1 B1 is a copy of the writ of summons filed on 2nd September, 1987, Exhibit 1 BIA is a copy of the amended writ of summons, Exhibit 1 B2 is a copy of the 2nd further Amended statement of claim filed on 18th. March, 1991, Exhibit 1 B3 is a copy of the statement of defence filed by the defendant on 4th December, 1992 and Ex-

hibit 1 B4 is a copy of an excerpt of the record of proceedings at the trial. Paragraph 6 of the further Affidavit makes reference to the further Writ of summons and proposed amended 2nd Further amended statement of claim which are annexed thereto and marked as Exhibits SU 1 and SU 2 respectively.

Counsel submits that the Exhibits specially referred to in paragraph 5 of the further affidavit show that the transaction between the parties was in US Dollars. And furthermore, counsel submits that after due trial, the trial court found the claim was one for indebtedness on the denomination of US dollar in terms of US\$9, 747, 914. 46. Counsel also refers to Exhibit 1 B3, i.e the statement of defence wherein the defendant/respondent raised the plea of illegality in that the loan was illegal and unenforceable being in foreign currency i.e. in US Dollars, contrary to the Exchange control act, 1962.

He finally submits that the amendment sought is to bring the pleadings in line with the evidence already adduced, and place reliance on Okolo & Ors v Nwamu (1973) All N.L.R. 101 and Ijebu Ode Local Government v Adedeji Balogun & CO. (1991) 1 N.W.L.R. (Pt 166) at p. 157 or (1991) 1 S.C.N.J. 1. He urges the court to grant the application.

Defendant's/respondent's learned counsel, Idris Kutigi, Esq. submits that the court, in considering the application, should refer to the proceedings in the high court and the court of appeal in order to ensure that justice is done to either party, and that the motion for amendment should not be treated in isolation. He submits that an application for amendment, as in the present case, should be taken at the hearing of the appeal and places reliance on Adekeye v. Akin Olugbade (1987) vol 18 N.S.C.C. 865 at 871. It is counsel's further submission that there is no evidence of the mode of repayment of the money nor was the trial court asked to enter judgement in US Dollars. He also contends that if the amendment is granted it will enable the applicant to put in a new issue neither fought in the trial court nor in the court of appeal. Finally, counsel submits that the amendment sought is not in line with the evidence led at the trial.

In conclusion, counsel says that he relies on all the paragraphs

of the counter-affidavit and urges the court to dismiss the application.

Replying, Mr. Ajumogobia submits that the application is not an attempt to raise a fresh point of law for the first time but a mere application for amendment of the writ of summons and paragraph 17(a) of the
 B 2nd further amended statement of claim, as well as the Relief sought as set as set out in paragraph 4 of the appellants/applicants notices of appeal.

I wish first to dispose of the submission by learned counsel for the respondent wherein he contended _that the application for amend-
 C ment, such as in the present case, should be take together at the hearing of the appeal for which he placed reliance on Adekeye v. Akin-Olugbade (supra). Suffice it to say that such an approach has nothing to commend it. **It is clearly neater to dispose of all interlocutory applications in
 D an appeal before seriously embarking on the appeal properly so called. Be that as it may, the above authority cited in this regard is demonstrably unhelpful to the submission made by learned counsel. The same is accordingly discountenanced.**

**There is yet another submission by respondent's learned
 E counsel to the effect that the applicant's application is a surreptitious way of raising a fresh or new issue not addressed at the two lower courts which ought not be allowed. I do not accept this sub-
 F mission. The procedure to allow a party to an appeal to canvass a new issue not raised at the lower court is firmly established. The present application is not even remotely similar to it.**

Reading the pleadings of the parties - as amended from time to time - and the evidence tendered at trial-bearing in mind that the respon-
 G dent did not field any witness-and the judgement of trial high court, it is beyond dispute that the crux of the controversy between the parties was a claim initialed by the appellants/applicants for the repayment of a loan given by the 1st appellant to the respondent at the latter's request in the
 H sum of US\$5,000.000, and the said loan with interest was guaranteed by the 2nd appellant. The striking feature of the parties's loan agreement is that the loan was given in US Dollars. When the demand was made for the refund of the indebtedness, the respondent, by the letter dated 15th

September, 1986, written to 1st appellant did not only acknowledge the loan of US\$5,000,000 but unequivocally informed him that " I (meaning the respondent) have instructed my solicitor Chief F.R.A. Williams (S.A.N.) to contract you and arranges settlement for the loan"

The learned trial judge, Adeniji, J. entered judgement on 30th June, 1993 in favour of the applicants in the following terms:-

"Judgement is hereby entered for the plaintiffs in the sum of N45,387, 264, 42 kobo being outstanding debt owing to the plaintiff as a result of a loan granted by the 1st plaintiff to the defendant at his request and which debt is now in the sum of US \$9, 747, 914.44 (Nine Million seven hundred and forty-seven thousand, Nine hundred and fourteen US Dollars forty-four Cents) i.e as at 31st July 1987 converted to naira at the prevailing exchange rate on 31st August, 1987 of US\$1.00 to N4.6561.

"Interest on the said debt at the rate of 18% per annum from 1st September 1987 until judgement and thereafter at the same rate of interest on the judgement debt and reducing balance until the total debt is liquidated"

Having regard to the preponderance of evidence laid before the trial court and the true nature of the transaction between the parties in respect of which the parties, at all material times, were at one that the sum of US\$5,000.000 loaned in that foreign currency would be repaid plus the accrued interest in the same United States currency or, presumably, the naira equivalent of the said loan plus the accrued interest. At the time of entering judgement by the trial judge, the principal sum plus interest thereon had amounted to US \$9,747, 714. 44.

To meet the justice of this case, applicant's learned counsel in this appeal has, by this application, sought to amend the writ of summons and the 2nd further amended statement of Claim in this case, in terms reproduced earlier in this ruling, in order to reflect this understanding between the parties.

The question that calls for determination is whether in all the circumstances of this case, this application ought to be granted or denied. **In law, to amend any legal process affords a party - whether**

a plaintiff or defendant and even the appellant or respondent on appeal - to correct an error in the legal document. Such correction can be made informally where the process is yet to be served. After service, however, correction on legal process may be effected, depending on the prevailing rules of court, either by consent of both parties or upon motion on notice, like the case in hand; such corrections are common place. Amendment enables the slips, blunders, and inadvertence of counsel to be corrected, in the interest of justice, ensuring always that no injustice is occasioned to the other party. The weight of judicial authorities leans in favour of a allowing a party to amend its legal processes whenever the need arises in order to ensure that the real matter in controversy between the parties, shorn of manifest errors, mistakes and slips, is adequately brought to focus and determined, with the proviso, however, that the right of the adversary party is neither unduly compromised nor unredressed.

The last point that is necessary to be made in this regard is that once the justice of the case so demands, the court can grant an amendment at any stage of the proceedings. Thus in Williams Rainy v. Alexander Bravo (1872) L.R. 4 P.C. Appeal 287, the refusal by the trial judge to allow an amendment to be effected when the judgement was being delivered was reversed by the Privy council and the amendment was granted. Also in J. Oguntimehin v. K. Gubere & Anor. (1964) 1 All N.L.R. 176 at p. 180, this court upheld the amendment of pleadings after close of evidence by plaintiff and defendants and rejected the trial judge's ruling that the application for amendment should have been made earlier.

In the case on hand, evidence showing the loan transaction between the parties and even the respondent's preparedness to repay the loan in US Dollars was overwhelming and incontestable, more so as the respondent did not field any evidence whatsoever at the trial. Evidence relevant and wholly germane to effect the amendment sought herein had been led by the applicants without any opposition whatsoever from the respondent. No doubt it was clear to the trial judge and discernible from his judgement that the loan agreement although exclusively

transacted in US Dollars was, however, by some slip claimed in Naira for which the court felt obliged to enter judgement as it did. It will wreak unprecedented havoc and grave injustice for this court - the court of last resort-to deliberately shut its eyes to the obvious inequity that would result therefrom. No evidence would be required to effect the amendment sought. The aim of the amendment is to bring the pleadings in line with the evidence already led. It has not been suggested that the amendment will take the respondent by surprise or prejudice him or cause an undue delay. It seems to me that the circumstance are manifestly compelling that the amendment be granted.

Accordingly, it is ordered, first, that the endorsement in the amended writ of summons and paragraph 17(a) of the 2nd further amended statement of claim be amended to read as follows:-

"The plaintiffs claim jointly and severally from the defendant the sum of US\$9. 747. 914.44 (nine million seven hundred and forty-seven thousand, nine hundred and fourteen US Dollars forty-four cents) being outstanding debt owing to the plaintiffs as a result of a loan granted by the 1st plaintiff's to the defendant at his request which debt in the sum of US\$9. 747. 914. 44 (nine million seven hundred and fourteen US Dollars forty cents) the naira equivalent of which was N45, 387, 204. 42k (forty-five million. Three hundred and eight-seven thousand, two hundred and four naira, forty-two kobo) as at 31st July 1987 converted to naira at the prevailing exchange rate on 31st August, 1987 of US\$1.00 to N4.6561".

Second, that the relief sought which is contained in paragraph 4 of the notices of appeal of 1st and 2nd appellants/applicants be amended read as follows:-

"Allow the appeal, set aside the majority decision, uphold the minority decision giving judgement to the 2nd appellant/applicant with the variation that the judgement of the Honorable Justice A.B. Adenji in the high court of lagos state be varied by substituting the sum of US\$9, 747 914. 44 (nine million seven hundred and forty-seven thousand, nine hundred and fourteen US Dollars forty-four cents) being outstanding

debt owing to the 2nd appellant/applicant or the naira equivalent thereof, for the sum of N45,387, 204. 42 contained therein."

There will be N1,000.00 costs in favour of the respondent.

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KARIBI-WHYTE JSC

I have had the privilege of reading in draft the ruling in this application of my learned brother Achike, JSC. I agree entirely with his reasoning and conclusion granting this application.

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The application was brought by appellants in their motion dated and filed on 19th April, 2000 praying this court for amendment of the writ of summons and the 2nd further amended statement of claim in this appeal. The prayer is for the amendment of the endorsement in the writ of summons and paragraph 17(a) of the 2nd further amended statement of claim to read as follows:

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"The plaintiffs claim jointly and severally from the defendant the sum of US\$9, 747, 914. 44 (Nine million seven hundred and forty-seven thousand, nine hundred and fourteen US dollars forty- four cents) being outstanding debt owing to the plaintiff as a result of a loan granted by the 1st plaintiff to the defendant at his request which debt in the sum of US\$9, 747, 914, 44 (Nine million seven hundred and forty-seven thousand, nine hundred and fourteen US dollars forty-four cents) the naira equivalent of which was N45, 387, 204 .42 (forty-five million, three hundred and eight-seven thousand, two hundred and four naira, forty- two kobo) as at 31st, July 1987 converted to naira at the prevailing exchange rate on 31st August, 1987 of US \$1.00 to N4,6561"

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In paragraph 4 of the notices of appeal of the 1st and second appellants/applicants the following relief was sought:

"Allow the appeal, set aside the majority decision uphold the minority decision giving judgement to the 2nd appellant/applicant with the variation that the judgement of the Honourable Justice A.B. Adeniji in the high court of Lagos State be varied by substituting the sum of US\$9, 747, 914.44 (nine million, seven hundred and forty-seven thousand, nine hundred and fourteen US Dollars, forty-four cents) being the

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outstanding debt owing to the 2nd appellant/applicant or the naira equivalent thereof, for the sum of N45,387,204.42 contained therein.

Concisely stated the amendment sought is to state wherever applicable in US dollars the claim hitherto expressed in Nigerian naira.

In arguing the motion before us, H. Odein Ajumogobia Esqr. for B the appellant applicants relied on the 18 paragraph affidavit of the applicants and further affidavit of 8 paragraphs annexed as Exhibits IBI, IBIA, IBI2, IB3 and IB4 as averred in paragraph 5 of the further affidavit. These are copies of the Writ of summons, filed on 2nd September, 1987, C the amended writ of summons, a copy of the 2nd further amended statement of claim filed on 18th March, 1991, a copy of the statement of defence filed by the defendant on the 4th December, 1992, a copy of the statement of defence filed by the defendant on the 4th December, 1992, and a copy of an excerpt of the record of proceedings at the trial, D respectively.

In paragraph 6, the further affidavit referred to in the writ of summons, and the proposed amended further amended statement of claim, annexed thereto and marked Exhibit SU1 and SU2 respectively. E

In his submission learned counsel submitted that the Exhibits referred to in paragraph 5 of the further affidavit disclose that the transaction between the parties was in US dollars. After due trial the trial court found the claim to be one for indebtedness on the denomination of F US dollars in the sum of US\$9, 747, 914. 46. He referred to the statement of defence i.e. Exhibit IB3, wherein the defendant raised the plea of illegality, and that the transaction being in foreign currency was illegal and unenforceable, and contrary to the exchange control act, 1962.

The amendment sought is to bring the pleadings in line with the G evidence already on record and that no new evidence oral or documentary was required. Learned counsel cited and relied on Okolo & Ors v. Nwamu (1973) . All N.L.R. 101, Ijebu-Ode Local Government v. Adedeji Balogun & Co. (1991) 1 N.W.L.R. (Pt. 166) 157. He urged the court to H grant the application.

Mr. Idris Kutigi, Esqr. learned counsel for the defendant relying on all the paragraphs of respondent's counter affidavit opposed the appli-

cation. In his submissions, the court in considering the application should refer to proceedings in the courts below to ensure that justice was done to either party, and that the motion should not be treated in isolation. He argued that the application for amendment should be taken at the hearing of the appeal. He relied for this submission on Adekeye v. Akin-Olugbade (1987) vol. 18 N.S.C.C. 871. He submitted that there was no evidence of the mode of repayment of the money, nor was the trial court asked to enter judgement in US Dollars. He contended that granting the amendment will enable the applicant to introduce a new issue not fought in the court of trial and not in the court below.

In a short reply, Mr. H. Odein Ajumogobia for the applicants pointed out that there was no attempt by the amendment sought to raise a new point of law for the first time. The prayer merely seeks amendment of the writ of summons, paragraph 17(a) of the 2nd further amended statement of claim, as well as the relief sought as set out in paragraph 4 of the appellants/applicants notice of appeal.

The substance of the opposition of the amendment is that the application for amendment should not be taken in isolation, i.e. consideration should not be done at this stage of the proceedings, but that the court should do so at the hearing of the appeal itself. The reason for this suggestion, namely, to ensure that justice is done to either party, is the basis of all consideration for amendment. It is for that same reason that all outstanding errors which can be cured by amendment likely to confuse in the hearing of the substantive action should be amended before the hearing of the appeal. This is because to leave the error so discovered uncorrected will without doubt lead to the doing of injustice to the party who will suffer injury if it remained uncorrected.

The basic principle governing the granting of leave to amend is for the purpose of determining the real issue or issues in controversy between the parties. See Cropper v. Smith (1884) 26 Ch. D 710. The courts have always followed the established principle that the fundamental object of adjudication is to decide the rights of the parties, and not to impose sanctions merely for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights-See

A.V. Amadi v. Thomas Aplin & CO. (1972) 1 All N.L.R. (Pt. 1) 409.

It is the sacred duty of courts to ensure that everything is done towards the facilitation of the hearing of the matter and the expedition of the hearing of the case. I do not consider the postponement of the resolution of an extant ambiguity which can be cured by an amendment, to the hearing of the substantive appeal as was suggested by Mr. Idris Kutigi is the best manner of dealing with the amendment of a discovered omission. The suggestion of counsel truly obfuscates rather than assists in the curing of the ambiguity.

The other, but more profound, suggestion by Mr. Idris Kutigi is that the amendment sought is a clever way of raising a fresh or new issue not addressed before the courts below and ought not to be allowed. Mr. H. Odein Ajumogobia moving the motion has pointed out that applications were not raising any new issue and do not require any new evidence in support of the application. They are relying entirely on the evidence before the court and that the amendment sought is to bring the claim in line with the evidence. My understanding of the nature of the amendment on reading the amendment the supporting affidavit and the documents attached relied upon, gives me the satisfaction that the amendment does not involved consideration of and is not likely to raise any new issue not raised in the courts below. I accordingly reject the suggestion of Mr. Kutigi.

I shall now consider whether the application before us should be granted. I have already stated the facts relied upon and the arguments of counsel in this application. It rewards clarity to state even if in outline the genesis and facts of this transaction which has eventually resulted in instant litigation.

The loan with interest subject matter of this action was given in US Dollars by the 1st plaintiff to the defendant. It was guaranteed by the 2nd plaintiff. When the demand was made for the repayment of the loan, the defendant wrote to the 1st plaintiff by the letter dated 15th September, 1986 acknowledge the indebtedness of the loan of US \$5,500,000 and in that letter informed the 1st plaintiff that he, the defendant, had instructed his solicitors, Chief F.R.A. Williams, S.A.N. to contact 1st

plaintiff to arrange settlement of the loan.

It is pertinent to observe that although the transaction described above was made in US Dollars, the writ of summons, claimed the sum of N45,387,264.42 kobo being the naira equivalent of \$9,747,914 44 US Dollars converted to naira at the prevailing exchange rate on 31st August, 1987 of N1.00 to US\$4.8561. The statement of claim also at paragraph 11 expressed it in the same terms. Judgement was entered for the plaintiffs/applicants in terms of the writ of summons in the high court as follows:

"Judgment is hereby entered for the plaintiffs in the sum of N45,387,264.42 kobo being outstanding debt owing to the plaintiff as a result of loan granted by the 1st plaintiff to the defendant at his request and which debt is now in the sum of US\$9,747,914.44 (Nine Million Seven Hundred and Forty-Seven Thousand, Nine Hundred and Fourteen US Dollars Forty-Four Cent) i.e as at 31st July 1987 converted to naira at the prevailing exchange rate on 31st August, 1987 of US\$1.00 to N4.6561.

Interest on the said debt at the rate of 18% per annum from 1st September, 1987 until judgement and thereafter at the same rate of interest on the judgement debt and reducing balance until total debt is liquidated."

This amendment is sought in order to reflect the understanding between the parties, in view of the evidence before the trial court, and the nature of the transaction between the parties. The question is whether this amendment ought to be granted in all the circumstances of this case.

It is well settled that leave to amend may be made and granted at any stage of the proceedings. See *Totty v. Effiong & Anor.* (1966-67) 10 E.N.L.R.45. It is however important to seek such leave as soon as the defect in the proceedings is detected. Notwithstanding this guide an amendment may be sought and, if appropriate, granted on appeal if it is to amend the record of the trial court in line with the facts proved before the trial court and the decision. This power is to be exercised to prevent the occurrence of substantial injustice.- See *Metal Construction (W.A.) Ltd. & ors v. Migliore & Anor.* (1979) 6-9 S.C. 163, 171-172. *Karimu Laguro*

& Anor. v. Honsu & Anor. (1992) 2 N.W.L.R. 278.

Appellant has applied for this amendment before this court on discovering the error. In paragraph 13, 14 and 16 of the affidavit in support of the application for leave to amend it was deposed to as follows:-

"14. That it would be in the interest of justice for the writ of summons and statement of claim to be amended to reflect the appellant/applicants's claim for the United State Dollar sum of the adjudged debt plus interest or the naira equivalent thereof at the date of payment or when the honourable court might authorise enforcement of its judgement in the event that this appeal shall succeed.

13. That I am informed by Miss Ibukun Odegbaïke, account officer of guaranty Trust Bank Plc, and I verily believe that the current rate of exchanged between the naira and the United States dollars is N101.05 to US\$1.00.

16. That the amendment is necessary and proper to correct the pleadings and vary the judgement of the high court of Lagos so that the position under the judgement shall be clear and free from ambiguity and to enable this honourable court give an adequate and just consideration to the appellant/applicant's appeal".

Application for amendment is generally refused if granting it will result in injustice to the other side-see *Adetutu v. Aderohunmu* (1984) 6 S.C. 92. It will surely be refused if made mala fide. There is no evidence that this application was made mala fide. On the contrary, the supporting affidavit has deposed to the fact that unless the amendment was made, the judgement of the trial court varied accordingly to correct the error and omission in expressing the manifest intention of the court in the event of the appeal being allowed injustice will result to the 2nd appellant - see paragraph 17.

The principles taken into account in considering whether an application for amendment should be granted are, inter alia, the attitude of the parties, the nature of the amendment sought in relation to the suit, the question in controversy and the time when the amendment was being sought. Of course where the amendment was being sought mala fide or

if the amendment even if granted will not cure the defect in the proceedings the court will not grant it - see *Lagunju Abasi v. Raji Labiyi* (1958) W.R.N.L.R. 12.

It is essential to the grant of an application for amendment for the applicant to show the materiality of the amendment sought

B - See *Oyenuga v. Provisional council of the University of Ife* (1965) N.M.L.R.9.

The courts will not easily grant an application for amendment which if granted will unduly delay the hearing of the suit and unfairly prejudice either party to the suit. See *Dominion flour Mills Ltd. v. Abimbola George* (1960) LL.R. 53.

C Where the application for grant of amendment falls within these

principles, as in the application before us, the court will have no hesitation in granting it. The fact that the application was first brought in this

court will not affect the grant. In this case all the evidence necessary for

D the grant of the application were before the trial court, and if amendment

was sought there it would have been granted. For instance, there is evidence of the loan transaction between the parties in US Dollars, which

is the issue in controversy requiring amendment. There was evidence of

E the preparedness of the defendant/respondent to repay the loan. There is

no evidence in contradiction. It was clear to the trial judge as could be inferred from his judgement that the loan transaction was in US dollars,

but the claim and relief sought were expressed in naira. The court gave

F judgement in naira. There is in my opinion no argument against the

materiality of the amendment. I do not think *this* court can tolerate a situation where an error which can be corrected without prejudice or

injustice to either party should be allowed to remain uncorrected because the adverse party would wish it so. I am *of* the opinion, which is

G supported by several decided case of this court that an application for an

amendment which will not occasion injustice to the other party, even if the courts below have failed to do so, will be granted. See *Laguro v. Honsu* (1992) 2 N.W.L.R. 279 S.C.

H The aim of the amendment in the application before us is to

bring the pleadings in line with the evidence on record. There is no suggestion that any new evidence is being sought or will be required on either side because of the amendment. There is also no question of

undue delay to the proceedings or prejudice to the respondent. There is no doubt therefore the course of justice demand the grant of this application. I therefore accordingly so order.

I abide by the orders and the costs awarded in the ruling of my learned brother Okay Achike, J.S.C.

B

OGUNDARE JSC

I have read in draft the ruling just delivered by my learned brother, Achike, JSC. I entirely agree with him and for the reasons given by him I, too, order as prayed in the appellants/applicant's motion. I award N1,000.00 (One thousand naira) costs of this application in favour of the respondent.

D

ONU JSC

Having had the opportunity of a preview of the leading ruling just delivered by my learned brother, Achike, JSC. before now, I am in complete agreement therewith that the application for the amendment is meritorious.

Accordingly, I too grant it and make similar order as to costs contained therein.

F

EJIWUNMI JSC

I have had the privilege of reading before now the ruling of my learned brother, Achike, JSC.

G

As the issue raised in this application was carefully considered, I agree for the reasons given that this application ought to be granted.

The question that has raised for determination in this application is whether the appellants/applicants ought to be granted leave to amend their Writ of summons and paragraph 17(a) of their 2nd further amended statement of claim.

It seems to me manifest from a careful reading of the record of

proceedings and indeed the judgement of the trial court, Adeniji J., that the event that led to this case was the loan granted to the respondent in the sum of US\$5,000.000 (five million US dollars) at the request of the respondent. The said loan with interest was guaranteed by the 2nd appellant. It is, I think, manifest that the loan was given in US dollars. When the demand was made for the refund of indebtedness, the respondent in a letter dated 15th September, 1986 and written to 1st appellant did not only acknowledge the loan of US\$5,000.000 (Five million US dollars), but he did not challenge that fact. All that was done then was that he informed his creditors that he has instructed his solicitor Chief F.R.A Williams (SAN) to contact them.

The application here, having regard to the arguments advanced by their learned counsel is whether the applicants should be allowed to effect an amendment to their Writ of summons and paragraph 17(a) of their statement of claim to bring the pleadings in line with the evidence on record . Though the respondent has opposed this application, he has not in my respectful view, shown what prejudice, if any that he would suffer should the amendment be granted.

Bearing in mind the general principle that an amendment could be granted at any time in a matter which is still live in the court, I do not consider that this application is improper. See *Cropper v. Smith* (1884) 26 Ch. D 710, *Amadi v. Thomas Aplin & CO.* (1972) 1 All N.L.R. (pt. 1) 409. Recognizing also that the main aim of pleadings was to cure all discernible defects in pleadings, and to settle the real controversy between the parties in order to do substantial justice between them, this application has merit. See *Metal construction (W.A.) Ltd. & Ors v. Migliore & Anor.* (1979) 6-9 S.C. 163, 171-172, *Karimu Laguro & Anor. v. Honsu* (1992) 2 N.W.L.R. 279.

For all the above reasons and the fuller reasons give in the lead ruling of my learned brother, Okay Achike, JSC, I make the same orders as were made in the lead ruling aforesaid.