

SUPREME COURT OF NIGERIA

4TH FEBRUARY, 2000. SC. 240/1994

**CORAM:- A. G. KARIBI-WHYTE, E. O. OGWUEGBU,
A. I. KATSINA-ALU, O. ACHIKE, U. A. KALGO, JJSC**

ALHAJA RAFATU AYORINDE & 4 ORS. APPELLANTS
(For themselves and other descendants of Late
Gbadamosi Fagbuyi Ayorinde otherwise known
as Ayande)

AND

ALHAJA AIRAT ONI & ANOR. RESPONDENTS

***ACTIONS** - Constitution of an action - Where the only defendants were sued in a particular capacity - That was found to be improper - The action would be struck out - For being improperly constituted.*

***ACTIONS** - Improperly constituted action - Various options open to an appellate court - As set out in a previous Supreme Court decision.*

***ACTIONS** - Improperly constituted action - Two alternatives are open to the Supreme Court - In the circumstances of this case - Striking out is the preferred alternative.*

FACTS

Before the Lagos High Court, the plaintiffs/appellants instituted an action against the defendants/respondents claiming inter alia, declaration that the plaintiffs are the owners of the property in dispute and possession of the property. The plaintiffs instituted the action against the defendants as the children of one Late Yisa Giwa on the ground that the children became their customary tenants. The trial court found that the only 2 defendants against whom the action was filed are not the sons of Yisa Giwa and that it was wrong for the plaintiffs to have sued them as such. But further in its judgment, the court gave judgment for the plaintiffs against the defendants but not as children or grand children of Musa

(Yisa) Giwa stating that "the capacity of the defendants is hereby amended accordingly."

Defendants appealed to the Court of Appeal which found that the action was improperly constituted and struck it out. Being dissatisfied, the plaintiffs have now appealed to the Supreme Court.

ISSUE FOR DETERMINATION

Whether the action from which this appeal is predicated was competent in terms of being properly constituted.

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

Constitution of an action

1. To my mind, this belated amendment cannot, by any stretch of imagination, becloud the fact that the appellants' action against the respondents was improperly constituted, because having found that the respondents (defendants) did not descend from Yisa Giwa they ought not to have been sued as such. The learned trial Judge said so boldly in unmistakable words. Even though I had reproduced his Lordship's observation in this regard, I wish, if only by way of emphasis, to reproduce it again in this judgment. Said he:

"It was wrong of the plaintiffs to sue the two defendants as children and grand children of Musa Giwa. Evidence before the court showed what the plaintiffs called Musa Giwa was Yisa Giwa. But the two defendants are not children and grand children of Yisa Giwa."

For all intents and purposes, it follows that the two defendants on record, having been found not be children and grand children of Yisa Giwa, ought, in all honesty, to have been struck out, leaving the position of defendant or defendants wholly void. If there is no competent defendant on record, before the case went to trial and throughout the trial, certainly the action in respect thereof would be struck out on the ground that it is improperly constituted. Any thing to the contrary will be absurd and unacceptable. (p. 230 D)

Improper action - Various options

2. For completeness, it is relevant to note that counsel for both parties cited and called in aid the relatively recent decision of this Court in Okoye v Nigeria Constitution and Furniture Company Ltd (supra) as it relates to the various options open to an appellate court where it reaches the conclusion that an action is improperly constituted because those who would have been parties were not made and the case proceeded to trial. In the leading judgment, Akpata, J.S.C. identified these options, depending on the facts of each case, as

"1. To remit the case for re-trial and for those who ought to have been joined to be joined;

2. To strike out the action if a re-trial would necessitate extensive and/or complicated amendments to the writ and statement of claim to reflect the joinder;

3. To join for purposes of the appeal the person who ought to have been joined in the trial court; and

4. To hold that the person complaining that he ought to have been joined was not such a necessary party and that the non-joinder would not defeat the cause or matter." (p. 232 A)

Improper action - Two alternatives

3. I am clearly of the opinion that in the circumstances of this case two alternatives are open to this Court, namely, either to remit the action for retrial after the proper defendants i.e. true descendants of Yisa Giwa would have been ascertained and then joined as a party or to strike out the action on the ground that it was improperly constituted. I would adopt the latter approach as the former may be fraught with further procedural difficulties of embarking on series of amendments of the writ and statement of claim. In the result, I am clearly of the same view with the Court of Appeal that the crucial issue in this appeal was the fact that the action was improperly constituted. Consequently, the proper order to make in the circumstances, for reasons earlier stated, was an order striking out the case. I so hold. (p. 232 G)

NOTABLE POINTS OF INTEREST

ACHIKE JSC

1. Non-joinder of a necessary party - Legal effect

Learned counsel for the appellants had, inter alia, submitted that where a
 B necessary part to an action, for one reason or the other, was not joined,
 the non-joinder will not render the judgment a nullity. This is a correct
 statement of the law. In my opinion, failure to join necessary party in an
 action is a procedural irregularity which does not affect the competence
 C or jurisdiction of the court to entertain the matter before it. But where
 the irregularity leads to injustice or unfairness to the opposing party, it
 may lead to setting aside the judgment on appeal. It is pertinent to em-
 phasize the fact that failure to join the descendants of Yisa Giwa in the
 action leading to this appeal did not render the judgment a nullity on the
 D ground of lack of jurisdiction. (p. 231 G)

KARIBI-WHYTE JSC

*2. Decision that action was improperly constituted - Issue of merit does
 E not arise*

It is hardly contestable that where the Court has determined a matter
 before it on the ground that the action before it was not properly consti-
 tuted, the question as to whether the court decided the merits of the case
 F does not arise. Similarly irrelevant are issues whether judgment can be
 entered in a capacity different from that in which action was brought.
 This is because the action having not been properly constituted, it does
 not give rise to legal consequences. (p. 236 G)

3. Actions - Elementary considerations in filing actions

It is an elementary consideration in bringing actions that a writ of sum-
 mons must not only state the name of a Plaintiff with legal capacity to
 bring the action, it must also contain the name of a defendant, with legal
 H capacity to defend the action, and the claim against the defendant. In
 other words the writ of summons shall state briefly and clearly the Par-
 ties to the action, the subject matter of the claim and the relief sought.
 There must be a dispute between the plaintiff and the Defendant - Nnodi

v. Okafor (1963) NNLR. 42. It is well settled that a statement of claim filed by the Plaintiff supersedes the endorsement on the writ of summons and cures whatever defect in the endorsement - see Fadahunsi v. Shell Company of Nigeria Ltd. (1969) NMLR. 304. At the commencement of trial a properly constituted action must contain the plaintiff, a defendant and the claim against the defendant. (p. 239 G)

4. Actions - Failure to join necessary party - Is not the issue in this case

The situation in the instant appeal is different from the case relied upon in the submission by learned counsel to the Appellants, where a necessary party to an action, for one reason or the other was not joined, the non-joinder will not render the judgment a nullity. It is a correct proposition of law that where an action is properly constituted, with a plaintiff with legal capacity to bring the action, a defendant with capacity to defend, and a claim with cause of action against the defendants, and the action has satisfied all pre-conditions for instituting the action, the fact that a necessary party to the action has not been joined, is not fatal to the action and will not render the action a nullity. - See Oladeinde & anor. v. Oduwole (1962) WNLR.41. Where the nature of the evidence before the Court is such that the case of parties before it can be determined in the absence of those not joined, it can proceed to do so. It is only in those cases where it will not be right and the court cannot properly determine the issues before it in the absence of the parties whose participation in the proceeding is essential for the proper, effectual and complete determination of the issues before it, will it be necessary to insist on the joinder of such necessary parties. - See Uku & ors v. Okumagba & ors. (1974)3 SC. 35. (p. 241 H)

OGWUEGBU JSC

5. Court can join necessary party suo motu

Under the Rules, the court is entitled to join those who may likely be affected by the result of the action. This is a discretion in the court which it can exercise on its own motion or upon the application of either party. None of the parties applied to have the descendants of Yisa Giwa

joined and the court did not on its own motion join them. Learned trial judge purported to amend the proceedings thus:

" I hold that the plaintiffs are entitled to the relief of possession of the property against the two defendants but not as children and grand-children of Musa Giwa. The capacity of the defendants is hereby amended accordingly."

It was too late in the day for him to do so. Furthermore, the issues of possession, right of occupancy and perpetual injunction claimed by the plaintiffs are not the type or rights and interests of the parties actually before him which he could determine without joining the descendants of Yisa Giwa. (p. 244 E)

REPRESENTATION

D L. B. Lawal- Akapo Esq. for the Appellants
M. I. Onafowokan Mrs. for the Respondents

CASES REFERRED TO

E Nnodi v. Okafor (1963) NNLR. 42
Fadahunsi v. Shell Company of Nigeria Ltd. (1969) NMLR. 304
Oladeinde v. Oduwale (1962) WNLR.41
Uku v. Okumagba (1974)3 SC. 35
F Ikpere v. Aforije (1972) 1 All NLR (pt.1) 220
Onwumalu v. Osageme (1971) NSCC vol.7 p.13
Okoye v Nigeria Construction & Furniture Co Ltd (1991) 6 NWLR (Pt.199) 501 at 512
Green v Green (1987) NSCC Vol.18 p.1115
G Ekpoke v Usilo (1978) NSCC 413 at 414
Peenok Investment Ltd v Hotel Presidential Ltd (1982) 13 NSCC 477 at 478
Ekpere v Aforije (1972) 1 ALL NLR (Pt. 1) 220

H

LEAD JUDGMENT BY ACHIKE JSC

The appellants as plaintiffs at the Lagos High Court instituted this action in a representative capacity (as representing themselves and

other descendants of late Gbadamosi Fagbuyi Ayorinde otherwise known as Ayande) against the defendants. They claimed as follows:

(i) *"A declaration that the plaintiffs are the owners of the property situate, Lying and known as No. 67, Docemo Street, Lagos being an Estate of inheritance from their Ancestor late Gbadamosi Fagbuyi Ayorinde otherwise known as Ayande.*

(ii) *A declaration that the plaintiffs are the persons entitled to certificate of occupancy in respect of the said land.*

(iii) *Possession of the property.*

(iv) *Order of perpetual injunction restraining the defendants whether by themselves, their servants and/or Agents from further act of trespass on the land."*

On 3/1/90 the learned trial Judge, Adeyinka, J. entered judgment in favour of the plaintiffs. On defendants' appeal, the Court of Appeal unanimously reversed the judgment of the trial court and found for the defendants. Dissatisfied with the lower court's judgment, the appellants have now appealed to this Court by Notice of Appeal dated 22/6/94. From the judgment of the lower court appellants' learned counsel, L.B. Lawal-Akapo, Esq identified five issues for determination, namely:

(1) *"Whether or not an action will fail because of NON JOIN- DER of a party.*

(2) *What is the legal effect of a person who had knowledge (whether actual or constructive) of the pendency of a suit the result of which may likely affect his interest and did not apply to be joined as a Party.*

(3) *Whether judgment can be entered against a person sued in one capacity in a different (sic) capacity other than the capacity in which he was originally sued.*

(4) *Whether or not the judgment of a court could stand where the court did not consider the case or argument pur (sic) forward by one party and make a definite finding one way or the other.*

(5) *Whether or not a court can discredit and reject the submission of a party on a major point of appeal and proceed to enter judgment in favour of the same party on the ground that the appeal was not*

focused or premised on the discredited and rejected submission."

Respondents' learned counsel, Messrs. Onafowokan & Onafowokan postulated two issues for determination, viz,

(a) *"Whether having regard to the nature and the manner in which the relief sought by the plaintiffs in the trial court and the findings of the trial court that the Defendants are not the children and grand children of Yisa Giwa neither are they the descendants of Yisa Giwa, the Appellate Court was right in holding that the action was not properly constituted."*

(b) *"Whether having regard to the Writ of Summons and the statement of Claim filed in this suit and the Plaintiffs' contention through out the trial that the action was against the children of Yisa Giwa coupled with the findings of the trial court that the Defendants were not the children of Yisa Giwa against whom the Plaintiffs were seeking reliefs, the Appellate court was right in striking the case out for non-joinder of the children and grandchildren of Yisa Giwa."*

At the oral hearing, Mr. Lawal-Akapo, learned appellants' counsel submitted that non-joinder of a party cannot defeat an action and calls in aid the Supreme Court decision in Onoyeme v. Okunibe (1965) All NLR (Reprint) 378.

For the respondents, Mrs. Onafowokan emphasized that the question is, was the action properly constituted before the trial court? To this question, the Court of Appeal answered in the negative because the defendants/respondents were sued in a representative capacity as children of one Yisa Giwa but it turned out that the defendants/respondents before the court were the children of one Musa Giwa and the trial court decided to give judgment in their personal capacity. The Court of Appeal held that the trial court was wrong to so hold. She finally submitted that since the plaintiffs/appellants had neither joined nor sued the right parties the action was bound to fail and to buttress this proposition she called in aid the authorities of Ikpere & ors v. Aforije (1972) 1 All NLR (pt.1) 220 and Onwumalu v. Osageme (1971) NSCC vol.7 p.13.

Some basic facts in relation to the case leading to this appeal may be recapitulated graphically. The parcel of land which comprises

the subject-matter of this appeal is situate, lying and otherwise known as No.67 Docemo Street, Lagos. It is common ground that the late Gbadamosi Fagbuyi Ayorinde, otherwise known as Ayande, was the owner of the parcel of land by virtue of a Crown Grant dated 7th June, 1971, registered at No. 467 page 467, Vol.6 in the Lands Registry, Lagos. All the appellants are the descendants of late Gbadamosi Fagbuyi Ayorinde who died intestate and in possession of the property. Yisa Giwa (mistakenly referred to as Musa Giwa, both in the writ and the statement of claim) and his children also lived on the property in the life time of Ayorinde and after his death, with the permission of the appellants and without payment of rent. The children and/or descendants of Yisa Giwa, by an arrangement with the respondents decided to redevelop the property without reference to the appellants who in turn challenged this move by institution of this action.

For better understanding of the issue which formed the central theme of the appeal before this Court, I intend to reproduce the relevant excerpt of the judgment of the trial judge which runs as follows:

"I also refer to my finding that the plaintiffs are entitled to a declaration of title to the land in dispute. It follows that the children of Yisa Giwa became customary tenants to the plaintiffs. Ayorinde did not give the property to Yisa Giwa as blood relation but as a friend. It follows that if Sala Giwa the junior sister to Yisa Giwa shared possession of the property with Yisa Giwa as per the evidence of the 1st defendants witness, Sala Giwa had no interest in the property. The 1st and 2nd defendants being grandchildren of Sala Giwa have no interest in the property in dispute and therefore have no tenancy relationship with the plaintiff. (sic) The children and grandchildren of Yisa Giwa who had customary tenancy relationship with the plaintiffs as their overlord did not join the defendants to defend this action. The 1st and 2nd defendants demolished the original property at No.67 Docemo Street and erected a new building thereon. The 1st defendant witness a child of Yisa Giwa testified that she and her brothers and the children of Sala Giwa rebuilt the property. The 1st defendant witness and the other children of Yisa Giwa ought to have join (sic) as co-defendants to resist the plaintiffs

claim and not to leave the two defendants whom they have allegedly authorized to rebuilt the property.

It was wrong of the plaintiffs to sue the two defendants as children and grandchildren of Musa Giwa. Evidence before the Court showed that what the plaintiffs called Musa Giwa was Yisa Giwa. But the two defendants are not children and grandchildren of Yisa Giwa whom the plaintiffs knew had customary tenancy with their late father and grandfather Ayorinde but of Sala Giwa."

Further down in his judgment, his Lordship said as follows:-

"I held that the plaintiffs are entitled to the relief of possession of the property against the two defendants but not as children and grandchildren of Musa Giwa. The capacity of the defendants is hereby amended accordingly."

Finally, in the penultimate paragraph to the end of the judgment, this is what his Lordship said:

"I refer to the Afolabi v Adekunle case, supra and hold that judgment will be given to the plaintiffs in their representative capacity. The defendants (sic) pleading and the evidence showed that the name of the 2nd defendant was FASIU BANIRE and not WASIU BANIRE and I so amend."

The summary of the excerpts reproduced above may be state as follows:

(a) There is a finding that Yisa Giwa was a customary tenant of Ayorinde and not tenant at will as asserted by the respondents;

(b) Respondents (as defendants) were not the children and grand children of Yisa Giwa against whom the plaintiffs/appellants alleged they had customary tenancy with their father and grand father;

(c) The court also made a finding that the respondents were not the children and grand children of Yisa Giwa but the children and grand children of Sala Giwa;

(d) Evidence before the court showed that the person the plaintiffs called Musa Giwa was Yisa Giwa;

(e) The court found that respondents were not the children and grand children of Yisa Giwa and accordingly it entered judgment against them, and suo motu amended their representative capacity to be in their

personal capacity, and

(f) *The court also, suo motu, amended the name of 2nd defendant to be Fasiu Banire.*

It is necessary to have a close look at the two sets of issues submitted to the Court for the determination of this appeal and see which is more appropriate in the circumstances of this appeal. The crux of this appeal, as it appears to me, neatly raises the question whether the action from which this appeal is predicted was competent in terms of being properly constituted. Clearly, if the action as formulated by the appellants qua plaintiffs was properly constituted then most of the issues postulated by the appellants may become live issues, whereas, if, on the other hand, the appellants' action was defectively constituted, then the several issues postulated by them may avail them in any way whatsoever. It is against this background and in the circumstances of this appeal that I feel obliged to prefer the issues postulated by the respondents. They make for tidier analysis of the real controversy raised in this appeal.

I shall now consider the primary or main issues postulated by the parties that would be sufficient to determine this appeal. For the appellants, I am of the view that Issues Nos 1 and 2 are sufficient in this regard while the only two issues formulated by the respondents, taken together, would be apt to dispose of the controversy in this appeal. I shall now examine the submissions by the two learned counsel against the background of what I have said starting with the appellants' counsel.

Appellants' learned counsel Lawal-Akapo, Esq submits that non-joinder of a necessary party will not defeat the action or render the judgment of the court a nullity. Consequently, according to counsel, failure to join the children of Yisa Giwa (also called Musa Giwa) ought not to have led the lower court to the conclusion that the action was not properly constituted as to entitle the court to strike out the claim; counsel calls in aid the decisions in Leonard Okoye & ors v Nigeria Construction & Furniture Co Ltd & ors (1991) 6 NWLR (Pt.199) 501 at 512. Continuing, learned counsel on his Issue No. 2 and as an extension of the submission in his Issue No.1, further submits that where a person who has a vested interest or right on a matter and has knowledge of the pendency

of a suit in respect thereof, and which may likely affect his interest, he must of necessity apply to be joined in the proceedings, and where he fails to do so he would be bound by the outcome of the suit. Counsel referred to the testimony of 1st DW that the children of Yisa (Musa)

B Giwa were aware of the pendency of the suit in relation to the land in dispute and failed to apply to be joined. The consequence of their indifference is that they are bound by the result of the suit and relied on the authorities of Green v Green (1987) NSCC Vol.18 p.1115, Ekpoke v Usilo (1978) NSCC 413 at 414 and Peenok Investment Ltd v Hotel Presidential
C Ltd (1982) 13 NSCC 477 at 478.

Responding to the above submissions, Mrs. Onafowokan, learned respondent's counsel points out that from the outset of the trial of this case the appellants as plaintiffs made it clear, both from their pleadings
D and evidence, that one Yisa Giwa was the customary tenant of their late father and that they were seeking their various reliefs, in particular, an order for injunction, against the children and grand children of Yisa Giwa. She also observed that one of the findings of the trial court was that the
E respondents were not the children and grand children of Yisa Giwa but those of one Sala Giwa she then submits that customary tenancy of Yisa Giwa should first be determined before an order of injunction can be made. She further submits that since the learned trial judge found that
F the 1st and 2nd defendants being grand children of Sala Giwa have no tenancy relationship with the plaintiffs because the tenancy relationship was between their (plaintiffs') father and Yisa Giwa, it follows that the persons whose customary tenancy had to be determined were not made
G a party to the suit. The granting of an order of injunction, in effect, means the determination of the tenancy of the children and grand children of Yisa Giwa without making them a party to the suit and thereby denied them the opportunity of being heard. She further submits, that to
H do so is against the principle of audi alteram partem. In other words, she submits that since the plaintiffs did not join the persons against whom they were seeking relief, the action was not properly constituted and ought to have been struck out, relying on the same authorities of Okoye v Nigerian Construction & Furniture Co. Ltd (supra) and Ekpere & ors v

Aforije (1972) 1 ALL NLR (Pt. 1) 220.

Having closely examined the submissions of learned counsel for the parties, the pleadings and evidence led at the trial, as well as the decision of the lower court on appeal, it seems clear to me that the turning point in this appeal is the determination whether, as argued by the appellants, the respondents who were aware of the pendency of the case in which they had interest were justified to remain aloof without applying to the court to be joined, on the one hand, or whether the appellants' action which was found to be improperly constituted ought to have been set aside, on the other hand, seeing that the people against whom action was expressly instituted were not made party to the action to enable them defend same. The case was quite curious in some respects. In paragraph 4 of the 2nd Amended Statement of Claim, the appellants as plaintiffs, lucidly pleaded:

4" The Defendants are children and grand children of Musa Giwa (deceased) who in his life time occupied the premises at No. 67 Docemo Street, Lagos as "a Customary tenant to" Late Gbadamosi Fagbuyi Ayorinde upon agreed conditions herein after stated.

5 xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

6 Upon the death intestate of the said musa Giwa, his children and grand-children including the Defendants continued to pay general rates and to effects minor expenses on the said premises as their late father i.e. the said late Musa Giwa, and the plaintiffs left them to continue in occupation as long as they acknowledge their title to the said property and the families ties based on cordial relationship between the Plaintiffs' ancestors and the Defendants' ancestors continued until recently, when the Defendants started to assert rights of ownership over the said property."

And it should be noted that respondents (defendants) were sued as children and grand children of late Musa Giwa (meaning Yisa Giwa). Yet the learned trial judge made a specific finding that the two defendants i.e. respondents herein are not children and grand children of Musa (i.e. Yisa) Giwa whom the appellant knew had customary tenancy with their late father and grand father Ayorinde. In other words, the trial court found

that the respondents were not the children and grand children of Yisa Giwa but the children and grand children of Sala Giwa. Having so found it was stupendous for the learned trial judge to have overlooked the respondents' representatives capacity i.e. 'as children and grand children of Yisa Giwa' and proceeded to give judgment against them as such, not only for possession but also for declaration sought by the appellants with regard to a right of occupancy. Obviously, from the finding of the learned trial judge, the persons constituted as defendants (herein respondents) were not true children or grand children of Yisa Giwa and therefore not the persons to be directly affected by the result of the action.

This fact notwithstanding, it was crystal clear that the appellants has sought to litigate the issues in the case as between themselves and the children and grand children of Yisa Giwa and only at the tail-end of the case that the judge treated the respondents in their personal capacities and not as representatives children and grand children of Yisa Giwa, the capacity of the respondent (defendants) having been amended. **To my mind, this belated amendment cannot, by any stretch of imagination, becloud the fact that the appellants' action against the respondents was improperly constituted, because having found that the respondents (defendants) did not descend from Yisa Giwa they ought not to have been sued as such. The learned trial Judge said so boldly in unmistakable words. Even though I had reproduced his Lordship's observation in this regard, I wish, if only by way of emphasis, to reproduce it again in this judgment. Said he:**

"It was wrong of the plaintiffs to sue the two defendants as children and grand children of Musa Giwa. Evidence before the court showed what the plaintiffs called Musa Giwa was Yisa Giwa. But the two defendants are not children and grand children of Yisa Giwa."

For all intents and purposes, it follows that the two defendants on record, having been found not be children and grand children of Yisa Giwa, ought, in all honesty, to have been struck out, leaving the position of defendant or defendants wholly void. If there is no competent defendant on record, before the case went to trial and throughout the trial, certainly the action in respect thereof would

be struck out on the ground that it is improperly constituted. Any thing to the contrary will be absurd and unacceptable.

The circumstances of the case in hand may be likened to those in the case of Ekpere & ors v Aforije & ors (1972) 1 All NLR (part 1) 220 which learned counsel for the respondents cited and relied on. Here, the plaintiffs sought a declaration as representatives of the Mosagan Community of Jesse Clan which in effect meant that the Jesse Clan had no interest in the land in dispute the said Jesse Clan not having been made a defendant in the action through appropriate representation. Delivering the judgment of the Supreme Court, Lewis, JSC at p. 228:

"Now as to Chief Williams' first point, as we have already indicated, in our view it was absolutely clear both on the claim as formulated in the writ and in the statement of claim that the plaintiffs were seeking to obtain declaration that Jesse clan as such, had no interest in the land in dispute as it was Mosagan Village Community land and had no right accordingly to deal with the land on behalf of the Jesse Clan through its representative when they made the lease (Exhibit JUI) and that the lease should therefore be declared null and void. What bring so we do not understand why the plaintiffs saw fit when bringing the action, not to make the Jesse Clan through appropriate representation a defendant to the action."

By this, the Supreme Court upheld the contention of Chief Williams that the 'action was entirely wrongly constituted as the relief sought was against the Jesse Clan yet the Jesse clan as such was never made a party to the action.' In the result, the court ordered that the action be struck out with costs.

Learned counsel for the appellants had, inter alia, submitted that where a necessary part to an action, for one reason or the other, was not joined, the non-joinder will not render the judgment a nullity. This is a correct statement of the law. In my opinion, failure to join necessary party in an action is a procedural irregularity which does not affect the competence or jurisdiction of the court to entertain the matter before it. But where the irregularity leads to injustice or unfairness to the opposing party, it may lead to setting aside the judgment on appeal. It is pertinent

to emphasize the fact that failure to join the descendants of Yisa Giwa in the action leading to this appeal did not render the judgment a nullity on the ground of lack of jurisdiction.

For completeness, it is relevant to note that counsel for both parties cited and called in aid the relatively recent decision of this Court in Okoye v Nigeria Constitution and Furniture Company Ltd (supra) as it relates to the various options open to an appellate court where it reaches the conclusion that an action is improperly constituted because those who would have been parties were not made and the case proceeded to trial. In the leading judgment, Akpata, J.S.C. identified these options, depending on the facts of each case, as

"1. To remit the case for re-trial and for those who ought to have been joined to be joined;

2. To strike out the action if a re-trial would necessitate extensive and/or complicated amendments to the writ and statement of claim to reflect the joinder;

3. To join for purposes of the appeal the person who ought to have been joined in the trial court; and

4. To hold that the person complaining that he ought to have been joined was not such a necessary party and that the non-joinder would not defeat the cause or matter."

The circumstances of the case under appeal were rather curious, as earlier observed, in that the learned trial Judge found as a fact that the defendants/respondents were falsely sued as children and grand children of Yisa Giwa and castigated the appellants that they were wrong to have sued the defendants as children and grand children of Yisa Giwa. **I am clearly of the opinion that in the circumstances of this case two alternatives are open to this Court, namely, either to remit the action for retrial after the proper defendants i.e. true descendants of Yisa Giwa would have been ascertained and then joined as a party or to strike out the action on the ground that it was improperly constituted. I would adopt the latter approach as the former may be fraught with further procedural difficulties of embarking on se-**

ries of amendments of the writ and statement of claim.

In the result, I am clearly of the same view with the Court of Appeal that the crucial issue in this appeal was the fact that the action was improperly constituted. Consequently, the proper order to make in the circumstances, for reasons earlier stated, was an order striking out the case. I so hold. Accordingly, I dismiss this appeal as lacking in merit. I assess and award N10,000.00 costs in favour of the respondents.

KARIBI-WHYTE JSC

I have read the judgment of my learned brother Okay Achike, JSC in this appeal. I agree entirely with him dismissing this appeal. I have in addition decided to state my own reasons for agreeing in full.

This appeal is against the judgment of the Court Appeal, Lagos Judicial Division, delivered on the 27th day of April, 1994, Coram Sulu-Gambari, Uwaifo and Ayoola, JJCA. In a unanimous judgment read by Ayoola JCA, the Court of Appeal held that the action of the plaintiffs/ Respondents against the Defendants/Appellants was not properly constituted, and accordingly allowed the appeal of the Defendants against the judgment of the learned trial Judge giving the reliefs sought together with the order as to costs of the action in the High Court. The Court of Appeal made an order to strike out the action of the plaintiffs/Respondents against the judgment of the learned trial Judge giving the reliefs sought together with the order as to costs of the action in the High Court. The Court of Appeal made an order to strike out the action of the Plaintiffs/Respondents against the Defendants/Appellants and for Plaintiffs/Respondents to pay costs of the action assessed at N500 in the High Court and in the Court of Appeal assessed at N1,000.

The facts which gave risen to this litigation are very simple, precise and short. The pleadings by themselves exemplify the simplicity of the facts even though there were filed statement of claim; statement of Defence. Second amended Statement of Defence of 1st and 2nd Defendants, 2nd Amended Statement of Claim, 2nd Amended Statement of

Defence of 1st and 2nd Defendants.

THE FACTUAL AND GENERAL BACKGROUND

The subject matter of the action is the claim to the ownership of 67 Docemo Street, Lagos which plaintiffs claim to have inherited from their ancestor, late Gbadamosi Fagbuyi Ayorinde, otherwise known as Ayande. Plaintiffs claim to be entitled to the grant of a certificate of occupancy in respect of the said property and possession of the property. Plaintiff's sought a perpetual injunction restraining the Defendants, their Agents and servants from ever entering the said premises.

The fact that 67 Docemo Street, Lagos was owned by late Gbadamosi Fagbuyi ayorinde is not in dispute. It was also not in dispute that Gbadamosi Fagbuyi Ayorinde died intestate. It was also not in dispute that Plaintiffs are descendents of Gbadamosi Fagbuyi Ayorinde, and that upon his death his property devolved upon his children and grand children in accordance with established native law and custom.

It is the contention of Plaintiffs that Defendants are not the descendants of late Gbadamosi Fagbuyi Ayorinde. On the other hand Plaintiffs said that Defendants are the children and/grant children of Musa Giwa, who occupied 67 Docemo Street as a customary tenant to late Gbadamosi Fagbuyi Ayorinde due to the cordial relationship between them.

According to the Plaintiffs, the children of Musa Giwa continued as their father before them to live in 67 Docemo Street, rent free. Defendants however, went on to pull down the existing structure on the land with a view to rebuilding same despite warnings from the Plaintiffs not to do so. This is the reason for this action.

On their part, defendants also claim descent from Gbadamosi Fagbuyi Ayorinde, through Sefinatu Giwa, who they claim to be Ayorinde's daughter and that Ayorinde gave the property to Yisa Giwa in consideration of his birth and descend through his mother, late Madam Sefinatu Giwa (nee Ayorinde) to enable late Yisa Giwa to set up the immediate family and raise his children.

The 1st Defendant claim as grand-child of late Sala Giwa, and that she had the mandate and concurrence of the children and grandchildren and descendants of late Yisa Giwa and late Sala Giwa to rede-

velop the family property at 67 Docemo Street, Lagos for residential purpose of the family.

At the trial in the High Court of Lagos, before Adeyinka J, the following findings of fact were made:

1. Yisa Giwa, the Defendant's predecessor in title was permitted B to live at 67 Docemo Street, Lagos, by late Gbadamosi Fagbuyi Ayorinde for love and close friendship.

2. Yisa Giwa and his children had exclusive possession of the property.

3. Yisa Giwa was a customary tenant to Ayorinde under native C Law and Custom of Lagos in respect of the property.

4. The learned trial Judge rejected the contention that Yisa Giwa was a tenant at will.

5. The learned trial Judge found that what Plaintiffs called Musa D Giwa was Yisa Giwa.

6. However, the Defendants are not children and grand children of Yisa Giwa who plaintiffs knew was the customary tenant of their late father and grand father, but of Sala Giwa. E

7. The learned trial Judge held that it was wrong for plaintiffs to have sued the two defendants, who are not children or grand children of Musa Giwa, the Defendant before the Court had no defence to the action and therefore as between them and the Plaintiffs, the latter must suc- F ceed.

Realizing the defect in the action, the learned trial Judge suo motu amended the capacity of the defendants and name of the 2nd Defendant to the action and entered judgment for the plaintiffs against the Defendants for declaration of entitlement to the grant of certificate of G occupancy in respect of 67 Docemo Street, Lagos, possession and perpetual injunction.

THE COURT OF APPEAL

The Defendants dissatisfied with the judgment appealed to the H Court of Appeal against the judgment. The main issues in the Court of Appeal as disclosed from the formulation of issues for determination are

(1) Whether having found that it was wrong to have sued the defendants, as "children and grand-children of Yisa Giwa and that they are not descendants of Yisa Giwa, the trial Judge should have held that the action was not properly constituted.

B (2) Whether the learned Judge was right in holding that Yisa Giwa was customary tenant and not a tenant at will.

The Court of Appeal decided the appeal on the question whether the action had been properly constituted, and held that it has not been properly constituted. The appeal was allowed and the judgment of the trial C Judge set aside. Plaintiffs have appealed against this decision.

APPEAL TO THIS COURT

They have relied on five grounds of appeal. I have not considered it necessary to reproduce the grounds of appeal because of their D comparative irrelevance to the critical issues in the judgment of the Court of Appeal which is the subject matter of complaint. It is important to state the ratio of the judgment appealed against where it was stated,

"Be that as it may, this appeal must be decided on the question E whether the action has been properly constituted. I would therefore allow the appeal set aside the judgment of the High Court giving the reliefs sought together with his order as to costs in respect of the action in the High Court." I would order that the action be struck out and order that F the Plaintiffs should pay costs of the abortive action in the High Court in the sum of N500 and costs of the appeal in the sum of N1,000" (See pp. 150-151).

It seems to me learned Counsel to Appellants has ignored this passage both in the determination of the grounds of appeal against the G judgment, and in the formulation of issues for determination. It is hardly contestable that where the Court has determined a matter before it on the ground that the action before it was not properly constituted, the question as to whether the court decided the merits of the case does not arise. H Similarly irrelevant are issues whether judgment can be entered in a capacity different from that in which action was brought. This is because the action having not been properly constituted, it does not give rise to legal consequences. Thus of the five issues for determination formu-

lated only 1 and 2 need attention. I reproduce the issues accordingly.

"ISSUES FOR DETERMINATION

(a) Appellant (1) *Whether or not an action will fail because of NON JOINDER of a Party.*

(2) *What is the legal effect of a person who had knowledge (whether actual or constructive) of the pendency of a suit the result of which may likely affect his interest and did not apply to be joined as a Party.*

(3) *Whether judgment can be entered against a person sued in one capacity in a different capacity other than the capacity in which he was originally sued.*

(4) *Whether or not the judgment of a Court could stand where the Court did not consider the case or argument put forward by one Party and make a definite finding one way or the other.*

(5) *Whether or not a court can discredit and reject the submission of a party on a major point of appeal and proceed to enter judgment in favour of the same party on the ground that the appeal was not focused or premised on the discredited and rejected submission."*

The two issues for determination formulated by Respondent seem to me appropriate and adequately cover the issues involved in this appeal. I shall adopt them in my consideration of this appeal. The issues are as follows -

"ISSUES FOR DETERMINATION

(b) Respondents *It is the contention of the Respondents that the issues for determination in this appeal are as follows:-*

a. *Whether having regard to the nature and the manner in which the relief sought by the Plaintiffs in the trial court and the findings of the trial court that the Defendants are not the children and grand children of Yisa Giwa neither are they the descendants of Yisa Giwa, the Appellate Court was right in holding that the action was not properly constituted.*

b. *Whether having regard to the Writ of summons and the Statement of Claim filed in this suit and the Plaintiffs' contention through out the trial that the action was against the children of Yisa Giwa coupled with the findings of the trial court that the Defendants were not the children of*

Yisa Giwa against whom the Plaintiffs were seeking reliefs, the Appellate court was right in striking the case out for non-joinder of the children and grand children of Yisa Giwa."

CONSIDERATION OF APPEAL In my view the determination of the issues so formulated would resolve the issue posed by the appeal against the Respondents was properly constituted. If it is not as held by the Court below *quaesito cadit*.

ARGUMENTS OF APPELLANTS' COUNSEL Mr. Lawal-Akapo, learned Counsel to the Appellants both in his brief of argument and orally before us submitted quite rightly and as a general rule that non-joinder of a necessary party will not defeat the action or render the judgment of the court a nullity. Accordingly, failure to join the children of Yisa Musa ought not to have led the lower Court to the conclusion that the action was not properly constituted as to entitle the Court to strike out the claim. Leonard Okoye & ors. v. Nigerian Construction & Furniture Co. Ltd. & ors. (1991) 6 NWLR (pt. 199) 501 at 512 was cited and relied upon.

Learned Counsel relying on the doctrine of standing by in arguing his second issue, submitted that where a person with vested interest or right in a matter has knowledge of the pendency of a suit in respect thereof likely to affect his interest adversely, he must apply to be joined in the proceedings, and will be bound by the outcome if he fails to do so. He referred to the testimony of DW1 that the children of Yisa (Musa) Giwa were aware of the ongoing litigation and had failed to apply to be joined. The decisions of Green v. Green (1987) NSCC. Vol. 18 p. 1115, Ekpoke v. Usilo (1978) NSCC. 413 at p. 414 and 478 Peenock Investment Ltd. v. Hotel Presidential Ltd. (1982) 13 NSCC. 477, 478 were cited.

ARGUMENTS OF RESPONDENTS COUNSEL In her reply to the submissions of learned Counsel to the Appellants, Mrs. Marian Onafowokan, learned Counsel to the Respondents made it clear that Appellants as Plaintiffs have been consistent both in their writ of summons and statement of claim, that the reliefs sought was against the children and grand children of Yisa Giwa. The said Yisa Giwa was the customary tenant of Gbadamosi fagbuyi Ayorinde, the ancestor of the Plaintiffs. Learned Counsel ob-

served that one of the findings of the trial Judge was that Respondents were not the children and grand children of Yisa Giwa, but those of one Sala Giwa. It was the submission of learned Counsel that having found that 1st and 2nd Defendants being grand children of Sala Giwa, who have no tenancy relationship with Plaintiffs, because the tenancy relationship was between their father and Yisa Giwa, it follows that the person whose customary tenancy had to be determined were not made party to the action.

There is no doubt that the granting of an order of injunction means, the determination of the tenancy of the children and grand children of Yisa Giwa, without making them a party to the suit and without an opportunity of being heard on the matter. This it was submitted violates the principle of audi alteram partem. For this consideration the action was not properly constituted and ought to have been struck out. Learned Counsel cited and relied on Okoye v. NCFC Ltd. (1991) 6 NWLR (pt. 199) 501 and Ekpere & ors. v. Alorije (1972) 1 All NLR (pt. 1) 220. CONSIDERATION OF THE ARGUMENTS The above submissions concisely stated are the summary of arguments urged on us by learned Counsel in this appeal. A careful analysis of the submissions of counsel, the pleadings and evidence at the trial, the judgments of the trial Judge and of the Court below, reveal the need to start from first principle. It seems obvious to me that the elementary considerations about the commencement of an action and the essential elements of a properly constituted action ought to be discussed before considerations of the effect of the attitude of respondents who were aware of the pendency of the case in which they have interest, and the justification for their being aloof without applying to the court to be joined. The question of their standing by whilst a litigation affecting their interest is going on, depends upon the validity of the legal activity on the purported action.

It is an elementary consideration in bringing actions that a writ of summons must not only state the name of a Plaintiff with legal capacity to bring the action, it must also contain the name of a defendant, with legal capacity to defend the action, and the claim against the defendant. In other words the writ of summons shall state briefly and clearly the

Parties to the action, the subject matter of the claim and the relief sought. There must be a dispute between the plaintiff and the Defendant - Nnodi v. Okafor (1963) NNLR. 42. It is well settled that a statement of claim filed by the Plaintiff supersedes the endorsement on the writ of summons and cures whatever defect in the endorsement - see Fadahunsi v. Shell Company of Nigeria Ltd. (1969) NMLR. 304. At the commencement of trial a properly constituted action must contain the plaintiff, a defendant and the claim against the defendant. In Alhaji Aromire v Awoyemi (1972) 1 ALL NLR (pt.1) 101, it was held that it was improper to join as co-defendants to an action persons against whom the plaintiff has no cause of action and against whom he has not made any claim - See Lajumoke v. Doherty (1969) NWLR. 281.

It is pertinent in this case to observe that the plaintiffs have brought this action against Alhaja Airat Oni and Alhaji Fasiu Banire. In paragraphs 4 and 6 of the Plaintiffs Statement of Claim they pleaded.

"4. *The defendants are children and grand children of Musa Giwa (deceased) who in his lifetime occupied the premises at No.67 Docemo Street, Lagos, as "a Customary tenant to "Late Ghadamosi Fagbuyi Ayorinde upon agreed conditions hereinafter stated.*

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6" *Upon the death intestate of the said Musa Giwa, his children and grand children including the Defendants continued to pay general rates and to effect minor expenses on the said premises as their late father i.e. the said late Musa Giwa, and the Plaintiffs left them to continue in occupation as long as they acknowledge their title to the said property and the families ties based on cordial relationship between the Plaintiffs ancestors and the Defendants ancestors continued until recently, when the Defendants started to assert rights of ownership over the said property."*

It is obvious that plaintiffs brought this action against the Defendants as children and grand children of late Musa Giwa (meaning Yisa Giwa). Learned counsel for the Respondent had rightly pointed out the specific finding by the learned trial judge that the two defendants, i.e. the respondents to this appeal are not children and grand children of Musa Giwa

(i.e. Yisa) whom the Appellants knew had customary tenancy with their late father and grand father Gbadamosi Fagbuyi Ayorinde. The learned trial judge found that Defendants are not the children and grand children of Musa (Yisa) Giwa, but the children and grand children of Sala Giwa. Having so found it became obvious that the proper defendants against whom Plaintiffs have claimed to have a cause of action, as endorsed on the writ of summons and pleaded in their statement of claim are not before the court. Accordingly, the defendants before the Court who are not the children and grand children of Musa (Yisa) Giwa, are not the persons directly affected by the result of the action and are not the proper defendants in this action. They are not persons against whom plaintiffs have a claim and desire to prosecute this action.

It follows therefore from this finding that there are no defendants against whom Plaintiffs can proceed. In the absence of any competent defendant, as the finding has disclosed before the case went on trial, the action should have been struck out on the ground that it is improperly constituted. The Court of Appeal was right to so hold, and learned counsel for the Respondents has so correctly submitted. It is elementary and fundamental requirement of the institution of actions in Court that a defendant should not be brought to court unless a plaintiff has a claim against him. In Ekpere & ors. v. Aforije & ors. (1972) 1 ALL NLR (pt.1) 220, the plaintiffs sought as representatives of the Mosagan Community of Jesse Clan which in effect meant that the Jesse Clan had no interest in the land in dispute. The Jesse Clan had not been made a defendant in the action through appropriate representation. Since the relief claimed was against the Jesse clan, and the Jesse clan was not a party to the action, it was held the action was entirely wrongly constituted and struck out with costs. So, in this case since the necessary defendants against whom plaintiffs are claiming reliefs have not been brought before the court to enable the exercise by the Court of its adjudicatory jurisdiction, the action is accordingly not properly constituted - See Madukolu v. Nkemdilim & ors. (1962) 1 ALL NLR.587.

The situation in the instant appeal is different from the case relied upon in the submission by learned counsel to the Appellants, where a

necessary party to an action, for one reason or the other was not joined, the non-joinder will not render the judgment a nullity. It is a correct proposition of law that where an action is properly constituted, with a plaintiff with legal capacity to bring the action, a defendant with capacity to defend, and a claim with cause of action against the defendants, and the action has satisfied all pre-conditions for instituting the action, the fact that a necessary party to the action has not been joined, is not fatal to the action and will not render the action a nullity. - See Oladeinde & anor. v. Oduwale (1962) WNLR.41

Where the nature of the evidence before the Court is such that the case of parties before it can be determined in the absence of those not joined, it can proceed to do so. It is only in those cases where it will not be right and the court cannot properly determine the issues before it in the absence of the parties whose participation in the proceeding is essential for the proper, effectual and complete determination of the issues before it, will it be necessary to insist on the joinder of such necessary parties. - See Uku & ors v. Okumagba & ors. (1974)3 SC.35. Peenok v. Hotel Presidential Ltd. (2982)12 SC.1, 48, Green v. Gree (1987)12 NWLR.480.

In the appeal before us, the Plaintiffs have not brought the Defendants against whom the claim is being sought to enable the exercise of the jurisdiction of the court for the effectual and complete determination of the issues. This is not the case of joinder. The Plaintiffs have not brought the defendants against who a claim has been made. In the absence of the real defendants the Court cannot proceed with the claim of the Plaintiff. It is left with the only option to strike out the action.

Both learned counsel in this appeal have relied on the recent decision of this Court in Okoye & ors v. NCFC Ltd. & ors (1991)6 NWLR.501 for the options available to the Court in dealing with a case where the action before it was not properly constituted because those who should have been parties were not so made and the case proceeded to trial.

In Okoye & ors. v. NCFC Ltd. & ors. (supra), Akpata, JSC identified the following options depending on the facts of the case as

follows-

"1. To remit the case for retrial and for those who ought to be joined to be joined;

2. To strike out the action if a retrial will necessitate extensive and/or complicated amendments to the writ and statement of claim to reflect the joinder;

3 . To join for purposes of the appeal the person who ought to have been joined in the trial Court;

4. To hold that the person complaining that the ought to have been joined was not such a necessary party and that the non-joinder would not defeat the causes or matter."

In the circumstances of this case it is clear that Appellants have brought the wrong defendants before the Court, and for an effectual and complete determination of their claim, they should bring before the court, the children and grand children of Musa (Yisa) Giwa. I am therefore clearly of opinion that the action not being properly constituted in the absence of proper defendants ought to be struck out. The other option is that of remitting the action for retrial before another judge. This will still involve ascertaining the true descendants of Yisa Giwa and then joined as a party to the action. I prefer the expedient of striking out the action as not being properly constituted. I so hold.

Accordingly, I also will and hereby dismiss this appeal as lacking in merit. Costs assessed at N10,000 is hereby awarded to Respondents.

OGWUEGBU JSC

I have had the advantage of a preview of the judgment just delivered by my learned brother Achike, J.S.C., and I am in agreement with him in all the issues raised in this appeal.

The facts which led to the proceedings now on appeal before us have been fully set out in the said judgment and I need not recount them before making my short comment on the issue of non-joinder of the children and grandchildren of Yisa Giwa as defendants in the action.

The learned trial judge found as a fact that the defendants on

record are the children and grandchildren of Sala Giwa and not those of Yisa Giwa who was the customary tenant of the plaintiff's late father and grandfather Gbadamosi Fagbuyi Ayorinde. He chastised the plaintiffs for suing the wrong defendants. He nevertheless gave judgment in their favour against the two defendants whom he found not to be the children of Yisa (Musa) Giwa. He suo motu amended the capacity in which they were sued. It was submitted in the appellants' brief that non-joinder of a necessary part should not defeat an action and that the failure to join the children and grand children of Yisa (Musa) Giwa should not have warranted the striking out of the action.

Learned counsel for the respondents in her own brief submitted that as the plaintiffs failed to join the descendants of Yisa Giwa whom their pleadings and evidence revealed to be the descendants of their customary tenants against whom they claimed, the action was improperly constituted and that the court below was right in striking it out. She referred the court to the cases of Okoye & ors v. Nigerian & Furniture Co. Ltd & ors. (1991) 6 N.W.L.R. (Pt. 199)501 and Ekpere & ors. v. Aforije & ors. (1972)1 ALL N.L.R. (Pt.1) 220.

The learned trial judge made a finding that the defendants on record were wrongly sued and proceeded to amend the capacity in which they were sued just before he made the consequential orders in his judgment. Under the Rules, the court is entitled to join those who may likely be affected by the result of the action. This is a discretion in the court which it can exercise on its own motion or upon the application of either party. None of the parties applied to have the descendants of Yisa Giwa joined and the court did not on its own motion join them.

Learned trial judge purported to amend the proceedings thus:

"I hold that the plaintiffs are entitled to the relief of possession of the property against the two defendants but not as children and grandchildren of Musa Giwa. The capacity of the defendants is hereby amended accordingly."

It was too late in the day for him to do so. Furthermore, the issues of possession, right of occupancy and perpetual injunction claimed by the plaintiffs are not the type or rights and interests of the parties actually

before him which he could determine without joining the descendants of Yisa Giwa. He ought to have joined the children and grand children of Yisa Giwa because their presence is necessary to enable the court effectually and completely settle all the questions in the action.

The failure to join the children and grand children of Yisa (Musa) Giwa who are necessary parties is only an irregularity which did not effect the competence of the court. The net result is that the action was not properly constituted and the court below having various options, in its wisdom, rightly struck out the action. See Okafor & ors. v. Nnaife & ors. (1973)1 N.M.L.R. 245. An order of re-trial would not have been proper as it would have necessitated extensive amendments of the pleadings. The minor amendment which the learned trial judge purported to make could be not have cured the defect. See Ekpere & ors. v. Aforije & ors. (*supra*).

In the result, this appeal fails and I hereby dismiss it with N10,000.00 costs in favour of the defendants.

KATSINA-ALU JSC

I have had the privilege of reading in advance the judgment of my learned brother Achike, JSC in this appeal. I entirely agree with it.

The plaintiffs instituted this action against the children and grand children of Musa Giwa. The reliefs sought were against the children and grand children of Musa Giwa. The plaintiffs made this fact very plain in paragraph 4 of their 2nd Amended Statement of Claim. It reads:

The Defendants are children and grand children of Musa Giwa (deceased) who in his life time occupied the premises at No. 67 Docemo Street, Lagos as " a Customary tenant to " Late Gbadamosi Fagbuyi Ayorinde upon agreed conditions herein-after stated.

But something went wrong. The named defendants herein were not the children and grand children of Musa Giwa. This was the finding of the learned trial judge. The defendants were persons against whom the plaintiffs had no claim. Now, I find that curious. But be that as it may, I should imagine that the plaintiffs thought of what to do. So, what was

the course(s) of action open to them? As far as I see it, the only option was to discontinue, withdraw the suit. This is rational and good sense. The plaintiffs did not sue the persons they set out to sue.

I must stress that this is not a case where a plaintiff has failed to include a defendant, among others, against whom he has a claim. In such a situation one can talk about a non-joinder of a party. In the circumstances of the present case, the issue of non-joinder of a necessary party does not arise. Clearly the action was wrongly constituted. The plaintiffs sued persons against whom they had not claim. the proper order, in the circumstances, was an order striking out the case

Accordingly, I would also dismiss this appeal with N10,000.00 costs in favour of the defendants/respondents.

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KALGO JSC

At the trial, the plaintiffs/appellants sued the defendants/respondents as the children and grand children of Musa Giwa whom they alleged in their pleadings, had customary tenancy of the land in dispute from their father and grand father one Gbadamosi Fagbuyi Ayorinde. At the trial, the learned trial judge found, according to the evidence that the defendants/respondents were not in fact the children and grand children of Musa Giwa; they were the children and grand children of Sala Giwa who was not a customary tenant of Ayorinde. What is more, the learned trial judge further found that it was one Yisa Giwa who had the customary tenancy of the land in dispute situate at 67 Docemo Street, Lagos and whose children and grand children should have been sued in this action. The learned trial judge despite these findings gave judgments for the plaintiffs/appellants but this was overturned by the Court of Appeal.

The substantive issue for the determination of this court in this appeal is whether the action was properly constituted at the initial stage. Looking at the evidence on the record of appeal and the findings of the learned trial judge, there is no doubt in my mind that the proper defendants would have been Yisa Giwa's children and grand children and not Musa Giwa's or Sala Giwa's children and grand children as was done in

this case. It was also my view that the learned trial judge was wrong to change or amend the capacity in which the 2 defendants/respondents were sued and give judgment against them as he did. The case was therefore wrongly constituted before the trial court as there was no proper defendants against whom any relief could be given favour of the plaintiffs/appellants. The action should therefore have been struck out ab initio. See Ekpere & ors v Aforiji (1972) 1 ALL NLR (pt.1) 220. Leonard Okoye v Nigerian Construction & Furniture Co. Limited (1991) 6 NWLR (pt.199) 501; J.C. Limited v Ezenwa (1996) 4 NWLR (pt. 443) 391. B

In the circumstances, I entirely agree with my learned brother Achike, JSC in his leading judgment that there is no merit in the appeal. I therefore dismiss the appeal and award the sum of N10,000.00 costs in favour of the respondents. I also abide by the consequential order made by him. C D

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