

**SUPREME COURT OF NIGERIA**

7TH APRIL, 2000. SC. 106/1999

**CORAM:- A. G. KARIBI-WHYTE, M. E. OGUNDARE, A. I.  
IGUH, S. O. UWAIFO, E. O. AYoola, JJSC**

MOBIL OIL (NIGERIA) PLC	.....	APPELLANT
AND		
IAL 36 INC	.....	RESPONDENT

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***PRACTICE & PROCEDURE*** - Demurrer - Amended pleading - Where the time limited for delivering an amended statement of defence has not elapsed - It is competent for the defendant to raise a demurrer.

***PRACTICE & PROCEDURE*** - Demurrer - Application procedure - A party who chooses to proceed by way of demurrer - Cannot superimpose on it a procedure of his own making.

***PRACTICE & PROCEDURE*** - Demurrer - Under Order 27 of the Federal High Court (Civil Procedure) Rules 1976 - Nature and extent of the plea.

***PRACTICE & PROCEDURE*** - Demurrer - Plea of - A defendant has an option to make a demurrer in appropriate cases - But he does not have the option to do so - After issues have been joined by delivery of defence.

**FACTS**

In the Federal High Court, Lagos, the plaintiff/respondent's claim by amended statement of claim was for damages against the 1st defendant/appellant and another, jointly and severally, for the damages done to its aircraft by the 1st defendant's fuel truck at the Port Harcourt International Airport. The plaintiff amended its particulars of claim and statement of claim twice; first, on 14th August, 1992 and, second, on 14th June 1994. The defendants filed their statement of defence to the first

amended statement of claim on 8th October, 1992. They have not filed an amended statement of defence in response to the second amended statement of claim when by a motion on notice filed on 15th September, 1994, they applied pursuant to Order 27 rules 1 and 3 of the Federal High Court (Civil Procedure) Rules, 1976 and the inherent jurisdiction of the Court that the Plaintiff's claim against the defendants be dismissed "for want of a reasonable cause of action against the defendant and for non-compliance with S. 58 of the Insurance Decree No. 58 of 1991. Several grounds were given for the application. The plaintiff raised an Objection to the application on the ground that it was incompetent as the defendants had already filed their statement of defence.

The learned trial judge overruled the plaintiff's objection. She held that "Order 27 of the Federal High Court Rules permits that an issue of preliminary objection can be filed at any stage of proceedings". The plaintiff appealed to the Court of Appeal, Lagos Division, contending, inter alia that the trial judge was wrong in entertaining the demurrer application after the close of pleadings by the Parties. The Court of Appeal held inter alia that the defendant's application for the dismissal of the plaintiff's suit by way of demurrer was properly before the trial court as the same was validly filed and entertainable even at the close of pleadings by virtue of the provisions of the said Order 27 Rules 1 - 3 of the Federal High Court (Civil Procedure) Rules, 1976. The plaintiff has now cross-appealed to the Supreme Court against this decision of the Court of Appeal while the main appeal brought by the 1st defendant is against the aspect of the Court of Appeal decision which held that the plaintiff's 2nd amended statement of claim disclosed a reasonable cause of action. The appeal was determined on a threshold issue raised in the cross-appeal.

**ISSUE FOR DETERMINATION**

*(1) Whether the application of the Defendant to dismiss the claim of the plaintiff brought under Order 27 rr. 1-3 Federal High Court (Civil Procedure) Rules 1976 was competent.*

**HELD** (Unanimously allowing the cross-appeal and striking out the main appeal per lead judgment of **AYOOLA JSC**)

***Demurrer - Under Order 27 of the Federal High Court Rules 1976***

1. Order 27 of the Rules enables a defendant to make a demurrer. Demurrer has now been abolished in several jurisdictions in this country, but they have been retained by the Federal High Court at all times material to the defendant's application. Demurrer is a long-standing procedure known to the common law for determining suits on points of law only. None will now suggest that a demurrer in terms of Order 27 rules (1) - (3) now brings the pleadings to an end. Demurrer, in terms of the Rules, is raised by motion and it is if the plea fails that the defendant is called upon to plead to the facts. The assumption that underlies the provisions of O. 27 r. 3 that upon failure of a demurrer, the court shall "order the defendant to answer the plaintiff's allegation of fact", is that the defendant had not already done so by filing a statement of defence. It was from this assumption and the nature of demurrer as a threshold plea that the courts are reinforced in establishing the principle that after the defendant had already answered the allegations of fact by delivering a defence, he could no more revert to a threshold plea and raise a demurrer. In this jurisdiction that has been a long-standing interpretation of the relevant provisions of the Rules. (p.1010 D)

***Demurrer - Plea of***

2. The defendant has an option to make a demurrer in appropriate cases. He does not have the option, as the law stands at present, if he chooses to come by way of demurrer, to do so after issues have been joined by delivery of defence. (p.1012 C)

***Demurrer - Application***

3. A party who chooses to proceed by way of demurrer cannot superimpose on it a procedure, of his own making, and insist on making his application after issues have already been joined. (p.1012 F)

***Demurrer - Amended pleading***

4. Where the time limited for delivering an amended statement of defence in response to the amendments in the statement of claim had elapsed and

no consequential amendment has been made to the statement of defence, issues are deemed joined and it would be too late to raise a demurrer. Where such time has not elapsed, it should be competent for the defendant to raise a demurrer in the normal way based on the inadequacy of the amended statement of claim. In the present case although the 2nd statement of claim was filed on 14th June, 1994; the application by the defendant was not brought until 15th September, 1994. In these circumstances it is not far-fetched to deem that issues have already been joined on the pleadings as they stood. In this wise, it was too late for the defendant to raise a demurrer. (p.1013 D)

### **NOTABLE POINTS OF INTEREST**

#### **AYOOLA JSC**

*1. Order 31 rule 19 offers an alternative to demurrer*

Order 31 rule 19 of the Rules which enables a party to apply to the court to strike out any pleading on the ground, inter alia, that it discloses no cause of action, to some extent, offers an alternative to demurrer and gives the defendant a somewhat wider latitude as to the time in the proceedings when he could make the application.... (p.1012 B)

#### *2. Principles of pleadings*

An amended pleading speaks from the date of the original pleading: Rotimi v. Magregor (1974) SC. 133; Government of the Mid-west v. Mid-mo-tors (1977) 10 SC. 43. Upon an amendment of the statement of claim, the defendant is at liberty to amend his statement of defence, without leave of the court, in so far only as is necessary to meet the facts introduced by the amendment. This, I venture to think, translates to a right in the defendant to plead afresh to the case made on the amended pleading of the plaintiff. Where, of course, the defendant fails to amend his defence, and his original defence thereby stands as the defence to the amended statement of claim, the parties are brought to an issue on the amended statement of claim and the defence as filed before the amendment of the statement of claim. (p.1013 A)

**KARIBI-WHYTE JSC**

*3. The basis of a demurrer*

As has often been pointed out in several decided cases including those decided by this Court,

*"The whole basis of a demurrer is in effect to short circuit the action and by a preliminary point of law to show that the action founded on the writ and statement of claim cannot be maintained."* - See Lewis, JSC in Aina v. Trustees of Railway Corporation Pensions Fund (1970) 1 All NLR. 281 at p. 283. (p.1019 E)

*4. The expression "may" in Order 27 rule 1 is mandatory*

The provisions of the rule which seem to me clear and unambiguous, do not appear to be so both to the learned trial Judge and the Court below in this case. In construing the provisions of the rule they have held that the provisions are directive and not mandatory, and not exhaustive, and that the application to dismiss the claim of the Plaintiff can be brought at any time and even after the demurring Defendant has answered the allegations of facts being objected to by filing his statement of defence. With due respect to the learned Justices of the Court of Appeal, this is a wrong statement of the law and flagrant disregard of the governing statutory provisions and the binding decided cases. It seems to me on a calm and careful reading of the relevant provisions of the rule and after considering the cases decided on the construction of the provisions of Order XXXVII r. 1 which are in pari material, it is difficult to support either of the criticisms of the rule made by the courts below. Again, the expression "may" in Order XXVII r. 1 is not directory but mandatory. The defendant can only raise the defence at the time prescribed in the rules and by motion. -See Martins v. Federal Administrator-General (1962) 1 All NLR. 120. The defendant who relies on the provisions of the rule cannot resort to another alternative. (p.1019 G)

*5. It is fundamental to read the sections as a whole when construing a statute*

It is an elementary principle and fundamental to the construction of the

provisions of any statute to read the sections as a whole to enable the interpreter to gather the collective sense of the provisions. Where the subject matter construed concerns other sections of the same statute, all the related provisions must be read, considered and construed together as forming a composite whole. It is imperative in the construction of a section to read together all the sections and paragraphs. This is because the sub-sections or sub-paragraphs may be and are necessarily complementary to and explain the meaning and scope of the main section or paragraph. The meaning of a section may be controlled by other individual sections or sub-sections in the same Act. - See Minister of Housing and Local Government v. Lambert (1969) 2 WLR. 447. Clear and unambiguous words should be given their ordinary literal meaning - See Ojokolobo v. Alamu (1987) 3 NWLR (pt. 61) 377 SC. (p.1020 C)

6. *The scope of the application of the provisions of order 27 rr. 1 - 3*  
The scope of the application of the provisions of Order XXVII rr. 1-3 has been admirably summarized in the case of Ali-Elkhadra v. International Metal Industries Ltd. (1976) 2 FRCR. 82 where the learned trial Judge summed it up thus -

*"For the invocation of Order XXVII Federal High Court (Civil Procedure) Rules therefore, One must apply not before a statement of claim, and not after a statement of defence, for it is premature in the former, and too late in the latter."* (P.1023 E)

7. *Preliminary objection founded on lack of jurisdiction - When to apply to dismiss the suit*

Where the suit against the defendant is fundamentally defective and which discovered on the fact of the writ of summons to be untenable, it has been held to be unnecessary to wait until a statement of claim was filed - See Adejumo v. Military Governor Lagos State (1972) 1 All NLR (pt. 1) 159; Enwezor v. Onyejewe (1968) 1 All NLR. 14. Where a preliminary objection to a suit is founded on lack of jurisdiction, it is possible to apply to dismiss the suit on grounds of law even before a statement of claim is filed. Order XXVII does not remove the inherent powers of the Court to

hear and determine at any time a question of law raised on the pleadings, on the application of either, party or by the Court proprio motu. (p.1024A)

*8. The necessity of adhering to binding judicial precedent*

The Court of Appeal was wrong in its view that the earlier decisions of this Court which have circumscribed the scope and limits of the operation and application of Order XXVII rr. 1-3. Impede the development of the law. With due respect to the Courts below, its construction of the provision offended against the rules of strict interpretation of procedural rules and the doctrine of binding judicial precedent. The decisions of the Supreme Court which the courts ignored are binding on them. They cannot on any pretext decide to ignore them. It is unusual and not expected that a lower court could be deliberately defiant in the commission of obvious judicial errors. It is the more distressing when no acceptable juridical reasons were offered for its desire to depart from well settled principles. It is sincerely hoped that this attitude to binding judicial precedent will be avoided in future and will not be repeated. (p.1024 E)

**OGUNDARE JSC**

*9. The practice of demurrer has now been abolished in the Federal High Court*

The practice of demurrer has now been abolished in the Federal High Court - See Order 24 rule 1 of Federal High Court (Civil Procedure) Rules, 1999 - which came into force in July 1999. (p.1026 B)

**IGUHJSC**

*10. Application by way of demurrer brought before plaintiff has pleaded is premature*

It, therefore, cannot now be disputed that Order 27, Rules 1 - 3 of the Federal High Court (Civil Procedure) Rules, 1976, the provisions of which are in par materia with those of Order 28 Rules 1 - 3 of the old Supreme Court (Civil Procedure) Rules contemplate that the pleadings have reached the point where the plaintiff has pleaded the facts upon which he relies for his claim before an application by way of demurrer for the dismissal

of a suit may properly be raised. Such an application brought under that Rule of Court made before the plaintiff has pleaded facts upon which he relies for his claim must be regarded as premature and liable to be struck out. (p.1029 H)

B

*11. Only points of law may be taken in a demurrer application*

It is thus plain that only points of law may be taken or argued in a demurrer application. Evidence in respect of matter of fact in rebuttal of the averments in the plaintiff's Statement of Claim is neither permissible nor allowed. (p.1031 B)

C

*12. Distinction between application by way of demurrer and application in lieu of demurrer*

D I think I should point out that an application by way of demurrer under the Federal High Court (Civil Procedure) Rules, 1976 must not be confused with or mistaken for an application in lieu of Demurrer applicable presently in Lagos and Western States. In the latter class of applications, E the points of law desired to be raised by the defendant as a preliminary issue are required to be set out in the Statement of Defence before such application in lieu of demurrer is raised. See Onibudo v. Akibu (1982) 13 N.S.C.C. 199. This position is totally different from the procedure prescribed by Order 27 Rules 1 - 3 of the Federal High Court (Civil Procedure) Rules 1976. (p.1032 B)

F

### **REPRESENTATION**

F. O. Fagbohungebe (with him Ayo Ajayi) for the appellant

G

L. C. Ibogu for the respondent / cross-appellant

### **CASES REFERRED TO**

Onibudo v. Akibu (1982) 13 N.S.C.C. 199

H Adejumo v. Military Governor Lagos State (1972) 1 All NLR (pt. 1) 159

Enwezor v. Onyejewe (1968) All NLR. 14

Ali-Elkhadra v. International Metal Industries Ltd. (1976) 2 FRCR. 82

Minister of Housing and Local Government v. Lambert (1969) 2 WLR.



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Ojokolobo v. Alamu (1987) 3 NWLR (pt. 61) 377 SC.

African Newspaper v. Nigeria (1985) 2 NWLR (pt. 6) 137

Rotimi v. Magregor (1974) SC. 133

Government of the Mid-west v. Mid-motors (1977) 10 SC. 43

B

Onibudo v. Akibu (1982) NSCC (Vol. 13) 199

Fadare v. Attorney General of Oyo State (1982): 4 SC 60

**RULES REFERRED TO**

C

Federal High Court (Civil Procedure)

Rules, 1976; Order 27 rr 1, 2 & 3; and order 31 r. 19

**LEAD JUDGMENT BY AYoola JSC**

There are before us an appeal by the 1st defendant in an action [Suit No. FHC/L/123/92) ("the suit")] commenced at the Federal High Court and a cross-appeal by the plaintiff in the said suit. The appeal and the cross-appeal are from the decision of the Court of Appeal (Oguntade, Pats-Acholonu and Aderemi, JJ.C.A) on an appeal brought before them from the decision of the Federal High Court. For convenience, in this judgment the appellant is referred to as the 1st defendant and the respondent is referred to as the plaintiff.

In the Federal High Court the plaintiff's claim was initially for cost of repairs of plaintiff's aircraft which was leased to a company, called Barnax Airline Ltd, and which was damaged when the fuel truck owned by Mobil Oil (Nigeria) PLC, the 1st defendant, drove into it. By a subsequent amendment the plaintiff's claim was for damages against the 1st defendant and another, jointly and severally, for the damage done to its aircraft by the 1st defendant's fuel truck at the Port Harcourt International Airport. As contained in the plaintiff's 2nd Amended Particulars of Claim and 2nd Amended Statement of Claim the particulars of the plaintiff's claim were as follows:

(i) Net amount indemnified by insurers to insured -IAL 361 INC  
US\$ 1,441,678.84

(ii) Survey and Legal Fees

US\$ 200,000.00

(iii) General damages

US\$ 100,000.00

US\$ 1,

741,678.84"

The plaintiff amended its particulars of claim and statement of claim twice; first, on 14th August, 1992 and, second, on 14th June 1994. The defendants filed their statement of defence to the first amended statement of claim on 18th October, 1992. They have not filed an amended statement of defence in response to the second amended statement of claim when by a motion on notice filed on 15th September, 1994, they applied pursuant to Order 17 rules 1 and 3 of the Federal High Court (Civil Procedure) Rules ("the Rules") and the inherent jurisdiction of the court that the plaintiff's claim against the defendants he dismissed "for want of a reasonable cause of action against the defendants and for non-compliance with S. 58 of the Insurance Decree No. 58 of 1991. "Several grounds were given for the application, but since most of them are irrelevant to the issues in this appeal, there is no need to set them out. The plaintiff raised an objection to the application on the ground that it was incompetent as the defendants had already filed their statement of defence.

Ukeje, J., before whom the application came, overruled the plaintiff's objection. She held that the action against the 2nd defendant, an insurance company, was bad for non-compliance with the mandatory provisions of section 58 of the Insurance Act since the requisite one month's notice was not served on it prior to the action and that the action against the 1st defendant was incompetent because the plaintiff lacked "locus to institute the action." In the event, the learned judge struck out the plaintiff from the suit, and dismissed the suit on the ground as she put it, of "the plaintiff's lack of locus to institute or prosecute the action."

The plaintiff's appealed to the Court of Appeal contending, first that the trial judge was wrong in entertaining the demurrer application after the close of pleadings by the parties, secondly, that she was in error in relying on "evidence (or other than) the statement of claim" in determining that the plaintiff did not have a reasonable cause of action, and, thirdly, that the statement of claim disclosed a cause of action. There

was no appeal from the order striking out the 2nd defendant from the suit.

Pats-Acholonu, JCA, who delivered the leading judgment of the Court of Appeal with which Oguntade and Aderemi, JJ.C.A., agreed, disposed of these contentions as follows. As to the first, he regarded it as indulging in mere technicalities to hold that the demurrer applications was incompetent. While acknowledging that "the Supreme Court in its judgments in this sort (sic: of?) procedure have held tenaciously to the view that once the statement of defence has been filed parties must lead evidence, a court may be constrained against its better judgment to blindly follow suit," he, nevertheless, went on to say that: "a party can take a point of law at any early stage it does not matter whether such recourse to wind up the case at that stage is made after the statement of claim before the defence or even after the parties close their pleadings." Being of the further view that Order 27 of the Rules is not exhaustive, he concluded that it was not wrong for the defendant to question the competence of the plaintiff's pleadings and that the course taken by the defendant was proper.

In regard to the second issue, the learned justice held that the plaintiff having failed to specify in what regard the trial judge had made use of facts outside the statement of claim, there was no way the court pronounce on the plaintiff's complaint. On the third issue, he held that the action against the defendant subsisted. It is not quite clear what his pronouncement on the material question, whether there was want of reasonable cause of action, was.

All he said was this: "The cause of action in the suit is the damage caused to the aeroplane but one would have to have a holistic approach to all the averments to determine whether the Respondents (sic) (i.e the plaintiff) are remotely connected with the matter and whether suit was premature." However, the parties in this appeal seemed to have proceeded on the footing that the court below had held that the statement of claim disclosed a reasonable cause of action.

It is clear that the threshold question that must be dealt with in this matter is that raised by the cross-appeal which is: whether the

defendant's application was competent. The provisions of Order 27 of the Federal High Court (Civil Procedure) Rules are as follows.

"27(1) Where a defendant conceives that he has a good legal or equitable defence to the suit, so that even if the allegations of the plaintiff were admitted or established, yet the plaintiff would not be entitled to any decree against the defendant, he may raise the defence by a motion that the suit be dismissed without any answer upon questions of fact being required by him.

(2) For the purpose of such application, the defendant shall be taken as admitting the truth of the plaintiff's allegations, and no evidence respecting matters of fact, and no discussion of questions of fact, shall be allowed.

(3) The Court, on hearing the application, shall either dismiss the suit or order the defendant to answer the plaintiff's allegations of fact, and shall make such order as to costs as the Court seems just."

**Order 27 of the Rules enables a defendant to make a demurrer. Demurrer has now been abolished in several jurisdictions in this country, but they have been retained by the Federal High Court at all times material to the defendant's application. Demurrer is a longstanding procedure known to the common law for determining suits on points of law only.** Plucknet explained in his Concise History of the Common Law (4th edn) at pp. 389-390 that:

"The object of pleadings is to explore the law and the facts of a case by means of the assertions and denials of the parties until an issue has been reached. If is an issue of fact, then the parties will have ascertained a material fact which one asserts and the other denies in terms so precise that a jury will have no difficulty in hearing evidence on the matter and finding the truth of it. If it is an issue of law, the parties will have admitted the relevant facts, leaving it to the court to decide whether the law applicable to them is as the plaintiff or as the defendant maintained. This is called a "demurrer" because one of the parties has pleaded that he is entitled to succeed on the facts admitted by the other, and is willing to rest (demourer) at the point. If his opponent does the same, then demurrer is joined, the pleadings are at an end, and the court hears

*the argument on the point of law, and decides it."*

None will now suggest that a demurrer in terms of Order 27 rules (1) - (3) now brings the pleadings to an end. Demurrer, in terms of the Rules, is raised by motion and it is if the plea fails that the defendant is called upon to plead to the facts. The assumption B that underlies the provisions of O. 27 r. 3 that upon failure of a demurrer, the court shall "order the defendant to answer the plaintiff's allegation of fact", is that the defendant had not already done so by filing a statement of defence. It was from this assumption C and the nature of demurrer as a threshold plea that the courts are reinforced in establishing the principle that after the defendant had already answered the allegations of fact by delivering a defence, he could no more revert to a threshold plea and raise a demurrer. In this jurisdiction that has been a longstanding interpretation D of the relevant provisions of the Rules.

In The Gold Coast and Ashanti Electric Power Development Corporation v. The Attorney General of the Gold Coast (1937) 3 WACA 215, after the pleadings have been closed, by the filing of the statement E of claim by the plaintiff and a defence by the defendant and a reply by the plaintiff, the defendant made an application by way of demurrer. The West African Court of Appeal held that the application was too late. In Aina v. Trustees Nigeria Railway Corporation Pensions Fund [1970] (Vol. F 6) NSCC 225, it was held that the time to take a demurrer is before the defendant pleads. Lewis, JSC, delivering the judgment of this Court in that case said (at p. 228):

*"Once a person has pleaded however the time for demurrer is G passed and he cannot then, in our view, under the rules of court seek to raise by way of a preliminary objection what he should have done earlier under the rules of Court by demurrer."*

In the recent case of Ege Shipping & Trading Industries v. Tigris International Corporation [1999] 14 NWLR (Part 637) 70, this court held H (Per Ogundare JSC, following Odivo v. Obor (1974) SC. 23, [1974] (9) NSCC 103) that an application to dismiss under Order 27 of the Rules must be made before issue is joined.

Undaunted by the weight of authority against the position he takes, counsel for the defendants pressed on us the argument that the provisions of Order 27 are permissive and not mandatory. That contention may be correct only to the extent that there is nothing in Order 27 which makes it mandatory for a defendant to proceed by demurrer in all cases in which he conceives that there is a point of law which, raised as a defence, may dispose of the case even if all allegations of fact are admitted or deemed admitted. Order 31 rule 19 of the Rules which enables a party to apply to the court to strike out any pleading on the ground, inter alia, that it discloses no cause of action, to some extent, offers an alternative to demurrer and gives the defendant a somewhat wider latitude as to the time in the proceedings when he could make the application.. **The defendant has an option to make a demurrer in appropriate cases. He does not have the option, as the law stands at present, if he chooses to come by way of demurrer, to do so after issues have been joined by delivery of defence.** Both in the judgment of the court below and in the defendant's counsel's brief before us, there has been a failure to distinguish between cases decided on rules of court in which proceedings in lieu of demurrer have been substituted for demurrer which has been abolished where those rules apply. Cases such as Onibudo v. Akibu (1982) NSCC (Vol. 13) 199, and Fadare v. Attorney General of Oyo State (1982): 4 SC 60 are to be read with this distinction in mind. **A party who chooses to proceed by way of demurrer cannot superimpose on it a procedure, of his own making, and insist on making his application after issues have already been joined.**

However counsel for the 1st defendant has argued that since the defendant has not filed an amended defence to the 2nd amended statement of claim, he could make a demurrer, before delivery of an amended statement of defence, since no issue would have been joined on the amended statement of claim in such circumstances. It is an argument which cannot be brushed aside without some consideration.

It does appear to me that to deprive a party of the opportunity of having the case disposed of on a demurrer after the plaintiff had by amendment, substituted a statement of claim which does not disclose a reason-

able cause of action for one which does and to which the defendant could not reasonably raise a demurrer, cannot be supported either by principle or, by reason or, even, by common fairness. An amended pleading speaks from the date of the original pleading: Rotimi v. Magregor (1974) SC. 133; Government of the Mid-west v. Mid-motors (1977) 10 SC. 43. B  
Upon an amendment of the statement of claim, the defendant is at liberty to amend his statement of defence, without leave of the court, in so far only as is necessary to meet the facts introduced by the amendment. This, I venture to think, translates to a right in the defendant to plead C afresh to the case made on the amended pleading of the plaintiff. Where, of course, the defendant fails to amend his defence, and his original defence thereby stands as the defence to the amended statement of claim, the parties are brought to an issue on the amended statement of claim and the defence as filed before the amendment of the statement of claim. D  
Flowing from those principles of pleadings one may be permitted to make certain propositions that would throw some light on the defendant's counsel's submissions. **Where the time limited for delivering an amended statement of defence in response to the amendments in E the statement of claim had elapsed and no consequential amendment has been made to the statement of defence, issues are deemed joined and it would be too late to raise a demurrer. Where such time has not elapsed, it should be competent for the defendant to F raise a demurrer in the normal way based on the inadequacy of the amended statement of claim.**

**In the present case although the 2nd statement of claim was filed on 14th June, 1994; the application by the defendant was not brought until 15th September, 1994. In these circumstances it G is not far-fetched to deem that issues have already been joined on the pleadings as they stood. In this wise, it was too late for the defendant to raise a demurrer.** It is difficult to resist the lurking impression that counsel for the defendant may have pursued the latter part H of his argument as an after-thought having regard to the manner in which the prayer in the application was couched and the facts deposed to in the affidavit in support of the application which all suggested that the defen-

dant was not contemplating any order in terms of Order 27 rule 3 should the application fail.

Be that as it may, I come to the conclusion that the application for demurrer in this case is incompetent. The court below should have  
B so held and struck it out. In the result, since the cross-appeal has succeeded, it is unnecessary to determine the other issues raised in the cross-appeal and in the main appeal. The defendants being at liberty, if so  
C advised, to raise those points they had set out to canvass by their demurrer as points of law by their pleading, if so amended, it is inexpedient to pronounce on those point. It suffices for the purposes of these appeal and cross-appeal to order as follows: I allow the cross-appeal and set aside (i) the ruling of the High Court, and (ii) the judgment of the Court of  
D Appeal. The 1st defendant's appeal, being from a ruling in proceedings which are incompetent, is struck out. I order that N10,000 costs be paid by the defendants to the plaintiff.

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#### **KARIBI-WHYTE JSC**

I had the privilege of reading in draft, the judgment of my learned brother E. O. Ayoola, JSC in this appeal and cross-appeal, I am in complete agreement with his reasoning.

F

This appeal emanates from the ruling in a preliminary objection of the Federal High Court Lagos, and concerns the construction of the meaning and scope of Order 27 rules 1, 2 & 3 of the Federal High Court (Civil Procedure) Rules 1976. Plaintiff's claim on the 14th August, 1992  
G by an amended statement of claim against the defendant is for damages resulting from the damage caused to their Aircraft by the fuel truck, property of the Defendant/Appellants as set out in its 2nd Amended particulars of claim and 2nd Amended statement of claim both dated 14th June, 1994. The Defendants/Appellants filed a statement of defence dated  
H October, 1992 denying liability on the grounds that it was not a party to the lease agreement or at all. The Defendant/Appellants did not file a defence to the 2nd Amended statement of claim. The Defendant proceeded on the 15th September, 1994 to file a motion challenging the



competence of the action, relying on the provisions of order 27 rr. 1 and 3 of the Federal High Court (Civil Procedure) Rules 1976.

Plaintiff submitted in objection to the motion that a statement of defence having been filed the application is in violation of Order 27 r.2 of the Rules and is therefore inapplicable. The application is incompetent. B  
In a short but terse ruling the learned trial Judge dismissed the objection to the preliminary objection stating as follows - at p.119

*"Order 27 of the Federal High Court Rules permits that an issue of preliminary objection can be filed at any stage of proceedings. Accordingly, the plaintiff's notice of preliminary objection is dismissed."* C

In construing the provisions of Order 27 rr.1 and 2, the learned trial Judge said, at p. 131 -

*"It is my view that the provisions of Order 27 rules 1 and 3 are D  
directive and not mandatory. Therefore it would make no difference at what stage a motion of preliminary objection is brought before the Federal High Court. It can definitely be brought before the Defendant has E  
filed his defence or it may be brought after the Defendant has filed his Defence; and in both cases no issues of fact shall be canvassed. This is a clear difference from the High Court of Lagos Rules which in Order 22 rule 1 provides -*

*"No demurrer shall be allowed" F  
Order 27 contains no such specific provision."*

The 1st defendant appealed to the Court of Appeal against the ruling, on the ground inter alia, that the learned trial Judge was wrong to have entertained the application for demurrer after the close of pleadings by the parties. That the trial Judge was wrong to have relied on "evidence (other than) the statement of claim" in determining that the plaintiff G  
did not have a reasonable cause of action. It was also held that the statement of claim disclosed a cause of action. There was no appeal against the order striking out the 2nd defendant from the suit. H

The Court of Appeal allowed the appeal of the 1st Respondent and dismissed the appeal of the 2nd Respondent. In the unanimous decision delivered by Pats-Acholonu JCA, the court below held that despite

the fact that the supreme Court has been tenacious in the view that after the close of pleadings, the parties must lead evidence the practice has the tendency to make the development of the law inelastic and static and was not likely to help in the growth of the law. The Court of Appeal saw nothing wrong in a party taking a point of law at any stage if this was likely to terminate the case. The court below observed that Order 27 was silent on the further procedure on the point, and was therefore not exhaustive. Accordingly the Court of Appeal expressed the view that "there was nothing wrong for the defendant to question the competence of the plaintiff's pleadings particularly if the defendant raised those objections in his own pleadings i.e. in the statement of defence." It therefore in affirming the learned trial Judge on this point stated,

*"Therefore the course taken by the Respondent with reference to the pleading of the Appellant is in order."*

It seems to me indisputable that the threshold issue in this appeal is that raised in the cross-appeal, namely, whether the application of the Defendant to dismiss the claim of the plaintiff brought under Order 27 rr.1-3 Federal High Court (Civil Procedure) Rules 1976 was competent. The determination of the question will depend upon the proper construction of the provisions of the enabling rules of procedure.

Appellant has filed the grounds of appeal which are as follows -  
GROUND ONE

*The lower Court erred in law when it held that the Respondent's 2nd Amended Statement of Claim disclosed a reasonable cause of action against the Appellant when in fact, the consortium of insurers who purported to have subrogated the Respondent's right failed to establish the wrongful act of the Appellant as well as the consequent damage caused to the Respondent by such act.*

GROUND TWO.

*The lower Court erred in law in determining the issue of disclosure of reasonable cause of action when it failed to consider and pronounce upon the issue of the purported subrogation of the Respondent's right by the consortium of insurers, in fact, both the Appellant, and the Respondent had canvassed argument on the issue of subrogation in their*

*respective briefs of argument.*

GROUND THREE.

*The lower Court erred in law when it completely failed or neglected to consider whether or not the proper Plaintiff or party in law were before the Court in view of the insurer's purported subrogation in the Respondent's name without due compliance with the relevant and applicable provisions of the Federal High Court (Civil Procedure) Rules despite the fact that both parties in this appeal had extensively argued the issue in their respective briefs of argument.*

RELIEF SOUGHT FROM THE SUPREME COURT.

*i. An order setting aside the decision of the Court of Appeal on the issue of reasonable cause of action*

*ii. A declaration that the Respondent as Loss Payee has no right that can be subrogated by the consortium of insurers.*

*iii. A declaration that there was no proper Plaintiff or party before the Federal High Court.*

*iv. An order dismissing the Respondent's action in its entirety for the aforesaid reasons."*

Respondent has in his cross-appeal filed two grounds of appeal which read:-

"GROUND ONE.

*The Court below erred in law when it held that the trial Judge was right to entertain a demurrer application under the Federal High Court (Civil) Procedure Rules, 1976 after the close or conclusion of pleadings by the parties.*

GROUND TWO.

*The Learned Justices of the Court of Appeal erred in law when they failed to hold that the Federal High Court relied on material outside the Plaintiff's Statement of Claim in considering the Defendant's demurrer application."*

Appellant has formulated two issues for determination in this appeal. Respondent accepted the two issues formulated by the Appellant, in addition to his two issues arising from the grounds of appeal in the cross-appeal.

ISSUE NUMBER 1

As at 27th October, 1994, (when the Appellant's demurrer application was filed) was there any Plaintiff before the Court given the technical withdrawal from the action made by the original Plaintiff IAL 361  
B INC whose claim as Loss Payee has been fully paid by the Consortium of Insurers.

ISSUE NUMBER 2

Does the Respondent's 2nd Amended Statement of Claim dated  
C 14th June, 1994 disclose a reasonable cause of action against the Appellant as held by the Court of Appeal?"

ISSUE NUMBER 3

Whether the Court of Appeal was right in maintaining that the Appellant's Demurrer application can be entertained by the Trial Court  
D after the close or conclusion of pleadings by the parties given the express provisions of Order 27 Rules 1-3 of the Federal High Court (Civil Procedure) Rules 1976?

ISSUE NUMBER 4

Whether the Court of Appeal was right in not making a finding  
E that the Federal High Court relied on material outside the Plaintiff's Statement of Claim in considering the Defendant's Demurrer application and consequently failed to uphold the Plaintiff's appeal on this grounds?"

I am concerned in this judgment with issue number 3 which is  
F the threshold issue, the resolution of which will determine this appeal. The issue No. 3 which I have already stated is the threshold issue has been reproduced above.

Order 27 rules 1-3 of the Federal High Court (Civil Procedure)  
G Rules 1976, provide

"27 (1) Where a defendant conceives that he has a good legal or equitable defence to the suit, so that even if the allegations of the plaintiff were admitted or established, yet the Plaintiff would not be entitled  
H to any decree against the defendant, he may raise the defence by a motion that the suit be dismissed without any answer upon questions of fact being required by him.

(2) For the purpose of such application, the defendant shall be

taken as admitting the truth of the Plaintiff's allegation, and no evidence respecting matters of fact and no discussions of questions of fact shall be allowed.

(3) *The Court on hearing the application, shall either dismiss the suit or order the defendant to answer the Plaintiff's allegation of fact, and shall make such order as to costs as the court seems just.*" B

The above quoted rule is in pari material with the provisions of Order XXVIII rule 1 of the former Rules of the Supreme Court, 1948. The rule provides for dismissal of suits on grounds of law technically referred to as demurrer. The Order in the form in which it was used has now been abolished in the Federal High Court and in several jurisdictions, although it was applicable at all material times in the proceedings of this case. A demurrer is a known and well accepted common law procedure which enables a defendant who contends that even if the allegations of facts as stated in the pleading to which objection is taken are true, yet their legal consequences are not such as to put the defendant (the demurring party) to the necessity of answering them or proceeding further with the cause. This, concisely stated, is the concept of the rule as formulated. As has often been pointed out in several decided cases including those decided by this Court, C D E

*"The whole basis of a demurrer is in effect to short circuit the action and by a preliminary point of law to show that the action founded on the writ and statement of claim cannot be maintained."* - See lewis, JSC in Aina v. Trustees of Railway Corporation Pensions Fund (1970) 1 All NLR. 281 at p. 283, Mayor, etc. of Manchester v. Williams (1891) 1. QB. 94) F

The provisions of the rule which seem to me clear and unambiguous, do not appear to be so both to the learned trial Judge and the Court below in this case. In construing the provisions of the rule they have held that the provisions are directive and not mandatory, and not exhaustive, and that the application to dismiss the claim of the Plaintiff can be brought at any time and even after the demurring Defendant has answered the allegations of facts being objected to by filing his statement of defence. G H

With due respect to the learned Justices of the Court of Appeal, this is a wrong statement of the law and flagrant disregard of the governing statutory provisions and the binding decided cases. It seems to me on a calm and careful reading of the relevant provisions of the rule and after considering the cases decided on the construction of the provisions of Order XXVII r. 1 which are in pari material, it is difficult to support either of the criticisms of the rule made by the courts below. Again, the expression "may" in Order XXVII r. 1 is not directory but mandatory. The defendant can only raise the defence at the time prescribed in the rules and by motion. - See Martins v. Federal Administrator-General (1962) 1 All NLR. 120. The defendant who relies on the provisions of the rule cannot resort to another alternative.

It is an elementary principle and fundamental to the construction of the provisions of any statute to read the sections as a whole to enable the interpreter to gather the collective sense of the provisions. Where the subject matter construed concerns other sections of the same statute, all the related provisions must be read, considered and construed together as forming a composite whole. It is imperative in the construction of a section to read together all the sections and paragraphs. This is because the sub-sections or sub-paragraphs may be and are necessarily complementary to and explain the meaning and scope of the main section or paragraph. The meaning of a section may be controlled by other individual sections or sub-sections in the same Act. - See Minister of Housing and Local Government v. Lambert (1969) 2 WLR. 447. Clear and unambiguous words should be given their ordinary literal meaning - See Ojokolobo v. Alamu (1987) 3 NWLR (pt. 61) 377 SC. African Newspaper v. Nigeria (1985) 2 NWLR (pt. 6) 137. A reading of the provisions discloses that the demurring defendant can only succeed to dismiss the claim of the plaintiff where before filing his defence, he relies on a legal and equitable defence, to the suit, and admits for the purposes of the application the facts pleaded by the plaintiff. This construction follows from the provisions of Rule 1 of Order XXVII 1. I find no ambiguity in the words of this provision. In Martins v. Administrator-General of the Federation & anor. (1962) 1 All NLR. 120 where the provision of Order

XXVIII r. 1 was considered, the Supreme Court held that where the Defendant does not rely on any facts or equitable grounds for the dismissal of the claim against him but on the law, the motion paper need only contain the grounds of law relied upon for the application. In that case the legal defence that Plaintiff held office at the pleasure of the B crown appeared on the motion paper; and accordingly there was no remedy for compulsory retirement. Where the grounds for seeking to dismiss the suit is not disclosed on the motion paper, the application is liable to be struck out for non-compliance with the rules. See Martins v. Administrator-General of the Federation (super); Fred Egbe & anor. v. Thompson Yonwuren & anor. (1976) 2 FRCR. 46. Habib v. Principal Immigration Officer (1958) 3 FSC. 77. C

The punctus temporis for bringing the motion to dismiss a suit on grounds of law in compliance with Order XXVII rr. 1-3 would appear D to be of real importance and critical significance. The courts below in the instant application would appear to have held the view that the Order is not exhaustive on the point and that "a party can take a point of law and if it will bring about the termination of the case at an early stage it does E not matter whether such a recourse to wind up the case at that stage is made after the statement of claim before the defence or even after parties close their pleadings." The opinion concluded, at p. 223.

*"In my view therefore there was nothing wrong for the defendant F to question the competence of the Plaintiff's pleadings particularly if the defendant raised those objections in his own pleading i.e. in the statement of defence."*

The Court of Appeal appears to have adverted to binding judgments of this Court on the interpretation of the provision when they made refer- G ence to "judgements of the Supreme Court.. in this sort of procedure holding tenaciously to the view that once a statement of defence has been filed parties must lead evidence", but went on to doubt whether such a view will help in the growth of jurisprudence. The Court of Appeal H however thought that the case of Onibudo v. Akibu (1982) NSCC (vol. 13) 199 supports the view that a demurrer application can be used for disposing of cases after the close of pleadings. The Court of Appeal

relied heavily on the judgment in Okoye v. Nigeria Furniture and Construction Co. Ltd. (1991) 6 NWLR (pt. 199) 501 at p. 540 in support of its view.

It is important in the construction of Order XXVII rr. 1-3, to  
 B read the provisions carefully and together. It is clear from the unambiguous words of rule 1 which states "that the defendant who raises the defence that the suit of the Plaintiff against required of him, that the Defendant is not expected to file a statement of defence before making the application. But a statement of claim is an essential pre-condition. In  
 C J. O. Amawo & anor. v. A-G. North central State & 2 ors. (1973) 6 SC. 47, Coker JSC construing the provisions of Order XXVIII r. 1, held that a statement of claim must have to be served before the rule is invoked. This is because rule 1 speaks of the allegations of facts by the Plaintiff in  
 D the statement of claim being admitted or established, as predicated admission of the truth of Plaintiff's allegations.

The service of the statement of claim is both express and implicit in all the rules of Order XXVII. For instance r. 2 which clearly  
 E provides that for the purposes of the application, (the defendant) admits the truth of the Plaintiff's allegations of fact and disallows "evidence respecting matters of fact, and discussions of questions of fact, "does not contemplate the joining of issues on questions of fact, and therefore  
 F renders prior serving a statement of defence not only unnecessary, but a disqualification.

In the early decision of the West African Court of Appeal, of Gold Coast & Ashanti Electric Power Development Corporation v. A-G (1934) 4 WACA. 215 it was held too late to rely on the rule after filling a  
 G statement of defence. However, it was observed,

*"We see no reason why a defendant, who has been ordered to file a defence within a certain time of receipt of the statement of claim, should not immediately move the Court under Order 19 to have the suit  
 H dismissed. If he failed in his application the Court would then order that defendant to answer Plaintiff's allegations of fact, i.e. it would repeat its original order on the defendant."*

It seems inescapable from the words of the rule that a defendant who has



delivered a statement of defence cannot rely on the rule. The delivery of a statement of defence ipso facto indicates that the defendant has joined issues with the Plaintiff on the allegations of facts in the statement of claim and has not admitted as truth the facts alleged. In Aina v. Trustees of Railway Corporation Pensions Fund (1970) 1 All NLR. 281, the Supreme Court held,

*"Once a person has pleaded however, the time for demurrer is passed and he cannot then, in my view, under the rules of Court seek to raise by way of preliminary objection what he should have done earlier under the Rules of court by demurrer"* per Lewis JSC at p. 287.

The provision of Rule 3 of Order XXVII enables the Court on hearing the application under Rule 1 to dismiss a suit to either grant the application, or in the case of failure by the Defendant to establish the grounds for dismissal to order that Plaintiff's allegations of fact be answered. In this latter case, the Defendant shall then file his statement of defence. This is clearly acknowledgment of the fact that a statement of defence had not been filed. Recently, this Court in Ege Shipping Industries v. Tigris International Corporation (1999) 14 NWLR (PT. 637) 70, restated earlier decisions of this Court and held that an application to dismiss a suit on grounds of law under Order XXVII of the Rules of the Federal High Court must be made before issue is joined.

The scope of the application of the provisions of Order XXVII rr. 1-3 has been admirably summarized in the case of Ali-Elkhadra v. International Metal Industries Ltd. (1976) 2 FRCR. 82 where the learned trial Judge summed it up thus -

*"For the invocation of Order XXVII Federal High Court (Civil Procedure) Rules therefore, One must apply not before a statement of claim, and not after a statement of defence, for it is premature in the former, and too late in the latter."*

The Court below and the learned trial Judge would appear to have confused the two different rules, namely, the rule relating to demurrer, and the general rule enabling the dismissal of an action or pleadings on grounds of law under Order XXI r. 19 or Order XLVIII r. 2. These provisions offer an alternative to demurrer, and are wider in scope and application.

This latter rule may be and are usually invoked at the close of pleadings in reliance on a paragraph of the statement of defence.

Where the suit against the defendant is fundamentally defective and which discovered on the fact of the writ of summons to be untenable, it has been held to be unnecessary to wait until a statement of claim was filed - See Adejumo v. Military Governor Lagos State (1972) 1 All NLR (pt. 1) 159; Enwezor v. Onyejewe (1968) 1 All NLR. 14. Where a preliminary objection to a suit is founded on lack of jurisdiction, it is possible to apply to dismiss the suit on grounds of law even before a statement of claim is filed. Order XXVII does not remove the inherent powers of the Court to hear and determine at any time a question of law raised on the pleadings, on the application of either, party or by the Court proprio motu.

In Mills v. Renner (1940) 6 WACA. at p. 145, the West African Court of Appeal observed,

*"It would be manifestly absurd to suggest that a court was bound to proceed with the taking of lengthy evidence of the parties to a suit where it appeared that the whole suit could be decided upon the pleadings without any evidence being called."*

The Court of Appeal was wrong in its view that the earlier decisions of this Court which have circumscribed the scope and limits of the operation and application of Order XXVII rr. 1-3. Impede the development of the law. With due respect to the Courts below, its construction of the provision offended against the rules of strict interpretation of procedural rules and the doctrine of binding judicial precedent. The decisions of the Supreme Court which the courts ignored are binding on them. They cannot on any pretext decide to ignore them. It is unusual and not expected that a lower court could be deliberately defiant in the commission of obvious judicial errors.

It is the more distressing when no acceptable juridical reasons were offered for its desire to depart from well settled principles. It is sincerely hoped that this attitude to binding judicial precedent will be avoided in future and will not be repeated.

It is important to point out that Onibudo v. Akibu (supra); Fadare

v. A-G of Oyo State (1982) 4 SC. 60 are cases decided on proceedings in lieu of demurrer and not on demurrer. Where the procedure adopted in the application to dismiss a suit is one of demurrer, the provisions of demurrer govern strictly and must be followed.

Counsel for the 1st Defendant has argued and quite properly that since the defendant has not filed an amended statement of defence to the 2nd amended statement of claim, the defendant can rely on a demurrer since no issue would have been joined on the amended statement of claim in such circumstance. This submission has considerable force and substance. But it must be examined within the context of the litigation as a whole.

It is well settled that an amendment speaks from the date of the original pleading. - See Salako v. Williams (1998) 11 NWLR (pt. 974) 505. Upon an amendment of the statement of claim, the defendant is at liberty to amend his defence without leave of the court, to the extent of the amended statement of claim. If the Defendant fails to amend his statement of defence notwithstanding the amended statement of claim he will be deemed to have admitted the amendment in the amended statement of claim, and will be deemed to have joined issues with the Plaintiff in terms of the amended statement of claim. Having joined issues, it will not be competent to rely on the application on a demurrer. However, if the defendant on the amendment by the Plaintiff raised a demurrer in the normal manner within the period for replying to an amendment to a statement of claim, this would have satisfied the provisions of Order XXVII. Such a demurrer would be competent.

The second amendment to the statement of claim in the instant case was filed on the 14th June, 1994. The application by the defendant to dismiss the action was filed on the 15th September, 1994. It is obvious therefore in the circumstance that issues have been joined on the pleadings in contravention of the provisions of Order XXVII rr. 1 & 2. Accordingly the application for demurrer in this case is incompetent.

The Court of Appeal should have so held and struck it out. Since the cross-appeal is successful, it seems to me unnecessary to determine the other issues raised both in the cross-appeal and in the appeal.

I abide by the Orders made in the leading judgment.

**OGUNDARE JSC**

B I agree entirely with the judgment just delivered by my learned  
brother Ayoola, JSC. I adopt his reasoning as mine. I have nothing more  
to add except to note that the practice of demurrer has now been abol-  
ished in the Federal High Court - See Order 24 rule 1 of Federal High  
Court (Civil Procedure) Rules, 1999 - which came into force in July  
C 1999.

I too allow the cross-appeal of the plaintiff and strike out the  
main appeal of the 1st defendant. I abide by the consequential orders,  
including the order for costs, made by my learned brother Ayoola, JSC.  
D

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**IGUH JSC**

I have had the privilege of reading in draft in draft the judgment  
E just delivered by my learned brother, Ayoola, J.S.C. and I am in full  
agreement with the reasoning and conclusions therein

The application which gave rise to the present appeal and the  
cross-appeal was by way of demurrer. It was made pursuant to the  
F provisions of Order 27 Rules 1 and 3 of the Federal High Court (Civil  
Procedure) Rules, 1976 for an order dismissing the plaintiff's claims  
against the defendant for want of reasonable cause of action and for non-  
compliance with section 58 of the Insurance Decree, 1991 (Decree No.  
58 of 1991)

G When this application came up for hearing, learned counsel for  
the plaintiff raised a preliminary objection thereto. His main contention  
was that having regard to the facts that pleadings had been concluded  
and exchanged in the suit, the issue of demurrer was no longer available  
H to the defendant.

The Learned trial Judge in dismissing this preliminary objection  
observed -

*"It is my view that the provisions of order 27 rules 1 and 3 are*

*directive and not mandatory. Therefore it would make no difference at what stage a motion of Preliminary Objection is brought before the Federal High Court. It can definitely be brought before the Defendant has filed his Defence or it may be brought after the Defendant has filed his Defence; and in both cases no issues of fact shall be canvassed."*

B

She concluded -

*"I therefore hold that that motion is properly before this court. I therefore dismiss the Plaintiff's Objection and shall proceed to determine the Defendant's/Appellant's motion upon its merits."*

C

On appeal before the Lagos Division of the Court of Appeal, it was held that the defendant's application for the dismissal of the plaintiff's suit by way of demurrer was properly before the trial court as the same was validly filed and entertainable even at the close of pleadings by virtue of the provisions of the said Order 27 Rules 1 - 3 of the Federal High Court (Civil Procedure) Rules, 1976. It is this decision of the Court of Appeal that is the subject matter of the cross-appeal in this proceeding. It seems to me convenient, for reasons which will become apparent later in this judgment, to dispose of the cross-appeal first.

D

The main issue for resolution in the cross-appeal is whether the Court of Appeal was right in maintaining that the defendant's application by way of demurrer could be entertained by the trial court at the close of pleadings under the provisions of Order 27 Rules 1 - 3 of the Federal High Court (Civil Procedure) Rules, 1976. I think it will be useful for easy reference to set out the whole provisions of Order 27 of the Federal High Court (Civil Procedure) Rules, 1976, namely -

F

*"(1) Where a defendant conceives that he has a good legal or equitable defence to the suit, so that even if it the allegations of the plaintiff were admitted or established, yet the plaintiff would not be entitled to any decree against the defendant, he may raise this defence by a motion that the suit be dismissed without any answer upon questions of fact being required from him.*

G

*(2) For the purpose of such application, the defendant shall be taken as admitting the truth of the plaintiff's allegations, and no evi-*

H

*denance respecting matters of fact, and no discussion of questions of fact, shall be allowed.*

(3) *The Court, on hearing the application, shall either dismiss the suit or order the defendant to answer the plaintiff's allegations of fact, and shall make such order as to costs as the Court deems just".*

There can be no doubt that under the provisions of the above rules of courts, a defendant is entitled to have a plaintiff's suit dismissed without taking evidence or calling for any answer on questions of fact from the defendant where, on the face of the Statement of Claim, there is a good legal or equitable defence to the action. Such proceedings, however, are by way of demurrer.

It is clear to me that the defendant's application in the present case was made by way of demurrer. It is equally settled that whenever the issue of demurrer is raised, the defendant shall be taken as having admitted the truth of all the allegations of fact contained in the plaintiff's Statement of Claim and, accordingly, no evidence in respect of matters of fact shall be permitted or allowed. See Glover etc. v. Officer Administering Government of Nigeria 19 N.L.R. 45, Ege Shipping and Trading Industry and others v. Tigris International Corporation (1999) 14 N.W.L.R. (Part 637) 70 etc. I think I ought also to point out that for the issue of demurrer to be properly raised and considered, the plaintiff's Statement of Claim shall have been filed. See Amawo and Another v. Attorney-General, North Central State and others (1973) 6 S.C. 47, 1973 N.S.C.C. 411 where this court considered the provisions of Order 28 of the old Supreme Court Rules which are pari materia with the provisions of Order 27 Rules 1 - 3 of the Federal High Court (Civil Procedure) Rules, 1976 now under consideration. Coker, J. S. C., delivering the judgment of this court explained the position as follows -

*"It is obvious from the wording of this order that a statement of Claim at least, must have been filed before the order can be invoked. Rule 1 clearly speaks of "the allegation of the plaintiff" being admitted or established. Rule 2 required that for the purpose of an application under the order "the defendant shall be taken as admitting the truth of the plaintiff's allegations" and when we come to Rule 3, we find that if*

*the Court is satisfied that the application was properly made under that order, then the court shall dismiss the plaintiff's action and if, on the other hand, the court is not so satisfied, it will then order "the defendant to answer the plaintiff's allegations of fact". Whole of Order 28 requires that some sort of pleading should have been filed before it can be invoked."* B

Similarly in Ayorinde Martins v. Federal Administrator - General and Another (1962 1 All N.L.R. 120) this Court, again interpreting the same provisions of Order 28 Rule 1 of the old Supreme Court (Civil Procedure) Rules held that in applications by way of demurrer, pleading stage would have to be reached where the plaintiff has pleaded the facts upon which he relies for his claim and that a motion to dismiss an action under that order made before the plaintiff has pleaded facts upon which he relies for his claim is premature. Said this court, per Bairamian, F. J. D

*"It is plain that those rules contemplate that the plaintiff has made allegations of fact, and the defendant raised a defence in law or equity that, even though that facts alleged were to be taken as true, the plaintiff cannot have judgment, and the defendant, should not be required to answer upon the facts. In other schemes of procedure, the defendant puts in his defence and includes that objection in it; and then the parties agree to have that objection heard first, or it is so ordered. In the rules quoted above, the defendant can move the court, before putting his Statement of Defence, in the hope that he may be saved the trouble of answering on the facts. But, under either scheme, there has been a statement of the facts on which the plaintiff relies for his claim. If a defendant choose to move under Order 28, Rule 1, the court cannot deal with such a motion without first giving the plaintiff an opportunity of making his allegations of fact in support of his claim. In the present case, the defendant moved under that rule, but the claim was dismissed without the plaintiff being given that opportunity, so the order of dismissal of the suit was a mistake."* E F G H

It, therefore, cannot now be disputed that Order 27, Rules 1 - 3 of the Federal High Court (Civil Procedure) Rules, 1976, the provisions

of which are in par materia with those of Order 28 Rules 1 - 3 of the old Supreme Court (Civil Procedure) Rules contemplate that the pleadings have reached the point where the plaintiff has pleaded the facts upon which he relies for his claim before an application by way of demurrer for the dismissal of a suit may properly be raised. Such an application brought under that Rule of Court made before the plaintiff has pleaded facts upon which he relies for his claim must be regarded as premature and liable to be struck out.

The real issue for resolution in his cross-appeal, however, is whether the application in issue for the dismissal of the said plaintiff's suit by way of demurrer under the provisions of Order 27 Rule 1 can be properly made at the stage of the proceedings when it was raised, that is to say, at the close of pleadings when the defendant had filed its Statement of Defence and had thus joined issues with, the plaintiff on questions of fact raised in its Statement of Claim.

A close study of the provisions of Order 27, Rule 1 of the Federal High Court (Civil Procedure) Rules, 1976 leaves one in no doubt as to the state in any proceeding that an application by way of demurrer may be made. In this regard two observations must be made. These comprise as follows -

*"(1) Order 27 Rule 1 clearly indicates that the defence in issue may be raised by a motion that the suit be dismissed without any answer upon questions of fact being required of him. The suggestion, therefore is that the application shall be made before the Statement of Defence is filed.*

*(2) Order 27 Rule 3 further prescribes the order a trial court hearing such an application may finally make, namely, it shall either dismiss the suit or order the defendant to answer the plaintiff's allegations of fact."*

It is clear to me that the import of the above two observations is that a defendant is not required to file his Statement of Defence before he raises his application by way of demurrer. This is because the court at the conclusion of hearing of the application shall either dismiss the suit or order the defendant to answer the plaintiff's allegations of fact. The



latter order clearly entails a directive by the court for the defendant to file his Statement of Defence to the plaintiff's action.

I think I ought also to reiterate that sine by virtue of the provisions of Order 27 Rule 2, the defendant, in a demurrer proceedings, shall be taken as admitting the truth of all allegations of fact pleaded in the plaintiff's Statement of Claim, no evidence respecting matters of fact and no discussion of questions of fact, shall be allowed. See Nwadiaro v. Shell Development Co., Ltd. (1990) 6 N.W.L.R. (Part 150) 322. It is thus plain that only points of law may be taken or argued in a demurrer application. Evidence in respect of matter of fact in rebuttal of the averments in the plaintiff's Statement of Claim is neither permissible nor allowed. It is my firm view, having regard to all I have stated above, that once a defendant has joined issues on facts with the plaintiff by filing his Statement of Defence in a suit, he cannot demur any longer under the provisions of Order 27 Rule 1 of the Federal High Court (Civil Procedure) Rules, 1976. Any such application after the close of pleadings must be regarded as incompetent and liable to be struck out. See Aina v. The Trustees of the Nigerian Railway Corporation Pensions Fund (1970) 1 All N.L.R. 281 where this court, per Lewis, J.S.C. explained the position as follows -

*"The whole basis of a demurrer is in effect to short circuit the action and by a preliminary point of law to show that the action founded on the writ and the statement of Claim cannot be maintained. Once a person has pleaded however, the time for demurrer is passed and he cannot then, in our view, under the rules of court seek to raise by way of preliminary objection what he should have done earlier under the rules of court by demurrer."*

So, too, in Casimir Odivo v. Nweke Obor and Another (1974) 2 S.C. 23 at 31; (1974) N.S.C.C. 103 at 107, this court, per Elias, C. J. N. succinctly put the matter thus -

*"We think that the learned trial Judge was clearly in the wrong when he decided to uphold the preliminary objection of Counsel for the Defendants at the particular stage in the proceedings when the Statement of Defence had already been filed and the issues joined between the two*

*parties. The learned trial Judge should have pointed out to Counsel for the Defendant that the preliminary objection should have been made after the delivery to him of the Statement of Claim and before filing his Statement of Defence".*

B I think I should point out that an application by way of demurrer under the Federal High Court (Civil Procedure) Rules, 1976 must not be confused with or mistaken for an application in lieu of Demurrer applicable presently in Lagos and Western States. In the latter class of applications, the points of law desired to be raised by the defendant as a preliminary issue are required to be set out in the Statement of Defence before such application in lieu of demurrer is raised. See Onibudo v. Akibu (1982) 13 N.S.C.C. 199. This position is totally different from the procedure prescribed by Order 27 Rules 1 - 3 of the Federal High Court D (Civil Procedure) Rules 1976.

The conclusion I therefore reach is that both courts below were in error when they upheld the defendant's application by way of demurrer under the provisions of Order 27 Rule 1 of the Federal High Court E Rules, 1976 at the particular stage of the proceedings when the defendant had filed its Statement of Defence in the action and issues joined between the parties.

See too Fadare and others v. Attorney - General, Oyo State (1982) N.S.C.C F 52 at 58 . The defendant's application for demurrer is in my view belated and incompetent since it had joined issues with the plaintiff by filing its Statement of Defence in the suit. The main issue for determination in the cross-appeal must therefore be resolved in favour of the plaintiff, now cross-appellant, and against the respondent, now appellant.

G In the final result, the plaintiff's cross-appeal is allowed and the decisions of the High Court and the Court below, in so far as they relate to appellant, are hereby set aside. The main appeal having emanated from proceedings which are basically incompetent is hereby struck out. H I abide by the rest of the orders including those as to costs made in the leading judgment of my learned brother, Ayoola, J. S. C., with which I am in complete agreement.

**UWAIFO JSC**

I had the opportunity to read in advance the judgment of my learned brother Ayoola JSC and that of my learned brother Iguh JSC. I fully agree with the reasoning and conclusions in each of them. For that reason I find no need to add my own contribution other than to respectfully adopt their reasoning as mine. I, too, accordingly allow the cross-appeal and set aside the decisions of the two courts below in the terms ordered by Ayoola JSC. I also strike out the main appeal. I abide by the order for costs.

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