

**SUPREME COURT OF NIGERIA**

14TH APRIL, 2000. SC. 79/1994

**CORAM:- S. M. A. BELGORE, E. O. OGWUEGBU, S. U. ONU,  
O. ACHIKE, U. A. KALGO, JJSC.**

ANTHONY EHIDIMHEN	.....	APPELLANT
AND		
1. AHMADU MUSA	.....	RESPONDENTS
2. UNITED AFRICA CO., OF NIGERIA LTD		

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***ACTIONS*** - Party - Proper party - Where there is no evidence to connect a party with the cause of action - That party is not a proper party to the action.

***COMPANY LAW*** - Legal personality - Incorporated company - Is not one and the same with a division of another incorporated company.

***ESTOPPEL*** - Action - Document - Where a document which was solely relied upon to found estoppel - Was made after the happening of the accident upon which the action arose - The document cannot work as an estoppel.

***ESTOPPEL*** - Principle of estoppel - Application - when the principle will apply.

**FACTS**

In the High Court of Borno State sitting at Konduga, the Plaintiff/appellant claimed against the defendants/respondents jointly and severally for N61,000.00 (Sixty one thousand naira) being the pre - accident value of the plaintiff's Peugeot 505 SR saloon car, special damages of N1,314,600.00 (One million, three hundred and fourteen thousand, six hundred naira) and interest at the court rate of 10% per annum on the above total sum with effect from the date of judgment until liquidation.

The plaintiff's Peugeot saloon car and a Man Diesel lorry driven

by the 1st defendant were involved in an accident as a result of which the plaintiff's car and the goods being carried therein were completely destroyed. The plaintiff averred that the said Lorry was driven by the 1st defendant for and on behalf of the 2nd defendant. He further averred that the 2nd defendant is United Africa Company of Nigeria Limited and that G. B. Ollivant (otherwise known as G. B. O.) is a division of the 2nd defendant. He stated that the 2nd defendant's office within jurisdiction is situated at No. 3 Kirikasama Road, Maiduguri. The defendants filed a joint statement of defence denying any liability. In particular they denied the ownership of the Man Diesel Lorry which was involved in the accident with the plaintiff's car or that G. B. Ollivant (Nigeria) Limited is part of the 2nd defendant. The defendants averred that G. B. Ollivant does not exist since its voluntary winding up published in official Gazette No. 34 Vol. 6 of 27th June 1974 and does not legally exist in its corporate personality and by reasons of which G. B. O. cannot be sued or sue except through the liquidator appointed to run its affairs. The 2nd defendant averred that the 1st defendant is not its agent.

At the trial, the plaintiff testified that he went to the premises of the 2nd defendant at No. 3, Kirikasama Road, Maiduguri where he collected a reply of a letter his counsel wrote earlier to the branch manager of the 2nd defendant. The reply was admitted in evidence without any objection as Exhibit "F". In the said Exhibit "F" D.W. 3, who was the branch manager of G. B. Ollivant at the material time confirmed that the vehicle involved in the accident and the goods in it, belonged to G. B. Ollivant. The plaintiff caused a photograph of the wall of the frontage of the Maiduguri office of G. B. Ollivant to be taken. The wall has inscribed on it the following. "G. B. OLLIVANT DIVISION OF U.A.C. OF NIGERIA LTD." The negative and copy of the said photograph were admitted in evidence as Exhibits "G" and "G1". The Defendants witnesses DW1 and DW3 testified to the effect that they did not know the 2nd defendant and that it did not employ them. They said they were working for G. B. Ollivant. Pursuant to the provisions of Section 73 of the Evidence Act, a Federal Gazette Notice of the voluntary winding up of G. B. Ollivant (Nigeria) Limited was admitted in evidence as Exhibit "L" with the con-

sent of the parties.

At the conclusion of the trial, the learned trial judge in a considered judgment found that the plaintiff had proved his case against the defendants and entered judgment in his favour. Dissatisfied, the defendants appealed to the Court of Appeal. Jos Division. The Court of Appeal, held that the 2nd defendant was not a proper party to the proceedings. It went ahead to order that the case be remitted to the High Court for re-hearing. Aggrieved, the plaintiff has now appealed to the Supreme Court raising three issues but the appeal was determined on two issues.

**ISSUES FOR DETERMINATION**

(2) *Is "G.B. Ollivant (Nig.) Ltd" one and the same as "G.B. Ollivant a Division of U.A.C. Nig. Ltd."*

(3) *Is U.A.C. Nig. Ltd a proper party in this suit and vicariously liable for the act of the first Defendant?*

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

***Company law - Legal personality***

1. In my respectful view, Exhibit 'L' has proved or established conclusively that G.B. Ollivant (Nigeria) Limited is an incorporated Company with a legal personality, status and capacity to sue and be sued. Solomon v. Solomon (1897) AC 22. Therefore, it has no connection or relationships with "G.B. Ollivant a Division of U.A.C. (Nigeria) Limited", which to me is described as a division of another incorporated company (U.A.C. Nigeria Limited). In this respect, I will agree with the submission of the learned counsel for the appellant in his brief, that the Court of Appeal was wrong to say that G. B. Ollivant (Nigeria) Ltd is one and the same as the "G.B. Ollivant a division of U.A.C. (Nig.) Ltd". (p. 1335 D)

***Estoppel - Principle of estoppel***

2. It is pertinent to observe that in the meaning of estoppel expatiated by this court in the Ugoji case quoted above, and in Section 151 of the Evidence Act, before estoppel applies, there must be some previous act, declaration, act or omission intentionally made by a person which caused

or permitted another person to believe to be true and upon which the latter acted to his detriment. In that case, and in that case only, can the principle of estoppel apply and the person who made the said act, declaration or omission cannot be allowed to deny such act, declaration or omission. See Osinrinde v Ajamogun (1992) 6 NWLR (pt. 246) 156. (p. 1337 D)

***Estoppel - Action***

C 3. In the instant appeal, there is nothing to show that Exhibit 'F' which was solely relied upon to found estoppel, was in fact made previous to the happening of the accident upon which this action arose. In other- words, the 2nd respondent did not expressly or by any conduct inform the appellant or his representative at any time before the happening of the D said accident that "G.B. Ollivant, a division of U.A.C. (Nig.) Ltd" whose address is at 3 Kirikasama Road, Maiduguri is a division of the 2nd re- spondent. Exhibit 'F' was only made as a result of a letter written by the appellant's counsel after the accident giving rise to this action. It appears E to me therefore, and I find accordingly, that Exhibit 'F' cannot work as an estoppel against the 2nd respondent and that Sections 19, 20 (1) and 151 of the Evidence Act are not relevant thereto. (p. 1337 F)

F ***Actions - Party***

4. Having found that Exhibit 'F' did not operate as estoppel to the 2nd respondent in this action and that there was no evidence to connect it with DW.1, D.W.3, and the vehicle No. PL 218 J, I have no hesitation in concluding that the 2nd respondent was not a proper party to this action. G (p. 1338 H)

**NOTABLE POINTS OF INTEREST**

**OGWUEGBU JSC**

H 1. *Civil cases are decided on preponderance of evidence*

A person who makes allegations in a pleading is, by the ordinary rules of pleading, bound to substantiate them and it is well know that civil cases are decided on a preponderance of evidence. The onus of proof in this

case was not discharged. See Sections 135 and 136 of the Evidence Act Cap. 112 Laws of the Federation of Nigeria 1990 and Kodilinye v. Odu 2 WACA 336 at 337 and Elias v. Omo-Bare (1982) 5 S.C. 25 at 47. In fact, there is preponderance of evidence in favour of the 2nd defendant.

(p. 1345 D)

B

### **ONU JSC**

#### *2. When an amendment of pleadings should not be allowed*

Now, it is well settled law that an amendment of pleadings should be allowed unless:-

C

(1) It will entail injustice to the Respondents

(2) The Applicant is acting Mala fide vide Tildersley v. Harper (1878) 10 CH.D. 393 at 396.

(3) By his blunder the Applicant has done some injury to the Respondents/which cannot be compensated for by costs or otherwise. See Tildersley's case (supra); Oguntimehin v. Gubere (supra) and Amadi v. Thomas Aplin (supra). (p. 1352 C)

E

### **ACHIKE JSC**

#### *3. For an action to succeed parties to it must be the proper parties*

The case leading to this appeal is a grand example of comedy of errors leading to an action being erroneously instituted against a person who ought not to be a party (i.e. 2nd defendant) to this case it is imperative that for an action to succeed the parties to it must be shown to be the proper parties to whom rights and obligations arising from the cause of action attach. (p. 1355 H)

G

### **REPRESENTATION**

Charles Obiashai, Esq., with Christopher Amuzor Esq. and Edwin Nweke Esq., for the Appellant

Olajide Ayodele Esq. S.A.N., with O. Arigbede Esq. for the Respondents

H

### **CASES REFERRED TO**

Solomon v. Solomon (1897) AC 22

Osinrinde v Ajamogun (1992) 6 NWLR (pt. 246) 156

Kodilinye v. Odu 2 WACA 336 at 337

Elias v. Omo-Bare (1982) 5 S.C. 25 at 47

Tildersley v. Harper (1878) 10 CH.D. 393 at 396

B Lauwers Import-Export v. Jozebson Industries Limited (1988) 3 NWLR (part 83) 429

University of Lagos v. Olaniyan (1985) 1 NWLR (part 1) 156

Ibanga v. Usanga (1982) 5 S.C. 103 at 126 - 127

Loufti v. Czanikow Ltd. (1952) 2 E.R. P. 823

C Adekeye v. Akin-Olugbade (1987) 3 NWLR 214 at pages 223 - 224

### **STATUTE REFERRED TO**

Evidence Act, ss. 19, 20(1), 26 and 151.

D

### **LEAD JUDGMENT BY KALGO JSC**

This action was commenced in the High Court of Borno State. The Writ of Summons together with the statement of claim was served on the defendants now respondents after obtaining leave of the trial court for service on the 2nd respondent who was out of the jurisdiction of that court. In the writ, plaintiff, now appellant claimed for:-

F *"A declaration that the defendants are jointly and severally liable to the plaintiff for all the damages suffered by the plaintiff as a result of an accident involving the plaintiff's Peugeot saloon car with registration No. BD 8118 JA and the second defendant's MAN DIESEL Lorry with registration No. PL 218 J, driven by the first defendant for and on behalf of the second defendant which said accident occurred on the 14th of December 1987 near Lamanti Village in the Konduga Local Government of Borno State along the Biu-Maiduguri Federal Highway as a result of which the plaintiff's car and the goods being carried therein were completely destroyed".*

G H The claim was particularized in paragraph 17 of the statement of claim as follows:-

*"(a) N61,000.00 (sixty one thousand naira) being the pre-accident value of the plaintiff's peugeot 505 SR Saloon car with registration*

No. BD 8118 JA;

*"(b) As special damages the sum of N1,314,600. (one million, three hundred and fourteen thousand, six hundred naira) being the value of one Haemodialysis machine, one sonicaid ultra sound machine, one passport, Children's clothes and drugs completely destroyed by fire as a result of the accident,*

*(c) Interest at the court rate of 10% per annum on the above total sum of N1,375,600.00 (one million, three hundred and seventy-five thousand, six hundred naira) with effect from the date of judgment until liquidation".*

The defendants (hereinafter referred to as the respondents) filed a joint statement of Defence denying any liability. In particular they denied the ownership of the man diesel lorry which was involved in the accident with the appellant's car or that G. B. O. Ollivant (Nigeria) Limited or G. B. O. is part of U.A.C of Nigeria Limited. The appellant also filed a reply to that defence.

The trial of the action was commenced on the 20th of February, 1990, in the course of which each side called 4 witnesses, at the end of which learned counsel for the parties addressed the court at length before the court adjourned for judgment. On the 9th of August 1991, the learned trial judge Ogunbiyi J. delivered a considered judgment in which she found that the appellant had proved his case against the respondents and she proceeded to order that the respondents were jointly and severally liable to the appellant as per paragraph 17 of the appellant's statement of claim set out earlier in this judgment.

The respondents were not happy with this judgment and by a notice of appeal containing 12 grounds of appeal, they appealed to the Court of Appeal, Jos. There, the parties filed and exchanged their written briefs. The appeal was then heard and in a reserved judgment delivered on the 26th January, 1994, by Muhammad JCA and concurred by Orah and Okezie JJCA, the Court of Appeal held that United Africa Co. of Nigeria Limited was not a proper party to these proceedings and went ahead per Muhammad JCA to order as follows:-

*"In the circumstances, the appeal succeeds. The 2nd appellant is*

*struck out. The judgment of the lower court is set aside. The case is remitted to the lower court for rehearing. The parties are at liberty to amend their pleadings - if they so wish".*

Dissatisfied with this judgment, the appellant now appealed to this  
B court on ten grounds of appeal.

In this court, the parties filed their respective briefs as required by the rules and exchanged them between themselves. In their joint brief, the appellants formulated 3 issues for the determination of this court which are:-  
C

*"(1) Whether the Court of Appeal was correct in setting aside the decision of the trial court refusing to grant the defendants leave to amend their statement of defence at the close of the plaintiff's case?*

*(2) Is "G.B. Ollivant (Nig.) Ltd" one and the same as "G.B. Ollivant  
D a Division of U.A.C. Nig. Ltd."*

*(3) Is U.A.C. Nig. Ltd a proper party in this suit and vicariously liable for the act of the first Defendant?*

For the respondent, the following issues were also set out in the  
E brief:-

*"(i) Whether the Court of Appeal was right in its conclusion that the amendment of the pleading sought by the respondents in the trial court ought to have been allowed?*

*(ii) Whether the Court of Appeal was right in its conclusion that the inscription G. B. Ollivant a Division of U.A.C. Nig. Limited as shown on exhibits F and G1 at the trial ought to have been read in the light of the oral evidence at the trial and the contents of Exhibits L and M?*  
F

*(iii) Whether the doctrine of estoppel would apply to bind U.A.C of Nigeria Limited having regard to the admissions made in Exhibits F, G and G1 on behalf of G. B. Ollivant a Division of U.A.C. Nigeria Limited?"*  
G

I have carefully examined the issues raised by both parties to this  
H appeal in relation to the grounds of appeal filed by the appellant, and have come to the conclusion that the appellant's issues are more germane for the determination of this appeal. I adopt them for this purpose.

I will take issue (2) and (3) together. These two issues encom-



passed the argument of the appellant that the phrase "G. B. Ollivant a Division of U.A.C. (Nig.) Limited" made U.A.C. Nig. Limited, the second respondent, a proper party to this action.

On page 5 of the record, the appellant pleaded in his statement of claim, paragraph 2 inter alia that:-

*"..... the second defendant on the other hand is united Africa Company of Nigeria Limited otherwise known as U.A.C. of (Nigeria) Limited; a Limited liability company incorporated in Nigeria engaged in commerce and industry operating all over Nigeria through its various divisions such as A. J. Seward, and G. B. Ollivant (otherwise known as G. B. O). The second defendant's office within jurisdiction is situated at No. 3 Kirikasama Road, Maiduguri".*

And in paragraph 3 of the statement of Defence, the respondents pleaded on page 25 of the record thus:-

*"The Defendants deny paragraph 2 of the statement of claim and aver that United Africa Company of Nigeria Limited is a separate entity and has nothing to do with A. J. Seward and G. B. O. as these are not part of U.A.C. of Nigeria Limited. The Defendants aver that it has no branch office in Maiduguri. In further reply to paragraph 2 of the statement of claim, the defendants aver that G. B. Ollivant does not exist since its voluntary winding up and published in Official Gazette No. 34 Vol. 6 of 27th June 1974 and does not legally exist in its corporate personality and by reasons of which G. B. O. cannot be sued or sue except through the liquidator appointed to run its affairs. The second defendant avers that the first defendant is not known to second defendant nor is he an agent to the second defendant at any time material to this action".*

At the trial both parties called evidence in line with their pleadings. The appellant himself testified that he went to the premises of the second respondent at No. 3, Kirikasama Road, Maiduguri where he collected a reply of a letter his counsel wrote earlier to the branch manager of the respondent. The reply was admitted in evidence without any objection, as Exhibit 'F', and D.W. 3, A. L. Wudil, who was the branch manager at the material time, confirmed in his evidence that he wrote and signed Exhibit 'F'. Exhibits G and G1 were the negative and the photograph

respectively of the said branch office. The respondents' witnesses DW 1 and DW 3 also testified to the effect that they did not know the second defendant and that it did not employ them. They said that they were working for G.B. Ollivant. DW.3 confirmed writing Exhibit 'F' as the branch manager of G.B.O. but did not know the relationship between the second defendant and G.B. Ollivant. He also confirmed that the man diesel lorry which was involved in the accident belong to his employers, G. B. Ollivant.

Pursuant to the provisions of section 73 of the Evidence Act, a Federal Gazette notice of the voluntary winding up of G. B. Ollivant (Nigeria) Limited was admitted in evidence as Exhibit 'L' with the consent of the parties. According to the respondents, the company called G. B. Ollivant (Nigeria) Ltd did not exist in its corporate name but it could sue or be sued through its liquidator. There was evidence that one Mr. Pinder was appointed the liquidator of the said company as per Exhibit 'L'.

The argument of the learned counsel for the appellant in his brief is that Exhibit 'F' is a clear admission by the respondents through D.W. 3 that the vehicle involved in the accident and the goods therein at the time of the accident belonged to the second respondent. He further argued that G.B. Ollivant where the goods were being carried to and which employed the 1st respondent was only a "division" of the second respondent.

Exhibit 'F' reads as follows:-

GB OLLIVANT  
DIVISION OF UAC OF NIGERIA LIMITED  
Divisional Headquarters  
182-184 Broad Street P. O. Box 144 Lagos  
Telephone 664466  
Tel: 232121

The Branch Manager's Office,  
P. O. Box 12,  
Maiduguri.  
4th November, 1988.

MD. 38/56/88  
Ngilari & Co.,  
Solicitors & Advocates,

91 Bukar Kolo Street,  
Off Sir Kashim Ibrahim Road,  
Maiduguri.

Dear Sir,

RE - MOTOR ACCIDENT ALONG DAMBOA - MAIDUGURI ROAD  
INVOLVING OUR COMPANY'S MAN DIESEL LORRY WITH REGIS-  
TRATION NUMBER PL 218 J DRIVEN BY AHMADU MUSA B

Your letter C/11/9/88 of 4th October, 1988 delivered by hand on 4th  
November, 1988 refers:

By writing this letter, I am confirming to you that the vehicle involved in  
the accident together with the goods carried therein belong to our Com-  
pany and the said ALHAJI AHMADU MUSA was at the time of the acci-  
dent carrying the goods to our Maiduguri Branch. C

Yours Faithfully,

For: G. B. Ollivant

Division of UAC of Nig. Ltd.

(SGD)

A.L. WUDIL

BRANCH MANAGER. E

cc: North East Area Manager- GBO-JOS.

In his evidence in chief, D.W.3 who was the maker of Exhibit 'F'  
had this to say:-

*"I do not know the relationship between the 2nd defendant i.e  
U.A.C. Nigeria Limited and G. B. Ollivant. On the 24th of June 1974  
the G.B. Ollivant Company was wound up. Mr. L.M. Pinder controls the  
management of G. B. Ollivant. The vehicle involved in the accident in  
this matter Registration No. P1 218 J belongs to G. B. Ollivant".* F G

In his cross-examination, he said:-

*"On the 4th November, 1988, I could remember writing a letter to  
the plaintiff's solicitors in my official capacity which I gave the plain-  
tiff. Exhibit 'F' is the letter which I wrote. At the top of Exhibit F is  
written G. B. Ollivant a Division of U.A.C. Nigeria Limited. I do not  
agree that Exhibit F at the time it was written showed any relationship  
between G. B. Ollivant and U.A.C. Nigeria Limited".* H

D.W. 1 who is the 1st defendant/respondent also testified thus:-

"I started driving in 1966 with G.B.O. Jos. I know the plaintiff in this case. I also would like to state that I do not know the 2nd defendant U.A.C. of Nigeria Limited. I started driving G.B.O. since 1966 but as of now I have left them and I am working with D.M. Pinder in Jos. In 1974 sometimes in June I was in Jos. Around this time the G.B.O. stopped working. In other words, they wound up the company. At that time one luketador (sic) took over the company. As at now my employer is D.M. Pinder". (Underlining mine)

Let me now look at Exhibit 'L'. It states:-

"Public Notice No. 93.

Company Decree 1968.

G.B. OLLIVANT (NIGERIA) LIMITED

MEMBERS VOLUNTARY WINDING UP. NOTICE OF APPOINTMENT OF LIQUIDATOR

Pursuant to Section 285

Name of Company - G.B. Ollivant (NIGERIA) LIMITED

Nature of business - Manufacturing Trading and General Merchandising. Address of Registered Office - NIGER HOUSE, 1/5 Odunlami Street, Lagos.

Liquidator's Name and Address-David Maurice Pinder, Niger House 1/5 Odunlami Street, Lagos.

Date of Appointment - 27th May 1974. By whom appointed - members in general meeting.

D.M. Pinder,

Liquidator".

From the contents of Exhibit 'F' copied above, it is very clear that D.W. 3 who wrote it was the branch manager of G.B. Ollivant at the material time and that the vehicle which was involved in the accident and the goods in it, belonged to G. B. Ollivant. It was also clear from the evidence of D.W.1 that he was at the material time an employee of one Mr. Pinder and not G.B. Ollivant. It is also abundantly clear that both DW 1 and DW 3 did not know the 2nd respondent and that the latter had no relationship with G.B. Ollivant at the time. Since all these have been

clearly established, there is therefore no doubt in my mind that the premises, No. 3 Kirikasama Road, mentioned in Exhibit 'F' could not possibly be a divisional office of the 2nd respondent. Exhibit 'L' the public notice No. 93 in the Federal Gazette, has clearly and undoubtedly established that the Company called G.B. Ollivant (Nigeria) Limited commenced B voluntary winding up since June 1974 and that one Mr. Pinder was its liquidator. It is certainly different from G. B. Ollivant, a division of U.A.C. (Nigeria) Limited mentioned in Exhibit 'F' because G. B. Ollivant as a division, simpliciter, is not an incorporated company in law and in fact. C And according to Exhibit 'L' the address of the registered office of the G. B. Ollivant (Nigeria) Limited is Niger House, 1/5 Odunlami Street, Lagos, whereas the address of the Divisional Headquarters of "G.B. Ollivant a Division of U.A.C. of Nigeria Limited" mentioned in Exhibit 'F' is 182 - 184 Broad Street, Lagos. The addresses are clearly different and for D different associations or bodies.

**In my respectful view, Exhibit 'L' has proved or established conclusively that G.B. Ollivant (Nigeria) Limited is an incorporated Company with a legal personality, status and capacity to sue and be E sued. Solomon v. Solomon (1897) AC 22. Therefore, it has no connection or relationships with "G.B. Ollivant a Division of U.A.C. (Nigeria) Limited", which to me is described as a division of another incorporated company (U.A.C. Nigeria Limited). In this re- F spect, I will agree with the submission of the learned counsel for the appellant in his brief, that the Court of Appeal was wrong to say that G. B. Ollivant (Nigeria) Ltd is one and the same as the "G.B. Ollivant a division of U.A.C. (Nig.) Ltd". But this is not the end of the G matter. The most important issue here is to determine whether the said division of U.A.C. (Nig.) Limited has any relationship with or actually belonged to the 2nd respondent. It must also be clearly proved that the vehicle (Man Diesel Lorry) involved in the accident actually belonged to the 2nd respondent and that D.W.I, its driver at the time, was an em- H ployee of the 2nd respondent. It should not be left to the learned trial judge to conclude by some logical deductions that "the whole" includes "a division". Learned trial judge on page 132 of the record said:-**

"In other words, *G. B. O. is a part of U.A.C which is the whole; consequently therefore, a part or a division cannot be a company on its own and cannot therefore exist on its own as an entity. In the case of Fawehinmi V. N.B.A. supra, the position of the law is that only person B (sic) who are of legal existence can sue or be sued. It follows from the said authority that G. B. O. in the matter at hand being a branch has no legal status .....*".

By this finding, the learned trial judge found that the 2nd respondent was a proper party to this action. With respect to her, I think she was wrong in so finding because even though Exhibit 'F' was not denied by DW 3, who agreed that DW.1 was their staff carrying goods to them in Maiduguri, both DW. 1 and DW. 3 in their testimonies denied knowing the 2nd respondent or having any relationship with it. How can that D relationship or knowledge be automatically presumed against the 2nd respondent? The learned trial judge did this using the principle of estoppel.

On page 133 of the record, the learned trial judge said:-

"With the existence of Exhibit F, G and G1, whereby the 2nd defendants are held out as the main company to which G.B.O. is a division, they are estopped from denying that the 1st defendant is neither their employee nor is the vehicle their own and also that the G.B.O. is their division". (Underlining mine

F By this, the learned trial judge is holding the contents of Exhibit 'F' as issue estoppel against the 2nd respondent. She held that by Exhibit 'F' the 2nd respondent could not deny that G. B. O. is not their division nor that the DW.1 is not their employee or that the Man Diesel Lorry involved in the accident is not their vehicle. She relied on Sections 19, 20 (1) and G 151 of the Evidence Act. Sections 19 and 20 of the Act, deal with admissions as a relevant fact, but according to Section 26 of the same Act they" are not conclusive proof of the matters admitted, but they may operate as estoppels under the provisions of part VIII of this Act". This H means that evidence may be called to rebut any such admissions but they may in some cases constitute estoppel. What then is an estoppel?

In the case of Ukaegbu v. Ugoji (1991) 6 NWLR (pt. 196) 127 at 143-144, this court defined estoppel as:-

"..... an admission, or something which the law views as equivalent to an admission. By its very nature, it is so important, so conclusive, that the party whom it affects is not allowed to plead against it, or adduce evidence to contradict it ..... Estoppel prohibits a party from proving anything which contradicts his previous acts or declarations to the prejudice of a party who relying upon them has altered position". (Underlining mine) B

Section 151 of the Evidence Act contained in part VIII of the said Act also provides:-

"When one person has, by his declaration, act or omission, intentionally caused or permitted a thing to be true and to act upon such belief, neither he nor his representative in interest shall be allowed, in any proceedings between himself and such person or such person's representative in interest, to deny the truth of that thing". (Underlining mine) D C

It is pertinent to observe that in the meaning of estoppel expatiated by this court in the Ugoji case quoted above, and in Section 151 of the Evidence Act, before estoppel applies, there must be some previous act, declaration, act or omission intentionally made by a person which caused or permitted another person to believe to be true and upon which the latter acted to his detriment. In that case, and in that case only, can the principle of estoppel apply and the person who made the said act, declaration or omission cannot be allowed to deny such act, declaration or omission. See Osinrinde v Ajamogun (1992) 6 NWLR (pt. 246) 156. E F

In the instant appeal, there is nothing to show that Exhibit 'F' which was solely relied upon to found estoppel, was infact made previous to the happening of the accident upon which this action arose. In other-words, the 2nd respondent did not expressly or by any conduct inform the appellant or his representative at any time before the happening of the said accident that "G.B. Ollivant, a division of U.A.C. (Nig.) Ltd" whose address is at 3 Kirikasama Road, Maiduguri is a division of the 2nd respondent. Exhibit 'F' was only made as a result of a letter written by the appellant's counsel after the accident giving rise to this action. It appears to G H

**me therefore, and I find accordingly, that Exhibit 'F' cannot work as an estoppel against the 2nd respondent and that Sections 19, 20 (1) and 151 of the Evidence Act are not relevant thereto.**

I also agree entirely with the finding of the Court of Appeal per B Muhammad JCA at page 215 of the record that:-

*"Exhibit F in which DW3 confirmed that ' the vehicle involved in the accident together with the goods being carried therein belong to our company and the said Alhaji Ahmadu Musa was at the time of the accident carrying the goods to our Maiduguri Branch'*

C *Could only mean that the vehicle and the goods carried therein belonged to G.B.O. and that Alhaji Ahmadu Musa was carrying goods to G.B.O.'s Maiduguri Branch. It cannot mean that the vehicle belong to U.A.C. not that Alhaji Ahmadu Musa was a staff of U.A.C."*

D This finding was fully supported by the testimonies of DW.1 and DW.3 which I quoted earlier in this judgment and I do not consider it necessary to repeat them here. But the substance of what they said was that neither of them knew U.A.C. (Nig.) Ltd or had any relationships E with it and they are not under its employment. D.W. 1 said that he was, at the material time employed by one Mr. Pinder. DW.3 also testified that he was at that time, an employee of G.B. Ollivant, which gave him a letter of employment which was in his possession, and that the vehicle Man F Diesel Lorry has its registration particulars in the possession of his employers. The appellant did not call any evidence, apart from relying on Exhibit 'F' to connect the 2nd respondent with G.B. Ollivant or DW. 1 and DW.3 nor did he call Mr. Pinder the liquidator of G.B. Ollivant (Nig.) G Ltd to give any evidence. He even failed to produce the letters of employment of DW.1 and DW.3 to confirm who employed them. He also failed to produce in evidence the registration particulars of the Man Diesel Lorry Registration No. PL 218 J which was involved in the accident H with his vehicle. If he had produced these pieces of evidence, the position of the 2nd respondent in connection with DW.1 and the vehicle PL 218 J would have been clear and would be easier to determine whether it was a proper party to this action.

**Having found that Exhibit 'F' did not operate as estoppel to**



**the 2nd respondent in this action and that there was no evidence to connect it with DW.1, D.W.3, and the vehicle No. PL 218 J, I have no hesitation in concluding that the 2nd respondent was not a proper party to this action.** I agree with the conclusion of the Court of Appeal on this and answer issues (2) and (3) in the negative. B

The appellant's claim against the 1st and 2nd respondent was joint and several. The learned trial judge gave judgment against the respondents jointly and severally having found that the 1st respondent was negligent and the 2nd respondent was vicariously liable. Now that the 2nd respondent by this judgment is not a proper party to the action, its name must be struck out leaving only the 1st respondent. The judgment of the learned trial judge cannot now stand against the 1st respondent alone. It is accordingly set aside. In the circumstances, I do not think that any useful purpose will be achieved in considering issue I which deals with the amendment of pleadings. I will not consider it as it is a useless exercise in view of my earlier findings on issues (2) and (3). C D

Finally and for the reasons set out above, I find that there is no merit in this appeal. I dismiss it with N10,000.00 costs in favour of the respondents and make the following orders:- E

(1) The name of the 2nd respondent be and is hereby struck out as a party to the action;

(2) Decision of the Court of Appeal is affirmed and case is remitted to the Borno State High Court for rehearing by another judge; F

(3) The parties shall be at liberty to amend their pleadings if they so wish.

G

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### **BELGORE JSC**

I read in advance the judgment of my learned brother Kalgo JSC and I am in full agreement with him that this appeal is devoid of merit. I dismiss it too and make the same consequential orders as made in the judgment of Kalgo J.S.C H

**OGWUEGBU JSC**

I have had the privilege of reading in draft the judgment of my learned brother Kalgo, J.S.C which has just been delivered. I agree entirely that the appeal should be dismissed. The facts of the case have been exhaustively dealt with in the judgment of my learned brother Kalgo, J.S.C. I shall refer to so much of the facts as are relevant in my consideration of the issues involved.

The second and third issues formulated in the plaintiff/appellant's brief form the basis of the plaintiff's claim in the trial court. Until the two issues are determined one way or the other, the court cannot consider the plaintiff's first issue for determination which questions the correctness of the decision of the court below in granting the defendants leave to amend their statement of defence after the plaintiff had closed his case.

The plaintiff's issues (2) and (3) read as follows:

"(2) *Is G.B. Ollivant (Nig.) Ltd. one and the same as "G.B. Ollivant a Division of U.A.C. (Nig.) Ltd."*?

(3) *Is U.A.C. (Nig.) LTD. a proper party in this suit and vicariously liable for the act of the first Defendant."*

Shortly after the accident which involved vehicle No. BD 8118 JA driven by the plaintiff and vehicle No. PL 218 J driven by the 1st defendant, the plaintiff's solicitor wrote a letter to the Branch Manager of G. B. Ollivant, Maiduguri, for certain information. The reply was dated 4th November, 1988 and signed by one A. L. Wudil, Branch Manager. The reply was admitted in evidence as Exhibit "F". It reads:

"G. B. OLLIVANT  
Division of U.A.C. Nigeria Limited,  
Divisional Headquarters,  
182 - 184 Broad Street,  
P. O. Box 144 Lagos.  
Telephone 664466  
Tel: 232121

GBO  
  
  
  
  
  
  
  
  
  
The Branch Manager's Office,  
P. O. Box 12,  
Maiduguri

4th November, 1988

BM 38/56/88

Ngilari & Co

Solicitors & Advocates,

.....

B

.....

.....

Dear Sir,

Re Motor Accident Along Damboa .....

Maiduguri Road Involving Our Company's Man Diesel Lorry With Reg-  
istration Number PL 218 J Driven By Ahmadu Musa

C

Your letter C/11/9/88 of 4th October, 1988 delivered by hand on  
4th November, 1988 refers.

By writing this letter, I am confirming to you that the vehicle in-  
volved in the accident together with the goods being carried therein be-  
long to our Company and the said ALHAJI AHMADU MUSA was at the  
time of the accident carrying the goods to our Maiduguri Branch.

D

Yours faithfully,

E

For G. B. Ollivant

Division of UAC of Nig. Ltd.

Sgd. A. L. Wudil

Branch Manager

F

CC: North East Area Manager - G. B. O., Jos."

The plaintiff caused a photograph of the wall of the frontage of  
the Maiduguri Office of G. B. Ollivant to be taken. The wall has inscribed  
on it the following:

"G. B. OLLIVANT DIVISION OF U.A.C. OF NIGERIA LTD."

G

The negative and copy of the said photograph were admitted in evidence  
as Exhibits "G" and "G1".

In paragraph 3 of the statement of claim, the plaintiff averred thus:

"3. By a letter dated 4th November, 1988 addressed to the plaintiff's  
solicitors by the second defendant's Maiduguri divisional branch Man-  
ager acting in the course of his official duties for and on behalf of the  
second defendant which is hereby pleaded; it was confirmed inter alia

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that" ..... the vehicle involved in the accident together with the goods being carried therein belong to our company and the said Alhaji Ahmadu Musa was at the time of the accident carrying the good (sic) to our Maiduguri branch."

B The defendants in paragraphs 2, 3, 4 and 28 of their joint amended statement of defence pleaded as follows:

"2. The Defendants deny the ownership of Man Diesel Lorry Registration No. PL. 218 J referred to in paragraph 1 of the statement of claim and the defendants aver that other facts within the knowledge of C the plaintiff (sic).

3. The defendants deny paragraph 2 of the statement of claim and aver that United Africa Company of Nigeria Limited is a separate entity and has nothing to do with A. J. Seward and G. B. O. as they are not part D of U.A.C. Nigeria Ltd. The defendants aver that it had no branch office in Maiduguri. In further reply to paragraph 2 of the statement of claim, the defendants aver that G. B. OLLIVANT does not exist since its voluntary winding up and published in official Gazette No. 34 Vol. 6 of 27th E June, 1974 and does not legally exist in its corporate personality ..... The second defendant avers that the first defendant is not known to the second defendant nor is he an agent to the second defendant at any time material to this action.

F 4. The defendants in reply to paragraph 3 of the statement of claim aver that the alleged branch Manager of G. B. O. Maiduguri is not an agent or servant of the second defendant but to the liquidator appointed to run the affairs of G.B.O., the second defendant is not answerable to the official acts of the said G. B. O. Manager, who is not in any G way connected with the second defendant.

28. The defendants aver that the second defendant cannot be held to be vicariously liable for the negligence of the plaintiff for parking carelessly and dangerously on the highway and for the conduct of the H first defendant at the material time to this action when first defendant was not an agent of the second defendant. The second defendant avers that first defendant has no legal relationship with the second defendant."

In reply to the amended statement of defence, the plaintiff averred

as follows in paragraph 2 (a), (b), (c), (d) and (e) thereof:

"2 (a) *Prior to the accident in question, there was a notice addressed to the whole world exhibited on the premises known as plot No. 3 Kirikasama Road Maiduguri (The second defendants said premises within jurisdiction) containing the words "G. B. Ollivant A Division of U.A.C. of Nigeria Limited" in bold letters.* B

(b) *Similarly, a photograph of the premises aforesaid taken by the plaintiff even after the accident still carried the Notice aforesaid addresses to the whole world with the words "G.B. Ollivant A Division of U.A.C. of Nigeria Limited" boldly shown thereon.* C

(c) *The letter dated 4th November 1988 addressed to the plaintiff's solicitor by the second defendants said Maiduguri Divisional branch Manager referred to in paragraph 3 of the plaintiff's statement of claim emanated from the premises referred to in paragraphs 2a and b above which premises and the employees working thereon had been held out to the whole world by the second defendant as being their premises and the workers thereon as being the second defendant's employees.* D

(d) *Acting on the strength of the second defendant's representations referred to in paragraphs a, b, and c, above; the plaintiff took legal steps and incurred tremendous financial expenses to his detriment in instituting the present legal action against the defendants which but for the said representations, the plaintiff would not have done.* E

(e) *In the premises; the second defendant is estopped and precluded by its acts or conducts from denying that G. B. Ollivant is part and parcel of the second defendant or disputing the ownership of the second defendant or disputing the ownership of the vehicle with registration No. PL 218 J or disputing the fact that the first defendant was at all material times to this action its servant or agent acting in the course of its employment."* F G

At the close of pleadings issues were joined as to whether G. B. O. is a division of U.A.C. Nigeria Ltd. and whether the second defendant is the owner of Man Diesel Lorry No. PL. 218 J driven by the 1st defendant on the fateful day as its servant or agent. The plaintiff relied heavily on the contents of Exhibits "F", "G" and "G1" in his attempt to establish the H

fact that U.A.C. (Nigeria) Ltd. is the owner of the lorry No. PL 218 J driven by the 1st defendant at the time of the accident.

The first defendant testified as D.W.1. Part of his evidence relevant to the issues being considered reads:

B "I started driving in 1966 with G. B. O. Jos. I know the plaintiff in this case. I also would like to state that I do not know the 2nd defendant U.A.C. of Nigeria Limited. I started driving G. B. O. since 1966, but now I have left them and I am working with D.M. Pinder in Jos. In 1974 sometimes in June I was in Jos. Around this time the G. B. O. stopped working. In otherwords they wound up the company. At that time one Luketador took over the company. As at now my employer is D. M. Pinder ..... On that date I was driving Man Diesel vehicle PL 218 J."

D In answer to cross-examination by plaintiff's counsel, the 1st defendant stated:

"I was bringing the goods to D.M. Pinder a liquidator to G. B. O. .... The goods were being brought to the G. B. O. Office here in E Maiduguri. The office is Exhibit "GI" before this court. I do not know U.A.C. at all. .... The said D. M. Pinder is a black man and he lives in Jos. Mr. Pinder is the one who has taken over the G. B. O. office and is responsible for everything. He took out (sic) the premises from G. B. O. I do not know why U.A.C. appeared in Exhibit "GI". My service F was transferred from G. B. O. to Mr. Pinder and I was issued a transfer letter the letter is burnt. .... As at the time the company G. B. Ollivant Nigeria Limited had wound up. .... As at the time the company G. B. Ollivant Nigeria Limited had wound up. .... As at the G time of the accident the company G. B. Ollivant Limited was not in existence."

Alhaji Ahmed Lamido, Branch Manager of G. B. O. testified as D. W. 3 thus:

H "..... I am a Branch Manger of G. B. Ollivant, Maiduguri Branch. I only come to know the plaintiff in this suit when the incident happened. I know the first defendant who is our driver. I do not know the relationship between the 2nd defendant i.e. U.A.C. Nigeria

*Limited and G. B. Ollivant. .... On the 24th June, 1974 the G. B. Ollivant Company was wound up. Mr. D. M. Pinder controls the management of G. B. Ollivant. The vehicle involved in the accident in the matter Registration No. PL 218 J belongs to G. B. Ollivant. The first defendant works for G. B. Ollivant."*

B

In answer to cross-examination by plaintiff's counsel, D.W.3 said

*"I do agree that G. B. Ollivant Nigeria Limited was the company which was wound up in 1974. Up till this morning the words "G. B. Ollivant Nigeria Limited a Division of U.A.C. Nigeria Limited" is still shown in Exhibit "G1" . .... It is true that A. J. Seward is a Division of the 2nd defendant."*

C

It is strange that despite the paucity of evidence produced by the plaintiff on Issue No. 3, the learned trial judge held that G. B. Ollivant is a Division of U.A.C. (Nigeria) Limited, and therefore, a proper party to the suit. The factual or legal nexus between G. B. Ollivant and the 2nd defendant was not established by credible evidence.

D

A person who makes allegations in a pleading is, by the ordinary rules of pleading, bound to substantiate them and it is well know that civil cases are decided on a preponderance of evidence. The onus of proof in this case was not discharged. See Sections 135 and 136 of the Evidence Act Cap. 112 Laws of the Federation of Nigeria 1990 and Kodilinye v. Odu 2 WACA 336 at 337 and Elias v. Omo-Bare (1982) 5 S.C. 25 at 47. Infact, there is preponderance of evidence in favour of the 2nd defendant.

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F

Exhibit "L" is a Federal Republic of Nigeria Official Gazette No. 34 Vol. 61 of 27th June, 1974 containing notice of the appointment of Mr. D. M. Pinder as Liquidator of G. B. Ollivant (Nigeria) Limited with effect from 27th May, 1974. This notice is at page 1050 of Exhibit "L". The winding up was Members' Voluntary Winding Up. The accident which gave rise to these proceedings occurred on 14th December, 1987 more than thirteen years after the appointment of the Liquidator of G. B. Ollivant (Nigeria) Limited. Upon the service of the Statement of Defence on him and in the light of the averments therein, plaintiff should have conducted a search in the office of the Corporate Affairs Commission to satisfy

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himself whether G. B. Ollivant (Nigeria) Limited was fully wound up and eventually dissolved and whether there was an arrangement between U.A.C. (Nigeria) Limited and G. B. Ollivant. Mere reliance on Exhibits "F", "G" and "G1" was not enough to establish the relationship between B G. B. Ollivant and the 2nd defendant to make the latter vicariously liable for the negligence of the 1st defendant.

It was argued by the learned counsel for the plaintiff that Exhibit "F" is an admission by D.W. 3 that the vehicle driven by the defendant at the time of the accident and the goods carried by it belonged to the 2nd C defendant and that the 1st defendant was an employee of the 2nd defendant. These were not borne out by the evidence of D.W.1 and D.W. 3. It is only when G. B. Ollivant is proved to be a Division of U.A.C. (Nigeria) Limited, for example, that G. B. Ollivant is partner or agent of the 2nd D defendant at the material time that the statements contained in Exhibits "F", "G" and "G1" might be used to establish the liability of the 2nd defendant for the negligent act of the 1st defendant while in the course of his employment by the 2nd defendant. In the absence of proof of such E relationship, sections 20(1) and 151 of the Evidence Act cannot be called in aid of the plaintiff. If G. B. Ollivant (Nigeria) Limited was fully wound up and dissolved, it would have lost its legal entity and cannot be one and the same person as "G. B. Ollivant, a Division of U.A.C. (Nigeria) Limited." F In view of the conclusion I have reached on Issue Nos. (2) and (3), it is not necessary for me to discuss Issue No. (1).

For the above reasons, I dismiss the appeal and abide by all the consequential orders made by my learned brother Kalgo, JSC. in the lead judgment including the order as to costs. G

### ONU JSC

I had the privilege before now to read the judgment of my learned H brother Kalgo, JSC just delivered. I am in entire agreement with it that the appeal lacks merit and ought therefore to fail.

In the trial court (the High Court of Borno State sitting at Konduga) the Appellant, then Plaintiff, claimed against the Defendants, now Re-



spondents as follows:-

*"A declaration that the Defendants are jointly and severally liable to the Plaintiff for all the damages suffered by the Plaintiff as a result of an accident involving the Plaintiff's Peugeot Saloon Car with Registration No. BD. 8118 JA and the second Defendant's MAN DIESEL Lorry with Registration No. PL. 218 J. driven by the first Defendant for and on behalf of the second Defendant which said accident occurred on the 14th of December, 1987 near Lamanti Village in the Konduga Local Government of Borno State along the Biu-Maiduguri Federal Highway as a result of which the Plaintiff's car and the goods being carried therein were completely destroyed."*

The case went to trial after the exchange of pleadings by the parties. In a considered judgment delivered by Ogunbiyi, J. on 9th August, 1991 found in favour of the Appellant as per paragraph 17 of his Statement of Claim, viz:

*"(a) N61,000.00 (Sixty One Thousand Naira) being the pre-accident value of the Plaintiff's Peugeot 505 SR Saloon Car with Registration No. BD. 8118 JA;*

*(b) As special damages the sum of N1,314,600.00 (One Million, Three Hundred and Fourteen Thousand, Six Hundred Naira) being the value of one Haemodialysis machine, one Sonicaid ultra sound machine, one passport, children's clothes and drugs completely destroyed by fire as a result of the accident.*

*(c) Interest at the court rate of 10% per annum on the above total sum of N1,375,600.00 (One million, three hundred and seventy-five thousand, six hundred naira) with effect from the date of judgment until liquidation."*

The facts of the case have been lucidly set out in the leading judgment of my learned brother that I see no purpose of repeating them here. My task therein having been made lighter, I deem it sufficient to go straight into the consideration of the appeal in which three questions submitted at the instance of the Appellant and which I hereby adopt for our determination, are:-

*"(1) Whether the Court of Appeal was correct in setting aside the*

*decision of the trial court refusing to grant the Defendants leave to amend their Statement of Defence at the close of the Plaintiff's case?*

(2) *Is "G. B. Ollivant (Nig) Ltd. one and the same as "G. B. Ollivant a Division of U.A.C. Nigeria Limited?"*

B (3) *Is U.A.C. Nigeria Limited, a proper party in this suit and vicariously liable for the act of the first Defendant?"*

Issue No.1:

C This issue raised by the Appellant from grounds 3 and 4 of the Grounds of Appeal pertains to the refusal of the trial court to grant the Defendants leave to amend their Statement of Defence at the close of the Plaintiff's case.

D It has been held that the Court will always look at the materiality of a proposed amendment before making an order. See Wood v. Earl of Durham 21 Q.B.D. 501. And since the principle is trite that where an amendment will allow the pleadings to be in line with evidence and findings made by the trial Judge, the same will be allowed (see England v. Palmer 14 WACA 659; Woluchem v. Gudi (1981) 5 S.C. 291; Okafor v. Ikeanyi (1979) 3 & 4 S.C. 99 at 106) as this court has laid down the basic principle for refusal to amend in the case of Asani Taiwo & Ors. v. Adamo Akinwumi (1975) 4 S.C. 143 per Fatayi Williams, J.S.C. as he then was:-

F *"In the first place, unless there is very good and strong justification for so doing, a High Court should be reluctant to grant amendments of the pleadings after the close of the case before judgment, even though it has been indicated in the course of the hearing that same amendment might be asked for. Such an amendment may be allowed where the matter involved has been raised in the course of the trial and Counsel has addressed the court on it, since it will be merely incorporating in the pleadings that which has emerged in the course of the case as an issue between the parties."* See also Loufti v. Czanikow Ltd. (1952) 2 E.R. P. H 823 and Mosudi Saka v. Disu & Ors. Appeal NO. CA/1/190/87 delivered on 4/7/89 per Omololu Thomas, J.C.A. (unreported). Indeed, as stated in Chief Adedapo Adekeye & 3 Ors. v. Chief O. B. Akin-Olugbade (1987) 3 NWLR 214 at pages 223 - 224:

"..... The aim of an amendment is usually to prevent the manifest justice of a cause from being defeated or delayed by formal slips which arise from the inadvertence of Counsel ..... "

Thus, in the instant case for the amendment sought by the Respondent, the learned trial Judge held as follows:-

"On the issues joined on the pleadings, the Plaintiff led evidence on the 20th February 1990 and tendered Exhibits C, D, and E which were receipts issued him from the PAP Services Limited, and there was as rightly argued by Mr Ngilari no objection by the Defendants. The plaintiff's witness No. 4 also did give evidence on the same day with the plaintiff and he was not asked questions as to the existence or not of PAP Services Limited. The issues at hand therefore is with the facts before the Court particularly on the issues joined between the parties and on which evidence was led by the plaintiff and his witnesses can the Defendants now be allowed to introduce new facts? Furthermore and among other things that the amendment sought for was a complete departure from the Statement of Defence and that none of the matters in the amendment ever came up as an issue before the Respondent closed his case. In other words, it would not be appropriate at this stage to allow the Defendant introduce the said proposed paragraphs 5 (a) and 16 (a) as the same would amount to an introduction of new facts giving rise to injustice being occasioned to the Plaintiff who cannot be adequately compensated for by costs."

As can be seen from the records the application of the Respondents is to amend the Statement of Defence:-

(i) "by adding paragraph 5 (a), 16(a) and 21 as shown in the proposed Amended Statement of Defence."

(ii) by deleting paragraph 23 of the Statement of Defence and substituting paragraph 23 in the proposed Amended Statement of Defence."

As transpired, the Appellant did not oppose the application with regard to paragraphs 21(a) and 23 of the Statement of Defence and so the trial court granted leave to amend these paragraphs. But with regard to the application to amend paragraphs 5(a) and 16(a), the Appellant strenu-

ously opposed the application. Paragraph 5(a) sought to plead a letter from the Company Registry about the existence or otherwise of PAP Services Limited, while paragraph 16(a) sought to plead the letter addressed by the Solicitors to the Appellant by the Branch Manager of G. B. Ollivant Nigeria Limited, dated 4th October, 1988. The Appellant contended that he would be taken by surprise by the pleading of these facts after he had closed his case and further that such an amendment would not only embarrass, and over-reach him but that it could not in any way be compensated for by costs.

It is clear from the above that the two issues upon which the amendment was sought by the Respondents are not new issues at the trial. Indeed, they are issues about which the trial court heard evidence from the Appellant. The attempt made by the Respondents to enable the Respondents bring in evidence in rebuttal of the stance taken at the trial on the two matters by the Appellant. The refusal to allow the amendment sought shut out, as it were, the case which the Respondents sought to present at the trial. I am of the view that justice and fair play to the parties to enable each party to present its case in the court unfettered, seems to be the overriding principle. A situation in which one of the parties is not allowed to present his case fully by a refusal to allow it to amend its pleadings cannot be said to ensure that justice is done to the party. I take the view that in all the circumstances of the facts upon which the proposed amendments in the case in hand are based, there is no introduction of new issues. In particular and bearing in mind the two cases, the Appellant was fully aware of the issues and he had as it were, through his witnesses, given evidence and tendered documents in respect of the matters. The Respondents ought therefore to have been allowed to amend their pleadings to reflect their own defence to these facts. The refusal to allow the amendment, in my opinion, was in error. The Court below was therefore right to interfere as it did with the exercise by the learned trial Judge of her discretion - such an exercise having been based on wrong principles, irrelevant facts, and a misapprehension of the facts in issue between the parties. In such circumstances, the court below rightly interfere with the exercise of discretion by the learned

trial judge - the amendment sought having been demonstrated to be in respect of facts to which the Appellant had already adduced evidence. See the case of Chief Jacob Ibanga & Ors. v. Chief Edet Usanga & Ors. (1982) 5 S.C. 103 at 126 - 127, where Irikefe, JSC as he then was and who read the lead judgment of this Court stated the principles involved thus:- *"I think learned Counsel for the Respondent was right in stating that he would not now resist an amendment of the pleadings in order to reflect a claim for perpetual injunction. As I had stated earlier, this action was fought on the footing that there was in fact such a claim. Furthermore, Counsel for the Respondents had addressed the court on it. No new issues were being raised by the amendment sought. The evidence on injunction had already been given and the effect of the amendment of the pleadings would be to enable the Court utilize evidence already given and not objected to. No irreparable harm would be caused by this type of amendment and it is clearly a situation which can be met by an award of costs".* See AMADI V. THOMAS APLIN LTD. (1972) 1 ALL NLR 409 in which ENGLAND V. PALMER 14 WACA 659, and OGUNTMEYIN V. GUBERE 1964 ALL NLR were cited with approval. See also E AKINKUOWO V. FAFIMOJU (1965) N.M.L.R. 347. See LOUFTI V. CZANIKOW LTD. (1952) 2 ALL E.R. at P. 823 where Sellers J. opined that an amendment may be allowed:-

(a) *"Where the matter involved has been raised in the course of the trial and Counsel has addressed the Court on it, since it will be merely incorporating in the pleadings that which has emerged in the course of this case as an issue between the parties."* (Underlining is for emphasis). See also Oyenuga v. Provisional Council of University of Ife (1965) NMLR While it is indisputable that in the case herein Counsel had not addressed the learned trial judge on the issue upon which the amendment had been raised in the course of the trial, the matters emerged as issues between the parties from the evidence given by the Appellant, the witness he called from PAP Services Company Nigeria Limited, and the documents which he tendered at the trial vide Exhibits 'D', 'E' and 'F'. I am of the view therefore that the amendment sought cannot amount to the raising of new issues by the Respondents. A fortiori, the amendment cannot over-

reach, embarrass or take the Appellant by surprise. The Court below was therefore right, in my view, in the conclusion which it reached on the question of the amendment sought by the Respondents in this appeal.

In CHIEF OJAH AND OTHERS V. CHIEF EYO OGBONI AND OTHERS (1976) 4 S.C. 69 at 76-77, this Court per MADARIKAN, JSC held as follows:- *"In exercise of the powers thus conferred the Court must have more regard to substance and as a general rule, an amendment under Order XXXIV will be granted if it is for the purpose of determining in the existing suit the real questions or question in controversy between the parties."*

Now, it is well settled law that an amendment of pleadings should be allowed unless:-

- (1) It will entail injustice to the Respondents
- (2) The Applicant is acting Mala fide vide Tildersley v. Harper (1878) 10 CH.D. 393 at 396.

(3) By his blunder the Applicant has done some injury to the Respondents/which cannot be compensated for by costs or otherwise. See Tildersley's case (supra); Oguntimehin v. Gubere (supra) and Amadi v. Thomas Aplin (supra).

Later on after giving due consideration to the various instances where an amendment of pleadings can be granted, the learned Justice who was the writer of the leading judgment in the court below opined, rightly in my view, as follows:-

*"We cannot agree that to allow the amendments sought in the present case would be unjust to the Defendants. Indeed, the proposed amendment raise points which appear to us to be vital to the case, and unless they are adjudicated upon, the real issues between the parties will be left undecided. We are satisfied that the Defendants were not misled or embarrassed. Evidence germane to the amendments sought had been led by the plaintiffs without any objection. In our view, the learned Judge proceeded on wrong principles in refusing the amendments sought. We are therefore in no doubt that to allow the ruling of the Lower Court to stand would involve a real injustice to the Plaintiff/Appellant."*

From the foregoing, I am of the firm view that the Court below was right

in its observations when it stated that the trial Court ought to have allowed the amendments sought by the Respondents in respect of the two issues:-

(i) The existence or non-existence of PAP Services Company (Nigeria) Limited. B

(ii) The letter from the Solicitors of the Appellant to which Exhibit 'F' in the proceedings was a reply.

There is evidence on record of the receipts issued by PAP Services Nigeria Limited. As there is evidence of the person who had worked with the Company for ten years, the attempt by the Respondents to show that the Company does not exist cannot be said to be extraneous. Nor can it be said to be the raising of a new issue in the circumstances of the case. The letter from the Solicitors to the Appellant addressed to the Branch Manager of G. B. Ollivant to which Exhibit 'F' in the proceedings was a reply cannot, in the circumstances, amount to the raising of a new issue. Indeed, an amendment that is designed to create a suit that was not in existence is not permissible. See Pedro St. Mathew Daniel v. Olajide Bamgbose 19 N.L.R. 73. D  
E

It is pertinent at this juncture to refer to a number of matters with regard to the issue under reference which have been raised by the Appellant in his Brief. They are:-

(a) The indolence of the Respondents. F

(b) The fact that the proposed amendment would not alter the Respondents' case.

(c) The fact that in the circumstances it was not necessary to plead the letter in paragraph 16(a) and that the letter could have been tendered. G

Be it noted that without the amendment of the pleadings, all these matters except the issue of indolence were not part of the Appellant's case when he opposed the application by the Respondents to amend the joint Statement of Defence in the trial Court. They do not form part of the case of the Appellant. In respect of this issue of amendment, the Appellant ought not to be allowed to now introduce them at this stage of the proceedings. With regard to the question of the indolence of the Respondents, it is H

enough to re-iterate what this Court Per Madarikan, J.S.C. said in the case of CHIEF OJAH AND ORS. (supra) at pages 76-77 citing with approval Brown L.J in Cropper v. Smith (1884) 26 Ch.D 700 at pages 710 and 711 thus:-

B *"I think it is a well established principle that the object of Courts is to decide the rights of the Parties and not to punish them for mistakes which they make in the conduct of their case by deciding otherwise than in accordance with their rights.... I know of no kind of error or mistake*  
 C *which if not fraudulent or intended to overreach, the Court ought not to correct, if it can be DONE WITHOUT injustice to the other party. Courts do not exist for the sake of discipline but for the sake of deciding matters in controversy and I do not regard such amendment as a matter of favour or of... It is as much a matter of right on his part to have it corrected, if*  
 D *it can be done without injustice, as anything else in the case is a matter of right."* (Underlining is by me for emphasis).

Now, it is Appellant's contention that whether or not to grant the amendment is an exercise of the discretionary powers of the trial court and the  
 E Court of Appeal ought not to substitute its own views for that of the trial Court. I am satisfied that the Court below was fully aware of this point and rightly observed that the exercise of its discretion by the trial Court was based on wrong principles and irrelevant considerations. See Lauwers  
 F Import-Export v. Jozebson Industries Limited (1988) 3 NWLR (part 83) 429; In Re Adewumi (1988) 3 NWLR (part 83) 483 and University of Lagos v. Olaniyan (1985) 1 NWLR (part 1) 156. In the circumstances, it was right of the Court below to interfere as it did. The point has also  
 G been made by the Appellant that the refusal to grant the amendment of the pleadings sought by the Respondents did not affect their case in anyway. It is sufficient to say that they were denied their right to amend their pleadings and they denial, no doubt, shut them out from presenting their case in the trial Court. The Court below, in my firm view, was therefore  
 H right in the conclusion it reached that the refusal to grant the Respondents' application has occasioned a miscarriage of justice.

In reviewing the above decision the Court of Appeal held as follows:-

*"The 1st Appellant at the trial gave evidence that, he looked into*



*Respondent's car before it caught fire and there was nothing in the car. DW2 also gave evidence to that effect. Issues were clearly joined by the parties as to the existence of the equipments. The Appellants sought to amend their defence by pleading a letter they received from the Companies Registry in respect of the existence or otherwise of PAP Services Co. Ltd... In my view, where a person claims he was carrying some goods and that he bought the goods from X Ltd. and this was denied alleging that the person who said he was carrying the goods has no money to purchase such goods, an attempt, by the person denying the existence of the goods, to show that X Ltd from whom the goods were said to be purchased does not exist, will not be introducing new issues. The amendment will not overreach, nor occasion miscarriage of justice."*

On the other aspect of the amendment, the Court of Appeal held:

*"The amendment sought was to plead the letter which the Respondent himself instructed his solicitor to write to the 2nd appellant ..... At worst, it could be said that the Appellants were indolent. But indolence, without more, cannot be a ground for refusing an application to amend pleadings."*

*The conclusion of the Court of Appeal on pages 223 is that:-*

*"The Appellants were not allowed to fully pursue their case which tantamounts to a denial of fair hearing occasioning miscarriage of justice."*

The above conclusion, in my opinion, is unimpeachable. My answer to the first issue is accordingly in the affirmative.

I do not deem it necessary to consider issues 2 and 3 which have been amply covered by my learned brother Kalgo, JSC both of which were answered in the negative.

For the reasons I have given and the fuller ones contained in the judgment of my learned brother Kalgo, JSC I too allow the appeal and make the same consequential orders inclusive of costs contained therein.

### ACHIKE JSC

The case leading to this appeal is a grand example of comedy of

errors leading to an action being erroneously instituted against a person who ought not to be a party (i.e. 2nd defendant) to this case it is imperative that for an action to succeed the parties to it must be shown to be the proper parties to whom rights and obligations arising from the cause of action attach. It was manifestly evident that the proper defendant or defendants who would squarely be called to question with regard to the consequences arising from the accident between the two vehicles respectively driven by the plaintiff (with registration No. BD 81118 JA) and the 1st defendant (with registration No. PL 218 J) is yet to be identified. The case again highlights the problem of obtaining such relevant pre-trial information that would have disentangled the confusion between the names "G.B. Ollivant (Nigeria) Limited, "G.B. Ollivant, a division of U.A.C. (Nigeria) Limited" and U.A.C. (Nigeria) Limited" without the trial judge being unfortunately left to presumptuously, without evidence placed before him, to enable him infer the relationship between these entities as he did in his judgment at page 132 of the record.

It is clear from the evidence that the 2nd defendant (respondent) has not been properly identified as a party in this suit. The court is obliged to strike his name out of this suit and allow the remaining parties, especially the appellant, to reconstitute the parties to the suit as they may deem fit. Unless the mix-up in relation to the proper parties to this appeal is clarified the court cannot properly determine the liability between the appellant, 1st respondent and such other person, as the evidence seems to indicate, who is jointly liable with the 1st respondent in respect of the accident.

It is for the foregoing and the fuller reasons given by my learned brother Kalgo, J.S.C. in his leading judgment, which I was opportuned to have had a preview that I agree entirely with him that this appeal should be dismissed. Accordingly, I strike out the name of the 2nd respondent and remit the case for rehearing before another judge of the Borno State High Court. Both parties are free to amend their pleadings should they so desire.

I award N10,000 costs in favour of the respondents.