

SUPREME COURT OF NIGERIA
9TH FEBRUARY, 2001. SC. 239/1993
CORAM :- A. G. KARIBI-WHYTE, M. E. OGUNDARE,
S. U. ONU, O. ACHIKE, S. O. UWAIFO, JJSC.

LASISI KODE (Substituted by order PLAINTIFFS/
of Court for Lamidi Atanda, the RESPONDENTS/
Deceased for himself and on Behalf APPELLANTS
of Odetunde Family

AND

ALHAJI SUARA YUSSUF DEFENDANT/RESPONDENT

COURTS - Duty - Speculation - The duty of the court is not to embark on speculation - But to act upon facts tested before it - According to the rules and law.

LAND LAW - Title - As there is a distinction - Between grant of land and settlement - Proof of a grant in this case - Does not amount to proof of title.

LAND LAW - Title - Evidence - Pleadings - Having led evidence - In line with pleading - As to grant of land in dispute to him - Appellant cannot later ask to plead settlement instead of grant.

PLEADINGS - Amendment - Could be allowed at any time - Except in certain circumstances.

PLEADINGS - Amendment - Which is designed to overreach - By making a ground of appeal useless - Constitutes an abuse of process of court - And ought to be dismissed.

PLEADINGS - Amendment - Appellate court should not use its discretion - To give approval for an amendment - Prompted by the findings of trial court - In favour of one party.

PLEADINGS - Amendment - *The case of Laguro v Honsu - Is distinguishable from present case - As it was merely an amendment - To bring record - In line with evidence adduced.*

PLEADINGS - Amendment sought on appeal - *Is incompetent - As it will require defendant - To amend his statement of defence - And lead new evidence thereon - Giving the case a completely different complexion.*

FACTS

This is an Interlocutory application, in which the appellant who had been substituted for the deceased plaintiff sued the defendant for himself and on behalf of Odetunde family at the High Court of Oyo State holden at Ibadan for declaration to a statutory or customary right of occupancy to land. In putting his claim before the trial court the appellant pleaded his root of title to a grant made to his ancestors but in proof, he led evidence of settlement by his ancestors. This evidence was not objected to by the defendant who had denied the grant of the disputed land to the plaintiffs ancestors and had set up a contrary root of title.

The trial judge gave judgment in favour of the plaintiff on the ground of preponderance of evidence in their favour. The defendant appealed to the Court of Appeal and in the amended ground of appeal raised the fact of failure by plaintiff to prove the root of title pleaded by them at the trial court. The filed his reply brief asking for leave to amend his statement of claim to show settlement instead of a grant in order to bring it in line with the evidence amongst other reasons and as it was due to inadvertence of counsel. The Court of Appeal rejected the application and dissatisfied the plaintiff has now appealed to the Supreme Court.

ISSUES FOR DETERMINATION

“(1) Whether or not this is a proper case in which extension of time and leave to appeal should be granted.

(2) Whether or not the Learned Justices of the Court of Appeal exercised their discretion properly, judicially and judiciously in refusing to grant the amendment of record sought? If the answer is ‘NO’.

(3) *Whether the Supreme Court will interfere and set aside the order and grant the amendment on the ground that there is manifest error on the part of the Court of Appeal in that:*

(i) *They took into consideration irrelevant and extraneous matter and failed to take into account relevant matters.*

(ii) *There is misapprehension of the facts and misconception of law.*

(iii) *And that it is in the interest of justice to interfere and grant the amendment to meet the end of justice.*

(4) *Whether the Supreme Court will accelerate the hearing of the appeal and depart from the Rules by treating this application as the appeal itself."*

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

Title - Proof of a grant

1. It ought to be borne in mind that this Court had long before now clearly decided that there is a difference between a grant and a settlement. For, while a grant comes from a previous title holder to a subsequent one called a grantee, settlement does not recognise a previous titleholder. See Mogaji & Anor. v. Olofa (1968) NMLR. Thus, where a plaintiff as in the instant case, established a grant of the land in evidence, he cannot be said to have proved his title. See Balogun v. Akanji (1988) 1 NMLR (Part 70) 301 at 322. (p. 474 G)

Title - Evidence in line with pleadings

2. Furthermore, the appellant having led evidence following his pleading as to the grant to him of the land in dispute cannot now be heard to blow hot and cold by asking to plead settlement in place of a grant. See Ezomo v. A.G. of Bendel State (1986) 4 NWLR (Part 36) 448. (p. 475 A)

Pleadings - Amendment could be allowed at any time

3 The courts have held and it has remained so, that where an amendment is intended to overreach; or it will entail injustice to the respondent or that

the applicant is acting mala fide. (See T. Idesbeg v Harper (1878) Cd. D 393 at 396); or that by his blunder the applicant has done some injury to the respondent which cannot be compensated by costs or otherwise - see James Oguntimehin v. Gubere 92964) All NLR (Vol. 1) 176, this Court has held that an amendment could be allowed at any time. See also Akinkuowo v. Fafimoju (1965) NMLR 349. Thus, where amendment will allow the pleadings to be in line with the evidence and the findings made by the trial Judge, the same will be allowed. See England v. Palmer (1955) 14 WACA 659 (p. 476 A)

Pleadings - Amendment which is designed to overreach

4. I am inclined to the view held fast by learned counsel for the Respondent that the amendment the application sought, was one that was designed against ground 4 of the Grounds of Appeal of the Appellant at the lower court. The lower court indeed so found in their judgment and the Appellant herein conceded after much disputation, at page 13 of their Brief as follows:

“Funny enough learned counsel waited until he has read the above ground of appeal and prepared the respondents’ brief of argument before he deemed it desirable to seek the amendment. The reason he is seeking the amendment becomes obviously not farfetched for anyone can reasonably infer that it is for the purpose of knocking off the legs of the table. By so doing, and if the application is granted, the ground of appeal will have no legs to stand on.”

I cannot agree more since the ground of appeal would have overreached and been incapable of being considered again in the judgment yet to be delivered. This is what the authorities I have reviewed above concluded was an abuse of the process of court. It is in that light and for the reasons demonstrated thus far that I am of the firm view that the application and this appeal constitute an abuse of process of court. And as to what constitutes an abuse of the process of court, the decision in Harriman v. Harriman (1989) 5 NWLR (part 119) 6 and Okorodudu v. Okoromadu (1977) 3 SC.21 are instructive. Thus, a case found to constitute an abuse of the process of court as clearly depicted in this case ought to be

dismissed. See Arubo v. Aiyeleru & 5 Ors. (1993) 2 K.L.R. 23 at 25. By the same token the ground of appeal would have thereby become useless and non-existent as it would have become incapable of being considered again in the judgment yet to be delivered. I am therefore persuaded by the authorities cited to us to hold inexorably that the application and this appeal constitute an abuse of the process of court. (p. 477 D)

Pleadings - Amendment - Appellate court's discretion

5. Much as I concede that the court below can order or grant an amendment of pleadings or records, but the court ought not to give approval for or to an amendment of record or pleadings which, as in the instant case, is prompted by the finding of the trial court in favour of the Appellant based on proceedings presented before the High Court. (p. 478 C)

Pleadings - Amendment - Distinguishing

6. The amendment that was granted in Laguro v. Honsu (1992) 2 SCNJ (Part 11) 201 relates to the time the trespass complained of took place. The claim there erroneously and ridiculously alleged that the trespass being complained of took place after the Writ of Summons was issued and served on the Defendant. This is undoubtedly and patently preposterous and it was to correct this bizarre occurrence that the court allowed an amendment on the ground that the amendment was merely to bring into focus the real issues between the parties. The Plaintiff therein did not plead one form of trespass and proved another; hence common sense and interest of justice were then rightly invoked. Therein also (Laguro v. Honsu (supra)) this court re-iterated that an amendment would be granted to bring them in line with the evidence already adduced:

“provided the amendment is not intended to overreach and the other party is not taken by surprise and the claim or defence of the said other party would not have been different had the amendment been averred when the pleadings were first filed.”

This certainly is not the case here. C.f. Cropper v. Smith (supra); Amadi v. Thomas Aplin & Co. (1972) 1 All NLR (Part 1) 409 where the application to amend had merit. See too Metal Construction (W.A.) Ltd. v.

Migliore & Anor (1979) 6 - 9 SC. 163 at 171 - 172. (p. 479 F)

Pleadings - Amendment sought - Is incompetent

7. The respondent's affidavit in the lower court against the amendment
 B deposed to among other facts that he would need to meet same by "*calling additional evidence of early settlers in the area.*" This averment was not challenged by the appellant herein and the lower court acted on it by holding that:

C "...by the very nature of the amendment the facts of the case will wear a completely different complexion."

This finding, in my humble view, is flawless, honest and certainly not a ruse. How, one many ask, would the respondent be allowed to amend his pleading to meet the amendment proposed by the appellant
 D and to lead evidence on the amended Statement of Defence? It is certainly impossible. This is why, above all considerations, the amendment sought by the appellant cannot be granted without requiring some amendment of the defence and the facts on the amended Statement of Defence.
 E I am of the firm view that the appellant has not succeeded in putting across any case that would warrant my disturbing this finding and to thereon inexorably hold that it would be intolerable at this stage, late in the day, or to allow an amendment that would lead to a new trial and
 F render the appeal useless. Indeed, the appellant cannot be heard to say that the respondent has said all that he would need to say at the trial court and that he would have nothing more to say at the trial before judgment is dished out to either party. (p. 480 E)

G ***Courts - Duty - Speculation***

8. This would not only be speculative but outrightly against all known principles of fair hearing as complemented by the rules relating to pleading; the defendant is at that stage at liberty to plan and present his defence only to enable him rely on the failure of the plaintiff to prove his case. The Court is not to embark on speculation but to act upon facts tested before it according to the rules and practice of the law. See Okoko v. The State (1964) 1 All NLR 473. (p. 481 C)

NOTABLE POINTS OF INTEREST

KARIBI WHYTE JSC

1. Supreme Court - Power to amend record of trial court

This Court has decided in Metal Construction (W.A.) Ltd. & Ors. v. D.A. B Migliore & anor. (1979) 6-9 SC.163 that it has an inherent power to amend the record of the trial Court so as to comply with the facts proved before that Court and decision given by it. - See Gbogbolulu of Vakpo v. Hodo (1941) 7 WACA. 164. This is to prevent the occurrence of substantial injustice. The facts of the instant case do not fall within this principle. The fact that the two courts below refused the amendment would not have precluded this court granting the amendment in an appropriate case and to avoid occasioning injustice to the other party. (p. 484 C)

ACHIKE JSC

2. Evidence in conflict with pleadings - Goes to no issue

The law is quite clear that any evidence led by a party which is in conflict with the party's pleading goes to no issue and should either be discounted or expunged by the trial court. The reason is elementary but predicated on a fundamental principle of pleading which stipulates that parties to a case are tried and bound by their pleadings; so also the court adjudicating the suit. Thus facts not pleaded cannot constitute issues to be decided by the trial court. The appellate court has a duty to ignore evidence not based on pleaded facts. (p. 485 H)

REPRESENTATION

Alhaji Y. A. Agbaje, S A N with Messrs. Kola Alawode and A. A. Ossai Esq. for the Appellant

Olaseeni Okunloye Esq. with him A.A. Adewoye, for the Respondent.

CASES REFERRED TO

Arubo v. Aiyeleru & 5 Ors. (1993) 2 K.L.R. 23 at 25

Mogaji & Anor v Olofa (1968) NMLR

Balogun v Akanji (1988) 1 NMLR (Part 70) 301

Ezomo v A G of Bendel State (1986) 4 NWLR (Part 36)448 at 462

Watson v Cave (No 2) 1881 17 Ch D 23

Ekpo v Ita 11 NLR 68

T. Idesbeg v Harpar (1878) Ch D 393 at 396

B James Oguntimehin v Gubere (1964) All NLR (Vol. 1) 176

Akinkuowo v Fafimoju (1965) NMLR 349

England v Palmer (1955) 14 WACA 659

Salami v Odogun (1991) 2 NWLR (Part 173) 291

Akinyede v Opere (1968) 1 ANLR 65

C Osinupebi v Saibu (1982) 7 SC 104, 111

LEAD JUDGMENT BY ONU JSC

D The appeal herein (a hybrid of a sort) which the Appellants designate as a case involving land as well as an interlocutory application both rolled into one, had its roots in the High Court of Oyo State holden at Ibadan. There, the two original plaintiffs, Tihamiyu Adeagbo (now deceased) and Alhaji Lamidi Atanda, for and on behalf of Odetunde family sued the E defendant (Alhaji Suara Yussuf) for title to Statutory Right of Occupancy to Odetunde family land at Oke-Ode in Ibadan on which their ancestor Odetunde settled.

F After the commencement of the action, Alhaji Lamidi Atanda, who also eventually died, brought an application for an injunction against the defendant/respondent to restrain the latter from entering or building on the land and in a 32-paragraph affidavit in support thereof, he deposed to the following relevant averments:-

G “1. That I am the 2nd plaintiff/respondent/appellant in this appeal.
2. That our claim against the defendant/respondent as per our Statement of Claim is as follows:

H (1) The plaintiffs claim against the defendant a declaration to a statutory or customary right of occupancy to all that piece or parcel of land verged Red on Plan No. APAT/OY/06/1986 (excluding the area verged Green).

(2) The plaintiffs also claim 10,000.00 damages against the defendant for trespass committed by the defendant, in respect of the said

parcel of land sometime in December, 1984 which trespass is still continuing.

(3) The Plaintiffs also claim perpetual injunction restraining the defendant, his servants, agents and privies from committing further acts of trespass on the land in dispute.

3. That the land in dispute is situate at Oke-Ode, Agbamu, Ibadan and that before the institution of this action, the plaintiffs/appellants who are descendants of one Odetunde live in Odetunde Compound, Isale Ijebu, Ibadan where the ancestors of the defendant's vendors also lived.

4. The said Odetunde had 4 (four) parcels of land at Ibadan and one at Ibuko (Bode) is within Ibadan town the others are farmland including the one at Agbamu. In 1964 when the descendants of the defendant's vendor took action in Suit 1/122/64 against the descendants of plaintiffs' ancestor claiming joint ownership of the land at Bode in Ibadan, they were asked to go to Customary Court to settle the question of family status.

5. That the said descendants of Defendant's vendors took action Suit CV/5/68 in Ibadan Grade A Customary Court claiming a declaration that they are members of the plaintiffs' family, but their claim was dismissed.

6. That in the said proceedings they admitted that Odetunde had other 3 (three) parcels of land and named the land in dispute at Agbamu as one of them. The proceedings and judgment in Suit CV/5/68 were tendered as Exhibit 6 in the High Court.

7. That in 1978 when members of the defendant's vendors trespassed on portion of the land in dispute and were sued in Suit B2/CV/18/78 they changed the name of their ancestor to Odebanbi. The case was not fought to finality because the customary courts were wound up.

8. That in 1984 when the defendant trespassed on the land in dispute and after he has been sued, the plaintiffs brought an application for interlocutory injunction against him to restrain him from entering and building on the land in dispute.

9. That the plaintiffs filed an affidavit in support of the motion and deposed to their root of title to the land in dispute as follows:

Paragraph 4 - That the land in dispute was settled upon by Odetunde

the ancestor of the plaintiffs many years ago.

Paragraph 5 - That Odetunde has another parcel of land at Ibuko, Ibadan which was granted to him by Late Alesinloye.

Copy of the affidavit which is at pages 4 - 6 of the record of appeal is attached as Exhibit 'A'.

B *10. That the defendant/appellant/respondent swore to a Counter-affidavit to which was attached an agreement for sale of land purportedly signed or thumb printed by his vendors as descendants of Oderinde family.*

C *11. That it is the same people who in 1968 claimed to be members of Odetunde family and in 1978 claimed to be members of Odebambi family who now claimed to be me members of Oderinde family.*

12. That on 3rd February 1986 Counsel for the plaintiff/respondent/appellant filed Statement of Claim and averred in paragraph 3 as follows:-

D *"The land in dispute formed part of land settled upon by one Odetunde, the ancestor of the plaintiffs many years ago after grant by Alesinloye during the reign of Maye after the Egbas and Ijebus have (sic) been driven away from the area."*

E *Copy of the 5 pages of the Statement of Claim at pages 33 - 37 of the record is attached as Exhibit 'B'. Copy of Statement of Defence at pages 54-57 is attached as Exhibit 'B1'.*

13. That on 12th February, 1987 the 1st PW gave evidence as follows:- See page 69 lines 20-29:-

F *"I know the land in dispute That land is at Oke-Ode, Agbamu road near Sanyo in Ibadan. The land is 150 acres. My family got on the land during the Ibadan Ijebu war. Odetunde was a warrior and he was our ancestor who first settled on the land. Iba Oluyole was the reigning Olubadan at the time. It was Bankole Alesinloye who was the Balogun of Ibadan at the time (sic) told Odetunde to go and defend the land against the Ijebus. When the war was over, Odetunde settled there...."*

Copy of his evidence at page 69 is attached as Exhibit 'C'.

H *14. That the defendant's/appellant's/respondent's Counsel did not object to this piece of evidence when it was given.*

15. That the Learned Trial Judge gave judgment in favour of the plaintiffs after making, inter alia, the following findings of fact:-

(1) *In fact it is not disputed that Odetunde's Compound and Oderinde's Compound are one and the same Compound. Page 112 (5-7)*

(2) *Looking at the traditional evidence alone there seems to be little to help chose between them. Either is probable.*

(3) *If Traditional history and boundary men are all the evidence I have to go by I will for the above reason prefer plaintiffs' story as more probable. There are, however, other evidence to consider.* B

(4) *He referred to various cases instituted by plaintiffs against defendant's vendors and particularly to CV/5/68. The proceedings and judgment relating to it tendered as Exhibit 6 and said:-* C

"All these fully convince me of the claim of the plaintiffs that it is the descendants of the plaintiffs in suit Exhibit 6 that now collect themselves together to call themselves Oderinde family to avoid the effects of the judgment in Exhibit 6." D

(5) *I accept the evidence of the plaintiffs that the vendors of the defendant are descendants of the various guests of the plaintiffs' ancestor Odetunde.*

(6) *It is clear from the foregoing that the preponderance of credible evidence is hereby in favour of the plaintiffs and I am satisfied that the plaintiffs' ancestor originally settled on the land in dispute."* E

Copy of the said judgment is attached as Exhibit 'D'.

16. *That the defendant was dissatisfied with the decision and appealed to Court of Appeal. Copy of his original notice of appeal dated 17th of July, 1987 is attached as Exhibit 'E'.* F

17. *That on 7th June, 1989 the Defendant's/Appellant's/Respondent's Counsel applied for leave to amend his original grounds of appeal by adding 4 (four) additional grounds in which ground 4 read (sic):* G

"The Learned Trial Judge erred in Law by failing to dismiss the plaintiffs' suit when the plaintiffs failed to prove the root of title pleaded as relied upon by them....."

Copy of the additional grounds of appeal is attached as Exhibit 'F'. H

18. *That after the application was granted on 17th October, 1989 the Learned Counsel for the plaintiffs/respondents filed his reply brief on 27th November, 1989 indicating his intention to apply for leave to amend*

paragraph 3 of the Statement of Claim.

19. That the plaintiffs'/respondent'/appellants' Learned Counsel after his first improper application was refused later filed another application praying for leave to amend the records by amending paragraph 3 of the Statement of Claim at page 33 of the record of appeal.

(1) By deleting the words "After grant by Alesinloye during the reign of Maye and substitute therefore the words "During the reign of Iba Oluyole" on the following grounds:-

- (i) It is to bring evidence in line with pleadings.
- (ii) To make use of already available evidence.
- (iii) To reflect the facts established and accepted by the Court
- (iv) To amend all defects and errors necessary for the purpose of determining the real question in controversy between the parties.

(2) For leave to file an amended brief.

20. That copy of the said application and affidavit in support is attached as Exhibit "G" and the Defendant's/Respondent's Counter-affidavit and further affidavit are attached as Exhibits 'H' and 'H1'.

21. That on 4th May, 1993 the Court of Appeal dismissed the application and held among others;

(1) That paragraph 7 of the applicants' affidavit which relied on Suit CV/5/68 as facts leading to the confusion created in the averment did not contain feasible excuse for the error.

(2) That his excuse that his attention was not drawn to the variance is feeble as he was supposed or presumed to have carried out proper scrutiny.

(3) The case of EDOZIE V. EDOZIE (1993) 1 NWLR (Part 272) page 679 on the question of negligence of Counsel and shifting of responsibility was relevant to this case.

(4) That the amendment sought is not minor.

(5) That the appellants' Counsel waited until he has read the grounds of appeal before seeking an amendment and that his reasons for seeking amendment is to knock off the legs of the table to leave the ground of appeal without any legs to stand upon

(6) The amendment sought is not necessary for determining the

real question in controversy when even though in evidence it is so divergent from what was originally the case the appellant put forward to the court in his Statement of Claim.

(7) The grant will deprive the appellant the right of fair hearing and will constitute injustice and prejudice to him.

B

Copy of the Ruling is attached as Exhibit 'J'.

22. That I was dissatisfied with the said ruling and I intend to appeal immediately but my Learned Counsel, Alhaji Y. Ade Agbaje SAN advised me to wait until the Court of Appeal finally disposes of the appeal when I could take the interlocutory appeal along with the substantive appeal, should the need arise.

C

23. That he has now told me and I verily believed him that on second thought he has discovered that it will be better to appeal against the said ruling to save time and expenses.

D

24. That my said Learned Counsel further told me and I verily believed him that he will apply to the Supreme Court to treat my application for leave as the appeal itself and that if the issue is decided before the Court of Appeal determine the appeal, the decision on this point by the Supreme Court will greatly assist the Court of Appeal in a just determination of the appeal before it.

E

25. That the delay in appealing within time is due to the facts stated in paragraphs 22 and 23 above.

F

26. That a copy of my proposed Notice of Appeal which has already been filed is attached herewith as Exhibit 'K'.

27. That the grounds of appeal contain arguable points of law which show a reasonable likelihood of the application and the appeal succeeding.

G

28. That a copy of my brief in support of this application and which I will also rely upon and use in arguing the appeal itself when and if the application is treated as the appeal is granted is now ready for filing.

29. That the papers needed for this appeal are attached herewith.

H

30. That it will be in the interest of justice if this application is heard and granted and the application treated as the appeal itself.

31. That the appeal in the substantive application is still pending and

has not been heard at the time of filing this application.”

When the plaintiff’s/respondent’s/appellant’s Counsel later filed the Statement of Claim on 3rd February, 1986 he averred in paragraph 3 thereof as follows:- (See Exhibit B. page 10 of the record of proceedings).

B *“The land in dispute formed part of land settled upon by one Odetunde, the ancestor of the plaintiffs many years ago after grant by Alesinloye during the reign of Maye after Egbas and Ijebus have (sic) been driven away from the area.”*

C On 12th February, 1987 when he was being led in evidence the 1st PW gave evidence of original settlement contrary to what was pleaded and the junior Counsel did not see the variance; nor did he draw the attention of his senior to it. When his senior took over the case he too did not advert to it (see Exhibit C page 19, lines 14 - 30).

D Thus, when evidence was given on the point it was not objected to. The learned trial Judge gave judgment in favour of the plaintiffs and relying on the evidence given, found among others as follows:

E *“It is clear from the foregoing that the preponderance of credible evidence is hereby in favour of the plaintiffs and I am satisfied that the plaintiffs and “ancestor originally settled on the land in dispute.”*

See page 17 (35 - 38) of Exhibit D. page 36 lines 35 - 38 of Record.

BEFORE THE COURT OF APPEAL

F The defendant/appellant/respondent was dissatisfied with the decision and so appealed to the Court of Appeal. His lawyer did not see the point so it was not raised in his original grounds of appeal, but on the 7th of June, 1989 the Defendant’s/Appellant’s/Respondent’s new learned Counsel saw it and applied for leave to amend his original grounds of
 G appeal by adding 4 (four) additional grounds in which ground 4 reads:

“The learned Trial Judge erred in Law by failing to dismiss the Plaintiffs’ suit when the plaintiff’s failed to prove the root of title pleaded as relied upon by them” (See Exhibit F page 40 of the Record) (Underlining above is mine for emphasis).

After the application was granted on 17th October, 1989, the Learned Counsel for the plaintiff/appellant filed his reply brief on 27th November, 1989 indicating his intention to apply for leave to amend paragraph 3 of

the Statement of Claim. After the plaintiffs'/respondents'/appellants' Learned Counsel's first improper application praying for leave to amend the records by amending paragraph 3 of the Statement of Claim at page 33 of the record, to wit:

"1 By deleting the words "After grant by Alesinloye during the reign of Maye and substituting therefore the words "During the reign of Iba Oluyole" on the following grounds:-

(i) It is to bring evidence in line with pleadings.

(ii) To reflect the facts established and accepted by the Court.

(iii) To amend all defects and errors necessary for the purpose of determining the real question in controversy between the parties.

2. For leave to file an amended brief (see Exhibit G page 41 of the records)."

The grounds for the amendment were stated as being that Counsel made a mistake while drafting the Statement of Claim by erroneously pleading the root of title to the land at Bode (Ibuko) which was a grant by Alesinloye instead of settlement. Further, that failure to apply for amendment at the Court below was due to inadvertence of Counsel and that the plaintiffs did not intend to rely on grant because Alesinloye never owned the land at any time and that pleading grant was a mistake or an error. See paragraphs 6 - 12 of affidavit (Exhibit G pages 42 and 43 of the records).

FINDINGS OF THE COURT OF APPEAL

The Ruling is Exhibit J at pages 49 - 64 wherein on 4th May, 1993 the Court of Appeal (hereinafter referred to as the court below) dismissed the application and held among others:-

(1) That paragraph 7 of the applicant's affidavit which relied on suit CV/5/68 as facts leading to the confusion created in the averment did not contain feasible excuse for the error.

(2) That his excuse that his attention was not drawn to the variance is feeble as he was supposed or presumed to have carried out proper scrutiny.

(3) The case of Edozie v Edozie (1993) 1 NWLR (Part 272) page 679 on the question of negligence of counsel and shifting of responsibility was relevant to this case.

(4) That the amendment sought is not minor.

(5) That the appellant's Counsel waited until he had read the grounds of appeal before seeking an amendment and that his reasons for seeking amendment is to knock off the legs of the table to leave the ground of appeal without any legs to stand upon.

(6) The amendment sought is not necessary for determining the real question in controversy when, even though in evidence, it is so divergent from what was originally the case the appellant put forward to the trial Court in his Statement of Claim.

(7) The grant will deprive the appellant the right of fair hearing and will constitute injustice and prejudice to him.

The appellant was dissatisfied with the said ruling and he appealed to this Court upon three original and with leave, four additional grounds of appeal (see the Notice of Appeal at pages 65 - 67 of the records).

Briefs of Argument were exchanged by the parties and in the appellant's Brief the four issues distilled and proffered for our determination contained on page 4 of their Brief dated 10th November, 1993. They are:

"(1) Whether or not this is a proper case in which extension of time and leave to appeal should be granted.

(2) Whether or not the Learned Justices of the Court of Appeal exercised their discretion properly, judicially and judiciously in refusing to grant the amendment of record sought? If the answer is 'NO'.

(3) Whether the Supreme Court will interfere and set aside the order and grant the amendment on the ground that there is manifest error on the part of the Court of Appeal in that:

(i) They took into consideration irrelevant and extraneous matter and failed to take into account relevant matters.

(ii) There is misapprehension of the facts and misconception of law.

(iii) And that it is in the interest of justice to interfere and grant the amendment to meet the end of justice.

(4) Whether the Supreme Court will accelerate the hearing of the appeal and depart from the Rules by treating this application as the ap-

peal itself.”

The Defendant/respondent (hereinafter referred to shortly as respondent) in response made an oral expatiation in support of his written brief to the effect that the appellant’s brief is defective and should be struck out. He submitted his reasons as being firstly, that what the appellant tagged B and presented as introduction in his Brief as saying “*For facts of this case ...*” and then went on to present the facts of the case. But the ‘*introduction*’ part of the a brief, learned counsel maintained, is different from the facts of the case and both are not interchangeable or in the alternative - the introduction serving as it does, its own purpose. Our attention was ad- C verted to Hon. Justice Nnaemeka Agu’s Manual of Brief Writing in the Court of Appeal and Supreme Court of Nigeria (1986) at page 16 under “*Introductory*” or *Preliminary Statement*” which:

“*Should inform the court who is appealing, against whose judg- D ment the appeal is, and whether the appeal is after a full trial or on some interlocutory matter. It will also give a short history of the case. Say the nature of the proceedings, and the decision by the court of trial.*”

The alleged introduction of the appellant, it was submitted, said noth- E ing about any or all the above and to the extent that the appellant’s Brief has ignored and or failed to comply with this important requirement. Hence, it is submitted, that the Brief is defective and so we are urged to treat it as such. The respondent thereupon stated the correct position as F follows:

“*The appeal before us, it is argued, is indeed an interlocutory appeal against the Ruling of the Court below sitting in Ibadan and dated the 4th day of May, 1993 per Aloma Mukhtar, J.C.A., with Kolawole and G Muhamad JJ. C.A. concurring, wherein their Lordships refused the application of the appellant herein, made at the court below for amend- ment of the Statement of Claim on the ground, inter alia, that the appli- cation is overreaching and will deprive the respondent herein of his right H to fair hearing, constitute substantial injustice and will be prejudicial to him. The said appellant’s application, it is further pointed out, is at pages 41-44 of the records. The Statement of Claim sought to be amended is at page 10 - 14 of the records. The lower court’s considered ruling*

made after full arguments were received on the application and the ruling thereof is at pages 49 - 64 of the records. The appellant has in his three grounds of appeal contained in his Notice of Appeal at pages 65 - 66 (ibid) of the records, appealed against the said ruling."

B FACTS OF THE CASE

The facts of this case as are relevant to this interlocutory appeal are that the appellant as plaintiff at the trial court sued the respondent as Defendant for declaration to a Statutory or Customary Right of Occupancy to land as contained in paragraph 40 of his Statement of Claim.

C In putting his claim before the trial court, the appellant pleaded his root of title at paragraph 3 of his Statement of Claim thus:

D *"3. The land in dispute formed part of a large track of land settled upon by one Odetunde the ancestor of the Plaintiffs many years ago after grant by Alesinloye during the reign of Maye after Egbas and Ijebus have been driven away from the area"* (Underlining supplied).

The respondent, as transpired, denied emphatically and set up a contrary root vide paragraphs 2 and 3 of the Statement of Defence. To prove his case, the appellant called traditional evidence by the 1st plaintiff who testified thus:

F *"My family got on the land during the Ibadan Ijebu War. Odetunde was a warrior and he was our ancestor who first settled on the land. Iba Oluyole was Olubadan at the time. It was Bankole Alesinloye who was the Balogun of Ibadan at the time told (sic) Odetunde to go and defend the land against the Ijebus. When the war was over, Odetunde settled there with his family and he established a village there."* (Underlining supplied by me).

G It ought to be borne in mind that this Court had long before now clearly decided that there is a difference between a grant and a settlement. For, while a grant comes from a previous title holder to a subsequent one called a grantee, settlement does not recognise a previous titleholder. See Mogaji & Anor. v. Olofa (1968) NMLR. Thus, where a plaintiff as in the instant case, established a grant of the land in evidence, he cannot be said to have proved his title. See Balogun v. Akanji (1988) 1 NMLR (Part 70) 301 at 322.

Furthermore, the appellant having led evidence following his pleading as to the grant to him of the land in dispute cannot now be heard to blow hot and cold by asking to plead settlement in place of a grant. See Ezomo v. A.G. of Bendel State (1986) 4 NWLR (Part 36) 448 at 462 and Watson v. Cave (No.2) 1881 17 Ch.D 23. Cf. Ekpo v. Ita 11 NLR 68. B

The learned trial Judge in giving judgment in favour of the appellants concluded as follows:

"It is clear from the foregoing that the preponderance of credible evidence is heavily in favour of the plaintiffs and I am satisfied that the plaintiff's ancestor, Odetunde, originally settled on the land in dispute." C
(underlining supplied by me for emphasis)

The respondents appealed against the judgement of the trial court. It is common ground that one of his additional grounds was ground 4 that was allowed to be argued by leave of the court, see page 56-57 of the record and page 2 paragraph 2(2) of the appellant's brief. After the learned counsel for appellant's first improper application was refused, he filed another application praying for leave to amend the records by amending paragraph 3 of the statement of claim as follows D E

(1) By deleting the words "after grant by Alesinloye during the reign of Maye and substituting therefore the words "During the reign of Iba Oluyole" on the following grounds: F

- (i) It is to bring evidence in line with pleadings
 - (ii) To make use of already available evidence
 - (iii) To reflect the facts established and accepted by the court
 - (iv) To amend all defects and errors necessary for the purpose of determining the real question in controversy between the parties. G
- (2) For leave to file an amended brief."

The Appellant was dissatisfied with the said ruling and so appealed on three grounds to this Court.

The respondent in the case in hand brought a preliminary objection H by arguing among other things that the application for amendment on the basis of bringing pleadings in line with an alleged evidence on record, the discretion to grant or refuse same is not automatic i.e. that the court

must always grant it.

The courts have held and it has remained so, that where an amendment is intended to overreach; or it will entail injustice to the respondent or that the applicant is acting mala fide. (See T. Idesbeg v Harper (1878) Cd. D 393 at 396); or that by his blunder the applicant has done some injury to the respondent which cannot be compensated by costs or otherwise - see James Oguntimehin v. Gubere (1964) All NLR (Vol. 1) 176, this Court has held that an amendment could be allowed at any time. See also Akinkuowo v. Fafimoju (1965) NMLR 349. Thus, where amendment will allow the pleadings to be in line with the evidence and the findings made by the trial Judge, the same will be allowed. See England v. Palmer (1955) 14 WACA 659, in the case of Salami v. Odogun (1991) 2 NWLR (Part D 173) 291, an objection was taken to the plaintiff's action on the ground that the action was not maintainable except the plaintiffs are personal representatives of the deceased and/or that the Plaintiffs must state that there are no personal representatives to the estate.

The learned trial Judge granted an amendment of the Statement of Claim to add a sentence that there are no executors to the estate of the deceased after the objection had been argued.

In consequence of this, the court below said as follows:

"The design of the amendment is to overreach the decision on the objections properly raised before the court and for which tenacious arguments have been proffered by both counsel requiring the deliberation and decision of the court. It is tantamount to a gross abuse of the process of the court to allow the respondent to bring the application to cure the defects complained about before the delivery of the ruling on the matter."

See Akinyede v. Opere (1968) 1 ANLR 65.

In an application for an amendment of the Writ of Summons, this Court held in Osinupebi v. Saibu (1982) 7 SC. 104, 111 and at 116 while refusing same as follows:

"...The amendment sought is, in my view one which if comprehensible, should have been made in the High Court before final adjudication

on the issue of declaration to enable parties to amend their pleadings, if granted.”

“...To grant the amendment sought would rather alter the character of the case as considered by the courts below.”

See also Oluola v. Ogunjobi (1986) 2 NWLR (Part 23) 508 at 513 where an amendment for joinder of co-plaintiffs was made at a time the defendant would have been entitled to the procedural defence of limitation of action if the amendment to join had not been made. In nullifying the joinder, the Court of Appeal (England) quoted with approval the dictum of Greer L.J. in Marboro Eage Star & British Dominions Insurance Co. (1932) 1 K.B. 485, 489 that:

“It has been accepted practice for a long time that the amendment which would deprive a party of a vested right ought not to be allowed.”

I am inclined to the view held fast by learned counsel for the Respondent that the amendment the application sought, was one that was designed against ground 4 of the Grounds of Appeal of the Appellant at the lower court. The lower court indeed so found in their judgment and the Appellant herein conceded after much dispute, at page 13 of their Brief as follows:

“Funny enough learned counsel waited until he has read the above ground of appeal and prepared the respondents’ brief of argument before he deemed it desirable to seek the amendment. The reason he is seeking the amendment becomes obviously not farfetched for anyone can reasonably infer that it is for the purpose of knocking off the legs of the table. By so doing, and if the application is granted, the ground of appeal will have no legs to stand on.”

I cannot agree more since the ground of appeal would have overreached and been incapable of being considered again in the judgment yet to be delivered. This is what the authorities I have reviewed above concluded was an abuse of the process of court. It is in that light and for the reasons demonstrated thus far that I am of the firm view that the application and this appeal constitute an abuse of process of court. And as to what constitutes an abuse of the process of court, the decision in Harriman v. Harriman (1989) 5 NWLR

(part 119) 6 and Okorodudu v. Okoromadu (1977) 3 SC.21 are instructive. Thus, a case found to constitute an abuse of the process of court as clearly depicted in this case ought to be dismissed. See Arubo v. Aiyeleru & 5 Ors. (1993) 2 K.L.R. 23 at 25. By the same token the ground of appeal would have thereby become useless and non-existent as it would have become incapable of being considered again in the judgment yet to be delivered. I am therefore persuaded by the authorities cited to us to hold inexorably that the application and this appeal constitute an abuse of the process of court. Much as I concede that the court below can order or grant an amendment of pleadings or records, but the court ought not to give approval for or to an amendment of record or pleadings which, as in the instant case, is prompted by the finding of the trial court in favour of the Appellant based on proceedings presented before the High Court. In saying all this, I am not unmindful of this Court's decision of Ojah & Ors. v. Ogboni & Ors. (1976) 4 SC. 69 at 75 - 81 in which the principles decided in the English case of Cropper v. Smith (1884) 86 Cd. D. 710 at 710/711 were adopted but which I hereby make bold to distinguishing it from what Bowen, L.J. said, to wit:

"I know of no error or mistake 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 an amendment as a matter of favour or of grace. It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy it is as much a matter of right on his part to have it corrected, if it can be done without injustice as anything else in the case is a matter of right."

I have carefully considered all the authorities cited to us at the Appellant's instance, many of which support the respondent's case. The case of Adekeye v. Akin-Olugbade (1987) 3 NWLR (Part 60) 214 for instance, copiously relied upon by the Appellants is in respect of an amendment of the respondent's claim when the facts upon which issues were joined and fought are in no way being altered and/or deleted. It is that the court

would allow amendment to be made to make use of the evidence that is lawfully on record and could be made use of with or without the amendment. See Professor V. O. Oyenuga v. Provisional Council of University of Ife (1965) NMLR 9. See also this Court's recent decision in an interlocutory appeal of Alsthom S.A. & Anor. v. Chief Dr. Olusola Saraki B (2000) 81 LRCN 3015; (2000) 14 NWLR (Part 687) 415 at pages 3026 and 423 - 424 respectively where this Court held inter alia that in law to amend any legal process affords a party whether a plaintiff or defendant and even the appellant or respondent on appeal, to correct an error in the legal document. Such correction can be made informally where the process is yet to be served. After service, however, correction on legal process may be effected, depending on the prevailing rules of court, either by consent of both parties or upon motion on notice. Such corrections are common place. Amendment enables the slips, blunders, errors and inadvertence of counsel to be corrected, in the interest of justice, ensuring always that no injustice is occasioned to the other party. C D

As can be seen, the principle being discussed does not permit the grant of an amendment to use evidence that is not lawfully on record and could not be useful but for the amendment. Those instances as in this case are cases where the law forbids the amendment on the ground that they will be unfairly prejudicial to the case of the opposite party, so as to overreach, surprise and or embarrass as analysed in the Adekeye's case F (supra).

The amendment that was granted in Laguro v. Honsu (1992) 2 SCNJ (Part 11) 201 relates to the time the trespass complained of took place. The claim there erroneously and ridiculously alleged that the trespass being complained of took place after the Writ of Summons was issued and served on the Defendant. This is undoubtedly and patently preposterous and it was to correct this bizarre occurrence that the court allowed an amendment on the ground that the amendment was merely to bring into focus the real issues between the parties. The Plaintiff therein did not plead one form of trespass and proved another; hence common sense and interest of justice were then rightly invoked. Therein also (Laguro G H

v. Honsu (supra) this court re-iterated that an amendment would be granted to bring them in line with the evidence already adduced:

“provided the amendment is not intended to overreach and the other party is not taken by surprise and the claim or defence of the said other party would not have been different had the amendment been averred when the pleadings were first filed.”

This certainly is not the case here. C.f. **Cropper v. Smith** (supra); **Amadi v. Thomas Aplin & Co.** (1972) 1 All NLR (Part 1) 409 where the application to amend had merit. See too **Metal Construction (W.A.) Ltd. v. Migliore & Anor** (1979) 6 - 9 SC. 163 at 171 - 172.

In **Jessica Trading Company Ltd. v. Bendel Ins. Co. Ltd** (1993) 1 NWLR (Part 271) 538; (1993) 1 SCNJ 240 which was an application for amendment of the claim of the Plaintiff to state the amount claimed in US Dollars as against the Nigerian Naira that was initially endorsed on the Writ, this Court in refusing the amendment stated the reason for the refusal per Kutigi, JSC as follows:-

“... It is thus quite clear that if the Writ and the Statement of Claim are amended as prayed, the court will not be in a position to amend or change witnesses’ testimonies. I agree with Mr. Ogbebor that the amendment if granted will certainly require the adducing of additional evidence if not a new trial. That will be intolerable.”

The respondent’s affidavit in the lower court against the amendment deposed to among other facts that he would need to meet same by *“calling additional evidence of early settlers in the area.”* This averment was not challenged by the appellant herein and the lower court acted on it by holding that:

“...by the very nature of the amendment the facts of the case will wear a completely different complexion.”

This finding, in my humble view, is flawless, honest and certainly not a ruse. How, one many ask, would the respondent be allowed to amend his pleading to meet the amendment proposed by the appellant and to lead evidence on the amended Statement of Defence? It is certainly impossible. This is why, above all considerations, the amendment sought by the appellant cannot be granted

without requiring some amendment of the defence and the facts on the amended Statement of Defence. I am of the firm view that the appellant has not succeeded in putting across any case that would warrant my disturbing this finding and to thereon inexorably hold that it would be intolerable at this stage, late in the day, or to allow an amendment that would lead to a new trial and render the appeal useless. Indeed, the appellant cannot be heard to say that the respondent has said all that he would need to say at the trial court and that he would have nothing more to say at the trial before judgment is dished out to either party. This would not only be speculative but outrightly against all known principles of fair hearing as complemented by the rules relating to pleading; the defendant is at that stage at liberty to plan and present his defence only to enable him rely on the failure of the plaintiff to prove his case. The Court is not to embark on speculation but to act upon facts tested before it according to the rules and practice of the law. See *Okoko v. The State* (1964) 1 All NLR 473 and *Masade Esene v. Cecilia Isikumen* (1978) 2 SC.87.

It is for the above reasons that I resolve the issue canvassed in this matter against the appellant.

In the result, I hereby dismiss the appeal as lacking in merit with 10,000.00 costs to the respondent. It is ordered that the main appeal before the Court below be heard by that Court with utmost despatch.

KARIBI-WHYTE JSC

I have read in advance the leading judgment of my learned brother Onu JSC, in this appeal. I agree with his reasoning dismissing the appeal. I also hereby dismiss the appeal.

I only wish to comment quite briefly on the issue whether Appellant should be allowed to amend his pleadings at this stage of the litigation between the parties.

The amendment sought in this appeal seems to go to the root of Appellant's claim in the trial High Court. It is important to state the claim before the trial Court. Paragraph 3 of the statement of claim stated as

follows -

“3. *The land in dispute formed part of a large track of land settled upon by one Odetunde the ancestor of the Plaintiffs many years ago after grant by Aleshinloye during the reign of Maye after Egbas and Ijebus have been driven away from the area.*”

Respondent denied this averment, and in paragraph 2 and 3 of the statement of defence set up a contrary root of title claimed.

It is relevant to refer to the evidence of 1st Plaintiff on the issue where he testified thus -

“*My family got on the land during the Ibadan Ijebu war. Odetunde is a warrior and he was our ancestor who first settled on the land. Iba Oluyole was Olubadan at the time. It was Bankole Alesinloye who was the Balogun of Ibadan at the time told (sic) Odetunde to go and defend the land against the Ijebus. When the War was over, Odetunde settled there with his family and he established a village there.*”

It is obvious from the averment in paragraph 3 of the statement of claim that Plaintiff relied for his root of title on grant of the land by Aleshinloye during the reign of Maye. But that the land was first settled by Odetunde, the ancestor of Plaintiffs. Both grant and settlement are relied upon.

There is a clear difference between acquisition of land by grant and by settlement. Whilst grant of land can only be from a previous title holder to another, who is the grantee, settlement does not recognise any previous title holder. - See Mogaji & Anor v Olofa (1968) NMLR. Hence, as in the instant case, where Plaintiff claims a grant, he must establish such grant by evidence - See Balogun v. Akanji (1988) 1 NMLR (pt.70) 301. Having led evidence in support of his pleading relating to grant of the land in dispute, he cannot now be heard to rely on settlement in place of grant earlier relied upon. - See Ezomo v. Attorney-General of Bendel State (1986) 4 NWLR (pt.36) 448.

It is pertinent to observe that in the Court below one of the additional grounds of appeal against the judgment of the learned trial Judge was for leave to amend the record by amending paragraph 3 of the statement of claim.

(1) By deleting the words *After grant by Aleshinloye during the reign of Maye and substituting therefore the words “During the reign of Iba Oluyole” on the following grounds:*

- (i) *It is to bring his evidence in line with the pleadings*
 - (ii) *To make use of already available evidence* B
 - (iii) *To reflect the facts established and accepted by the Court.*
 - (iv) *To amend all defects and errors necessary for the purpose of determining the real question in controversy between the parties.*
- (2) *For leave to file an amended brief.”* C

Respondent successfully raised a preliminary objection to this application. C
It is settled law that an amendment to enable evidence fall in line with the pleadings will be allowed at any time in the proceedings. - See Akinkuowo v. Fafimoju (1965) NMLR.349, England v. Palmer (1955) 14 WACA. 659, Oguntimehin v. Gubere (1964) NMLR.55 Nwankwo v. Nwankwo D (1993) 5 NWLR. 281. However, the Court will be obliged to refuse an amendment intended to overreach or that will result in injustice to the other party, or where the applicant is acting mala fide, See Amadi v. Thomas Aplin & Co. Ltd. (1972) 1 All NLR. (Pt.1) 409. The court will E not refuse an amendment which merely corrects an error which is a mere misnomer because the other party will prefer that the error remained uncorrected. - See Sam Warri Esi v. Shell BP Petroleum Development Co. of Nigeria Ltd. (1958) 3 FSC. 94, Adeleke v. Awoliyi & Anor. F (1962) 1 All NLR. 260.

I agree with the submission of learned Counsel to the Respondent in this appeal that the amendment sought was designed against ground 4 of the Appellant’s ground of appeal in the Court below. Ground 4 of that ground of appeal reads - G

“4. The learned trial Judge erred in law by failing to dismiss the Plaintiff’s suit when the Plaintiff failed to prove the root of title pleaded and relied upon by them.

PARTICULARS - H

1. The root of title pleaded and relied upon by the Plaintiff was a grant by Aleshinloye which was Not proved by evidence.
2. A Plaintiff who pleads and relies on a grant as his root of title in order

to succeed, is bound to prove by evidence such grant.”

I agree with learned Counsel to the Respondent that the amendment sought in this application was designed against ground 4 of the grounds of appeal reproduced above. This was the finding in the Court below. I agree with that observation. (See p.13 of Appellant’s brief of argument).

It cannot be seriously contended that the amendment sought will bring the evidence in line with the pleadings. Rather it raises a new root of title which will require the introduction of new evidence. - See Jessica Trading Co. Ltd. v. Bendel Ins. Co. Ltd. (1993) 1 NWLR. (Pt 271) 538. This Court has decided in Metal Construction (W.A.) Ltd. & Ors. v. D.A. Migliore & anor. (1979) 6-9 SC.163 that it has an inherent power to amend the record of the trial Court so as to comply with the facts proved before that Court and decision given by it. - See Gbogbolulu of Vakpo v. Hodo (1941) 7 WACA. 164. This is to prevent the occurrence of substantial injustice. The facts of the instant case do not fall within this principle. The fact that the two courts below refused the amendment would not have precluded this court granting the amendment in an appropriate case and to avoid occasioning injustice to the other party - See Laguro & anor. v. Honsu & anor. (1992) 2 NWLR.279. In the circumstances, and for the reasons given in this judgment and the fuller reasons in the leading judgment of my learned brother Onu JSC, I hereby refuse this application for amendment and dismiss the appeal. Appellants shall pay N10,000 as costs to the Respondent.

OGUNDARE JSC

I read in advance the judgment of my learned brother Onu, JSC just delivered. I agree with him that the appeal be dismissed. The application for amendment of the statement of claim brought before the Court below was rightly refused by that Court. The application was meant to overreach and would, if granted, have resulted in injustice to the Defendant who would have been made to face a case different to the one put before the trial Court.

I, too, dismiss the appeal and abide by the order for costs made by

my learned brother, Onu, JSC.

ACHIKE JSC

I have had the privilege of reading in advance the leading judgment delivered by my brother, Onu JSC. I entirely agree with him that the application be refused and the appeal dismissed. B

The background and facts leading to this appeal have been fully set out at some length in the leading judgment but I would just advert to some aspects thereof in my brief judgment.

In the plaintiffs/appellants' action, brought in a representative capacity, for declaratory action of title to right of occupancy to a certain piece of land, they pleaded their root of title to be by grant as averred in paragraph 3 of their Statement of Claim: C

"The land in dispute formed part of land settled upon by one Odetunde, the ancestor of the plaintiffs many years ago after grant by Aleshinloye during the reign of Maye after the Egbas and Ijebus have been driven away from the area." D

The defendant/respondent joined issue with the plaintiff/appellants on the root of title and asserted that his root of title was by settlement made through Oderinde. E

Contrary to their pleadings, the appellants testified as follows through 1st PW: F

"My family got on the land during the Ibadan Ijebu War. Odetunde was a warrior and he was our ancestor who first settled on the land. Iba Oluwole was Olubadan at the time. It was Bankole Alesinloye who was the Balogun of Ibadan at time told (sic) Odetunde to go and defend the land against the Ijebus. When the war was over, Odetunde settled there with his family and he established a village there." G

Clearly, this piece of evidence contradicts the averment in the appellants' pleadings or at best it puts forward a case quite at variance with the case championed by the appellants and with which they joined issue with the respondent. The law is quite clear that any evidence led by a party which is in conflict with the party's pleading goes to no issue and should either be discountenanced or expunged by the trial court. The reason is el- H

ementary but predicated on a fundamental principle of pleading which stipulates that parties to a case are tried and bound by their pleadings; so also the court adjudicating the suit. Thus facts not pleaded cannot constitute issues to be decided by the trial court. The appellate court has a duty to ignore evidence not based on pleaded facts. See Emegokwue v Okadigbo (1973) 4 SC 113 at 117, Ugo v Obiekwe (1989) 1 NWLR (Pt.99) 566 at 583 and National Investment & Property Co. Ltd v Thompson Organization Ltd. (1969) 1 NMLR 99.

In spite of these glaring inconsistencies the trial Judge found in favour of the appellants and, inter alia, in his judgment, he opined as follows:

“It is clear from the foregoing that the preponderance of credible evidence is heavily in favour of the plaintiffs and I am satisfied that the plaintiffs’ ancestor Odetunde, originally settled on the land in dispute.”

The respondent, as appellant in the lower court, appealed against the judgment of the trial court and in one of the grounds of appeal he raised the issue of evidence at the trial being different from the pleadings in the statement of claim. Consequent to this fact, the plaintiffs as respondents at the Court of Appeal moved that court to amend paragraph 3 of its statement of claim as follows:

“(1) By deleting the words “After grant by Alesinloye during the reign of Maye and substituting therefor the words “During the reign of Iba Oluyole” on the following grounds:

- (i) It is to bring evidence in line with pleadings*
 - (ii) To make use of already available evidence*
 - (iii) To reflect the facts established and accepted by the Court*
 - (iv) To amend all defects and errors necessary for the purpose of determining the real question in controversy between the parties.*
- (2) For leave to file an amended brief.”*

The lower court refused to grant the application for amendment on the ground that to do so would enable the surviving appellant to put forward a case at variance with that canvassed by the two original appellants at the trial court, as plaintiffs.

I have no doubt whatsoever that the lower court was right to have refused the application for amendment. No doubt, in a deserving case, an

appellate court, in exercise of its discretionary jurisdiction has power to grant an amendment. Thus in the recent case of Alshom S.A. & Anor v Chief Dr. Olusola Saraki (2000) 14 NWLR (Pt.687) 415, in a similar application for amendment of the writ of summons and a paragraph of the statement of claim, I stated at pp. 423-424 as follows: B

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

In that case, the application simply sought to correct an obvious blunder on the part of counsel. F

The case on hand is different. The plaintiffs/appellants’ root of title, by their pleadings that went to trial, was unequivocally founded on grant and was categorically denied by the defendant/respondent. Yet the learned trial Judge found as a fact that Odetunde, plaintiff’s ancestor settled on the land in dispute. The aim of the proposed amendment was really to bring the pleading in line with the judgment of the learned trial Judge. The Court of Appeal declined to grant the amendment sought because it would enable the plaintiffs to set up an entirely new case than they canvassed at the trial court. Put briefly, the application herein seeks to enable the applicant to make a fundamental round about whereby, he would, with the stamp of authority of the court, re-write the issue joined G H

by the parties at the trial and as set out in their pleadings. In other words, it is not necessary for the trial court to make findings of fact upon a point on which issues were not joined and based upon evidence introduced during the trial by one of the parties to a suit. See Amodu Latunde & Anor v Bello A.D. Lajinfin (1989) 5 SN J 59. In Osinupebi v Saibu (1982) 7 SC 104, at 116 this Court refused to grant the amendment sought on the ground that “*To grant the amendment sought would rather alter the character of the case as considered by the courts below.*” See Salami v Odogun (1991) 2 NWLR (Pt. 173) 291 and the oft cited decision of George & Ors v Dominion Flour Mills Ltd. (1963) 1 All NLR 71.

To grant the amendment proposed in the application would clearly overreach the interests of the respondent. Furthermore, it would directly neutralise one of the respondent’s grounds of appeal at the lower court which questions the finding of the trial court that is glaringly at variance with the pleaded facts. Such injustice cannot be appropriately redressed by monetary compensation of the respondent by costs. Therefore, the justice of the case demands that the amendment be denied.

The application for leave to appeal for the foregoing is unmeritorious. Accordingly, it is refused and the appeal is also dismissed with 10,000.00 costs to the respondent.

F

UWAIFO JSC

I have had the opportunity to read in advance the judgment of my learned brother Onu JSC. I agree that the application be refused and the appeal dismissed for the reasons he has given.

I think the matter can be simply dealt with. In the action for a declaration to a right of occupancy to a parcel of land the plaintiffs/appellants pleaded their root of title to be by grant made by one Alesinloye to their ancestor Odetunde during the reign of Maye. The defendant/respondent denied this and pleaded his root of title to be by settlement by one Oderinde. The case was supposed to have been fought on the issue thus joined.

But the appellants rather than lead evidence of grant by Adesinloye

during the reign of (Oba) Maye, gave the following evidence:

“My family got on the land during the Ibadan Ijebu War. Odetunde was a warrior and he was our ancestor who first settled on the land. Iba Oluyole was Olubadan at the time. It was Bankole Alesinloye who was the Balogun of Ibadan at the time told Odetunde to go and defend the land against the Ijebus. When the war was over, Odetunde settled there with his family and he established a village there.” B

This is evidence completely at variance with the pleading. It is inadmissible and should not have been admitted. As said in *Woluchem v. Gudi* (1981) NSCC (vol.12) 214 at p.227 per Nnamani JSC: C

“It is settled law that evidence in respect of matters not pleaded really goes to no issue at the trial and the trial court should not allow such evidence to be given ... It is also trite law that parties are bound by their pleadings and any evidence which is at variance with the averments in the pleadings goes to no issue and should be disregarded by the court.” D

Besides, the evidence put forward a completely different case from the one on which issue was joined. The learned trial judge had a duty to expunge the evidence in the course of preparing his judgment but he did not. He gave judgment for the appellants. In one of the grounds of appeal against the judgment, the respondent (as appellant) raised the issue of the variance between the evidence and the relevant averment in the statement of claim. It was at that stage that the appellants (as respondents in the Court of Appeal) applied to have the said averment in the statement of claim amended in order, *inter alia*, “to bring the evidence in line with pleadings.” The Court of Appeal refused to grant the amendment on the ground that it would constitute a different case from the one the appellants originally put forward at the trial court. The Court of Appeal was quite justified to refuse such an amendment. In *Nkanu v. Onun* (1977) NSCC (vol.11) 242 this court observed per Udoma JSC at page 246: F

“It is necessary also to observe having regard to the submissions addressed to us in this appeal on the issue of res judicata, that throughout the hearing of both suits in the High Court, no application was made, and none granted, to amend especially paragraph 20 of the statement of G H

claim, which therefore remained as, and formed part of the case of the plaintiffs throughout the proceedings in the High Court. It has often been stated by this court, and we repeat it again, that in the conduct of their cases before the High Court, parties are bound by their pleadings and will not be permitted to set up cases different from their pleadings either in the High Court or in this court on appeal.”

There was a case where an amendment was sought to introduce an averment of the existence of agency and to rely on illegality in the statement of defence after the plaintiffs had closed their case. This was refused by the trial judge on the ground that it would completely alter the defence relied on by the defendant at the time the plaintiffs concluded their case. The Federal Supreme Court upheld the propriety of such refusal when it observed per Bairamian, F.J., in the case which was reported as *George & Ors v. Dominion Flour mills Ltd* (1963) NSCC (vol.3) 54 at 59 thus:

“In the present case there was no plea or allegation of facts of illegality, or reference to the statutory provision which made the transactions or any of them illegal. The request for leave to amend the defence was made after the plaintiffs’ case was closed. If leave to amend were given, the maxim of *audi alteram partem* would not have been observed; so the learned trial judge had no choice but to refuse leave to amend.”

The present appellant’s case is even far graver than was considered in *George v. Dominion Flour Mills Ltd* (supra).

I find no merit in the application for leave to amend and in the appeal. I, too, refuse the application and dismiss the appeal. I abide by order for costs made by my learned brother Onu JSC.

H