

**SUPREME COURT OF NIGERIA**  
FRIDAY 15TH FEBRUARY, 2002. SC. 26/1996  
**CORAM:- A. B. WALI, I. L. KUTIGI, E. O. OGWUEGBU,**  
**U. MOHAMMED, U. A. KALGO, JJSC**

CHIEF KALU IGWE & ORS ..... APPELLANTS  
(For themselves and as representing  
the people of Etitiama Nkporo)

AND

CHIEF OKUWA KALU & ORS ..... RESPONDENTS  
(For themselves and as representing  
the people of Amaeke Abiriba)

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APPEALS - Concurrent findings - Supreme Court does not interfere  
- Unless there is some miscarriage of justice - Or violation of principle  
of law or procedure (H1)

JUDGMENTS - Delivery - Time limit - Where an application is made  
at conclusion of evidence and addresses - Three months period starts  
from date court adjourns for judgment (H2)

COURTS - Power - Pleadings - Amendment of - Courts can amend  
pleadings - And such power will not be questioned - Unless it was  
improperly exercised (H3)

PLEADINGS - Amendment - Time frame - Pleadings can be amended  
at late stage of proceedings - Provided that the other party is not  
taken by surprise (H4)

PLEADINGS - Amendment - Allegation of injustice - Sustainability -  
Aggrieved party must describe how the amendment unjustly affected  
his case (H5)

LAND LAW - Identity of land - Onus of proof - Since appellant al-  
leged that identity of the disputed land is not the same - He has duty  
to lead evidence - For superimposition of survey plan (H6)

LAND LAW - Visit to locus in quo - Notice of - There is no provision

for prior notice to parties - To assemble their witnesses - Before the visit is made (H7)

LAND LAW - Visit to locus in quo - Procedure adopted - Correctness of - Court adopted right procedure during the visit - By giving parties opportunity of being heard (H8)

APPEALS - Briefs - Objection to - Failure to reply - Effect - Since appellants failed to reply to the objection - They are deemed to have accepted same as meritorious (H9)

### **FACTS**

Dispute arose between plaintiffs/appellants and defendants/respondents over the ownership of seven adjoining parcels of land. The dispute led appellants to institute this action against respondents at the High Court of Abia State, Aba. Appellants claimed damages for trespass and injunction over the disputed land. Respondents also sued appellants at the same court and claimed declaration to title to two adjoining parcels of land, damages for trespass and injunction. Both suits were consolidated with consent of the parties. Appellants relied on traditional evidence of how their ancestors came to settle on the disputed land.

Respondents denied the appellants' traditional history and averred that the land in dispute consists of two parcels of land shown in their survey plan. Respondents equally gave traditional evidence of how their ancestors had been peacefully on the land until 1968 when appellants trespassed on same. At the end of hearing, instead of delivering the judgment, an oral application came from respondent's counsel seeking for leave to amend respondents' pleadings. The application was granted and the court thereafter adjourned for judgment. The court eventually dismissed appellants' claim and entered judgment for respondents. Dissatisfied, appellants filed appeal at the Court of Appeal, Port Harcourt. The appeal was also dismissed which led appellant to file another appeal to Supreme Court.

### **ISSUES FOR DETERMINATION**

*"1. Whether there had been a breach of the provisions of Section 258 of the 1979 Constitution and if that breach had occasioned a miscarriage of justice.*

2. Whether the amendment of the plans and pleadings of the respondents on the day judgment was to be delivered was proper.

3. Whether from the evidence before the Court, it could be said that the identity of the land is the same and the respondent had no duty to produce a composite plan of Exhibits A, M and N.

4. Whether the trial court adopted the correct procedure during the visit to the locus in quo and made proper use of the evidence obtained at the visit.

5. Whether the respondents had established a claim to the land in dispute and whether in the circumstance of the case, the test for resolving conflicting traditional evidence was applicable and properly applied.”

## **HELD** (Dismissing the appeal per **MOHAMMED**

**JSC, KUTIGI & KALGO JJSC dissenting)**

*APPEALS - Concurrent findings - Interference*

**1. In this appeal the appellants are contesting the concurrent findings of fact of both the High Court and the Court of Appeal. It is settled law that such concurrent findings should not be disturbed unless if there is some miscarriage of justice and violation of some principle of law or procedure. (p. 235 H)**

*JUDGMENTS - Delivery - Time limit*

**2. I am in complete agreement with the court below that “Mustapha’s case is on all fours with the case in hand. In any event where the statute says after the conclusion of evidence and addresses it does not inhibit a party from making any application which the procedure permits. Once such application is made and considered by the court the three months period would start from the date the court adjourns for judgment. This view is well considered by Obaseki JSC. In Mustapha’s case wherein he held as follows:**

**“On the issue of the High Court delivering its judgment outside the period prescribed by S. 258(1) of the 1979 Constitution, I found that the judgment of the High Court was delivered within the three months limit from the date of conclu-**

*sion of the final address and as such there was no breach. The application by the respondents for amendment of their pleadings interrupted the period and made the period of three months to start running from the date of the amendment. The Court of Appeal erred in holding that there was non-compliance with the section. (Underlining mine)”(p. 239 E)*

*COURTS - Power - Pleadings - Amendment of*

**3. It is settled law and practice that the power of the trial court to permit amendment of the pleadings is almost limitless and this power will not be questioned unless it is shown that the trial court’s discretion was improperly exercised.**

**There is no kind of error or mistake, which if not fraudulent or intended to over-reach, which the court cannot correct, if it can be done without injustice to the other party.**  
(pp. 240 G/241 H)

*PLEADINGS - Amendment - Time frame*

**4. An amendment of the pleadings would be granted, even at a late stage of the proceedings, if the amendment does not take the other party by surprise but is meant to write down what is understood by both parties to be the basis on which the action had been fought and evidence led from the beginning.**  
(p. 240 G)

*PLEADINGS - Amendment - Allegation of injustice - Sustainability*

**5. Learned counsel for the appellants made heavy weather of these amendments but failed to point out how the amendments affected their case before the court or how it would entail injustice or surprise or embarrassment to them. To say that the appellants were overreached by the amendments simpliciter without describing how the amendments affected their case before the court is a hollow submission. I therefore agree that the amendments of both the plans and the Statement of claim were of a cosmetic nature and caused no injustice or embarrassment to the appellants. I resolve this issue also in favour of the respondents.** (p. 242 A)

*Identity of land - Onus of proof*

**6. Learned counsel for the appellants cannot be correct to say that the presence of the same landmarks in both plans is no reason to conclude that the plans are the same. It is correct, though, that the super-imposition of the plans, Exhibits A, M and N by a qualified Surveyor would clarify the matter if the land in dispute was identical. But the Court of Appeal rightly observed that it was the duty of the appellants to lead evidence for the super-imposition of the plans since it is their case that the identity of the land in dispute is not the same. The appellants' counsel argued that the respondents were also plaintiffs in the case. But it is not the case of the respondents that the land in dispute is not the same. Looking at the plans and taking into consideration that the learned trial judge visited the Locus in quo, I am quite satisfied that the land in dispute between the parties from the evidence before the court is identical. This issue is also resolved against the appellants.** (p. 243 B)

*LAND LAW - Visit to locus in quo - Notice of*

**7. I agree with Edozie JCA, that the law does not provide for giving prior notice to parties in order that they may assemble their witnesses before undertaking the inspection of an immovable property.**

**But the learned trial judge did not visit the locus in quo alone. He was accompanied by Chief Uka Anya Uva, the 3<sup>rd</sup> appellant and the appellants' counsel to the land. The visit to the locus in quo is not for an additional hearing for all the witnesses to be assembled. The witnesses had already given evidence. The court is going there to see for itself what had been testified by the witnesses. If it needed any further explanation the parties and their counsel are there to give it. In any event the parties know more about the land in dispute than any of their witnesses.** (p. 243 H)

*LAND LAW - Visit to locus in quo - Procedure adopted*

**8. In the case in hand the learned trial judge visited the locus**

***in quo and heard witnesses there. Counsel were asked to cross-examine the witnesses which they declined. The court recorded all what transpired there and when it reassembled the notes were read to the hearing of all the parties and their respective counsel. Both counsel said that the notes were correct. I have not seen anything wrong with this procedure.***  
 (p. 244 G)

*APPEALS - Briefs - Objection to - Failure to reply - Effect*  
***9. It is axiomatic that the respondents' counsel is right that ground 5 has been erroneously coined "ground of law". It is at best ground of mixed law and fact. Ground 6 is definitely a ground of facts only. These two grounds could only be argued after obtaining the necessary leave of this court or the court below. The appellants have not reacted to this objection in their Reply Brief. Since they have not done so, I will regard their silence as accepting that the objection is meritorious. I therefore strike out grounds 5 and 6 and the issues formulated on them.***  
 (p. 246 G)

## NOTABLE POINTS OF INTEREST

### **KUTIGI JSC** (Dissenting)

***1. Pleadings - When leave can be granted for amendment***  
 Leave to amend will thus be allowed unless the party applying is acting mala fide or he had done some injury to his opponent which cannot be compensated for by costs or otherwise. Leave to amend ought to be allowed if also by doing so the real substantial question can be raised between the parties and multiplicity of legal proceedings avoided.  
 (p. 254 B)

***2. Pleadings - Amendments ought not to cause injustice to the other party***  
 The nature of the amendments by the Defendants were of such a nature that in my view the learned trial judge ought to have adjourned the proceedings to enable the Plaintiffs consider what steps they would next take. But that was not to be. Judgment in the case was delivered the following week after the amendments by the De-

fendants. I think the Court of Appeal was wrong when it held in the lead judgment that the Plaintiffs did not suffer any injustice as a result of the amendments. The Court was also wrong when it also held that by changing the “Red” in Exhibits M & N to “Pink”, and “Yellow” in the Statement of Claim to “Pink” did not mislead the Plaintiffs. I have no slightest hesitation in saying that the amendments were misleading and intended to over-reach, embarrass and surprise the Plaintiffs. (p. 255 D) B

### ***3. Proper person to amend a plan is the surveyor not counsel***

 C

I venture to state that the proper person to make any amendments to these plans would therefore have been the surveyor (DW.5), who made them and not counsel. The DW.5 would have been in a position to say whether or not there was any mistake on his part and the Plaintiffs would have been entitled to cross-examine him especially when the amendments went to the root of the dispute between the parties and has resulted in confusion as to the identity of the land in dispute. (p. 256 A) D

### ***4. When to file a composite plan and who to file it***

 E

Where parties in a suit choose to file different plans on both side, it will be the duty of the party who disputes the identity of the land (and who wants to succeed), to file a composite plan where that becomes necessary, or as the court may order or direct at the trial. The purpose of filing a composite plan is to fix and delimit the land in dispute. In this case, both the two lower courts erroneously in my view found that the identity of the land in dispute was established. There was therefore no need for a composite plan by either side. But the Plaintiffs in the Court of Appeal argued rightly in my view that the identity of the land in dispute was not established and the court, quite rightly too told them that it was their duty if that was the case to have prepared a composite plan. I think the court was right in its view as he who asserts must prove. Issue (3) therefore succeeds in part only. (p. 256 G) F G H

### ***5. Visit to locus - Judge wrongly placed himself in the position of a witness***

The learned trial judge from all indications I must say seemed to have

placed himself in the position of a witness, which he is not, when he began to make markings on the Plans (Exhibits in the case) and to call witnesses without the consent of the parties and to have proceeded to draw conclusions from his own observations not supported by evidence on record. It is not enough for learned counsel for the Defendants to merely contend that the counsel for the Plaintiffs was present throughout the visit and that he raised no objection to anything done but signed as correct the notes of the inspection prepared by the learned trial judge. As I said the learned trial judge in the case effectively placed himself in the position of a witness and arrived at conclusion based on his personal observations. He has descended into the arena. This he cannot do. (p. 257 G)

### **6. Purpose of a visit to locus in quo**

The main purpose of a visit to the locus in quo is to assist the court to understand fully the question in issue in a case, to appreciate and follow the evidence before it and properly apply such evidence in arriving at its decision. On such inspections the judge must avoid placing himself in the position of a witness. (p. 258 A)

### **7. Visit to locus does not justify violation of the rules of practice & procedure**

It is settled law that if a judge is of the view that it is necessary to substitute the eye for the ear in the reception of evidence and that such a course will assist in arriving at a decision, he may carry out an inspection of a locus in quo. But it must be borne in mind that proceedings at an inspection form part of the trial, and that a visit to the locus cannot justify a relaxation or non-observance of the law of evidence or the rules of practice and procedure. (p. 258 C)

### **KALGO JSC (Dissenting)**

### **8. Pleadings - When an amendment will not be granted**

If such grant is to be challenged, it must be shown that the judge did not exercise his discretion properly by establishing prejudice, unnecessary expense, irreparable inconvenience or lack of good faith. An amendment will also not be allowed where it will result in a party being confronted with an entirely new case at an extremely late stage of the trial, or is in conflict and not in harmony with the evidence

already given in the trial. An amendment of pleadings will not also be granted where it will entail injustice to the other party or where the party applying is acting mala fide or is likely by such amendment to cause to the other party such injury that may not be compensated by costs or otherwise. (p. 266 D)

B

### **REPRESENTATION**

Professor A. B. Kasunmu SAN, with U. Onwuka and Miss O. M. Lewis for the appellants

Chief K. K. Ogba for the respondents

C

### **CASES REFERRED TO**

Mustapha v. Governor of Lagos State (1987) 2 NWLR (Pt. 58) 539

Njemanze v. Shell B.P. Port-Harcourt (1966) All NLR 8

Loufti v. Czarnikow (1952) 2 AER 823

D

Ugbo v. Aburime (1994) 8 NWLR (Pt. 360) 1

Olumolu v. Islamic Trust of Nigeria (1996) 2 NWLR (Pt. 430) 253

Agbaje v. James (1967) NMLR 49

Oguntimeyin v. Gubere (1964) 1 All NLR 176

Ojah v. Ogboni (1976) 4 SC 69

E

Sanusi v. Ameyogun (1992) 4 NWLR (Pt. 237) 527

Okoye v. Kpajie (1973) NMLR 84

Fatoyinbo v. Williams (1956) 1 FSC 87

Laguro v. Toku (1992) 2 NWLR (Pt. 223) 278

F

Tildesley v. Harper 10 CH. D 393

Olu of Warri v. Esi (1958) SCNLR 384

Nweke v. Orji (1989) 2 NWLR (Pt. 104) 484

### **STATUTES REFERRED TO**

G

Constitution of the Federal Republic of Nigeria 1979, s. 258 (1)

Evidence Act, s. 77

### **LEAD JUDGMENT BY MOHAMMED JSC**

***In this appeal the appellants are contesting the concurrent findings of fact of both the High Court and the Court of Appeal. It is settled law that such concurrent findings should not be disturbed unless if there is some miscarriage of justice and violation of some principle of law or procedure.***

H

The plaintiffs, who are appellants, in this case in Suit No. HU/24/74 at High Court, Abia State sued the defendants/respondents claiming declaration of title to seven adjoining parcels of land, damages for trespass and injunction. The defendants/respondents also in Suit No. HU/43/74 sued the plaintiffs/appellants claiming declaration of title to two adjoining parcels of land, damages for trespass and injunction. Both suits were by the consent of the parties consolidated.

Pleadings were called and exchanged by the parties. The appellants' traditional history was that their ancestors were the first settlers on the land in dispute. Miss Lewis, learned counsel for the appellants described, in the appellant's brief how the appellants found and settled in the land in dispute in the following narrative:

*"Their ancestor, Iwo Okoro Ofuru, had emigrated from Asaga Ohafia and settled at Afia Nkwo where he founded the Afia Nkwo market. Iwo Okoro Ofuru begot Ezeaja Iwo. Ezeaja Iwo begot Okwo Ezeaja Iwo. When Iwo Okoro Ofuru died his descendants found that the land around the Afia Nkwo market was not fertile enough and so they emigrated to Ugwo Ugbagba, Ugwo Agbala and Ekike lands (three parcels of land within the land in dispute) where they settled and established juju shrines therein.*

*When Iwo Okoro Ofuru first settled at Afia Nkwo he was later joined by his brothers Chukwu Oke, Ali Oke and Oke Oke. After Ezeaja Iwo and his people had left the Afia Nkwo area, Inyima Oke and his brothers continued to settle there and in course of time named the place Abiriba which was coined from their original place Abiriba. It was from their settlement of the three pieces of land within the land in dispute that the plaintiffs/appellants ancestor went on to found the other parcels of land... Ukofia, Akwukwa Gwoghorogwoghor, Nkume Barara and Iyi Okwo, making the seven pieces of land comprising the land in dispute,. The plaintiffs/appellants ancestors further went beyond the Iyi Okwo stream to found the Etitiama Nkporo village. It was the Plaintiffs/Appellants' case that from time beyond memory they and their ancestors had been exercising maximum acts of ownership over the whole of the land in dispute."*

The respondents denied the appellants traditional history and averred that the land in dispute consists of two parcels of land. They were shown in their survey plans, Exhibits "M" and "N" as Nkpako

Obolobo and Nkpako Oboru-Uru. Their great ancestor, Enuda, migrated from Ena crossing the Cross River and finally settling in a place called Udara Ebuo in Ohafia. The respondents being famous blacksmith used to attend the Nkwo market at Abiriba and they used to meet and exchange trade with the appellants' people.

One day a fight occurred between the members of the two communities and it led to a communal war. During the skirmishes the appellants' ancestors were driven to a new area north of their original abode. The respondents' ancestors occupied the land left by the appellants' people. The respondents' people renamed the place left by the ancestors of the appellants "Abiriba". There was a second war between the two communities and the appellants ancestors were driven further north until they crossed the Iyi Okwo stream which became the natural boundary between the two communities. Both parties now lived in peace and accepted the Iyi Okwo stream as the natural boundary between the two communities. It was in 1968 during the Nigeria Civil war that the appellants began to trespass on the land of the respondents. The respondents sued them and a court made an order restraining them.

I have already mentioned earlier in this judgment that both the trial High Court and the Court of Appeal had dismissed the appellants' claim. The appellants have now come before this court being dissatisfied with the decision of the Court of Appeal. The following five issues have been identified by the appellants as relevant for the determination of the appeal;

*"1. Whether there had been a breach of the provisions of Section 258 of the 1979 Constitution and if that breach had occasioned a miscarriage of justice.*

*2. Whether the amendment of the plans and pleadings of the respondents on the day judgment was to be delivered was proper.*

*3. Whether from the evidence before the Court, it could be said that the identity of the land is the same and the respondent had no duty to produce a composite plan of Exhibits A, M and N.*

*4. Whether the trial court adopted the correct procedure during the visit to the locus in quo and made proper use of the evidence obtained at the visit.*

*5. Whether the respondents had established a claim to the land in dispute and whether in the circumstance of the case, the test*

*for resolving conflicting traditional evidence was applicable and properly applied.”*

The learned counsel for the respondents identified similar issues for the determination of this appeal.

B Starting with issue 1. Learned counsel for the appellants submitted that after addresses on the 18<sup>th</sup> of March, 1988 the learned trial judge adjourned for the judgment to be delivered on 17/6/88. However, on the 17<sup>th</sup> of June instead of delivering the judgment there was an oral application from the respondent’ counsel requesting for leave to amend the Statement of Claim and the plans, Exhibits M and N. Learned counsel for the appellants opposed the application. C The learned trial judge overruled the objection and granted the application. The court thereafter adjourned for the judgment to be delivered on 23/6/88.

D This issue was raised before the Court of Appeal and it held that the trial court was not in error to adjourn for judgment after permitting the respondents counsel to amend the Statement of Claim. The court below held that the facts of this case were on all fours with the facts in the case of *Mustapha v. Governor of Lagos State* (1987) E 2 NWLR (Part 58) 39. The learned counsel for the appellants argued that the facts of this case were not on all fours with the case of *Mustapha v. Governor of Lagos State* (Supra) because in that case counsel made further addresses after the amendment. But in this case there were no further addresses after the amendment of the Statement of Claim. F Counsel referred to “*Mustapha’s*” case where Nnamani J.S.C. held as follows:

*“In the instant case, final addresses were given before the learned trial judge on 17/7/84 and judgment reserved. Such judgment would have validly been delivered on or before 18<sup>th</sup> October 1984. On 4<sup>th</sup> October 1984 an application to amend the plaintiffs Statement of Claim was granted by the learned trial judge. On 17<sup>th</sup> October 1984 what would appear to me to be final addresses were taken and judgment was delivered on 9<sup>th</sup> November 1984... I take H note of the fact that the appellant amended the last paragraphs of his Statement of Claim to ask for further relief, that on the 4<sup>th</sup> of October 1984, both Miss Adereni for 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants and Mr. Awokoya for 3rd Defendant addressed the court opposing the amendment as lacking in merit, that on the invitation of the court to*

*be addressed further on the amendment, Mr. Awokoya for 3<sup>rd</sup> Defendant on 10<sup>th</sup> October 1984 offered substantial and long address on the amended Statement of Claim”.*

Miss Lewis referred also to the cases of Sodipo v. Lemmingkainen Oy & Another (1985) 2 NWLR (part 8) 547 and Ijebu-Ode Local Government v. Adedeji Balogun & Co. (1991) 1 NWLR (part 166) at page 136. In both cases after the court had adjourned for judgment it invited counsel for further addresses. The court thereafter delivered its judgment which was outside the three months period within which a judgment shall be delivered as provided by Section 258 (1) of 1979 Constitution. The Section read:

*“Every court established under this constitution shall deliver its decision in writing not later than 3 months after the conclusion of evidence and addresses and furnish all parties to the cause or matter determined with duly authenticated copies of the decision on the date of the expiry thereof.”*

Learned counsel for the respondents submitted that in dealing with this case the Supreme Court is called upon to construe Section 258(1) Constitution in its ordinary meaning. Learned Counsel further argued that in the construction of statutes the court must follow the ordinary meaning of the words used in the statute where the words were clear and unambiguous - See Ogbonna v. Attorney General of Imo State (1992).

***I am in complete agreement with the court below that “Mustapha’s case is on all fours with the case in hand. In any event where the statute says after the conclusion of evidence and addresses it does not inhibit a party from making any application which the procedure permits. Once such application is made and considered by the court the three months period would start from the date the court adjourns for judgment. This view is well considered by Obaseki JSC. In Mustapha’s case wherein he held as follows:***

***“On the issue of the High Court delivering its judgment outside the period prescribed by S. 258(1) of the 1979 Constitution, I found that the judgment of the High Court was delivered within the three months limit from the date of conclusion of the final address and as such there was no breach. The application by the respondents for amendment of their plead-***

***ings interrupted the period and made the period of three months to start running from the date of the amendment. The Court of Appeal erred in holding that there was non-compliance with the section. (See Mustapha case (supra on p. 559). (Underlining mine) ”.***

B This issue is therefore resolved in favour of the respondent.

Learned counsel for the appellants questioned in issue Two whether the amendment of the plans and pleadings of the respondent on the day judgment was to be delivered was proper? The issue here relates to the application made on 17<sup>th</sup> of June 1988 by counsel for the respondents to amend plans Exhibits M and N and also amend the Statement of Claim. Learned counsel for the appellants submitted that the amendments of Exhibits M and N were improper, irregular, invalid and null and void because the plans were already exhibits before the court. What the counsel for the respondents sought to do and what the learned trial judge granted was therefore an amendment of an Exhibit or exhibits before the court. Apart from the fact that a plan is a document which can only be amended by its maker, if the application to amend the respondents' plan had been properly brought and granted, a fresh plan should have been prepared by the respondents' surveyor which would then be tendered afresh in evidence after the case had been reopened.

With regard to pleadings which were amended the learned counsel argued that the application should have been brought by way of a formal application putting the other party on notice, showing exactly what is to be amended and what reasons are for the amendment. Counsel referred to Dennis Njemanze v. Shell B.P. Port Harcourt (1966) 1 ALL NLR, 8 at 11. and Agbaje v. Taibatu James G (1967) NMLR 49.

***It is settled law and practice that the power of the trial court to permit amendment of the pleadings is almost limitless and this power will not be questioned unless it is shown that the trial court's discretion was improperly exercised. An amendment of the pleadings would be granted, even at a late stage of the proceedings, if the amendment does not take the other party by surprise but is meant to write down what is understood by both parties to be the basis on which the action had been fought and evidence led from the beginning. See***

Amadi v. Thomas Aplin (1972) 4 S.C. 288, Oguntimehin v. Gubere (1964) 1 All N.L.R. 176 and Shell B.P. v. Jammal Engineering (1974) 4 S.C. 33.

I now come back to the present case. Learned counsel for the respondents at the trial High Court applied for permission to amend the plans and the Statement of Claim in the following submission: B

*“Ogba K. K. for the Defendants. May I respectfully crave the indulgence of the Court to orally to apply for an amendment of the defendants’ plan Exhibits M & N. The only amendment is at the Reference Sections of both plans. The third items in both for the word Red. I apply to substitute Pink. Then in the 2<sup>nd</sup> further amended Statement of Claim in Suit HU/43/74 filed on 16<sup>th</sup> July, 1986. I apply to amend paragraph 4. In line 7 I apply to delete the word Yellow and substitute Pink. In the further amended Statement of Defence filed on 4/2/86 in HU/24/74 in paragraph 7 I apply to delete lines 6 - 9 and in paragraph 10(c) in line 2 to delete the words “Both of” and substitute the words “which was part of”, for the word were. In line 2 of paragraph 11 to delete the words “both lying to the East of the land in dispute.” My Lord, the only purpose for those amendments is to bring the description of the land in dispute in harmony with the evidence adduced and the plans Exhibits M. & N.”* C D E

Learned trial judge in reaction to the objection raised by the appellants’ counsel to the application for the amendments ruled that the amendments do not at all affect the area in dispute. They merely changed colours of the land in dispute. Learned trial judge further stressed that he had description of the area in dispute from both sides and there is no doubt that both sides are disputing over one and the same parcel of land. I entirely agree. The Court of Appeal referred to the case of Cropper v. Smith (1884) 26 Ch.D 700 at 710 where it was held that the object of the court is to decide the right of the parties and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their right. **There is no kind of error or mistake, which if not fraudulent or intended to over-reach which the court cannot correct if it can be done without injustice to the other party.** F G H

It is patently clear that the change of colours in the plans did not change the boundaries of the land in dispute. I have looked at

the plans and in my respectful view the amendment was in fact unnecessary. What the surveyor had drawn was not changed by the recolouring. The amendment did not introduce any new issue but merely corrected an error in describing the colour with which the area in dispute was verged. ***Learned counsel for the appellants made heavy weather of these amendments but failed to point out how the amendments affected their case before the court or how it would entail injustice or surprise or embarrassment to them. To say that the appellants were overreached by the amendments simpliciter without describing how the amendments affected their case before the court is a hollow submission. I therefore agree that the amendments of both the plans and the Statement of claim were of a cosmetic nature and caused no injustice or embarrassment to the appellants. I resolve this issue also in favour of the respondents.***

The complaint of the appellants in issue three is where the Court of Appeal held that it was clear from Exhibits A and M that the identity of the land in dispute was the same. Learned counsel for the appellants argued, in the appellants brief, that the land in dispute is not the same. On Exhibit A, the Umuahia / Ohafia Road touches the land in dispute at the point called Isiomumu Amafor while on Exhibits M and N the land in dispute starts at Abiriba junction. Abiriba junction does not touch the plaintiffs' plan, Exhibit A and does not feature anywhere on the plan. Therefore, the area marked X by the learned trial judge on Exhibit M during his inspection of the land in dispute cannot be the same as the area marked X by the judge on Exhibit A. Counsel further argued that the reasoning of the Court of Appeal that the identity of the land in dispute is the same was predicated on the fact that there were some landmarks that were present on both Exhibits A and M.

But learned counsel for the respondents, quite correctly observed that the witness of the appellants, PW2, gave the following evidence:

H *"The defendants also sued us. Their action is also over the same land."*

Also in paragraph 9 of the affidavit in support of the appellant's motion for the two suits, HU/24/74 and HU/43/74, to be consolidated the appellants averred as follows:

*“That Suits No. HU/24/74 and HU/43/74 are cross actions or counter-claims of the same parties and the same subject matter”.*

Learned counsel further pointed out that learned counsel for the appellants before the trial court admitted that the point marked X on the plaintiffs plan, Exhibit A, by the learned judge is the same as the point marked X in Exhibit M. This point which is featured in both Exhibits A and M was Abiriba junction which is agreed to be an area belonging to the respondents. This area is a built up area. **Learned counsel for the appellants cannot be correct to say that the presence of the same landmarks in both plans is no reason to conclude that the plans are the same. It is correct, though, that the super-imposition of the plans, Exhibits A, M and N by a qualified Surveyor would clarify the matter if the land in dispute was identical. But the Court of Appeal rightly observed that it was the duty of the appellants to lead evidence for the super-imposition of the plans since it is their case that the identity of the land in dispute is not the same. The appellants counsel argued that the respondents were also plaintiffs in the case. But it is not the case of the respondents that the land in dispute is not the same. Looking at the plans, and taking into consideration that the learned trial judge visited the Locus in quo I am quite satisfied that the land in dispute between the parties from the evidence before the court is identical. This issue is also resolved against the appellants.**

Issue four deals with the trial courts visit to the locus in quo. The grouse of the appellants in respect of this issue is that before the learned trial judge decided to visit the locus in quo he did not give notice to the parties to assemble their witnesses before he embarked on the visit. There were juju priests who would have been called to identify the shrines on Exhibit A.

The issue concerning visit to locus in quo by the learned trial judge was raised before the Court of Appeal. Edozie JCA, who wrote the lead judgment considered the issue in sufficient detail. The learned justice of the Court of Appeal referred to Section 77 of the Evidence Act which gives the courts power to undertake inspection of an immovable property. **I agree with Edozie JCA, that the law does not provide for giving prior notice to parties in order that they may assemble their witness before undertaking the inspection**

**of an immovable property.**

The Evidence Act laid down two procedures for a visit to a locus in quo. The court may adjourn the case and move to the locus and continue sitting in the normal way by hearing and taking evidence of witnesses, or it may move to the locus to inspect the subject matter of dispute and return to the courtroom for evidence, if any, of inspection to be adduced. See *Chukwuogor v. Obuora* (1987) 2 N.S.C..C. 1063 Learned counsel for the appellants submitted that if they were given advance notice of the visit to locus in quo they would have assembled their witness including the juju priests and the surveyor. The juju priest would show the shrines and surveyor would have shown the judge other features on the plan. **But the learned trial judge did not visit the locus in quo alone. He was accompanied by Chief Uka Anya Uva, the 3<sup>rd</sup> appellant and the appellants' counsel to the land. The visit to the locus in quo is not for an additional hearing for all the witnesses to be assembled. The witnesses had already given evidence. The court is going there to see for itself what had been testified by the witnesses. If it needed any further explanation the parties and their counsel are there to give it. In any event the parties know more about the land in dispute than any of their witnesses.** When he surveyor testified in court he said:

*"The plaintiff's took me to the land. They showed me the features, I produce a plan."*

If that is so what stopped the plaintiffs from showing the features to the judge? It is permitted at the visit of the locus in quo for the learned trial judge to take notes of inspection and ask questions about the features he had been told by witnesses in court to exist on the land. After the inspection the court will re-assemble and hear evidence from witnesses who if the counsel of the parties request shall be cross-examined. It should be borne in mind that the court can choose to conduct the proceedings at the locus in quo.

***In the case in hand the learned trial judge visited the locus in quo and heard witnesses there. Counsel were asked to cross-examine the witnesses which they declined. The court recorded all what transpired there and when it reassembled the notes were read to the hearing of all the parties and their respective counsel. Both counsel said that the notes were***

**correct. I have not seen anything wrong with this procedure.**

Let me reproduce how the testimony of a mechanic was taken at the Locus in quo. It goes as follows:

*"The court noticed some structures in the said area - a mechanic workshop and a new storey building springing up. The workshop has definitely been for sometime. The owner of the workshop was fortunately there. The court sent for him and asked him questions which he answered under oath. Witness No. 2 at the inspection site.*

*Sworn on Bible, states in Ibo. My name is Awa Ukoha. I live at Eluda Primary School Abiriba. I am a motor mechanic.*

*By Court:*

*Q. Who is the owner of the mechanic workshop we are seeing?*

*A. I*

*Q. Do you own the land?*

*A. No*

*Q. Who is your landlord?*

*A. Udeagba Ichi*

*Q. Where is he from?*

*A. From Abiriba*

*Q. When did you first move in here?*

*A. In 1978*

*The court then invited counsel - to question the witness.*

*Cross-examined by Onukwu - No question*

*cross-examined by Ogba:*

*Q. Has anyone ever challenged you?*

*A. No."*

It is crystal clear from the proceedings above that the court cannot be faulted for taking the testimony of a witness at the locus in quo. After the notes of inspection were certified correct by counsel of both parties the court adjourned the case for further address. There is nothing irregular about the visit to the locus in quo and for these reasons I resolve this issue in favour of the respondent.

The last issue covers ground five and six. Grounds 5 and 6 are, according to the learned counsel for the respondent incompetent because they were grounds of fact and mixed law and fact. Learned counsel argued that the appellant had not obtained leave

before filing them. I will therefore reproduce those grounds for scrutiny:

*“5. The court of appeal erred in law in holding that the respondents have established by evidence a claim to the disputed parcel of land which conclusion was reached by the application of the well established test for resolving conflicting traditional evidence in respect of claims to land when that test is inapplicable and irrelevant to the determination of the claim before the trial court and the Court of Appeal.*

*Particulars of Error*

*(a) The claim before the court is not one of conflicting traditional evidence.*

*(b) The respondents admitted that the land originally belonged to the appellants but that they are now the present owners as a result of conquest. The burden is therefore on them to establish this fact even if (which is not admitted) the respondents show that:*

*(1) They are the owners of adjoining land*

*(2) That they are in occupation of what in essence is an insignificant portion of the land, and*

*(3) That they have judgments in their favour in respect of a portion of the land, which portion of the land is not clearly identifiable, these facts are not enough to give him title to the entire parcel of land.*

*(c) The various judgments relied upon by the trial judge particularly Exhibits J, J1, J2, & J3, (native court judgments) are not cases relating to title of the land between the respondents and the appellants or 3<sup>rd</sup> parties but are essentially claims to parcels of land as between members of the respondents clan.*

*6. The learned justices of the Court of Appeal erred in law in holding that the respondents have established ownership of the land in question through conquest when the evidence relied upon as to conquest was unreliable, inconsistent and based on inferences.”*

***It is axiomatic that the respondents’ counsel is right that ground 5 has been erroneously coined “ground of law”. It is at best ground of mixed law and fact. Ground 6 is definitely a ground of facts only. These two grounds could only be argued after obtaining the necessary leave of this court or the court below. The appellants have not reacted to this objec-***

***tion in their Reply Brief. Since they have not done so I will regard their silence as accepting that the objection is meritorious. I therefore strike out grounds 5 and 6 and the issues formulated on them.***

In the result, this appeal has failed and it is dismissed. The judgment of the Court of Appeal affirming the judgment of the High Court is hereby further affirmed. I award N10,000.00 costs in favour of the respondents.

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### **WALI JSC**

I am privileged to have read before now, the lead judgment of my learned brother Uthman Mohammed, JSC and with which I entirely agree. I adopt as mine, the reasoning and conclusion therein for dismissing the appeal.

I find the appeal lacking merit and I hereby dismiss it with N10,000.00 costs to the respondents.

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### **KUTIGI JSC (Dissenting)**

In the High Court holden at Umuahia the Plaintiffs in suit No. HU/24/74 sued the Defendants claiming a declaration of title to seven (7) adjoining parcels of land, general damages for trespass and an injunction.

The Defendants in suit No. HU/43/74 which is a cross-action sued the Plaintiffs also claiming for a declaration of title to two (2) adjoining pieces of land, special and general damages for trespass and an injunction.

The two suites were by consent of the parties later consolidated by the High Court with the plaintiffs and the Defendants in suit No. HU/24/74 being the Plaintiffs and Defendants respectively in the consolidated action.

Pleadings were ordered, filed and exchanged between the parties. In the course of trial there were series of amendments to the pleadings as well as the plans. The Plaintiffs on their side called a total of nineteen (19) witnesses while eight (8) witnesses testified for the Defendants.

The gist of the Plaintiffs' case was that their ancestor were the

first settlers on the land in dispute. Their ancestor, Iwo Okoro Oturu, had migrated from Asaga Ohafia and settled at Afia Nkwo. Iwo Okoro Oturu begat Ezeaja Iwo who begat Okwo Ezeaja Iwo. When Iwo Okoro Oturu died his descendants found that the land in Afia Nkwo was not fertile enough and so they emigrated to Ugwu Ugbagba, B Ugwu Agbala and Ekike lands, three parcels of land within the land in dispute, where they settled and established juju shrines thereon. That when Iwo Okoro Ofuru first settled at Afia Nkwo he was joined by one Inyima Oke from a place called Abiribara. Inyima Oke was C later joined by his brothers. After Ezeani Iwo and his people had left Afia Nkwo area, Inyima Oke and his brothers continued to live there and in course of time named the place Abiriba which was coined from their original place Abiribara. It was from their settlement of the three pieces of land, that the plaintiffs' ancestors went on to found D the other four parcels of land making the seven pieces of land comprising the land in dispute. The Plaintiff's ancestors also found the Etitiama Nkporo village beyond the Iyi Okwo stream. It was the Plaintiffs' case that from time immemorial, they and their ancestors had been exercising maximum acts of ownership over the whole of the E land in dispute.

The Defendants on the other hand, said the land in dispute which consists of two parcels of land belong to them. The said their ancestors fought and defeated the Plaintiffs and drove them away from their home and farmlands and have since been in exclusive F possession of the land in dispute. That the Plaintiffs had been driven further north until they crossed the Iyi Okwo stream. That peace was made on the northern bank of the Iyi Okwo which because the natural boundary between the Plaintiffs and the Defendants. That the G Plaintiffs first trespassed on the land in dispute in 1968 which they continued after the civil war. The Defendant tendered in evidence certain Native Court suits over portions of the land in dispute.

It is evident that each side relied on traditional history for its claim to the land in dispute. Both sides however, agreed that the area H now known as Abiriba was originally settled by the Plaintiffs. But while the Plaintiffs say their ancestors voluntarily vacated the place and migrated northwards in search of more fertile land, the Defendants maintained that the Plaintiffs' were expelled from Abiriba by military action.

At the conclusion of the trial, the learned trial judge dismissed the Plaintiffs' case and upheld the claims of the Defendants. He concluded his judgment on pages 418-419 of the record as follows:

*"In the final result the plaintiffs in suit No. HU/43/74 (i.e. Ameke Abiriba people) are entitled to succeed and I hereby enter judgment for them and declare in their favour title to statutory/customary right of occupancy over all that parcel of land called Nkpako Oboro Uru and Nkpako Obolobo which lie at Abiriba in Arochukwu/Ohafia Local Government Area and verged pink in Plan No. TJ/IM/36/LD made on 20<sup>th</sup> November 1985, and received in these proceedings as Exhibit M. I award in favour of the successful Plaintiffs in suit No. HU/43/74, the sum of N64,800.00 as special damages for the sand, stone and gravel excavated and carried away by the Defendant i.e. Etitiama Nkporo people in the land. I order perpetual injunction restraining the Defendants on record and those they represent i.e. Etitiama Nkporo people, their servants and or agents from committing any further acts of trespass in the land. I have earlier dismissed the suit of the Plaintiffs i.e. Etitiama Nkporo people in suit No. HU/24/74.*

*The Ameke Abiriba people are entitled to costs in both suits."*

Aggrieved by the decision of the learned trial judge, the Plaintiffs lodged an appeal to the Court of Appeal holden at Port-Harcourt. The Defendants also filed a Notice of Cross-Appeal which related to the quantum of special damages awarded by the trial Court only. The Plaintiffs filed a total of sixteen (16) grounds of appeal from which ten (10) issues were distilled for determination by the Court of Appeal. The Defendants naturally filed only one ground appeal and therefore framed only one issue for determination by the Court.

The Court of Appeal carefully considered all the issues submitted to it for resolution both in the Plaintiffs' appeal and in the Defendants' Cross-appeal and in a unanimous judgment came to the following conclusions-

"1. The judgment of the lower court is affirmed save the order for the award of special damages of N64,800.00 which is hereby set aside.

2. The cross-appeal fails and is dismissed

3. Costs are to remain where they were incurred."

Still dissatisfied with the judgment of the Court of Appeal, the

Plaintiffs have now further appealed to this Court.

In accordance with the Rules of Court the parties have filed and exchanged brief of argument in the appeal. Learned counsel on both sides also made additional oral submissions at the hearing of the appeal. The briefs were adopted on both sides.

B In the Plaintiff's brief the following five (5) issues have been identified for determination.

C *"1. Whether there had been a breach of the provisions of section 258 of the 1979 Constitution and if that breach had occasioned a miscarriage of justice.*

*2. Whether the amendment of the plans and pleadings of the Respondents (Defendants) on the day judgement was to be delivered was proper.*

D *3. Whether from the evidence before the Court, it could be said that the identity of the land is the same and the Respondents (Defendants) have no duty to produce a composite plan of Exhibits A, M. and N.*

E *4. Whether the trial Court adopted the correct procedure during the visit to the locus in quo and made proper use of the evidence obtained at the visit.*

F *5. Whether the Respondents (Defendants) has established a claim to the land in dispute and whether in the circumstances of the case, the test for resolving conflicting traditional evidence was applicable and properly applied."* (Words in brackets are mine)

I will now deal with the issues one after the other.

G Issue (1) - This issue can be disposed of quickly. The trial High Court heard final addresses on 18/3/88 and adjourned for judgment to be delivered on 17/6/88, exactly three months from the date of addresses. On 17/6/88 judgment was not delivered because an oral application was made to amend the pleadings and plans of the Defendants and which application was granted after addresses of counsel in support and opposition of the motion. Judgment was then delivered on 23/6/88. The Plaintiffs now contend that the judgment H contravened the provisions of section 258(1) of the 1979 constitution having been delivered over three months after addresses were heard on 18/3/88. The Defendants on the other hand stated that the judgement did not contravene section 258(1) of the 1979 Constitution because final addresses were made on 17/6/88 when submis-

sions were made for and against the motion to amend pleadings and plans. In addition they said that even if the delay of six (6) days (from 17/6/88 to 23/6/88) can be said to have been in breach of section 258(1) of the 1979 constitution, the Plaintiffs have failed to show that it has occasioned any miscarriage of justice on their part as provided for under section 258(4) of the 1979 Constitution. B

Now, section 258 subsections (1) and (4) of the 1979 constitution read as follows:

*“258(1) Every court established under this constitution shall deliver its decision in writing not later than 3 months after the conclusion of evidence and addresses and furnish all parties to the cause or matter determined with duly authenticated copies of the decision on the date of the expiry thereof.”* C

*“258(4) The decision of a court shall not be set aside or treated as a nullity solely on the ground of non-compliance with the provisions of this section unless the court exercising jurisdiction by way of appeal from a review of that decision is satisfied that the party complaining of such non-compliance has suffered a miscarriage of justice by reason thereof.”*

I must say that this same issues was argued before the Court E of Appeal. The Court of Appeal in its lead judgment had this to say:-

*“On 17/6/88 when judgment was to be delivered, the Respondents’ counsel applied orally to amend their pleadings. The Court heard addresses of counsel in support and opposition of the application and granted the application. The addresses of counsel on 17/6/88 were the final addresses within the meaning of section 258(1) of the 1979 constitution as interpreted in MUSTAPHA v. GOVERNOR OF LAGOS STATE (1987) 2 NWLR (PT 58) 539. The judgment delivered on 23/6/88 was therefore validly delivered within the stipulated period of 3 months. Even if the period were to be calculated from 18/3/88... The appellants by virtue of section 258(4) of the 1979 constitution have the burden of establishing that they had suffered a miscarriage of justice... It is therefore my considered view that the appellants having failed to establish that they suffered any miscarriage of justice their contention is misconceived.”* F G H

I entirely agree. The judgment of the High Court was certainly delivered within the 3 months’ limit from the date of conclusion of the final addresses as prescribed by section 258(1) of the

1979 constitution and as such there was no breach. The application by the Defendants for amendment of their pleadings and plans interrupted the period and made the period of 3 months to start running afresh from the date of the amendment. But even if section 258(1) was breached, the Plaintiffs woefully failed to show that they suffered  
B any miscarriage of justice as a result of the breach See section 258(4) *ibid*. The issue therefore fails.

Issue (2) - This issue relates to the oral amendments of the pleadings and plans by the Defendants before judgment was delivered finally. Despite the objections by the Plaintiff's counsel, the trial  
C court granted the oral application to amend. The Plaintiff's now contend, as they had done before the court below, that the plans Exhibits M & N which were before the court could only have been properly amended by its maker, the surveyor, and not by counsel. That  
D an application to amend if granted would have necessitated the filing of a fresh plan which would have been tendered afresh and the case therefore reopened. That the amendment granted in this case was improper, irregular, invalid and null and void. That at the point where the amendment was granted, a reopening of the case was without  
E doubt impossible and the amendment was intended to over-reach the Plaintiffs. It was also submitted that the Court of Appeal was wrong to have found that Exhibits M & N were part of the pleadings and as such could be amended orally. They are not part of the pleadings it was stressed. That the application to amend should have been brought  
F by way of a formal application putting the Plaintiffs on notice, and showing exactly what was to be amended and the reasons thereof. That the trial court by ordering the Defendants to write-in the amendments in the copies of the court's file, meant that there was no record  
G of what the state of the pleadings were before 17/6/68. The Plaintiffs were therefore overreached by the amendments because the case had already been fought on the previous pleadings. It was further submitted that the amendments have resulted in confusion as to the identity of the land in dispute between the parties because there was  
H no evidence on record as to the colouring of the plans by any of the Defendants' witness even though the amendments were said to have been done to bring the descriptions of the land in dispute in harmony with the evidence adduced and the Plans Exhibits M & N. The following cases were cited in support -

NJEMANZE v. SHELL B.P. PORT-HARCOURT (1966) ALL NLR 8 at 11, AGBAJE v. TAIBATU JAMES (1967) NMLR 49, BAMISHEBI v. OTE (1995) 8 NWLR (Pt. 411) 1. The court was urged to hold that the amendments of the pleadings and plans on 17/6/88 were improper.

Responding, the Defendants contended that there was in fact no amendment of the Plans and that the amendment of the pleadings merely led to the reduction of the area pleaded as being in dispute so that it would be in harmony with the area in dispute in the plans, Exhibit M & N. That an examination of the amendments would show that the only alteration in Exhibits M & N consisted of substituting the word PINK for the word RED in both plans, and the deletion of a few words and phrases from the Defendant's Statement of Claim in suit No. HU/37/74. That no new issues were introduced by the amendments and that the purpose of the amendments was to bring the description of the land in dispute in harmony with the evidence already adduced including the plans. It was submitted that the Plaintiffs were not and could not have been over-reached by the amendments. That although as a rule an application for an amendment should be by way of a motion, in practice an oral application can also be made where it is found to be convenient to do so as in this case. That rather than confuse the identity of land in dispute as contended by the Plaintiffs, the amendments clarified the situation. That it was not correct that the Plaintiffs were not given the chance to address the court after the amendments because the plaintiffs never applied to the court to address it, nor did they make any application to amend their own pleadings until judgment was finally delivered. It was contended that the amendments to the Defendants' pleadings and plans on 17/6/88 were merely cosmetic and only served to make more intelligible the description of the land in dispute.

This issue clearly relates to the propriety or otherwise of the amendments of the Defendants' pleadings and plans on the day fixed for the delivery of the judgment. I say straight away that the guiding principle of cardinal importance on the question of amendment is that all such amendments ought to be made for the purpose of determining the real question in controversy between the parties or of correcting any defect or error in the proceedings, the object of the court being to decide the rights of the parties and not to punish them

for mistakes they make in the conduct of their cases, provided they are not fraudulent or intended to over-reach and can be corrected without injustice to the other party (see generally *G. L. BAKER LTD v. MEDWAY BUILDING & SUPPLIES LTD* (1958) 1 WLR 1216 *TILDESLEY v. HARPER* 10 CH.D 396, *LOUFTI v. CZARNIKOW* B (1952) 2 AER 823 *ADETUTU v. ADEROHUNMU* (1984) 6 S.C. 92 *TAIWO & ORS v. AKINWUNMI & ORS* (1975) 4 S.C. 143). Leave to amend will thus be allowed unless the party applying is acting mala fide or he had done some injury to his opponent which cannot be compensated for by costs or otherwise. Leave to amend ought to be allowed if also by doing so the real substantial question can be raised between the parties and multiplicity of legal proceedings avoided (see *KURTZ v. SPENCE* 36 CH. D 774).

From the guiding principles stated above, I find nothing wrong D in the application to amend being made on the day of judgment. The problem here is whether the application ought to have been granted and if granted as the case herein, the Plaintiffs ought to have been given time or opportunity to amend their own pleadings as they might consider necessary.

E I have studied the record herein particularly the pleadings, evidence thereon, and judgments of the lower courts. I totally disagree with the learned counsel for the Defendants that the amendments effected on the day of judgment were merely cosmetic. Far F from that, they were far reaching as follows:

1. The pleadings of the defendants show the land in dispute as verged yellow vide paragraph 4 of the Statement of Claim in HU/43/74.

2. The plans of the Defendants, Exhibit M & N show the land G in dispute as verged red.

3. The area verged yellow in both Exhibit M & N is a much larger area than the area verged red. The small "red" lies within the large "yellow"

4. There is no evidence on record led by either the surveyor H or any witness on these colours or any colour at all.

5. By the amendments of changing the colours "yellow" and "red" to "pink", and deleting four lines from paragraph 7 of the Defendants Statement of Defence in HU/24/74 which dealt with the description of the land in dispute, the Defendants had tried to tally

the pleadings with their plans only and not with the evidence. This is fatal!

6. Defendants' counsel himself agreed that the amendments led to the reduction of the area pleaded as being in dispute (see page 18 of the Respondents' brief, last paragraph).

In view of the order which I intend to make finally in this case I do not intend to say more on this issue. Suffice it to say however that it is clear to me that in the circumstances such as this where the case of the parties had been fought on yellow and red pieces of land in dispute, it was improper to have allowed the Defendants to substitute the land in dispute with another a new "*pink*" piece of land not in dispute without giving the opportunity to the Plaintiffs to react by amending their own pleadings and or plan. Certainly the new "*pink*" piece of land cannot be the same as the former "*yellow*" or "*red*" pieces of land in dispute. If they are then where is the necessity for the amendment? It is not enough to say that the Plaintiffs opposed the application for amendments or that they did not ask or apply to make any amendment themselves. The nature of the amendments by the Defendants were of such a nature that in my view the learned trial judge ought to have adjourned the proceedings to enable the Plaintiffs consider what steps they would next take. But that was not be. Judgment in the case was delivered the following week after the amendments by the Defendants. I think the Court of Appeal was wrong when it held in the lead judgment that the Plaintiffs did not suffer any injustice as a result of the amendments. The Court was also wrong when it also held that by changing the "*Red*" in Exhibits M & N to "*Pink*", and "*Yellow*" in the Statement of Claim to "*Pink*" did not mislead the Plaintiffs. I have no slightest hesitation in saying that the amendments were misleading and intended to over-reach embarrass and surprise the Plaintiffs.

One other important point is whether the Plans, Exhibits M & N could have been properly amended like pleadings as stated by the Court of Appeal. It is true that Plan of the parties are normally pleaded and filed along with the pleading obviously to familiarize the other side with the subject matter of the dispute. But each side must go on from there to tender the Plan or Plans in evidence either by consent or through the maker who is usually a licensed surveyor. When a Plan is so admitted in evidence in a court of law it becomes

part of the evidence before the court. In this case both Exhibits M & N were tendered in evidence in court by DW.5, the licensed surveyor, who prepared the two plans. I have no doubt that the Plans were prepared as a result of the instruction passed to him (the surveyor) by the Defendants. I venture to state that the proper person to make any amendments to these plans would therefore have been the surveyor (DW.5), who made them and not counsel (see *UGBO v. ABURIME* (1994) 8 NWLR (PT. 360) 1. The DW.5 would have been in a position to say whether or not there was any mistake on his part and the Plaintiffs would have been entitled to cross-examine him especially when the amendments went to the root of the dispute between the parties and has resulted in confusion as to the identity of the land in dispute.

I therefore resolve issue (2) in favour of the Plaintiffs and hold that the amendments of the pleadings and Plans of the Defendants on the day of judgment was not proper in the circumstance of this case.

Issues (3) - This is about whether or not from the evidence before the court it could be said that the identity of the land in dispute is the same and who between the parties had the duty to produce a composite plan.

Having regard to what I have said above, it is clear that the identity of the land in dispute was not established. The Defendants knew very well that the area verged “green” in the Plaintiffs Exhibits A was not the same as the areas verged “yellow” and or “red” in the Defendants pleadings and Exhibits M & N respectively. Naturally this gave rise to their oral application to amend both the pleadings and plans on the day of judgment as discussed above. The plaintiffs were not given opportunity to react to the amendments which effectively affected and altered the subject matter of the dispute. Where parties in a suit choose to file different plans on both side, it will be the duty of the party who disputes the identity of the land (and who wants to succeed), to file a composite plan where that becomes necessary, or as the court may order or direct at the trial. The purpose of filing a composite plan is to fix and delimit the land in dispute. In this case, both the two lower courts erroneously in my view found that the identity of the land in dispute was established. There was therefore no need for a composite plan by either side. But the Plaintiffs in the

Court of Appeal argued rightly in my view that the identity of the land in dispute was not established and the court, quite rightly too told them that it was their duty if that was the case to have prepared a composite plan. I think the court was right in its view as he who asserts must prove. Issue (3) therefore succeeds in part only.

Issue (4) - This issue dealt with the visit to the locus in quo by the learned trial judge. During the visit the record shows that the court suo motu marked "X" in the Plaintiffs' Plan, Exhibit A, and Defendants' Plan, Exhibit M as being Abiriba Roundabout. The court also recalled Plaintiffs' PW.2 suo motu as well as called 3<sup>rd</sup> Defendant as a witness without application by counsel from either of the parties. The learned trial judge also went ahead to call as a witness the owner of a mechanic workshop who was in the vicinity. The learned trial judge examined PW 2 as to the locations of shrines in Exhibit A, a document prepared by a licensed surveyor PW1 forgetting that the Plaintiffs had earlier in court called PW.5, 11, 12, 13, & 14 who were juju priests in respect of the shrines shown in Exhibit A. These witnesses were not present while the questions were put to PW 2 who did not claim to have worshipped in those shrines.

The resultant effect of all these is that the learned trial judge made erroneous findings of fact to the effect for example that (1) there was no and there never had been shrines on the land in dispute and (2) the permanent structure he found on the land in dispute were constructed with the consent of the Plaintiff's who did not consider them as an invasion of their right of ownership. I have myself read the record and report of the visit to the locus in quo. I have no doubt that the visit had resulted in specific findings of fact which were unfavourable to the Plaintiffs and had resulted in a miscarriage of justice to them. The learned trial judge from all indications I must say seemed to have placed himself in the position of a witness, which he is not, when he began to make markings on the Plans (Exhibits in the case) and to call witnesses without the consent of the parties and to have proceeded to draw conclusions from his own observations not supported by evidence on record. It is not enough for learned counsel for the Defendants to merely contend that the counsel for the Plaintiffs was present throughout the visit and that he raised no objection to anything done but signed as correct the notes of the inspection prepared by the learned trial judge. As I said the learned

trial judge in the case effectively placed himself in the position of a witness and arrived at conclusion based on his personal observations. He has descended into the arena. This he cannot do. The main purpose of a visit to the locus in quo is to assist the court to understand fully the question in issue in a case, to appreciate and follow the evidence before it and properly apply such evidence in arriving at its decision. On such inspections the judge must avoid placing himself in the position of a witness (see generally *OLUMOLU v. ISLAMIC TRUST OF NIGERIA* (1996) 2 NWLR (PT 430) 253, *OJIAKO v. EWURU* (1994) 4 NWLR (PT. 341) 646, *AKEREDOLU v. AKINREMI* (1989) 3 NWLR (PT. 108) 164, *BRIGGS v. BRIGGS* (1992) 3 NWLR (PT 228)128. It is settled law that if a judge is of the view that it is necessary to substitute the eye for the ear in the reception of evidence and that such a course will assist in arriving at a decision, he may carry out an inspection of a locus in quo but it must be borne in mind that proceedings at an inspection form part of the trial, and that a visit to the locus cannot justify a 'relaxation or non-observance of the law of evidence or the rules of practice and procedure (see *ADEPONLE v. AJALEBE & ANLR* (1969), *ALL N.L.R.* 222). Issue (4) is consequently resolved in favour of the Plaintiffs.

Issue (5) - This is whether or not the Defendants had established their claim to the land in dispute. Having regard to my conclusions on issues (2) - (4) above, the answer obviously is that the Defendants could not be said to have proved their claims particularly in the light of the amendments and visit to the locus in quo referred to above. Issue (5) therefore succeeds.

On the whole the appeal succeeds. It is hereby allowed. The judgments of the Court of Appeal as well as that of the trial High Court are hereby set aside. The appropriate order to make in my considered view is, I believe, that of a retrial. It is therefore hereby ordered that the case shall be tried de novo by another judge of the High Court. The Defendants/Respondents shall pay to the Plaintiffs/Appellants costs assessed at 10,000.00 only.

### **OGWUEGBU JSC**

I had a preview of the judgment just delivered by my learned brother Mohammed, JSC. I am in complete agreement that this ap-

peal should be dismissed. I only wish to make my contribution in relation to whether the amendment of the plans and pleadings of the defendants was proper, whether the learned trial judge adopted the correct procedure during the visit to the locus in quo and made proper use of the evidence obtained at the visit and whether the defendants established their claim to the land in dispute. B

We have to bear in mind that this appeal emanated from two consolidated suits Nos. HU/24/74 and HU/43/74. The appellants in the court below and this court are plaintiffs in Suit No. HU/24/74 and the respondents herein are the defendants. In Suit No. HU/43/74, the positions are in the reverse order. On consolidation of both suits by the order of the court, the plaintiffs in the earlier action (HU/24/74) became the defendants. C

In paragraph 15 of the further amended statement of claim in HU/24/74, the plaintiffs' claim against the defendants is as follows: D

“(a) A Declaration of title to all those pieces or parcels of land known as and called (1) IYI OKWO,

(2) NKUMA BARARA, (3) UKOFIA, (4) AKWUKWA OGWOGHORO-GWOGHORO, (5) UGWU AGBALA, (6) UGWU UGBAGHA and (7) EKIKE all situate at Etitama Nkporo in the Arochukwu/Ohafia Local Government area within the jurisdiction of this court. E

(b) 1,000.00 being general damages for trespass

(c) Perpetual Injunction...” F

The defendants/respondents who are plaintiffs in HU/43/74, in paragraph 24 of their further amended statement of claim, claim against the defendants (plaintiffs in HU/24/74) jointly and severally as follows:

“(a) a declaration of title to those certain two pieces or parcels of lands known as and called “NKPAKO OBOLOBO” AND NKPAKO OBORO-URU situate at Amaeke Abiriba, the annual value whereof is 3,000.00 (three thousand naira)

(b) 81,072.00 (Eighty one thousand and seventy two naira) being damages for the acts of trespass committed by the Defendants on the said NKPAKO ABOLOBO and NKPAKO OBORO-URU lands in the possession of the Plaintiffs. H

(c) general damages of 20,000.00 ... and

(d) a perpetual injunction...”

Several documents were tendered by both parties and admitted in evidence by the court and of particular mention are the survey plans Exhibit "A" tendered by the plaintiffs and Exhibits "M" and "N" tendered by the defendants.

On 17<sup>th</sup> June, 1988, the day judgment in the case was to be delivered by the learned trial judge, learned counsel for the defendants orally applied to amend the defendants' survey plans Exhibits "M" and "N" as well as their pleading. The amendments sought consisted of the following:

(a) The substitution of the word "PINK" for the word "RED" which was used by the Surveyor in describing the colour in which the area in dispute was verged in the defendants' Exhibits "M" and "N"

(b) The substitution of the word "PINK" for the word "YELLOW" which appears in line 7 of paragraph 4 of the defendants' Further Amended Statement of Claim in HU/43/74 and Further Amended Statement of Defence in HU/24/74

(c) The deletion of certain words and phrases in paragraphs 10(c) and 11 of the defendant's Further Amended Statement of Defence in HU/24/74.

The application was opposed by the learned plaintiffs' counsel. In granting the application, the learned trial judge stated:

*"Learned counsel for the plaintiffs rightly observed that an amendment to pleadings can be made at any stage of proceedings. Indeed it could be made at any time before judgment... He has further argued that the amendments are quite substantial. I do not see how: The amendments do not all affect the area in dispute. I have the description of the area in dispute from both sides and there is no doubt that both sides are disputing over one and the same parcel of land even though in the majority of land cases each side gives the land in dispute the name it chooses. I do not see that the amendments make any difference of note in this matter."*

The plaintiffs' counsel contended in their brief that the plans were already before the court as exhibits having been tendered and evidence led thereon, that what the trial court did was an amendment of exhibits before the court and that it was improper and irregular to do so because the exhibits are documents which can only be amended by its maker when an application to amend the plan is properly brought and granted and a fresh plan would have been

prepared by the defendants' surveyor, filed and tendered afresh.

As to the pleadings, it was submitted that the application should have been brought formally showing what is to be amended and the reasons for the amendment. The cases of *Njemanze v. Shell B.P. Port Harcourt* (1966) 1 All NLR 8 at 11 and *Agbaje v. James* (1967) NMLR 49 were cited and relied upon. B

Even though issue (2) does not strictly flow from ground 12, of the ground of appeal, I will nonetheless comment on whether the learned trial judge failed to observed the principles governing the grant of leave to amend pleadings.. Since the learned plaintiffs' counsel at the court of trial rightly conceded that any pleading may be amended at any stage of the proceedings, and I should add that it has to be on such terms as may be just, the question whether the application was made on the day that judgment was to be delivered should no longer be an issue in this court. C

As to the propriety of granting leave to amend, there is no doubt that a trial judge and an appellate court have power to allow all such amendments as are necessary to enable justice to be done to the parties. It will be allowed on terms even at a late stage. "However negligent or careless may have been the first omission and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs, but if the amendment will put them into such a position that they must be injured, it ought not be made" per Brett, MR in *Clarapede & Co v. Commercial Union Association* (1883) 32 WR 262. If also the application is made mala fide, or if the proposed amendment will cause undue delay, or is irrelevant or useless, or would merely raise a technical point, leave to amend is usually refused. See *Oguntimeyin v. Gubere* (1964) 1 All NLR 176, *Amadi v. Thomas Aplin & Co. Ltd.* (1972) 4 SC 228, *Shell BP Petroleum Dev. Co. v. Jammal Engineering (Nig) Ltd.* (1974) 4 SC 33 and *Tiddesley v. Harper* (1878) 10 Ch. D 393. D

I am unable to see where the courts below erred in allowing the amendment or upholding the exercise of the discretion of the learned trial judge in the matter. Granted that one limb of the application was to amend the colouring of the area in dispute in Exhibits "M" and "N", the question to be asked is whether the changing of the colour from "RED" to "PINK" and from "YELLOW" to "PINK" added E  
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or subtracted an inch from the area of land in litigation. The key (References) No. 3 in both Exhibits “M” and “N” showed “Present Area in Dispute Verged Red”. It is this “RED” colouring in the two exhibits that the amendment was made to read “PINK”. The areas of lands in dispute in both plans were undisturbed. The learned trial judge after allowing the amendment did not even insert the pink colour but anybody reading the proceedings and the plan will read “pink” wherever “red” occurred. Adverting to the amendments to the pleadings, the amendments are not substantial. I will concede that it would have been neater if fresh pleadings had been filed incorporating the amendments but it has not been shown that the trial court was not guided by the principles of law governing the grant of leave to amend pleadings or proceedings. The plaintiffs have also not shown prejudice, unnecessary expense, and lack of good faith. The court below was therefore right in upholding the amendments granted by the learned trial judge.

The complaint by the plaintiffs of irregular procedure adopted by the learned trial judge during the visit to the locus in quo is an afterthought. They are trying to clutch a straw following some crucial findings made by the learned trial judge in his judgment which are unfavourable to them. A judge desirous of visiting a locus in quo to ascertain the presence and non-presence of physical facts on a disputed parcel of land does not need to give witnesses who testified before him advance notice of his intention to do so. It is enough if the principal parties and their counsel are present at the locus in quo. Every witness who testified for a party need not be present. In Exhibit “A” (plaintiffs’ survey plan) juju shrines are dotted in various places. The defendants disputed the facts of these claims. The defendants claim that they have permanent structures on the land in dispute and the plaintiff denied this. To resolve such a conflict, a trial judge may use his own observation at the locus in quo to resolve the conflict.

In *Ejidiike & Ors. v. Obiora* 13 WACA 270, the West African Court of Appeal held that where there is conflicting evidence as to physical facts, a trial judge may use his own observation to resolve the conflict. In the case of *Olubode v. Salami* (1985) 2 NWLR (Pt. 7) 282, an issue arose as to whether or not a footpath was in existence. The learned trial judge relying on the evidence with his record of

inspection and the plans filed found the defendants' footpath to be the correct boundary. In the case before us, the learned trial judge relied on the evidence, the survey plans Exhibits "A", "M" and "N" and his record of inspection. He did not place himself in the position of a witness.

On the inspection of the land in dispute the learned trial judge B stated in his judgment as follows:

*"I must say that it was as a result of the behaviour of some of the witnesses in the witness box that I decided I must go on inspection of the land in dispute. The Etitiama people were very firm in their claim that they have juju shrines in the land while the Ameke C Abiriba dismissed it as false and asserted that there is no single shrine in the land. It was after both sides had closed their case that I visited the land. Both parties and their counsel took part in the inspection... I took notes which I read over to counsel when we returned to the D court after inspection. Both counsel agreed that the proceedings during the inspection were correctly recorded and I caused counsel to be served with the notes. The plaintiffs i.e. the Etitiama Nkporo people could not show any shrine. We saw nothing remotely suggesting the presence of even one single juju shrine... From the plan Exhibit A E these shrines were dotted along the very road we traversed and Abiriba/ Ohafia road we also drove along... It is clear that what the Plaintiffs did was to prevail on their surveyor to indicate at random in their plan sites of juju shrines... We got to the house of Ukuku Ebe. It is a F concrete house and it looked old. When we got there I asked PW. 2 when the house was built. He replied about ten years ago. He was sworn. Defendant No. 3 was asked when it was built. He was sworn. He told the court that the house was built before the Nigerian civil war. We saw many permanent structures in the area around the petrol G station shown in Defendants' plan Exhibit "M" I was satisfied that the Plaintiffs deliberately did not show the Defendants' houses in the land in dispute."*

No objection was raised during the inspection and at the resumed hearing by the plaintiffs as to the way and manner the inspection was conducted. Section 77(ii) Cap. 112 Laws of the Federation of Nigeria, 1990 empowers a judge to inspect any movable or immovable property if oral evidence referred to the existence or condition of such a material thing. It provides:

“77(ii) If oral evidence refers to the existence or condition of any material thing other than a document, the court may, if it thinks fit, require the production of such material thing for its inspection, or may inspect or may order or permit a jury to inspect any movable or immovable property, the inspection of which may be material to the proper determination of the question in dispute and in the case of such inspection being ordered or permitted, the court shall either be adjourned to the place where the subject-matter of the said inspection may be and the proceedings shall continue at that place until the court further adjourns back to its original place of sitting or to some other place of sitting, or the court shall attend and make an inspection of the subject matter only, evidence, if any, of what transpired there being given in court afterwards; in either case the accused, if any, shall be present.” See also *Akhiwu v. Principal Lottery Officer, M. W. State* (1972) 1 All NLR (Pt. 1) 29 at 234.

Another complaint of the plaintiffs was whether the defendants established by evidence a claim to the land in dispute and whether in the circumstances of this case the test for resolving conflicting traditional evidence was applicable and properly applied. In dealing with the first limb of this issue, it will be convenient to set the various findings of fact made by the learned trial judge when he was evaluating the evidence adduced by the parties in the case:

1. That contrary to the claims of Etitama Nkporo people, the Ameke Abiriba people have the land East of the land in dispute. This findings is based on Suit Nos. HU/209/61 and HU/76/66 between the people of Elughu Nkporo and Ohafia.

2. That the land west of the land in dispute belongs to Ama-Ogudu abiriba people contrary to the claims of Etitama people.

3. That Ameke Abiriba people asserted that there is no single juju shrine in the land in dispute and the Etitama people gave the impression that the land is bristling with juju shrines. He found as a fact that there is no single juju shrine in the land.

4. That Ameke Abiriba people claimed to have permanent structures at Abiriba end of the land in dispute. Exhibit “A” the plan of Etitama Nkporo people gave the false impression that no buildings exist in that part of the land.

5. That Ameke people made large farms and plantations in the land over the years as owners of the land.

6. That Ameke Abiriba people have been farming in the area without interruption whatever from Nkporo people.

7. That Ameke Abiriba people have among themselves instituted actions for title in courts of law over portions of farm land in the area in dispute. Nkporo people knew about those cases and some of their prominent Chiefs sat as Customary Court Judges over those cases and they did nothing. B

From the above findings which are supported by evidence I am satisfied that the respondents who are plaintiffs in HU/43/74 established their claim to the land in dispute. C

The learned trial judge in the last paragraph of page 413 of the record found that the traditional histories given by both parties are in conflict. He did not declare them inconclusive. He proceeded to test the traditional histories with facts in recent years which the evidence established and came to the conclusion that the traditional history of acquisition of the land by conquest was more probable. D  
See *Kojo v. Bonsie* (1959) 1 WLR 1222, *Are v. Ipaye* (1990) 2 NWLR (Pt. 132) 312 and *Abinabina v. Enyimadu* 12 WACA 171 at 173.

The learned trial judge held:

“It is clear by reason of the above findings which are in favour of the Ameke Abiriba people, that the story of conquests of the Nkporo people should be preferable and is preferred. ....the story peddled by some of the witnesses by Nkporo people that there is no boundary between Nkporo and Abiriba is false. Iyi Nkwokota in time was corrupted to “Iyi Okwo” ...After the conquest the Etitiama Nkporo people did not at all cross over the stream of the Abiriba side to do anything whatsoever.” F

The court below also came to the conclusion that the respondents discharged the onus of proof that they acquired the land in dispute from the appellants by conquest. G

It was for these reasons, and the more detailed reasons in the leading judgment of Mohammed, JSC that I also dismissed the appeal. I endorse the order for costs made in the said judgment. H

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### **KALGO JSC (Dissenting)**

I had the advantage of a preview of the judgment just delivered by my learned brother Kutigi JSC. I agree entirely with his rea-

soning and conclusions. I allow the appeal and order a retrial.

Both parties to this appeal formulated 5 issues for determination which were exactly similar in substance. My Lord Kutigi JSC has painstakingly considered all the 5 issues and has reached the conclusions which I entirely agree with. I however wish to add a few words of mine on issue 2 of the appellant upon which the final decision on this appeal hinged. That issue reads.

*“Whether the amendment of the plans and pleadings of the Respondents on the day judgment was to be delivered was proper.”*

It was clear from the record of appeal that on the 17<sup>th</sup> of June 1988 the respondent, just before judgment was to be delivered in the trial court, applied orally to amend his pleadings affecting his plans Exhibits ‘M’ and ‘N’ which have already been tendered and admitted in court. The application was granted despite strong opposition by the appellant’s counsel and it was even not clear from the record whether the amendment was properly filed later. Be that as it may, the general rule for granting amendments of pleadings are very flexible and depends on the discretion of the judge and the circumstances of the case. If such grant is to be challenged, it must be shown that the judge did not exercise his discretion properly by establishing prejudice, unnecessary expense, irreparable inconvenience or lack of good faith. See *Shell B.P. Petroleum Development Corporation v. Jamal Engineering (Nig) Limited* (1974) 4 FSC 33 at 74; *Chief Jacob Ibanga & Ors v. Chief Edet Ubanga & Ors* (1982) 5 SC 103 at 126 - 127; *Nweke v. Orji* (1989) 2 NWLR (Pt. 104) 484. An amendment will also not be allowed where it will result in a party being confronted with an entirely new case at an extremely late stage of the trial, or is in conflict and not in harmony with the evidence already given in the trial. See *Jessica Trading Co. Limited v. Bendel Insurance Co. Limited* (1993) 1 NWLR (pt. 271) 538; *Onyenuga v. Provincial Council of the University of Ife* (1965) NMLR 9; *Olu of Warri v. Esi* (1958) SCNLR 384. An amendment of pleadings will not also be granted where it will entail injustice to the other party or where the party applying is acting mala fide or is likely by such amendment to cause to the other party such injury that may not be compensated by costs or otherwise. See *Laguro v. Toku* (1992) 2 NWLR (pt 223) 278 at 291-292; *Tildesley v. Harper* 10 CH.D 393; *Ojah v. Ogboni* (1976) 4 SC 69; *Amadi v. Thomas Aplin & Co., Limited* (1972) 1 All NLR

(pt. 1) 409.

In the instant case there was no doubt that the amendment was made or granted at a very late stage - on the day of judgment. And what is worse was that the effect of it was to change the colours of the plan already in court with reference to the identity of the land in dispute. Furthermore the evidence on record at the material time was not in harmony with the amendment sought to be made. In other words, the object of the amendment was not to bring the pleadings in line with the evidence. It has in fact, in my view, sought to change the character of the case and intended to over-reach. It cannot therefore have been done in good faith and entails prejudice and injustice to the appellant for which cost would be inadequate. B

I am therefore of the view that the order of amendment of pleadings made by the trial court and affirmed by the Court of Appeal was wrong and an improper use of discretion: It also cannot be corrected by this court based on the evidence on the record of appeal without injustice to either of the parties. In the circumstances, an order of retrial of this case is most appropriate. See *Sanusi v. Ameyogun* (1992) 4 NWLR (pt. 237) 527; *Okoye v. Kpajie* (1973) NMLR 84; *Fatoyinbo v. Williams* (1956) 1 FSC 87. C

From all what I said above, and for the reasons given by my Learned brother Kutigi JSC in his judgment. I also allow the appeal, set aside the decision of the Court of Appeal and order a retrial in the matter before another judge. I abide by the order of costs made in the said judgment. D

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