

SUPREME COURT OF NIGERIA
FRIDAY 26TH APRIL, 2002. SC. 57/1997
CORAM:- A. B. WALI, M. E. OGUNDARE, S. U. ONU,
U. A. KALGO, E. O AYOOLA, JJSC

1. H.R.H. IGWE J. N. OKOLI
2. CHIEF J. U. UGHASORO APPELLANT/RESPONDENTS
3. E. A. W. ESIOBU (PARTY AGGRIEVED/INTERESTED)
(For themselves and on
behalf of all members of
Isu Community)
AND
HENRY OKOLI PLAINTIFF/RESPONDENT
AND
THE SURVEYOR GENERAL
ANAMBRA STATE OF
NIGERIADEFENDANT/RESPONDENT
(MR. A. O. OBIANWU)

ACTIONS - Representative action - Continuity of - Death of person suing or defending in representative capacity - Does not bar others having interest in such action - From continuing with same (H1)

FACTS

Following a land dispute involving three communities of Nawfija, Ezira and Isu, each community filed this action in a representative capacity at the High Court of Anambra State, Onitsha. The actions were consolidated by the court. In its judgment, the court held that the area of land allotted to Isu community be demarcated by cement pillars at the expense of the three communities involved. However, the judgment was not complied with. Later on, Henry Okoli of Nawfija (in a representative action) filed an exparte application before Ekwerekwu J of the same court seeking for an order of mandamus to compel the Surveyor General of Anambra State to carry out the demarcation exercise as ordered by the trial court. The order was granted. The Isu community thereafter in a representative action brought an application praying that the Mandamus Order be set aside. The learned trial judge, Uyana J granted the application

and set aside the order of mandamus.

Aggrieved, Henry Okoli appealed to the Court of Appeal, Enugu. The court allowed the appeal and set aside the order of Uyana J. The Isu community being aggrieved appealed to the Supreme Court through their accredited representatives. Their application for stay of execution was refused by the Supreme Court. They nevertheless, filed another appeal at the same Court of Appeal seeking for enlargement of time within which to seek for leave to appeal against the decision of Ekwerekwu J of the trial High Court. By the time the application was filed, Henry Okoli had died and the court was so informed. Consequently, another application was filed praying the court for an order amending the application and notice of appeal by deleting Henry Okoli as a party and substituting him with his Royal Highness Igwe J. E. Okoli (Egbo II). The Court of Appeal unanimously granted the application. Aggrieved by this ruling, the Isu community has now appealed to the Supreme Court.

ISSUE FOR DETERMINATION

(i) Whether the Justices of the Court of Appeal were correct to have granted the application to amend the proceedings by substituting the Appellant in place of the deceased Plaintiff / Respondent, when the motion sought to be amended was filed after the death of the named plaintiff/ 1st Respondent."

HELD (Unanimously dismissing the appeal per **WALI JSC**)

Representative action - Continuity of

1. Where a case is prosecuted in a representative capacity, the death of the person or persons suing on behalf of the group or community is no bar to such a case being continued in a representative capacity by others having interest in the matter, who applied to be substituted for the deceased representative. This is because a person who sues in a representative capacity does so for the benefit of the group or community he is representing and himself. This principle also applies to an action being defended in a representative capacity. In a representative action both the named plaintiff as well as the un-

named plaintiffs and the named defendant as well as the unnamed defendants are all parties and if the former dies any of the latter can apply to the Court to substitute the demised plaintiff or defendant to prosecute or defend the case. The action does not die with the death of the named plaintiff or the named defendant. This is also the same with an action being prosecuted or defended on appeal. (p. 1016 D)

REPRESENTATION

Dr. Onyechi Ikpeazu, with him I.K. Ogbogu for the appellant
N. J. Obika (Mrs.) Solicitor-General, Anambra State for 1st respondent

T.E. Williams for the 2nd respondent

CASES REFERRED TO

Okonji & Ors v. Njokanma (1989) 4 N.R.L.R. (Pt. 114) 161
Ezenwosu v. Peter Ngonadi (1988) 3 NWLR (Pt. 81) 163
Atanda v. Olanrewaju (1988) 4 NWLR (Pt. 89) 394
Okonji v. Njokanma (1989) 4 NWLR (Pt. 114) 161
Obi Okoye & Ors v. Njokanma (1989) 4 NWLR (Pt. 114) 161
Ezenwosu v. Ngonadi (1988) 3 NWLR (Pt. 81) 163
G. B. Ollivant Ltd v. C. A. Vanderpruye (1935) 2 WACA 368
Otapo v. Sunmonu (1987) 2 NWLR (Pt. 58) 587-623
Okotie v. Olughor (1995) 4 NWLR (Pt. 392) 655

LEAD JUDGMENT BY WALI JSC

By a motion dated 13th November, 1995 the party aggrieved for and on behalf of his Isu community, prayed for the following reliefs:

“1. ENLARGEMENT of time within which to seek leave to appeal from the decision of Ekwerekwu J. delivered herein on 18th September 1989.

2. ENLARGEMENT of time within which to appeal from the said decision of Ekwerekwu J. delivered on 18th September 1989.

3. LEAVE to appeal from the said decision of Ekwerekwu J. delivered on 18th September 1989 as an interested party.

4. LEAVE to file the proposed Notice and Grounds of Appeal attached hereto and marked Annexure “A” out of time.

The motion was supported by a proposed Notice of Appeal containing 3 grounds. On 30th January 1996, Dr. Onyechi Ikpeazu, representing Henry Okoli of Nawfija Community, and 1st Respondent swore to an affidavit and averred in paragraphs 1,2, and 3 as follows:

B *“1. That I am a Barrister and Solicitor of the Supreme Court of Nigeria, engaged by Henry Okoli otherwise known as Henry Okoliegbo of Nawfija Community in Orumba South Local Government Area of Anambra State, in Suit No. AA/MISC 18/95 HENRY OKOLI V. SURVEYOR GENERAL ANAMBRA STATE.*

C *2. That upon receipt of motion No. CA/E/224M/95 in these proceeding, I went to deliver same to the said Henry Okoli but was informed that he died on 10th September, 1995.*

D *3. That I annex hereto and Mark EXHIBIT 1 Form D2, Federal Republic of Nigeria National Population Commission Certificate of Death, issued on 12th January, 1996 at Umunze, confirming registration of his death.”*

E From the contents of the affidavit supra and against which no counter affidavit was filed, it is clear that Henry Okoli, the 1st Respondent died on 10th September, 1995, while the motion filed by Chief F.R.A Williams SAN for and on behalf of the party aggrieved was dated 13/12/1995, that is about three months after the death of Mr. Henry Okoli. On 30/4/1996 Learned Senior Counsel brought another Motion in which he prayed as follows: -

F (i) Order amending Applicant’s Motion on Notice dated 13th November, 1995 and the proposed Notice of Appeal attached thereto as Annexure A by deleting Henry Okoli the 1st Respondent as a party and substituting him with His Royal Highness Igwe J.E. Okoli Egbo.

G The motion was supported by affidavit sworn to by T.E. Williams of Chief Williams Chambers in which he averred in paragraphs 2, 3 and 6 as follows:-

H *“2. On 5th February 1996, Dr. Onyechi Ikpeazu of Counsel informed this Honorable Court that his client (Henry Okoli) i.e. the Plaintiff / Respondent herein died on 10th day of September, 1995 before the filing and service of Applicants’ motion on Notice dated 13th November, 1995.*

3. The said Henry Okoli instituted the action herein in the court

below (Awka Judicial Division) in a representative capacity and on behalf of the Community of Nawfija, which Community is one of the parties in the Suits 0/19/48, 0/4/49 and 0/3/50 consolidated by Order of Court below (Onitsha Judicial Division) dated 20th day of February 1951.

6. *In the absence of any person appointed by the Nawfija Community to represent them in this proceedings, Applicants herein verily believe that His Royal Highness Igwe J.E. Okoli Egbo II who is the Traditional Ruler of Nawfija community is the fit and proper person to be made a party to this action in substitution of late Henry Okoli.*"

On 6th May, 1996 the application praying for amendment of the motion was argued before the Court of Appeal, Enugu Division,. Coram: Okay Achike as he then was and Niki Tobi and Ubaezuonu, JJCA. In a considered Ruling delivered by Niki Tobi, JCA (and with which Achike and Ubaezuonu JJCA agreed), the learned justice, in granting the application concluded in his Ruling dated 5/7/96 as follows:

"In the light of the foregoing, I grant the motion as prayed. I hereby order that the applicant's Motion on Notice dated 13th November 1995 and the proposed Notice of Appeal attached thereto as Annexure A be amended by deleting Henry Okoli as a party and substituting him with His Royal Highness Igwe J.E. Okoli Egbo II."

Aggrieved by the Ruling of the Court of Appeal, the appellant has appealed to this Court on the following grounds-

"GROUND 1: ERROR IN LAW:

The learned Justices of the Court of Appeal erred in law and thereby arrived at a wrong conclusion when they granted an amendment to the motion for extension of time within which to apply for leave to appeal as interested parties, leave to appeal as interested parties, leave to appeal e.t.c dated 13th November, 1995 to introduce a new party, when the motion sought to be amended was filed at a time when the Plaintiff/Respondent being the sole surviving Plaintiff was no longer living.

PARTICULARS OF ERROR:

1. *Henry Okoli, who was the sole named Plaintiff/Respondent in the motion met his demise on 10th day of September, 1995.*

2. *At the time the application was instituted there was no com-*

petent Proceeding before the court upon which the prayers in the motion filed on 13th November, 1995 as constituted could be founded.

3. Though suit No. AA/18/88 which was the basis for the appeal in CA/E/141/93 appeared to be an action prosecuted in a representative Capacity by Henry Okoli, upon his demise, the action stood in Abeyance and may only be revived by an initial application for Substitution.

4. The amendment or substitution granted by the learned Justice of the Court of Appeal purports to validate a course which was void from inception, as Henry Okoli had died at the time the proceeding was Instituted and not while same was pending.

GROUND II: ERROR IN LAW:

The learned Justice of the Court of Appeal misapplied the decision in *OKONJI & ORS V. NJOKANMA* (1989) 4 N.R.L.R. pt. 114, 161 and thereby arrived at an erroneous conclusion.

PARTICULARS OF ERROR

1. In *Okonji V. Njokanma*, (Supra) the proposed notice and ground of appeal was filed on 16th July, 1986 at which time the last surviving Defendant was still alive. In this case, the sole Respondent died on 10th September, 1995, at which time there was no pending proceeding between the parties.

2. The initial process following the death of the sole surviving Respondent would have been an application for substitution prior to any other step in the course of the proceeding.

3. The peculiar facts of the *Okonji V. Njokanma* (Supra) are not relevant for the purpose of the issues presented for determination in the case at bar.”

In compliance with provisions contained in Order 6 rule 5, of the Supreme Court Rules, 1985 (as amended), the parties filed and exchanged briefs of argument.

The appellant raised in his brief one issue for determination which reads:

“(i) Whether the Justices of the Court of Appeal were correct to have granted the application to amend the proceedings by substituting the Appellant in place of the deceased Plaintiff/Respondent, when the motion sought to be amended was filed after the death of the named plaintiff/ 1st Respondent.”

In the brief filed by Chief F.R.A Williams SAN for the Respondents/Party aggrieved the following solitary issue was formulated:

“Whether the Court of Appeal (Enugu Division) was right in granting the application dated 30th April, 1996 filed by the Respondents herein seeking an order to amend the Title Proceedings of the application dated 13th November, 1995 and proposed Notice of Appeal attached thereto by deleting Henry Okoli as a party and substituting him with His Royal Highness Igwe J. E. Okoli Egbo II having Regards (sic) to the facts of this appeal.”

Also in the brief filed by Defendant/2nd Respondent Surveyor General of Anambra State, the following single issue was formulated-

“Whether the justices of the Court of Appeal were right to have granted the application dated 30/4/96 to amend the title/proceedings of the application of 13th November, 1995 and the proposed Notice of Appeal attached thereto by deleting Henry Okoli (who had died on 10/9/95 i.e. before the filing of the application by Isiulo Community dated 13/11/95 and filed on 17/11/95) as a party and substituting him with His Royal Highness Igwe J.E. Okoli Egbo II, having regard to the facts of this appeal.”

The brief facts involved in this case can be stated as follows: Following a land dispute involving the three communities to wit – Nawfija, Ezira and Isu, each community filed a representative action as follows:

1. Suit No. 0/19/1948: O. Onyegiri
(on behalf of himself and the people of Isu)

vs

J. Okpukpara and Another.

2. Suit No. 0/4/1949: 1. Chief J. Okpukpara

2. Iroko Ozoemene

(for themselves and representing the people of Nawfija Awka)

vs

Chief S. Mbaochu and Two others.

3. Suit No. 0/3/1950: 1. Ofonokpara Umer

2. Dan Iloka

3. Ewu Uzochikwu

4. Nwafor Oji

(for Ezira Town.)

vs

S. Mbachu and Nine Others.

By order of the trial court, the 3 representative actions were consolidated, and on 7/12/51 judgment in the consolidated suits was given with an order that the area of land allotted to Isu community be demarcated by cement pillars at the expense of the three parties B involved, but this was not carried out.

In 1988 Henry Okoli of Ohakabi Village Nawfija for himself and on behalf of Nawfija community, filed an ex parte application before Ekwerekwu J of the Onitsha High Court for leave to apply for C order of Mandamus against the Surveyor-General of Anambra State to compel him carry out the demarcation exercise as ordered by the trial Court. The learned judge granted the leave as prayed and the order of mandamus against the Surveyor-General was made as follows -

D “Mandamus is therefore hereby ordered to issue to the Respondent Mr. A.O. Obianwu, Surveyor-General of Anambra State of Nigeria compelling him to demarcate the boundaries of land as ordered by Onitsha High Court in its judgment in the consolidated suits No. 0/10/49 and 0/3/50 and also further ordered by the Military E Governor of Anambra State and the then State Commissioner.”

The Isu Community through High Royal Highness Igwe J.N. Okoli, Chief J.U. Ugbasoro and E.A.W. Esiobu for themselves and on behalf of all members of Isu Community brought an application F dated 18/9/90 before Uyana J praying that the mandamus order be set aside, and the learned trial judge heard the application and granted it. The order of Mandamus made by Ekwerekwu J. was then set aside. Aggrieved by the decision of Uyana J, Henry Okoli, the 1st Respondent and Plaintiff in the mandamus proceedings appealed G against the order setting aside the mandamus order to the Court of Appeal, Enugu Division which allowed the appeal and set aside the decision and order of Uyana J, thus restoring the order of mandamus made against the 2nd Respondent/Defendant in the mandamus proceedings.

H Being dissatisfied with the decision and order of the Court of Appeal setting aside the mandamus order, the Isulo community through their accredited representatives mentioned supra, lodged an appeal to the Supreme Court against it. They also applied for an order of stay of execution of the Court of Appeal judgment which

was refused by the Supreme Court. It was at this stage that the Isulo community engaged the services of Chief F.R.A. Williams SAN to appeal against the decision of Ekwerekwu J in the Court of Appeal, Enugu Division, and to enable the learned Senior Counsel achieve that, he brought an application dated 10th December, 1995, in the names of His Royal Highness Igwe J. N. Okoli, Chief J.U. Ughasoro and E.A. Esiobu (for themselves and on behalf of all members of Isu Community) described as Party aggrieved/Interested Appellants / Applicants. Henry Okoli and the Surveyor-General, Anambra State are described in the motion as plaintiff/1st Respondent and Defendant/2nd Respondent respectively, praying as follows:

1. *ENLARGEMENT of time within which to seek leave to appeal from the decision of Ekwerekwu J. delivered herein on 18th September 1989.*

2. *ENLARGEMENT of time within which to appeal from the said decision of Ekwerekwu J. delivered on 18th September 1989.*

3. *LEAVE to appeal from the said decision of Ekwerekwu J. delivered on 18th September 1989 as an interested party.*

4. *LEAVE to file the proposed Notice and Grounds of Appeal attached hereto and marked Annexure "A" out of time*

By the time the application was filed, Henry Okoli had died on 10/9/95. When the application was called up, the learned counsel for the 1st Respondent, Dr. Onyechi Ikpeazu, brought to the notice of the Court of Appeal that his client had died on 10th September, 1995. See paragraphs 2 and 3 of Dr. Ikpeazu's Affidavit sworn to by him on 30th January, 1966 and filed on the same day.

As a result of this information of the death of the 1st Respondent, learned Senior Counsel for the Party aggrieved brought another application dated 30th April, 1996 and filed on the same day praying as follows-

"(i) Order amending Applicant's Motion dated 13th November, 1995 and the proposed Notice of Appeal attached thereto as Annexure A by deleting Henry Okoli as a party and substituting him with His Royal Highness Igwe J.E. Okoli Egbo II."

This application was moved and argued on 6/5/96. On that day E.O.E. Ekong appeared for applicants while Bosa Anyaeji appeared for the 1st Respondent. The Ruling was delivered on 5/7/96 in which the Court of Appeal unanimously granted the application

for deleting Henry Okoli, now deceased as a party and substituting him with His Royal Highness Igwe J.E. Okoli Egbo II. Aggrieved by the Ruling of the Court of Appeal, the Party aggrieved has now appealed to this Court.

I have already reproduced the issues formulated by the parties to this appeal, and save for the difference in the way and manner in which each is worded, they are similar in purport. I shall adopt the issue raised by the appellant in deciding this appeal. Having recounted briefly the facts involved in this case so far as they appear to me to be relevant, I shall now proceed to consider the contentions and submissions of learned counsel on both sides.

Henceforth the aggrieved party shall be referred to as the appellant while the plaintiff and defendant in the mandamus proceedings will be referred to as the 1st and 2nd respondents respectively.

It is the contention of the appellant that the Court of Appeal erred when it granted the appellant's prayer to amend the Motion filed on 17/11/95 by deleting the 1st Respondent as a party and substituting him with His Royal Highness Igwe J. Okoli Egbo II, as at the stage of that proceeding there was nothing to amend as it was obvious that upon the death of a party to an action on appeal, no further proceedings could be embarked upon until certain contingencies are fulfilled. It was submitted that if the cause of action survives the death of the party, the matter is kept in abeyance until an application to appeal as an interested party under section 222(a) of the 1979 Constitution is sought for and obtained. It was contended also that in the case under consideration, when the application in the name of the 1st Respondent dated 17th November, 1995 was filed, the 1st Respondent had already died and therefore no appeal was pending. The case of *RE: CLEMENT EZENWOSU V. PETER NGONADI* (1988) 3 NWLR (Pt. 81) 163; *ST. MATTHEW DANIEL DECEASED* in *RE MATTHEW OLAJIDE BAMGBOSE* 19, NLR 73 were relied upon. Learned counsel further stated that at the time the originating process was instituted the sole Plaintiff/1st Respondent had died and therefore there was no pending appeal. The case of in *RE OTUEDON OKOTIE & ORS. V. OLUGHOR & ORS.* (1995) 4 NWLR (PT. 392) 655 was cited in support. Learned counsel finally submitted that 1st Respondent had died at the time the application by the party aggrieved was filed hence there was no pending appeal in the

Court of Appeal between the parties. This Court was urged to allow the appeal and set aside the Court of Appeal decision.

In the brief of argument filed by the chambers of Chief F.R.A. Williams, SAN for the Respondents, it was submitted that the Court of Appeal was right in granting the prayer amending the Title/Proceedings of the application dated 13/12/95 and the Notice of Appeal attached thereto. It was also submitted that Henry Okoli now deceased, instituted the action for mandamus in a representative capacity for and on behalf of Nawfija community and his demise did not render the application filed null and void, particularly when there is a 2nd Respondent (Surveyor-General of Anambra State). It was contended that it is settled law that in a representative action, it is not only the named plaintiff who is a party to it, as the others who are not named are also parties to the action because they will equally be bound by the result of the action. It was further submitted that the appellant's contention that there was no Respondent to the application dated 13/12/95 cannot be correct and this court was urged to disregard the objection of technical nature being raised by the appellants so as to do substantial justice between the parties herein. The decisions in *G.B. OLLIVANT LTD V. C. A. VANDERPUYE* (1935) 2 WACA 368 at 370 and *ALHAJI CHIEF YEKINI OTAPO V. CHIEF R.O. SUNMONU & ORS.* (1987) 2 NWLR (Pt. 58) 587-623 were cited and relied upon. This court was urged to dismiss the appeal and affirm the decision of the Court of Appeal which learned counsel said is justified having regard to the fact that there was in existence the 2nd Respondent who was duly served with all processes and represented by counsel.

In the brief of argument filed by 2nd Respondent it was submitted that the Court of Appeal was right in granting the application of amendment and substitution of the co-respondents (party aggrieved i.e. Isulo community) and that in the application which is now the subject matter of this appeal, there are two sets of Respondents who are parties to wit: Henry Okoli and the Surveyor-General as 1st and 2nd Respondents respectively and that the demise of either of them, would not affect the right of action and the relief sought still exists against the living respondent who in this case is the 2nd Respondent. It was submitted that the case of *Ezenwosu v. Ngonadi* (1988) 3 NWLR (Pt. 81) 163 and *Re. Matthew Olajide Bamgbose*

19 N.L.R. 73 relied upon by the appellant are not apposite and that the Court of Appeal was right in applying the principles in the case of *Obj Okoye & Ors. V. Njokanma* (1989) 4 NWLR (Pt. 114) 161. The 2nd Respondent urges that the appeal be dismissed.

It is without any shadow of doubt that the 1st Respondent B instituted the Mandamus action in a representative capacity of his community having regard to the facts in this case and the affidavit sworn to by him in support of his application for the order of mandamus, particularly paragraphs 1,2, and 3 of the said affidavit. It is therefore not only incorrect but also misleading for the learned counsel for C the appellant to describe the 1st Respondent as a sole plaintiff in the mandamus proceedings. The application of 13/12/95 had two sets of respondents to wit: Henry Okoli and the Surveyor-General of Anambra State. They were duly served and represented in court. D See page 85 of the Record. The original application for mandamus was to all intents and purposes, therefore a representative action.

Where a case is prosecuted in a representative capacity, the death of the person or persons suing on behalf of the group or community is no bar to such a case being continued in a representative capacity by others having interest in the matter, who have applied to be substituted for the deceased representative. This is because a person who sues in a representative capacity does so for the benefit of the group or community he is representing and himself. This principle also applies to an action being defended in a representative capacity. In a representative action both the named plaintiff as well as the unnamed plaintiffs and the named defendant as well as the unnamed defendants are all parties and if the former dies any of the latter can apply to the Court to substitute the demised plaintiff or defendant to prosecute or defend the case. The action does not die with the death of the named plaintiff or the named defendant. This is also the same with an action being prosecuted or defended on appeal. See the case of *ATANDA V. H OLANREWAJU* (1988) 4 NWLR (Pt. 89) 394 at 402. In *Okonji v Njokanma* (1989) 4 NWLR (Pt. 114) 161 at 166 – 167, Eso JSC, in his lead judgment of the court re-stated the law as follows:

“When an action is instituted in a representative capacity and or against persons in representative capacity that action is not only by

or against the named parties. They are also by and against those the named parties represent. Those are not stated nomine. Indeed, they may be one or two or more, indeed they may be legion. And so, if all the named parties die the action still subsists on behalf of or against those they represent but who have not been stated nomine.

As it is an action on trial, it is also when the matter is on appeal. B
The appeal, as the case may be, subsists but the action or the appeal, again, as the case may be, cannot be prosecuted until a living person has been substituted for the named dead party.”

The learned Justice of Court of Appeal considered in detail the cases cited by the appellant, particularly the case of Ezenwosu v. C
Ngonadi (supra) and stated –

“Unlike the case of Ezenwosu v Ngonadi in which Ngonadi was sued in his personal capacity, the instant case has to do with a suit D
in a representative capacity. Therefore the relevant cases are Nzom v. Jinadu (supra); Atanda v Olarewaju (supra) and Okonji and others v. Njokanma (supra). A representative action does not die with the party. In other words, the demise of a party is not the demise of an action brought in a representative capacity. The action survives the deceased E
who until his death was only one of the parties.

The main submission of learned counsel for the respondent is that since Henry Okoli died before the motion of 13th November 1995 was filed, the present motion for amendment of the motion of 13th November, 1995 is incompetent. In Okonji v. Njokanma supra, F
the plaintiffs, in their representative capacity, sued the defendants also in their representative capacity. The defendants died one after the other. The last one died on 7th December 1988. It was not until 21st March 1989 that an application was made to substitute the present appellants for the dead defendants. The Supreme Court granted the G
application for substitution.”

In the light of the decisions cited and relied upon by Niki Tobì JCA in his Ruling of 5th July, 1996, I find no substance in this appeal. I endorse the conclusion arrived therein and the order made. I dismiss the appeal and award the Respondents N10,000.00 costs. H

OGUNDARE JSC

I agree entirely with the judgment of my learned brother Wali,

JSC just delivered, a preview of which I had before now. I have nothing more to add. I too dismiss the appeal and affirm the decision of the Court below

I abide by the order for costs made by my brother Wali, JSC.

B

ONU JSC

I agree for the reasons given in the leading judgment of my learned brother Wali, JSC just read, a preview of which I had before now, that this appeal lacks merit and ought to fail.

Accordingly, I dismiss it and make similar consequential orders contained therein inclusive of costs in favour of the respondents.

D

KALGO JSC

I have had the privilege of reading in draft the judgment just delivered by Wali JSC in this appeal. I agree with him that there is no merit in the appeal and it ought to be dismissed. I adopt his reasoning and conclusions therein and have nothing useful to add. I accordingly dismiss this appeal and abide by the order of costs made in the leading judgment.

F

AYOOLA JSC

I have had the privilege of reading in advance the judgment delivered by my learned brother, Wali, J.S.C. I agree with him that this appeal should be dismissed.

The simple and straightforward facts of this case are that the present respondents applied in the court below by a motion dated 13th November, 1995 for leave to appeal as interested parties against a decision in favour of Henry Okoli given by the High Court in 1989 against the Surveyor-General of Anambra State. The said Henry Okoli had obtained an ex parte order of mandamus to compel the said Surveyor-General to demarcate certain boundaries. By the time the application for leave to appeal as interested parties was brought by the 1st respondents, that is the parties interested, the said Henry Okoli had already died. Upon realizing that he had died, the present 1st respondents applied to the court below for an order amending their

motion dated 13th November, 1995 “by deleting Henry Okoli as a Party and substituting him with His Royal Highness Igwe J. E. Okoli Egbo II.” Igwe Okoli opposed the application but that notwithstanding, it was granted by the court below. Being of the view that since Henry Okoli had brought the proceedings for mandamus in a representative capacity, the proceedings survived him and that a new party could therefore be substituted for him, Niki Tobi, J.C.A., who delivered the leading judgment of the court below granted the application. B

On this appeal by the party substituted, Igwe Okoli, the appellant, the substance of the argument of his counsel is that although, as he puts it, “by another form of application the situation brought about by the death of Henry Okoli could have been rectified by creating a competent party from whom further proceedings could emanate” the amendment sought and granted was not the proper way to proceed. His reason for that submission is that at the time the application of 13th November, 1995 was brought it lacked a competent respondent since Henry Okoli who was named as respondent thereto had died. We have been referred to the case of *St. Matthew Daniel deceased In Re Matthew Olajide Bamgbose* 19 N.L.R. 73 where it was held that a petition having been brought in the name of a dead person, there was no existing suit and therefore an amendment to create a suit for the first time by substituting a living person as petitioner was not possible. C

The respondents in this appeal were right in their contention that the application dated 13th November, 1995 could not have been rendered null and void by reason alone of the death of Henry Okoli since the 2nd respondent to the application, the Surveyor-General, was a living party. Where proceedings are brought against two or more persons at a time when one or more, as the case may be, of such persons has or have died, the proceedings do not become a nullity. It could be put right by striking out the name of the dead party or parties, of course, without prejudice to a substitution of fresh parties for the deceased parties. In this regard, the appellant had put his case rather too highly by contending that the application in question was a nullity. Weak as the chance of its success may have been without a person who is a necessary party being joined, it remained nevertheless a live application. F

The real crux of this appeal is whether the court below should have made the amendment to the title of the motion in the manner asked for. I quickly refer to two principles of law which are here relevant, and I quote from The Supreme Court Practice 1993 para. 15/12/10. The first is that: “*Where one sues as a representative plaintiff, he is the sole plaintiff, and he is dominus litis until judgment.*” The second is that: “*if the representative plaintiff should fall out for any reason, the court has power to add or substitute any person represented though unnamed in the representative action and to bring him in as at the date of the original writ....*” These to some extent are concise statements of the attention of the court below.

There is no doubt that the court below has power to substitute a new party for a dead party. It is the clumsy way of going about it in this case that had created a problem. Had the parties interested sought to substitute Igwe Okoli for Henry Okoli before they brought their application of 13th November, 1995 there would probably not have been the type of objection now raised. Even after they had been aware of Henry Okoli’s death, had they sought to add Igwe Okoli as a party to their application in place of Henry Okoli there also would not have been the type of objection raised. They tried to achieve the same by an amendment of the title. That, in my view, was not the proper way of going about it. This was not a case of misnomer or error in naming a party but one of substituting a new party for the deceased one. Without an express provision of the rules of court permitting substitution of a party to be made by amendment of the title of the proceedings, I am of the view that the procedure adopted by the 1st respondent was erroneous.

However, in this case, notwithstanding that the prayer of the application could have been better put, the true result of the order made was to substitute Igwe Okoli for the deceased Henry Okoli. No suggestion has been made that Igwe Okoli was not proper person to be substituted or added as a party to the application, had such order been expressly sought. The appeal had been fought mainly on the ground that the application was a nullity for want of a living respondent. However, the Surveyor-General was also a respondent, even though the application for leave to appeal would not have amounted to much without the plaintiff in the proceedings sought to be appealed from, who would be the real respondent to the appeal, being

made a party.

In the particular circumstances of this case, notwithstanding that I do find the arguments of counsel for the appellants to be of some worth, I come to the conclusion that they were substantially technical in nature because the application was not a nullity. Had an express prayer been made to add Igwe Okoli to the proceedings as substitute for Henry Okoli, there would probably not have been a reasonable objection. In the result, I think substantial justice has been achieved in the overall circumstances, notwithstanding that the appropriateness of the means, that is, by way of amendment, by which that result had been achieved appears to me to be open to doubt.

For the reasons just stated, I too would dismiss the appeal with N10,000 costs to the 1st respondents.

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