

**SUPREME COURT OF NIGERIA**  
FRIDAY 31ST JANUARY, 2003. SC. 64/1997  
**CORAM:- M. L. UWAIS CJN, M. E. OGUNDARE,**  
**S. U. ONU, A. I. KATSINA-ALU, A. O. EJIWUNMI, JJSC**

GENERAL YAKUBU GOWON ..... APPELLANT  
AND  
1. MRS. EDITH I. IKE-OKONGWU  
2. TRUE TALES PUBLICATIONS LTD ..... RESPONDENTS  
3. KAYODE AJALA

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COURTS - Actions - Pleadings - Amendment - Until an action is finally determined - Court has ample powers of amendment at all stages of proceedings (H1)

ACTIONS - Counter-claim - Pleadings - Amendment - Defendant cannot by amendment of statement of defence - Raise counter-claim in respect of cause of action - That arose after writ was issued (H2)

ACTIONS - Counter-claim - Features - Counter-claim is an independent action - Which is not part of the original action - Though the two actions may be tried together for convenience (H3)

**FACTS**

1<sup>st</sup> plaintiff/respondent commenced this action against defendant/appellant (Gen. Yakubu Gowon) at the High Court of Lagos State claiming inter alia, a declaration that 3<sup>rd</sup> respondent's paternity has been acknowledged by appellant in accordance with the native law and custom of appellant's people. In his reaction, appellant filed a statement of defence.

Thereafter, he again filed a motion seeking leave to amend the statement of defence, enlargement of time within which to file a counter-claim and deeming the amended statement of defence containing the counter-claim already filed as duly filed and served. The motion was argued and on 15 March, 1991, the learned trial Judge struck out both the amended statement of defence and the counter-claim. Aggrieved, appellant appealed to the Court of Appeal, Lagos. The court dismissed the appeal. Aggrieved further, appellant appealed

to Supreme Court.

**ISSUE FOR DETERMINATION**

Whether the Court of Appeal was right in holding that the learned trial Judge was not in error in refusing the application for extension of time within which to file a counter-claim on the ground that the cause of action occurred to the defendant after he had filed his statement of defence.

**HELD** (Unanimously dismissing the appeal per  
**KATSINA-ALU JSC**)

*Pleadings - Amendment*

**1. When an action has been started, the court has, at all its stages until it is finally determined, ample powers of amendment. And it is the duty of the court to exercise those powers.**  
(p. 323 A)

*Counter-claim - Pleadings - Amendment*

**2. However the pertinent issue in the present case is whether the defendant should be granted leave to amend his statement of defence by joining to it a counter-claim based on an entirely fresh cause of action which arose after the action had been started.**

**Can a defendant, raise a counter-claim even though the cause of action accrued to the defendant subsequently to the issue of the writ in the original action? Just as the plaintiff cannot be allowed to bring into his case an entirely fresh cause of action which arose after the action had been started, a defendant will not be allowed to raise by way of an amendment to the Statement of Defence a counter-claim in respect of a cause of action that arose subsequent to the issue of the writ.**

(p. 323 B/G)

*Counter-claim - Features*

**3. In substance a counter-claim is a cross-action and not merely a defence to the plaintiff's claim. It is an independent action and not part of the original action though for conve-**

**nience the two are tried together.**

**As I have earlier on in this judgment stated, a counter-claim is a separate action. The defendant in a counter-claim assumes the position of a plaintiff and the plaintiff in the original action assumes the position of a defendant. Simply put, the parties in the original action swap places in the counter-claim. The defendant may, instead of suing separately insert his claim into the plaintiff's suit under the label of counter-claim if it is of a kind which by law he is entitled to raise and have disposed of in the plaintiff's action. If the original suit and the counter-claim arose out of the same set of facts or transactions, it would be desirable and indeed convenient to hear them together.** (p. 323 C)

### **REPRESENTATION**

H. Eze-Iyamu [Mrs.], for the Appellant

Olalekan Ojo, Esq., for the Respondents

### **CASES REFERRED TO:**

Sneade v. Wotherton Barytes & Lead Mining Co. (1904) 1 K.B. 295  
 Eshelby v. Federated European Bank Ltd. (1931) All E.R. Rep. 840  
 Oyegbola v. Esso West African Inc. (1966) 1 All NLR 170

### **LEAD JUDGMENT BY KATSINA-ALU JSC**

This is an appeal from the judgment of the Lagos Division of the Court of Appeal delivered on 10th August, 1993. The appeal arises out of an action which was brought by Mrs. Edith I. Ike-Okongwu and Mr. Musa Gowon against the defendant, General Yakubu Gowon in which they claimed as follows:

*"1. DECLARATION that the 2nd plaintiff's paternity has been acknowledged by the defendant in accordance with the Native Practice in Nigeria and/or practice under Native Law and Custom of Pankshin people of Pankshin Local Government Area where the defendant comes from.*

*2. DECLARATION that the statement contained in letter dated 16th day of October, 1987 written at the instance of the defendant (by his solicitors) to the Editor of Prime People Magazine is untrue.*

*3. DECLARATION that the defendant is estopped from deny-*

*ing paternity of the 2nd plaintiff whose paternity he has acknowledged in accordance with Native law and custom of Pankshin people of Pankshin Local Government area.*

B 4. *ORDER for payment by the defendant to the 1st plaintiff of the sum of N10,000,000.00 being damages for libel contained in a letter dated 16th October, 1987 published by the defendant through his Solicitor to the Editor of Prime People.*

C 5. *ORDER for payment by the defendant to the 2nd plaintiff of the sum of N20,000.00 being damages for libel contained in a letter dated 16th October, 1987 published by the defendant through his Solicitor to the Editor of Prime People.*

6. *AN ORDER for the payment of N280,000 being money spent for the Education and upkeep of the 2nd plaintiff as befit his status as the 1st son of a former Nigerian Head of State.*

D 7. *ORDER that the defendant should maintain and pay the school fees of the 2nd plaintiff from the date of judgment.*

8. *AN ORDER OF INJUNCTION restraining the defendant by himself or by his servants or agents from further writing or otherwise publishing of the plaintiffs the said or similar libel."*

E In his reaction the defendant filed a statement of defence. On 5 February, 1991, the defendant again filed a motion seeking leave to amend the statement of defence, enlargement of time within which to file a counter-claim and deeming the amended statement of defence containing the counter-claim already filed as duly filed and served. The motion was argued and on 15 March, 1991 the learned trial Judge struck out both the amended statement of defence and the counter-claim. The defendant's appeal to the Court of Appeal was dismissed. The defendant has further appealed to this court. The defendant, as appellant, raised three issues for determination in this appeal. They read:

H "1. *Whether the Court of Appeal was right in holding that the lower court was not in error refusing the application to amend the statement of defence, when the parties were still in the process of settling pleadings and before the action was set down for trial.*

2. *Whether the Court of Appeal was right in holding that the learned trial Judge was not in error in refusing the application for extension of time to file a counter-claim because the cause of action occurred to the defendant after he had filed a statement of defence.*

*3. Whether the Court of Appeal was right in holding that there was no appeal filed by the Appellant against the exercise of discretion by the lower court."*

For their part, the plaintiffs submitted two issues for determination in their respondents' brief of argument. These are:

*"1. Whether or not the Court of Appeal misdirected itself on the facts and the law in the appeal before it as a result of which it came to a wrong decision in the appeal."*

*2. Was the Court of Appeal right when it held that the appellant's appeal was not against the wrong or injudicious exercise of the discretion of the trial Judge in his decision from which the appellant's interlocutory appeal emanated."*

As I have already stated, three issues have been taken by the defendant here, and the short point upon which I decide this appeal is – whether the Court of Appeal was right in holding that the learned trial Judge was not in error in refusing the application for extension of time within which to file a counter-claim on the ground that the cause of action occurred to the defendant after he had filed his statement of defence.

The plaintiffs in the original action claim that the defendant, General Yakubu Gowon, is the father of the 2nd plaintiff, Musa Gowon. They also claim damages of the sum of N10,000,000.00 for alleged libel contained in a letter published by the defendant through his solicitors to the Editor of a monthly magazine "The Prime People." Also claimed is the payment of N280,000.00 being money expended for the education and upkeep of the 2nd plaintiff. Also that the defendant should maintain and pay the school fees of the 2nd plaintiff from the date of judgment. Lastly the plaintiffs seek an injunction to restrain the continued libel complained of.

As I have already stated, the defendant denied liability and filed his statement of defence, on 5 February, 1991. It was after this that he brought a motion seeking leave to file an amended statement of defence by the inclusion of a counter-claim. It is important to mention here that the parties to the counter-claim are General Yakubu Gowon as the plaintiff and Mrs. Edith I. Ike-Okongwu, True Tales Publications Limited and Kayode Ajala as the defendants. The subject of the counter-claim was an alleged libelous article in two publications of the magazine called "HINTS - True Life Romances."

These publications of the magazine were made after the plaintiffs had filed their amended statement of claim and after the defendant had also filed his statement of defence. In other words the cause of action arose after the parties had filed their pleadings in the original action.

B In its judgment the Court of Appeal held that:

*"It is the law that an amendment relates back to the original pleading and the amendment sought to be filed in this case seeks to incorporate a cause of action which arose after the statement of defence was filed did not exist. Such an amendment, generally, should not be allowed... If an amendment is to the effect that it would bring into an action an entirely fresh cause of action arising after the action had been started, such an amendment may not be allowed. The amendment in such a case should not be entertained in as much as it related to a cause of action which did not exist at the time when the writ was issued. To bring in such a cause of action does not seem to me to be amending the proceedings at all; it is starting a new cause of action, and one which could not have been sued upon at the time the action was commenced."*

E The Court of Appeal went on:

*"If what was sought to be done is simply to amend the statement of claim or even to raise an issue or cause of action arising after the statement of defence had been filed, no problem would have arisen. But problem will arise where the amendment sought would operate to have been retrospectively made to the date the original statement of defence was filed, and if at that date the cause of action envisaged or stipulated in the counter-claim was not existing at that time. Such an application should, in my considered view and upon the authorities above considered, be refused."*

In consequence thereof the Court of Appeal dismissed the appeal of the defendant. The defendant has attacked this decision. It was said that the issues in the pleadings of both parties show quite clearly that they are all interrelated. That being so it was contended H that it is convenient to have a single trial.

For their part, the plaintiffs have urged that the appeal of the defendant is without merit. It was submitted that the Court of Appeal was right when it held that where the amendment sought to be carried out or effected relates to a cause of action arising after the origi-

nal pleading had been filed, as in this case, such an amendment should not be allowed. The plaintiffs relied on the English cases of *Sneade v. Wotherton Barytes & Lead Mining Co. Ltd.* (1904) 1 K.B. 295; *Eshelby v. Federated European Bank Ltd.* (1931) All E.R. Rep. 840.

***When an action has been started, the court has, at all its stages until it is finally determined, ample powers of amendment. And it is the duty of the court to exercise those powers. However the pertinent issue in the present case is whether the defendant should be granted leave to amend his statement of defence by joining to it a counter-claim based on an entirely fresh cause of action which arose after the action had been started.***

***In substance a counter-claim is a cross-action and not merely a defence to the plaintiff's claim. It is an independent action and not part of the original action though for convenience the two are tried together. Can a defendant, raise a counter-claim even though the cause of action accrued to the defendant subsequently to the issue of the writ in the original action? Just as the plaintiff cannot be allowed to bring into his case an entirely fresh cause of action which arose after the action had been started, a defendant will not be allowed to raise by way of an amendment to the Statement of Defence a counter-claim in respect of a cause of action that arose subsequent to the issue of the writ.*** See *Eshelby v. Fed. European Bank* (1931) All E.R. Rep. 840. I think it is good sense. To bring in such a fresh cause of action, does not, viewed from any angle, constitute an amendment. It means what it is, that is, starting a new cause of action, and one which did not accrue, and therefore could not have been sued upon, at the time the action was brought.

***As I have earlier on in this judgment stated, a counter-claim is a separate action. The defendant in a counter-claim assumes the position of a plaintiff and the plaintiff in the original action assumes the position of a defendant. Simply put, the parties in the original action swap places in the counter-claim. The defendant may, instead of suing separately insert his claim into the plaintiff's suit under the label of counter-claim if it is of a kind which by law he is entitled to raise and have disposed of in the plaintiff's action. If the original suit***

**and the counter-claim arose out of the same set of facts or transactions, it would be desirable and indeed convenient to hear them together.** See *Oyegbola v. Esso West African Inc.* (1966) 1 All NLR 170.

The question arises, therefore, whether on the facts of this case, the original suit and the counter-claim can be tried together. Let me restate the salient points. The fulcrum of the original action is the paternity of the 2nd plaintiff, refund of money spent by the 1st plaintiff on the upkeep of the 2nd plaintiff and maintenance of the 2 plaintiff. The theme of the counter-claim is a libel action brought by the defendant. It has been said that the publication in the “Hints” Magazine was libelous of the defendant. It was said that the words complained of in their natural and ordinary meaning meant and were understood to mean:

*“1. That the defendant is a rapist. That the defendant is engaged in a conspiracy to commit murder, and had committed murder in the past.*

*1. That the defendant procured, hired assassins to commit murder, and had committed murder and rape.*

*2. That the defendant is an all time criminal and a robber.*

*3. That he also traffics in drugs.”*

There is still more. The parties in the original action are Mrs. Edith I. Ike-Okongwu and Mr. Musa Gowon as plaintiffs and General Yakubu Gowon as defendant. In the counter-claim the parties are General Yakubu Gowon as plaintiff and Mrs. Edith I. Ike-Okongwu, True Tales Publications Limited and Kayode Ajala as defendants. It will be seen clearly that the parties in both actions are not the same. The 2nd plaintiff is conspicuously absent in the defendant’s action. The 2nd and 3rd defendants - True Tales Publications Limited and Kayode Ajala on the other hand did not feature in the original action.

From the foregoing it will be seen clearly that the issues for resolution in the two actions are not the same; they are not inter-related. In the second place the parties are not the same. In the circumstances, I hold that the suits cannot be conveniently tried together. This issue disposes of this appeal.

I find it unnecessary to deal with the other issues raised in this appeal. It must be recalled that this suit was brought in 1990. It is now about 12 years old and the substantive case is still before the



Lagos State High Court. This is regrettable.

In the light of the reasons which I have given above, this appeal fails and I dismiss it and affirm the decision of the Court of Appeal delivered on the 10th of August, 1993. I award costs of N10,000.00 in favour of the plaintiffs. In view of the age of the substantive action I order that the High Court of Lagos State give it expeditious hearing. B

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**UWAIS CJN**

I have had the advantage of reading in draft the judgment read by my learned brother, Katsina-Alu, JSC. I entirely agree and have nothing to add. Accordingly, I too hereby dismiss the appeal and affirm the decision of the Court of Appeal which confirmed that of the trial court. Costs assessed at N10,000.00 is awarded in favour of the respondents against the appellant. D C

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**OGUNDARE JSC**

I agree entirely with the judgment of my learned brother, Katsina-Alu, JSC just delivered. I have nothing more to add. I too dismiss the appeal with costs as assessed by my learned brother. E

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**ONU JSC**

I have had a preview of the judgment of my learned brother, Katsina-Alu, JSC just delivered. I am in entire agreement therewith that the appeal fails and it is dismissed with similar consequential orders inclusive of costs. F G

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**EJIWUNMI JSC**

Being privileged to have read the judgment just delivered by my learned brother Katsina-Alu, JSC, I also dismiss the appeal for the reasons given in the said judgment. And award costs in the sum of N10,00.00 in favour of the plaintiffs. Appeal dismissed. H