

SUPREME COURT OF NIGERIA
FRIDAY 31ST JANUARY, 2003. SC. 149/1998
CORAM:- I. L. KUTIGI, U. MOHAMMED, U. A. KALGO,
S. O. UWAIFO, A. O. EJIWUNMI, JJSC

ARCH BISHOP PETER YARIYOK JATAU
(The Registered Trustee of the Archdiocese APPELLANT
of Kaduna of the Roman Catholic Church)

AND

1. ALHAJI MANSUR AHMED
2. MRS. DOROTHY AJIJOLA
3. KADUNA TEXTILES LIMITED
4. UNITED NIGERIA TEXTILES LIMITED RESPONDENTS
5. H. H. HOLDINGS LIMITED
(The Representatives of the Debenture
Holders and other contributors of Sacred
Heart Primary School, Kaduna)

APPEALS - Court - Issues - Suo motu raising - Correctness of - Court
can raise issue relating to matter before it - But parties must be given
opportunity to address court on the issue - Before decision is reached
(H1)

APPEALS - Fresh issue - Need for leave - Leave is required to raise
fresh point on appeal - And appellate court has discretion to grant or
refuse such leave (H2)

PLEADINGS - Amendments - Effective date - Any amendment of
pleadings at any stage of proceeding - Dates back to the date the
pleadings were originally filed (H3)

APPEALS - Court - Judgment - Binding nature of - Court of Appeal
cannot set aside its exercise of discretion to grant application - Unless
such discretion is proved to be a nullity (H4)

FACTS

Plaintiff/appellant sued defendants/respondents at the High
Court of Kaduna State claiming declarations and injunctions by which

appellant asserted his ownership of one Sacred Heart School in Kaduna metropolis, to the exclusion of the respondents. Judgment was given to appellant as prayed, whereupon respondent appealed to the Court of Appeal, Kaduna Division. During the pendency of the appeal, after briefs had been filed and exchanged, appellant filed a motion on notice seeking inter alia, for leave to amend the pleadings filed in the suit and all other processes by amending the name of appellant. The application was heard and granted without objection from respondents.

However in the course of hearing the appeal, the court suo motu raised an issue as to whether the amendment already granted as sought did not amount to raising a fresh point on appeal. It invited counsel to address it on this point. In the course of its judgment after the address, the court held that the application for amendment amounted to a fresh point on appeal and so was incompetent without a prior leave having been sought and obtained to raise same. Accordingly, it struck the suit out for lack of proper plaintiff. Aggrieved, appellant brought this appeal at Supreme Court contesting the jurisdiction of the court to revisit an order that it had already granted as well as the holding of the court that the amendment raised a fresh point.

ISSUES FOR DETERMINATION

“1. Whether in the circumstances of this appeal, the Court of Appeal was right in holding that the amendment it earlier granted to amend the name of the appellant and also the record for proceedings raised a new point or a fresh issue which was not raised in the court below.

2. Whether having granted the appellant leave to amend the name of the appellant also the record of proceedings, which amendment had retrospective effect, the Court of Appeal had the jurisdiction and competence to ignore or decline to give due legal effect to the said amendment when it allowed the appeal before it and proceeded to strike out the suit on the self-same ground that same was not properly constituted”.

HELD (Unanimously allowing the appeal per **KALGO**

JSC)*Court - Issues - Suo motu raising - Correctness of*

1. This issue did not arise from any ground of appeal or any point raised in the appeal before the Court of Appeal. It was raised by the Court of Appeal suo motu in the course of the hearing of the appeal before it. It related to the amendment granted by the Court of Appeal on the application of the appellant. I have earlier in this judgment set out how and in what circumstances it arose, i.e., after the learned counsel had completed their respective submissions in the appeal before that court. There is no doubt in my mind that by the contents of the issues raised by the Court of Appeal, it is an issue of law. I also have no doubt in my mind that courts of law are entitled to raise any issue of law in relation to any matter before it, but the parties to the case must be given the opportunity to address the court on the issue before the court reaches any decision on the issue so raised. In this case, the parties were given the opportunity to address the court soon after the issue was raised. So far so good. (p. 454 E)

APPEALS - Fresh issue - Need for leave

2. It is obvious that this issue did not arise at all in the trial court. It could not have so arisen because; (i) the amendment was not applied for or granted in the trial court and (ii) it was only raised by the Court of Appeal in the course of hearing the appeal. So the question of its being canvassed or raised in the trial court could not have arisen even though it may appear to be a fresh point.

It is now trite law that leave is required to file and argue any fresh point not canvassed in a lower court if it is to be considered in the appellate court and the court has a discretion to grant or refuse such leave. In the instant case, the issue was raised by the Court of Appeal itself; so the question of the exercise of a discretion to grant or refuse leave to argue the issue did not arise. (p. 455 A)

PLEADINGS - Amendment - Effective date

3. It is now well settled and trite law that any amendment of

the pleadings in a case, made or ordered at any stage of the proceedings before judgment, or even made in an appeal, dates back to the date when the pleadings were originally filed. This means that “once pleadings are amended, what stood before amendment is no longer material before the court and no longer defines the issues to be tried” And since the affidavit in support of the application averred in paragraphs 2-5 set out earlier in this judgment that amendment was sought not to introduce new dimension to the action but to enable the court to properly hear and determine the real question in controversy between the parties, and there was no counter-affidavit challenging these averments, the amendments were properly made and took effect on the same date. (p. 456 G)

Court - Judgment - Binding nature of
4. Learned counsel for the appellant submitted and I agree with him, that the exercise by the Court of Appeal of its discretion to grant the application for amendment, is a “decision” within the meaning of Section 277(1) of 1979 Constitution applicable to this case, and that it cannot review or set it aside unless it is proved to be a nullity. It was not proved to be a nullity in this case, and so the Court of Appeal was wrong to set it aside or disregard its resultant effect as it did in this case. It cannot also reopen it after its determination as it is functus officio. The Court of Appeal is therefore bound by its own decision in granting the amendments as prayed for by the appellant in his application and that it was wrong for them to refuse to give effect to the said decision in this appeal.
 (p. 457 C)

REPRESENTATION

Emmanuel J. J. Toro, SAN, with P. Kefas, for the Appellant
 T. E. Williams, with Mrs. Fatima Gambari Mohammed, for the Respondents

CASES REFERRED TO

Ibrahim v. JSC (1998) 14 NWLR (Pt. 584) 1
 Warner v. Sampson (1959) 1 QB 297

Ndiwe v. Okocha (1992) 7 NWLR (Pt. 252) 129

Dike v. Aduba (2000) 2 S.C. 24

John Andy Sons & Co. Ltd. v. N.C.R.I. (1997) 3 NWLR (Pt. 491) 1

Enigbokan v. A.I.I. Co. Nig. Ltd. (1994) 6 NWLR (Pt. 348) 1

Kate Enter. Ltd. v. Daewoo Nig. Ltd. (1985) 2 NWLR (Pt. 5) 116

Okonji v. Njokanma (1999) 12 S.C. (Pt. II) 150

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STATUTE REFERRED TO

Constitution of Federal Republic of Nigeria 1979, s. 277(1)

LEAD JUDGMENT BY KALGO JSC

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The appellant was the plaintiff in the High Court of Justice, Kaduna where he commenced this action on 3rd July, 1984 against the respondents jointly and severally claiming as per paragraph 24 of his amended statement of claim, the following reliefs:-

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(1) A DECLARATION that as The Registered Trustee of the Archdiocese of Kaduna of Roman Catholic Church, the plaintiff is by virtue of the said office, the lawful proprietor and owner of Sacred Heart School, Independence way, Kaduna, permission for the establishment whereof was sought by the plaintiff's predecessor, in-office and was duly granted on or about the 11th day of March, 1966, by the then Ministry of Education, Northern Region of Nigeria pursuant to and in accordance with the Education, Law Cap. 36 Laws of Northern Nigeria, 1963, (as now applicable to Kaduna State), and regulations made thereunder.

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(2) A DECLARATION that as the Proprietor and owner, of the said Sacred Heart School, Kaduna, the plaintiff is lawfully entitled and responsible at his sole discretion to the exclusion of all other persons, more particularly the defendants, their agents, servants or privies whomsoever and howsoever, for the management and control of the said school including the appointment of its Advisory Board, Manager, headmistress and other Staff, Pupils admission and to ensure that the school is managed and run in a manner satisfactory to the plaintiff and in compliance with the terms and conditions attached to the grant of proprietorship by the competent authority.

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(3) AN ORDER that the defendants more particularly the 2nd defendant should promptly and peacefully vacate, surrender and deliver up to the plaintiff or anyone or persons appointed by the

plaintiff possession of the said School and the management and conduct of its affairs and to surrender all property, records and books of the said school in a satisfactory manner and condition.

4. A PERPETUAL INJUNCTION restraining the defendants by themselves or their agents, servants, functionaries or privies whomsoever and howsoever from interfering with or hindering the plaintiff's management and control of the school".

Pleadings were then filed in court and exchanged between the parties. The Defendants/Respondents in their joint Statement of Defence raised counter-claim of 27 reliefs all in the nature of declarations. I do not intend to set them out in this judgment.

At the trial, the appellant gave evidence and called two witnesses in support of his claims. The respondents did not give any evidence or call any witness in their defence. Thereafter, learned counsel for the parties addressed the court and the trial court adjourned for judgment. In a considered judgment delivered on the 15th of May, 1987, the learned trial Judge, Ibiyeye, J., (as he then was), gave judgment for the appellant and granted all the reliefs claimed by him. The respondents were unhappy with this decision and they filed an appeal in the Court of Appeal on 7 grounds.

In the Court of Appeal, written briefs were filed and exchanged between the parties. On the 1st of August, 1994, while the appeal was pending, the appellant filed a motion on notice supported by an affidavit seeking the following reliefs:-

"(1) An order granting the respondent/applicant leave to amend the pleadings filed in this suit by amending both the Writ of Summons and the Statement of Claim by substituting the name of the respondent/applicant as presently appearing on the record with the following new name which is the proper name namely:-

"THE REGISTERED TRUSTEE OF THE ARCHDIOCESE OF KADUNA OF THE ROMAN CATHOLIC CHURCH"

(i) Upon the grant of the prayer in above to deem the record of proceedings in this suit as having been amended consequently; and

(iii) Such further or other order or orders as the court may deem fit to make in the circumstances".

The application was heard by the Court of Appeal and subsequently granted without any objection by the respondents,

On the 28th September, 1994, the appeal was heard and in the course of the hearing, the Court of Appeal referred to the amendment of the proceedings granted above, and said:-

“Mr. Toro: you told us in your address in this appeal that your amendment of this morning had a retrospective effect to the date when the exposition writ was filed. If that is the case will amount to raising a new point on appeal which was not canvassed in the court below”.

What the Court of Appeal was saying was that if the submission of learned counsel for the appellant was that the amendment of the proceedings granted by the Court that morning had retrospective effect, that would amount to raising a new issue not canvassed in the trial court and on which learned counsel for the parties must address the court. The learned counsel accordingly addressed the court on it, and the case was adjourned for judgment.

In its judgment, delivered on 30/11/94. The Court of Appeal, (Okunola, Mohammed and Opene, JJCA.), unanimously allowed the appeal, set aside the decision of the trial court and in its stead substituted an order striking out the suit before the trial High Court for lack of proper plaintiff. Dissatisfied with this decision, the appellant now appealed to this court on four grounds but later abandoned the 4th ground.

In this court, written briefs were filed and exchanged between the parties. In the appellant’s brief the following issues for the determination of this court were set out:-

“1. Whether in the circumstances of this appeal, the Court of Appeal was right in holding that the amendment it earlier granted to amend the name of the appellant and also the record for proceedings raised a new point or a fresh issue which was not raised in the court below (3rd ground of Appeal).

2. Whether having granted the appellant leave to amend the name of the appellant also the record of proceedings, which amendment had retrospective effect, the Court of Appeal had the jurisdiction and competence to ignore or decline to give due legal effect to the said amendment when it allowed the appeal before it and proceeded to strike out the suit on the self-same ground that same was not properly constituted. (1st and 2nd grounds of appeal)”.

The only issue raised by the respondents in their joint brief

was:-

“whether an action which was admittedly commenced in the name of the wrong plaintiff can be cured on appeal by an order of amendment substituting the name of the right plaintiff?”.

I have carefully studied the 3 grounds of appeal filed by the appellant in his notice of appeal to this court and I am of the view that the 2 issues raised in his brief are properly distilled from those grounds. On the other hand, the only issue formulated by the respondent does not appear to me to arise from any of the grounds of appeal. The issue stands to challenge the locus standi of the appellant in the trial court and questioned whether this can be cured or corrected by an amendment on appeal. That was not an issue in the grounds of appeal and since the respondents have not filed a cross-appeal to challenge the locus standi of the appellant at the trial, or after the amendment in the Court of Appeal, they cannot raise it now. I will therefore disregard and discountenance the only issue raised by the respondents in this appeal.

Issues 1 and 2 of the appellant deal with the extent of the amendment granted by the Court of Appeal and the resultant effect of such amendment in law.

I shall consider the first issue now. ***This issue did not arise from any ground of appeal or any point raised in the appeal before the Court of Appeal. It was raised by the Court of Appeal suo motu in the course of the hearing of the appeal before it. It related to the amendment granted by the Court of Appeal on the application of the appellant. I have earlier in this judgment set out how and in what circumstances it arose, i.e., after the learned counsel had completed their respective submissions in the appeal before that court. There is no doubt in my mind that by the contents of the issues raised by the Court of Appeal, it is an issue of law. I also have no doubt in my mind that courts of law are entitled to raise any issue of law in relation to any matter before it, but the parties to the case must be given the opportunity to address the court on the issue before the court reaches any decision on the issue so raised*** (See Ibrahim v. JSC (1998) 14 NWLR (Pt.584) 1; Ndiwe v. Okocha (1992) 7 NWLR (Pt.252) 129; Okonji v. Njokanma (1999) 12 S.C. (Pt.II) 150; (1999) 14 NWLR (Pt.638) 250. ***In this case,***

the parties were given the opportunity to address the court soon after the issue was raised. So far so good.

The next point in this issue is whether it constituted a new or fresh point not canvassed in the trial court. **It is obvious that this issue did not arise at all in the trial court. It could not have so arisen because; (i) the amendment was not applied for or granted in the trial court and (ii) it was only raised by the Court of Appeal in the course of hearing the appeal. So the question of its being canvassed or raised in the trial court could not have arisen even though it may appear to be a fresh point.**

It is now trite law that leave is required to file and argue any fresh point not canvassed in a lower court if it is to be considered in the appellate court and the court has a discretion to grant or refuse such leave. See *Kate Enterprises Ltd. v. Daewoo Nig. Ltd.* (1985) 2 NWLR (Pt. 5) 116. **In the instant case, the issue was raised by the Court of Appeal itself; so the question of the exercise of a discretion to grant or refuse leave to argue the issue did not arise.**

It is also pertinent to mention that the motion for the amendment filed by the appellant was on notice to the respondents and they raised no objection to it before the court granted it. So it could not be any thing new to them and in any case, the issue was raised by the court in the presence of counsel for both parties in court. There is therefore no surprise or injustice to either party especially as they were given the opportunity to address the court on the issue.

In the circumstances, I find feat the issue raised by the Court of Appeal suo motu in this appeal is not a new or fresh point requiring leave for it to be argued. I answer issue 1, in the negative.

I will now consider issue 2. The appellant's motion on notice filed on 1/8/94, was fully set out earlier in this judgment. I will not repeat it here. But for proper understanding of the situation, I find the following paragraphs of the affidavit in support of the application useful and relevant. They read:-

"2. That the appellants/respondents as the defendants before the trial High Court did not in both their Statement of Defence and Amended Statement of Defence join issue with the plaintiff/respondent/applicant on the proper name and/or capacity of the plaintiff to institute this suit.

3. *That the amendment now sought is meant to bring the proper parties to the suit before the court so as to enable the court to properly hear and determine this suit on the merits.*

4. *That the amendment sought, if granted, will not introduce a new dimension to the whole action and will not entail reopening the respondent/applicant's case.*

5. *That the amendment sought, if granted will accord with and be in line with the evidence adduced at the trial having regard to Exhibit 'A' to this affidavit and no new issue will be raised if the amendment is granted"*

Exhibit 'A' was the Certificate of Incorporation of the appellant. No counter-affidavit was filed by the respondents and when the motion was moved by the appellants, they raised no objection and it was granted as prayed. The court in granting the application ruled thus:-

"Court: Motion dated 28/7/94 and filed on 1/8/94 is ordered as prayed. Leave is hereby granted to the Respondent/ Appellant to amend the pleadings filed in this suit by amending both the writ of summons and the Statement of Claim by substituting the name of the Respondent/Applicant as presently appearing on the records with the following new name which is the proper name namely-

"The Registered Trustee of the Archdiocese of Kaduna of the Roman Catholic Church"

The record of proceedings in this suit is consequently deemed to have been amended consequently".

It is apparent and crystal clear that the effect of this order of the court was to amend the pleadings of the appellant and the writ of summons by putting the proper name of appellant with the words: *"The Registered Trustee of the Archdiocese of Kaduna of the Roman Catholic Church"* as disclosed in Exhibit 'A' attached to the application. The only point in this issue therefore is what is the legal effect of this amendment?

It is now well settled and trite law that any amendment of the pleadings in a case, made or ordered at any stage of the proceedings before judgment, or even made in an appeal, dates back to the date when the pleadings were originally filed. This means that "once pleadings are amended, what stood before amendment is no longer material before the court and no

longer defines the issues to be tried". See Enigbokan v. A.I.I. Co. Nig. Ltd. (1994) 6 NWLR (Pt. 348) 1 at 15-16, Warner v. Sampson (1959) 1 QB 297 at 321 cited by the learned counsel for the appellant in his brief. ***And since the affidavit in support of the application averred in paragraphs 2-5 set out earlier in this judgment that amendment was sought not to introduce new dimension to the action but to enable the court to properly hear and determine the real question in controversy between the parties, and there was no counter-affidavit challenging these averments, the amendments were properly made and took effect on the same date.***

Learned counsel for the appellant submitted and I agree with him, that the exercise by the Court of Appeal of its discretion to grant the application for amendment, is a "decision" within the meaning of Section 277(1) of 1979 Constitution applicable to this case, (See Dike v. Aduba (2000) 2 S.C. 24; (2000) 3 NWLR (Pt. 647) 1 at 10) and that it cannot review or set it aside unless it is proved to be a nullity. It was not proved to be a nullity in this case, and so the Court of Appeal was wrong to set it aside or disregard its resultant effect as it did in this case. It cannot also reopen it after its determination as it is functus officio. See John Andy Sons & Co. Ltd. v. N.C.R.I. (1997) 3 NWLR (Pt. 491) 1. The Court of Appeal is therefore bound by its own decision in granting the amendments as prayed for by the appellant in his application and that it was wrong for them to refuse to give effect to the said decision in this appeal. I therefore answer issue 2 also in the negative.

Finally and for the reasons stated above I find that there is merit in this appeal. I therefore allow it and set aside the decision of the Court of Appeal delivered on 30th November, 1994 and remit the case back to the Court of Appeal, Kaduna to be heard and determined on the merits by another Panel of the court. I award N10,000.00 costs to the appellant against the respondents.

KUTIGI JSC

I read before now, the judgment just delivered by my learned brother, Kalgo, JSC. I agree with the conclusion to allow the appeal

and remit the case to the Court of Appeal, Kaduna, for determination on merit by fresh panel. The Court of Appeal was clearly in error when after granting leave to amend the pleadings, it proceeded again to allow the appeal and strike out the suit before the trial court for want of the same amendment. I endorse the order for costs.

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MOHAMMED JSC

I have had a preview of the opinion of my learned brother, Kalgo, JSC., in the judgment just read. I entirely agree that the Court of Appeal had made a decision when it granted the application for amendment. That Court cannot review or set aside a decision which it is competent to make. I also allow this appeal and order the appeal to be reheard at the Kaduna Division of the Court of Appeal by a differently constituted panel of that Court. I abide by the order made in the lead judgment on costs.

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UWAIFO JSC

I am satisfied that my learned brother, Kalgo, JSC., has completely resolved the issues in this appeal in his judgment which I have had the opportunity of reading in advance. For the reasons he gives in reaching his conclusions, which reasons I respectfully adopt as mine, I too allow the appeal, set aside the judgment of the court below and order that the matter be remitted to the Court of Appeal, Kaduna for the hearing of the appeal on the merits. I also award N10,000.00 costs to the appellant against the respondent.

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EJIWUNMI JSC

I have had the privilege of reading before now the judgment just delivered by my learned brother, Kalgo, JSC. In the said judgment, the issues raised in the appeal having been properly considered in the light of the facts, the appeal was allowed. For all the reasons given in the said judgment, the appeal is also allowed by me and I abide with the consequential orders made.

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