

SUPREME COURT OF NIGERIA

10TH JUNE, 2005, SC. 244/2000

**CORAM:- M. L. UWAIS CJN, S. U. ONU, A. I. KATSINA-ALU,
U. A. KALGO, I. C. PATS-ACHOLONU, JJSC**

1. CHIEF J. A. ADEMESO APPELLANT
AND
1. MRS. MARIA OKORO
2. MR. JUSTIN OKORO RESPONDENTS
(ADMINISTRATRIX & ADMINISTRATOR
OF THE ESTATE OF LATE ALOYSIUS
OKECHUKWUOKORO)

PLEADINGS - Averment - Evidence - Where plaintiff forwards a case in his pleadings - Any evidence at variance with the averment - Goes to no issue - And should be disregarded by court (H1)

COURTS - Pleadings - Binding nature of - As parties are bound by their pleadings - Courts are also bound by the pleadings - And issues raised in the pleadings (H2)

EVIDENCE - Admissions - Counter affidavit - Pleadings - Where plaintiffs evidence is called by way of counter affidavit - In response to pleadings - Defendant is under no obligation - To counter the averment (H3)

COURTS - Appeals - Judgments - Notice to produce - Lower court's dismissal of defendant's application - For notice to produce a relevant document - Was erroneous (H4)

FACTS

Before the High Court of Lagos State, Ikeja Judicial Division, the plaintiff/respondent made claims against the defendant/appellant for an order of specific performance directing the 1st defendant to execute the

deed of transfer and the sale agreement in respect of the property at No. 22 Oluti Street, Oluti Amuwo, Lagos, having received the sum of N350,000.00 for purchase price. The plaintiffs filed their Statement of claim with their writ of summons upon which the 1st defendant served the plaintiffs a notice to produce for inspection, the draft Deed of assignment referred to in the statement of claim.

When the 1st defendant did not receive any response from the plaintiffs, he applied to court to compel the plaintiffs to produce the draft deed for inspection. In reaction to the application, the plaintiffs filed a counter affidavit wherein they deposed that the engrossed copy and correct draft were sent to the 1st defendant for execution. The trial court held that since the 1st defendant did not challenge the plaintiff's averment in their counter affidavit that the draft Deed of Assignment was returned to him for execution, the facts are deemed established. The 1st defendant's appeal to the Court of Appeal was dismissed. He has further appealed to the Supreme Court.

ISSUE FOR DETERMINATION

“Whether the learned Justices of the Court of Appeal were right in refusing to interfere with the exercise of the trial court's discretion ?”

HELD (Unanimously allowing the appeal per **KATSINA-ALU JSC**)
PLEADINGS - Averment - Evidence

1. In the present action, the plaintiffs in their Statement of Claim averred that they were the last in possession of the draft Deed of Assignment. In their affidavit evidence, however, the plaintiffs made a U-turn. They deposed that they returned the document to the 1st defendant for execution. Also, in their affidavit evidence, they stated that they would amend their Statement of Claim to reflect their new stand. I must say straight-away that a declaration of an intention to amend does not amount to an amendment of the pleadings. The case of the plaintiffs therefore is as averred in paragraph 14 of the Statement of Claim, that is, that the 1st defendant returned the document to the plaintiffs.

It is settled law that a plaintiff is bound by the case he puts forward in his pleadings. It is also settled law that any evidence which is at

variance with the averment of the pleadings goes to no issue and should be disregarded by the court. It is to be noted that one of the objects of pleadings is to settle the issues to be tried so that no party is taken by surprise and thereby ensure the fairness of the trial. A plaintiff must therefore call evidence to support his pleadings and evidence adduced which is in fact contrary to his pleadings should never be admitted. The evidence that they returned the document to the 1st defendant is plainly at variance with plaintiffs' Statement of Claim. That evidence, based upon the numerous decisions of this court, goes to no issue and should be disregarded by the court. (p. 1494 G)

Pleadings - Binding nature of

2. Just as the parties are bound by their pleadings, the trial courts are equally bound by the pleadings and the issues raised by and in those pleadings. The trial court therefore has no right to ignore the pleadings of the parties and proceed to consider issues not pleaded by the parties.

The two lower courts in this action, simply proceeded to consider an issue which the plaintiff did not put forward in his pleadings. What the two lower courts did was this. They looked at the affidavit evidence and not at the pleadings of the plaintiff. As I have earlier stated, an intention to amend the pleadings did not amount to an amendment. So, what this means is this. The case of the plaintiff is as put forward in paragraph 14 of the Statement of Claim. A plaintiff must call evidence to support his case put forward in his pleadings. Any evidence adduced by and for the plaintiff which is contrary to his pleadings should never be admitted.

(p. 1495 H)

EVIDENCE - Admissions - Counter affidavit

3. The trial court and the Court of Appeal were of the view that the 1st defendant should have challenged the counter-affidavit. The defendant's failure to contradict the averment that the draft Deed of Assignment was returned to him for execution was deemed an admission. I do not subscribe to this view. At that stage of the trial, the 1st defendant was under no obligation to counter the averment having regard to the fact that the

evidence the plaintiffs called by way of their counter-affidavit was in response to the application of the 1st defendant. But that evidence was clearly contrary to their pleadings. What the courts should have done was to look at that evidence vis-a-vis the plaintiffs' pleadings. No other B considerations were called into question at that stage. (p. 1496 D)

Judgments - Notice to produce

4. In conclusion, I hold that, in the circumstances of this case, the trial C court was in grave error when it dismissed the 1st defendant's application for an order directing the plaintiffs to produce for his inspection the draft Deed of Assignment pleaded in the plaintiffs' Statement of Claim. I further hold that the Court of Appeal acted in error in upholding the decision of the trial court. The single issue disposes of this appeal.

D In the result, this appeal succeeds and I allow it. I set aside the decisions of the trial court and the Court of Appeal. The plaintiffs are hereby directed to produce the said document for the inspection of and allow the 1st defendant to take a copy thereof. (p. 1496 H)

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REPRESENTATIONS

B. R. Fashola Esq., for the Respondents.
Adeyinka Olumide-Fusika for the Appellant

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CASES REFERRED TO

Nwafor Orizu v. Anyaegbunam (1978) 5 S.C. (Reprint) 18; (1978) 5 S.C 21

G National Investment & Properties Co. Ltd. v. The Thompson Organization & Ors. (1969) 1 All NLR 138

See Oduka & Ors. v. Kasunmu & Ors. (1968), NMLR 28 at page 31

Emegokwoe v. Okadigbo, 1973, 4 S.C. 113

H George & Ors. v. Dominican Flour Mills Limited, 1963, All NLR 51 at 77-78

African Continental Bank v. Attorney-General of Northern Nigeria, 1967, NMLR 231, at page 233

America Cyanamid v. Vitality (1991) 2 NWLR (Pt. 171) 15

Okonji v. Njokanma (1991) 7 NWLR (Pt. 202) 131

RULES REFERRED TO

High Court of Lagos (Civil Procedure) Rules 1972, O. 27 rr. 14 & 17(1)

LEAD JUDGMENT BY KATSINA-ALU JSC

This is an appeal from the decision of the Court of Appeal, Lagos vision, given on 11th July, 2000, whereby the Court of Appeal dismissed the appellant's appeal and affirmed the decision of the learned trial Judge who had exercised his discretion to refuse inspection of documents sought by the appellant. The appellant herein, Chief J. A. Ademeso, was the 1st defendant in the court of trial. The respondents, Mrs. Maria Okoro and Mr. Justin Okoro, were the plaintiffs before the Ikeja Judicial Division of the High Court of Lagos State.

By a Writ of Summons dated 31st January, 1995, the plaintiffs claimed against the 1st defendant along with three other persons, inter alia as follows:

“An order of specific performance directing the 1st defendant to execute the deed of transfer and/or the sale by agreement in respect of the property situate, lying and being at No. 22 Oluti Street, Oluti Amuwo, Lagos, having received the sum of N350,000.00 (Three hundred and fifty thousand Naira) being the agreed purchase price.”

By their Statement of Claim filed along with the Writ of Summons, the plaintiffs pleaded in paragraph 14 thereof as follows:

“14. The plaintiffs aver that after paying the total sum of =N=350,999.00 the 1st defendant returned the draft Deed of Assignment with minor corrections for final execution and released the following documents as positive step to transfer his interest in the property to the plaintiffs.

- (a) Application for Certificate of Occupancy dated 5/8/80.*
- (b) Government Treasury Receipt 92812 dated 31/7/80.*
- (c) Nigerian Tribune Newspaper issue of 14/7/81 at page Re Certificate of Occupancy.*
- (d) Deed of Indemnity in respect of Application For Approval of*

Building Plan dated 28/8/79.

(e) Authority to collect Certificate of Occupancy Dated 29/7/92.

(f) Building Plan DCB/931/58 of 17/10/79; and

(g) Survey Plan No. LAT/594/76 made by L. Ademola, a licensed

B *Surveyor, of 10/7/76.*

The plaintiff shall rely on all these documents at the trial of this case.” (Underlining mine)

C *Upon the receipt of the Writ of Summons and the Statement of Claim, the 1st defendant served on the plaintiffs a Notice to Produce dated 25th day of April, 1995, for inspection of the 1st defendant..... “the draft Deed of Assignment with minor corrections referred to in paragraph 14 of the Statement of Claim.” The 1st defendant received no response from the plaintiffs. In consequence thereof, the 1st defendant*
D *made an application to the trial court dated 21st June, 1995 and filed on 22nd June, 1995, for:*

“AN ORDER directing the plaintiffs/respondents to produce for the inspection of and permit the 1st defendant/applicant or his counsel to
E *take a copy of the “draft Deed of Assignment” pleaded in Paragraph 14 of the Statement of Claim..... ”*

On 12th July, 1995, the plaintiffs filed a “counter-affidavit” to the application of the 1st defendant. The pertinent paragraphs of the “counter-
F *affidavit” are 6 to 9 and they read as follows:*

“6. That in drafting the Statement of Claim I inadvertently omitted from paragraph 14 thereof.

7. That after the 1st defendant returned the draft Deed of Assignment with minor corrections the engrossed copy and corrected draft were
G *sent to the 1st defendant for execution.*

8. That the said draft Deed of Assignment is not with any of the plaintiffs but with the 1st defendant together with the copy for execution which (1st defendant) has refused to execute.

H *9. That when the first notice to produce dated 23rd day of April, 1995, was served on him, I was informed by Alhaji K. O. Tinubu, and I verily believe him that we could amend the Statement of Claim at the trial to reflect the true position as stated above. The learned trial Judge in his*

ruling dismissed the application for inspection. He reasoned thus:

“..... the application of the 1st defendant is in order. It should be granted in the normal circumstances.

However, this application is not all that straightforward and this is the reason. The plaintiffs through their Solicitors swore to a counter-affidavit wherein at paragraphs 7 and 8 the following appears:

7. That after the 1st defendant returned the draft/Deed of Assignment with minor corrections the engrossed copy and corrected draft were sent to the 1st defendant for execution.

8. That the said draft Deed of Assignment is not with any of the plaintiffs but with the 1st defendant together with the copy for execution which he (1st defendant) has refused to execute.

The question now is what is the reaction of the 1st defendant to these serious, grave and fundamental facts? None is the answer. In effect these facts are now unchallenged, not denied or controverted. In my humble view - the 1st defendant, ought to, react to these facts. I receive support for this view in the case of Ajomale v. Yaduath (No. 2) (1991) 5 NWLR (Pt. 191) at page 266 at pages 282-283, Nnaemeka-Agu, JSC. E observed:

‘It is, of course, trite law that when in a situation such as this, facts are provable by affidavit and one of the parties deposes to certain facts his adversary has a duty to swear to an affidavit to the contrary if he disputes the facts where, as in the instant case, such a party fails to swear to an affidavit to controvert such facts. These facts may be regarded as duly established.’

In the circumstances, how can a court ask a party who is not in possession of a document to produce it for inspection? To me it will be a futile exercise. Before dismissing the application I ask learned counsel for the parties to engage in in-depth research on these pre-trial procedures.

The application lacks merit. It is hereby dismissed.”

The 1st defendant’s appeal to the Court of Appeal was dismissed. H The Court of Appeal per Oguntade, JCA., (as he then was), held as follows:

“It is correct that Order 27 rule 17(1) does not contemplate the

filing of a counter-affidavit by the plaintiff but it seems to me that if a mistake it was for the plaintiffs to have filed a counter- affidavit, that was a minor and innocuous occurrence. This is because the plaintiffs would have been at liberty to explain to the lower court that the averment in paragraph 14 of the Statement of Claim was inaccurate; and that the plaintiffs would amend it later. Surely, it could not be the intendment of Order 27 that a party against which an order was to be made should not be heard. What is not made clear is the method by which such party could be heard. Was it by oral representations in court, or by a letter or by an affidavit?"

The 1st defendant has further appealed to this court. The 1st defendant as appellant has presented three issues for determination. These read as follows:

"(i) Whether the learned Justices of the Court of Appeal were right in holding that Order 27 Rules 14, 16 and 17 of the High Court of Lagos State (Civil Procedure) Rules 1972 did not stipulate a clear method by which a respondent to an application brought under those rules could be heard.

(ii) Whether the learned Justices of the Court of Appeal were right in affirming the decision of the court of first instance to cognize the plaintiffs' counter-affidavit and to accept and treat the content thereof as unchallenged and therefore proven in exercising its judicial discretion.

(iii) Whether in the circumstances of this matter the learned Justices of the Court of Appeal were right in refusing to interfere in the exercise of the judicial discretion vested in the learned Judge of the court of first instance in dismissing the 1st defendant's application."

The plaintiffs as respondents for their part, raised a lone issue for determination which reads:

"Whether the learned Justices of the Court of Appeal were right in refusing to interfere with the exercise of the trial court's discretion ?"

The question for resolution in this appeal is a very narrow one. That being so, I think the lone issue submitted by the plaintiffs is sufficient to dispose of this appeal.

The starting point is the counter-affidavit filed by the plaintiffs in

response to the application to produce the Deed of Assignment for inspection by the 1st defendant. As I have already stated, the plaintiffs filed their Statement of Claim along with their Writ of Summons. In paragraph 14 thereof, the plaintiffs averred that the 1st defendant returned the draft Deed of Assignment with minor corrections for final execution to them (plaintiffs). The plaintiffs also gave a list of other documents which they claimed the 1st defendant released to them. B

The reaction of the 1st defendant was to apply to court to compel the plaintiffs to produce the draft Deed of Assignment for his inspection. It must be observed here that what the 1st defendant did was in strict compliance with Order 27 Rules 14 and 17(i) of the High Court of Lagos State (Civil Procedure) Rules, 1972. Rules 14 and 17(i) proved as follows: C

“14. Every party to a cause or matter shall be entitled, at anytime, by notice in writing, to give notice to any other party in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his legal practitioner, and to permit him or them to take copies thereof.” (Underlining mine). D E

“17(i) If any party served with notice under rule 14 omits to notify a time for the inspection or objects to give inspection or offers inspection elsewhere than at the office of his legal practitioner, the court or a judge in chambers may on application of the party desiring it make an order for inspection in such place and in such manner as he may think fit: provided that the order shall not be made when and so far as the court or judge in chambers shall be of the opinion that it is not necessary either for disposing fairly of the case or matter or for saving costs.” (Underlining mine) F

The plaintiffs, in reaction to the application, filed a counter-affidavit the relevant paragraphs of which I have already reproduced. In their counter-affidavit, the plaintiffs deposed that the engrossed copy and corrected draft were sent to the 1st defendant for execution. It was added that the draft Deed of Assignment was not with any of the plaintiffs but with the 1st defendant. The plaintiffs further indicated in the counter-affidavit that they would amend their Statement of Claim at the trial to reflect this position. G H

As I have earlier on indicated, the learned trial Judge in his ruling reasoned that since the 1st defendant did not challenge the plaintiffs' averments, he regarded those facts as duly established. The learned trial judge asked rhetorically, "how can a court ask a party who is not in possession of a document to produce it for inspection". He answered by saying that it would, in his view, be a futile exercise. In consequence, the learned trial Judge dismissed the 1st defendant's application for inspection.

1st defendant's appeal to the court below was dismissed, thereby affirming the decision of the trial court.

Paragraph 14 of the Statement of Claim dated 31st January, 1995, reads in part as follows

"14. The plaintiffs aver that after paying the total sum of N50,000.00 the 1st defendant returned the draft Deed of Assignment with minor corrections for final execution....."

When asked by the 1st defendant to produce the document, that is, the draft Deed of Assignment for inspection, the plaintiffs prevaricated. They first remained silent. Then, they deposed in a counter-affidavit that: "That the said draft Deed of Assignment is not with any of the plaintiffs but with the 1st defendant together with the copy for execution which he (1st defendant) has refused to execute."

It has been submitted for the 1st defendant that the plaintiff is bound by his pleadings; that any evidence that is at variance with the pleadings is inadmissible. For this contention, learned counsel for the 1st defendant relied on the following cases: *America Cyanamid v. Vitality* (1991) 2 NWLR (Pt. 171) 15; *Okonji v. Njokanma* (1991) 7 NWLR (Pt. 202) 131.

In the present action, the plaintiffs in their Statement of Claim averred that they were the last in possession of the draft Deed of Assignment. In their affidavit evidence, however, the plaintiffs made a U-turn. They deposed that they returned the document to the 1st defendant for execution. Also, in their affidavit evidence, they stated that they would amend their Statement of Claim to reflect their new stand. I must say straight-away that a declaration of an intention to amend does not amount to an amendment of the

pleadings. The case of the plaintiffs therefore is as averred in paragraph 14 of the Statement of Claim, that is, that the 1st defendant returned the document to the plaintiffs.

It is settled law that a plaintiff is bound by the case he puts forward in his pleadings. It is also settled law that any evidence which is at variance with the averment of the pleadings goes to no issue and should be disregarded by the court - See Nwafor Orizu v. Anyaegbunam (1978) 5 S.C. (Reprint) 18; (1978) 5 S.C 21. It is to be noted that one of the objects of pleadings is to settle the issues to be tried so that no party is taken by surprise and thereby ensure the fairness of the trial. A plaintiff must therefore call evidence to support his pleadings and evidence adduced which is in fact contrary to his pleadings should never be admitted. See National Investment & Properties Co. Ltd. v. The Thompson Organization & Ors. (1969) 1 All NLR 138.

The evidence that they returned the document to the 1st defendant is plainly at variance with plaintiffs' Statement of Claim. That evidence, based upon the numerous decisions of this court, goes to no issue and should be disregarded by the court. In Dr. Nwafor Orizu v. Anyaegbunam, supra, this court held thus:

"It is settled law that a plaintiff must be held to the case put forward in his pleadings. In African Continental Bank v. Attorney-General of Northern Nigeria, 1967, NMLR 231, at page 233, Brett, JSC., delivering the judgment of this court regarded it as established rule that a plaintiff must be held to the case put forward in his Writ of Summons and pleadings, for, as it has also been established by this court, one of the issues to be tried, (See Oduka & Ors. v. Kasunmu & Ors. (1968), NMLR 28 at page 31; Emegokwoe v. Okadigbo, 1973, 4 S.C. 113). In the latter case, this court said 'that any evidence which is at variance with the averment of the pleadings goes to no issue and should be disregarded by the court. The reason for this strict rule is not far to seek, as it was said in George & Ors. v. Dominican Flour Mills Limited, 1963, All NLR 51 at 77-78. The fairness of any trial can be tested by the maxim audi alteram, and the other side cannot be properly heard if it is taken by surprise.'"

Just as the parties are bound by their pleadings, the trial

courts are equally bound by the pleadings and the issues raised by and in those pleadings. The trial court therefore has no right to ignore the pleadings of the parties and proceed to consider issues not pleaded by the parties.

B The two lower courts in this action, simply proceeded to consider an issue which the plaintiff did not put forward in his pleadings. What the two lower courts did was this. They looked at the affidavit evidence and not at the pleadings of the plaintiff. As I have earlier stated, an intention to amend the pleadings did not amount C to an amendment. So, what this means is this. The case of the plaintiff is as put forward in paragraph 14 of the Statement of Claim. A plaintiff must call evidence to support his case put forward in his pleadings. Any evidence adduced by and for the plaintiff which is D contrary to his pleadings should never be admitted.

The trial court and the Court of Appeal were of the view that the 1st defendant should have challenged the counter-affidavit. The defendant's failure to contradict the averment that the draft Deed E of Assignment was returned to him for execution was deemed an admission. I do not subscribe to this view. At that stage of the trial, the 1st defendant was under no obligation to counter the averment having regard to the fact that the evidence the plaintiffs called by F way of their counter-affidavit was in response to the application of the 1st defendant. But that evidence was clearly contrary to their pleadings. What the courts should have done was to look at that evidence vis-a-vis the plaintiffs' pleadings. No other considerations were called into question at that stage.

G However, if the evidence of the plaintiffs was in support of an application to amend their pleadings, the 1st defendant would be expected to challenge it. In any event, an application for amendment would precede the motion to produce filed by the 1st defendant.

H In conclusion, I hold that, in the circumstances of this case, the trial court was in grave error when it dismissed the 1st defendant's application for an order directing the plaintiffs to produce for his inspection the draft Deed of Assignment pleaded in the plaintiffs'

Statement of Claim. I further hold that the Court of Appeal acted in error in upholding the decision of the trial court. The single issue disposes of this appeal.

In the result, this appeal succeeds and I allow it. I set aside the decisions of the trial court and the Court of Appeal. The plaintiffs are hereby directed to produce the said document for the inspection of and allow the 1st defendant to take a copy thereof. The 1st defendant as appellant is entitled to costs which I assess at N2,000.00 in the trial court, N5,000.00 in the Court of Appeal and N10,000.00 in this court.

UWAIS CJN

I have had the opportunity of reading in draft the judgment read by my learned brother, Katsina-Alu, JSC, I entirely agree with the judgment. Therefore, I too hereby allow the appeal and adopt the order contained in the judgment.

ONUJSC

I agree.

KALGOJSC

I have had the advantage of reading in draft the judgment just delivered by my learned brother, Katsina-Alu, JSC., in this appeal. I agree with the reasoning and conclusions reached therein which I adopt as mine. I therefore also allow the appeal and set aside the decision of the Court of Appeal. I abide by the order of costs made in the leading judgment.

PATS-ACHOLONUJSC

I have read the lead judgment in draft of my noble Lord, Katsina-Alu, JSC., and I agree with him. It is a straightforward case. I have nothing further to urge on it.