

**SUPREME COURT OF NIGERIA**  
16<sup>TH</sup> DECEMBER, 2005. S.C. 111/2001  
**CORAM:- I. L. KUTIGI, U. A. KALGO, D. MUSDAPHER,**  
**A. M. MUKHTAR, W. S. N. ONNOGHEN, JJSC**

M. T. MAMMAN ..... APPELLANT  
AND  
A. A. SALAUDEEN ..... RESPONDENT

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PLEADINGS - Amendment of - Can be allowed at any stage including appeal - Save where injustice will result - And exercise of discretion by Court - Must be done judiciously (H1)

APPEALS - Pleadings - Amendment of - Appellate Court can amend pleadings - To avoid substantial injustice - Under certain conditions (H2)

APPEALS - Courts - Discretion - Interference - Where discretion is exercised upon a wrong principle - Appellate Court can interfere (H3)

PRACTICE & PROCEDURE - Appeals - Pleadings - Amendment that will overreach - Lower court acted judiciously - When it exercised its discretion - In refusing the application - For leave to amend the Statement of Claim (H4)

COURTS - Appeals - Findings - Reversal of lower court's findings - Occurs in certain circumstances - Such as where erroneous view of the evidence - Was taken by the lower court (H5)

DEFAMATION - Libel - Privileged publication - Pleadings - Solicitor's letter in this case being privileged - Trial court was wrong - In considering another fact - That was not pleaded (H6)

DEFAMATION - Appeals - Pleadings - Libel - Cross examination - Facts extracted therefrom - That were not pleaded - Were rightly expunged by

lower court - Unto interfering with trial court's finding (H7)

DEFAMATION - Libel - Publication - Where there is defence of qualified privilege - What to consider is - Whether publication to the person pleaded - Constitutes actionable libel (H8)

PLEADINGS - Libel - Reply - Where plaintiff never filed a reply - In reaction to the defence of qualified privilege - The defence cannot be dislodged (H9)

DAMAGES - Appeals - Libel - Ejabulor case - Provides the guiding principles - In assessment of damages for libel - But lower court was right in reversing the damages - Awarded in appellant's favour (H10)

APPEALS - Defamation - Issues - Relevance - Issues that are not relevant in an appeal - Will be ignored by the Court (H11)

### **FACTS**

Before the High Court of Kaduna State, the Plaintiff/Appellant sued the defendant/respondent claiming exemplary damages, an apology and injunction for libel on the ground that the allegation was false and malicious. The respondent was a customer of Trade Bank Plc, Kaduna where the appellant was a senior banker. The respondent in the course of doing business obtained credit from the bank which he failed to repay. Upon pressure by the bank to recover the facility, the respondent wrote, stating that his inability to pay was due to the fact that the appellant took part of the facility as "compulsory bribe".

The appellant aggrieved by the statement brought this action. The libel is alleged to have been published to the Manager of Trade Bank Plc, the employer of the appellant. The respondent admitted making the publication but denied that the words were published out of malice as the words were true and published on a privileged occasion. There was no reply to the statement of defence, since an application for extension of time to file a reply after evidence had been concluded was refused by the

court. The trial court gave judgment in favour of the appellant. The respondent appealed to the Court of Appeal where the judgment of the trial court was set aside. The appellant has now appealed to the Supreme Court.

**ISSUES FOR DETERMINATION**

*"(i) Whether having regard to the principles of law governing the amendment of pleadings as laid down by this Honourable Court in several decided cases the lower court exercised its discretion judiciously when it refused to grant the appellant leave to amend his statement of Claim.*

*(ii) whether having regard to the state of the pleadings, the law and the evidence adduced at the trial, the court of appeal was right to have overturned the clear findings of the trial judge that Exhibits 4,5,&6 were defamatory and that they were published out of spite and malevolence.*

*(iii) whether the lower court correctly stated the principles of law governing the defence of qualified privilege and whether the court was right to have upheld the defence of qualified privilege in the circumstance. ( Ground 5,6,7 and 9).*

*4. Whether the Court of Appeal was right in stating that even if the plaintiff's case had succeeded an award of #10,000.00 damages would have been sufficient instead #750,000.00 awarded by the trial court."*

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

***Amendment of pleadings - Can be allowed at any stage***

1. Generally speaking the law is that amendment to pleadings for the purpose of determining the real issues in controversy between the parties ought to be allowed at any stage of the proceedings, including on appeal, unless such amendment will result in injustice or surprise or embarrassment to the other party or the applicant is acting mala fide or by his blunder the applicant has done some injury to the respondent which cannot be compensated by way of costs or otherwise. In short, a consideration of an application for leave to amend pleadings involves the exercise of discretion by the court and it is the law that in exercising that discretion, the court must not only act judicially but also judiciously. The discretion is therefore to be exercised so as to do what justice and fair play may

require having regards to the facts and circumstances of the particular case. (p. 3110 G)

***Appellate Court can amend pleadings***

- B 2. It is trite law that an appellate court, such as the lower court and this court, has the jurisdiction to amend the pleadings of either party, upon application, so as to comply with the facts before the trial court and decision given by that court, so as to prevent the occurrence of substantial injustice. In such situations amendments are more readily granted when-  
C ever the grant does not necessitate the calling of additional evidence or the changing of the character of the case. (p. 3111 C)

***APPEALS - Courts - Discretion - Interference***

- D 3. The law is that a discretion properly exercised by a court will not be lightly interfered with by an appellate court even when the appellate court was of the opinion that it might have exercised the discretion differently. An appellate court will only Interfere where the trial court or lower court  
E exercised a discretion upon a wrong principle or mistake of law or under a misapprehension of the facts or took into account irrelevant or extraneous matters or excluded relevant matters thereby giving rise to injustice. (p. 3111 H)

F  
***Pleadings - Amendment that will overreach***

4. I had earlier found that the proposed amendments in paragraphs 3(a) and 5(a) of the statement of claim are intended by the appellant to overreach the respondent particularly as they are directed at neutralizing respondents  
G grounds 1 and 2 of the grounds of appeal. I am of the view that to allow the amendment would have resulted in substantial injustice to the respondent whose defence at the trial was that of qualified privilege and appellant ought to have known that to dislodge that defence he ought to plead  
H publication of the alleged libel to some one or people other than the employer of the appellant as pleaded in paragraphs 3 and 5 of the statement of claim. I therefore hold the view that the lower court in exercising its discretion in refusing the application for leave to amend the statement of

claim, acted judicially and judiciously and that under the circumstance this court cannot interfere. (p. 3112 C)

***Reversal of lower court's findings***

5. The basic question to be answered here is: When can an appellate court reverse a finding of fact by the lower court and whether the circumstance of this case qualifies for such a reversal. B

The law is that an appellate court will not ordinarily interfere with the findings of the trial court except in circumstances such as where the trial court has not made a proper use of the opportunity of seeing and hearing the witnesses at the trial or where it has drawn wrong conclusions from accepted credible evidence or has taken an erroneous view of the evidence adduced before it or its findings of fact are perverse or unsupported by the evidence. (p. 3113 F) C D

***Libel - Privileged publication - Pleadings***

6. There is no doubt that exhibit 6 is a letter written by a solicitor in the course of his duties to his client. The law is that such a letter cannot be defamatory since it is written on a privileged occasion see *Boxsus vs. Goblet* (1891) 4 All ER 1178 at 1180 where KOPES. LJ stated thus: E

*“For the proposals of the present case I am prepared to lay down this rule: that, if a communication made by a solicitor to a third party is reasonably necessary and usual in the discharge of his duty to his client, and in the interest of his client, the occasion is privileged”.* F

On exhibit 4 the trial court, contrary to the pleading, considered publication to a typist which fact is not pleaded. I agree with the lower court when it held that *“All that was required of the learned trial judge, having regard to the state of pleadings, was whether the publication was made on a privileged occasion and if he so found he was bound to throw out the respondent’s claim, It was not part of the respondents case on the pleadings that there was excess of privilege. The question of appellant exceeding his privilege does not, therefore arise not to talk of consideration and determination thereon.”* (p. 3114 G) G H

***Cross examination - Facts extracted therefrom***

7. The lower court then went on to conclude as follows: -

“Evidence extracted from appellant in the course of his cross-examination establishing publication to persons other than as pleaded in paragraph 3,4 and 5 of the statement claim are hereby expunged because they do not arise as parties did not join issues on them”.

In effect the lower court reversed the finding of the trial court that “I therefore find the writing printing and publishing of exhibits 4, 5 and 6 as defamatory”, and I am in full agreement with that holding, Applying the law regulating interference by appellate court with findings of fact by the lower court as reproduced earlier in this judgment to the facts of the case it is very clear and I hold the view that the lower court was duty bound to interfere with the findings in question particularly as they were contrary to the pleadings and applicable law. (p. 3115 C)

***Libel - Publication - Where there is defence of qualified privilege***

8. The essential part of the cause of action in libel is publication of the libellous matter complained of, not in the writing of the libellous matter. That being the case, it is trite law that an action for libel cannot be sustained without proof of publication – *Nsirim v. Nsirim* (1990) 3 NWLR (pt. 138) 285.

There is no doubt that exhibits 4, 5 and 6 being the alleged libellous materials were alleged by the appellant in paragraphs 3,4 and 5 of the Statement of claim to have been printed and or caused to be printed and published by the respondent to the branch manager of Trade Bank PLC or the said bank which is the employer of the appellant and a banker to the respondent. I had earlier stated in this judgment that exhibits 5 and 6 are mainly a reproduction of the allegation in exhibit 4 which respondent admitted being the author. The question therefore is not whether there was publication of the alleged libel but whether the publication to the person pleaded constitutes actionable libel having regards to the defence of qualified privilege. (p. 3117 A)

***Libel - Reply - Where plaintiff never filed a reply***

9. The employer of the appellant is a banker to the respondent and did advance some money to the respondent subject to repayment. Respondent defaulted in repaying the loan making it necessary for the appellant's employer to cause a letter of demand to be written to the respondent in relation to the account. It is in the process of explaining why the loan remained unpaid that the allegation in exhibit 4 was made. Both respondent and appellant's employer are definitely interested in the recovery of the loan and why it was not possible to do so as at that time.

It must be noted that the appellant had not filed a reply to the statement of defence in which the defence of qualified privilege was raised. That being the case appellant never pleaded, in reaction to the defence of qualified privilege, express malice on the part of the respondent in making and publishing exhibit 4. Having held that the defence of qualified privilege availed the respondent, the only way the appellant could have dislodged that defence was to have pleaded and proved express malice on the part of the respondent which he failed to do. In the circumstance, I resolve issue 3 against the appellant. (p. 3121 A)

***DAMAGES - Appeals - Libel - Ejabulor case***

10. On the issue of damages which forms a sub-issue in appellant's issue No.4 and the main issue in respondent's issue No.4, learned counsel for the appellant submitted that the guiding principles for assessment of damages in claims for libel is as laid down in *Ejabulor v. Osha* (1990) 5 NWLR (pt 148) 1 at 16 as follows.

- (i) the conduct of the plaintiff;
- (ii) his position and standing;
- (iii) the nature of the libel;
- (iv) the mode and extent of publication;
- (v) the absence or refusal of any retraction or apology;
- (vi) the whole conduct of the defendant from the time when the libel was published down to the very moment of the judgment:

I agree with learned counsel for the appellant that the principles, guiding the court in assessing damages in an action for libel are as stated

by this court in Ejabulor vs. Osha supra. I however do not agree with learned counsel in his submission that the lower court was wrong in reversing the award of #750,000.00 damages made by the trial court. It must be noted that with the resolution of the previous three issues against the appellant, the issue of award of damages has become academic. (p. 3121 F / 3122 D)

***APPEALS - Defamation - Issues - Relevance***

11. I have to observe that the sub-issues of when a claim for defamation is actionable per se; whether or not an allegation of receipt of bribe or gratification constitutes an offence and sufficiency of pleading in relation to claims for libel as; formulated and argue in appellant's issue No.4 are not relevant to the determination of the issues in the appeal. From the facts of this case and the law applicable thereto as expounded in this judgment the irrelevance of the sub-issues become apparent particularly as a resolution of them in favour of the appellant cannot result in the setting aside of the judgment of the lower court, I hold the view that to consider the said sub-issues amounts to an exercise in futility and a colossal waste of time. The same thing applies to appellant's issue 5.

In conclusion I find no merit whatsoever in this appeal which is consequently dismissed. (p. 3122 F)

**NOTABLE POINTS OF INTEREST**

**KALGO JSC**

*1. Amendment of pleadings - Guiding principles*

The general principle of law on amendment of pleadings and as laid down by the Courts, is that the amendment is generally granted at the discretion of the Court provided that such amendment would not establish any prejudice, unnecessary expense, surprise, irreparable inconvenience to a respondent or show any lack of good faith on the part of the applicant. See Shell B.P. Petroleum Development Co. Ltd. v. Jammal Engineering (Nigeria) Ltd. (1974) 4 FSC 33 at 74. The rules for amendment of pleadings are very flexible and depends on the discretion of the Court. In Steward v. North Metropolitan Tramways Co. Ltd. (1885-6) 16 Q.B.D



556, the Court held that:-

*“With regard to question of amendment of pleadings, a rule has been enunciated by the Court which is rather a rule of conduct than a rule of rigid law because the Court might depart from it if there were very exceptional circumstances in any particular case leading the court to think that it would not be right to apply it. It is nevertheless a rule of conduct which must be generally followed. The rule was thus laid down in Tildesley V Harper 10 CH.D. 393 by Lord Bramwell who there says:-*

*"My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting malafide or that by his blunder has done some injury to his opponent which could not have been compensated by costs or otherwise" (Underlining mine) (p. 3124 C)*

## **MUKHTARJSC**

### **2. Amendment of claim was rightly refused by Court of Appeal**

The new paragraphs sought to be added to the statement of claim are to my mind definitely a complete addition to the original statement of claim, which did not contain whom the defamatory words were published to or in fact a typist for that matter. By allowing the addition, a new complexion would have been added to the case, as it will further strengthen the appellant's case in meeting the required principles of the law of libel. The same goes for additional paragraph (5) of the statement of claim. The amendment if granted would have prejudiced the respondent and occasioned miscarriage of justice. The Court of Appeal was therefore right when it refused the application thus :-

*“I have good reason to believe that if the application is granted, some injustice will be occasioned on the appellant by short circuiting his two grounds of appeal....”*

Indeed if the application is granted it would have knocked the bottom of the said grounds. I hold that this is not a proper case to interfere with the lower court's exercise of its judicial discretion, which to my mind it has exercised judicially and judiciously. (p. 3129 E)

**REPRESENTATION**

Layi Babatunde Esq., SAN for the appellant with him is J. T. Oyetan (MRS.).

John O. Baiyeshea Esq. for the respondent with him is Richard S. Baiyeshea Esq.

**CASES REFERRED TO**

Adetutu v. Aderohunmu (1984) SCNLR 515 at 523

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

C Alsthom S. A. v. Saraki (2000) 10-11 S.C. 48

Resident Ibadan province v. Lagunju (1954) 14 WACA 549

Kudoro v. Alaka (1956) SCNLR 255

Williams v. Williams (1987) 2 NWLR (pt. 54) 66

D Saraki v. Kotoye (1990) 4 NWLR (Pt.143) 144

Ngwu v. Onuigbo (1999) 13 NWLR (pt.636) 512

Oyekanmi v. NEPA (2000) 15 NWLR (pt.690) 414

Okpiri v. Jonah (1961) 1 SCNLR 174

E Woluchem v. Gudi (1981) 5 SC 291

Ike v. Ugboaja (1993) 6 NWLR (pt. 301) 539

Achiakpa v. Nduka (2001) 14 NWLR (pt. 734) 623

Ukatta v. Ndinaze (1997 ) 4 NWLR (pt. 499) 251 at 263

F Abioye v. Alawode (2001) 3 SC 1 at 10

**LEAD JUDGMENT BY ONNOGHEN JSC**

This is an appeal against the judgment of the Division of the Court of Appeal delivered on 9<sup>th</sup> May 2000.

G The respondent is a customer of Trade Bank PLC Kaduna branch where the appellant was a senior banker. Respondent, in the course of doing business with the said bank obtained credit to enhance his business transactions, which he later failed to repay. Upon pressure being mounted H by the bank to recover the facility respondent stated in writing that his inability to repay was due to the fact that the appellant took part of the facility as “*compulsory bribe*”. Appellant felt aggrieved and sued the Respondent at the High Court of Kaduna State, Kaduna claiming exemplary

damages, an apology and injunction for libel on the ground that the allegation was false and malicious and that the respondent knew it to be false.

The libel is alleged to have been published to the Manager of Trade Bank PLC, the employer of the appellant. The respondent in his defence admitted making or authorizing the said publications but denied that the words were published out of malice or spite but that the words were true in fact and were published on a privileged occasion. B

There was no reply to the statement of Defence since an application for extension of time to file one after evidence had been concluded and the defendants counsel addressed the court, was refused by the learned trial judge In a ruling delivered on 18<sup>th</sup> December 1995. The trial Court however, gave judgment in favour of the appellant resulting in an appeal by the respondent to the Court of Appeal, which set aside the judgment of the trial court. The present appeal is against that judgment. C D

It is pertinent to mention the fact that after the respondent had appealed to the Court of Appeal, appellant attempted to amend his statement of claim which application was refused by the Court of Appeal on the ground, inter alia, that it was too late in the day to allow same, That apart, some of respondent's grounds of appeal were on the issues which the amendments sought to remedy. E

Learned counsel for both parties have filed their briefs of argument which have been duly served on either party. F

In his brief of arguments, learned counsel for the appellant, LAYI BABATUNDE Esq. Identified five (5) issues for determination.

These are: -

*"(i) Whether having regard to the principles of law governing the amendment of pleadings as laid down by this Honourable Court in several decided cases the lower court exercised its discretion judiciously when it refused to grant the appellant leave to amend his statement of Claim (Grounds 23, 24 & 25 of the Amended Notice of Appeal);* G H

*(ii) whether having regard to the state of the pleadings, the law and the evidence adduced at the trial, the Court of Appeal was right to have overturned the clear findings of the trial judge that Exhibits 4, 5, & 6 were*

*defamatory and that they were published out of spite and malevolence (Grounds 1, 2, 3, 4, 12 & 12 of the amended Notice of Appeal);*

*(iii) whether the lower court correctly stated the principles of law governing the defence of qualified privilege and whether the court was right to have upheld the defence of qualified privilege in the circumstance; (Grounds 5, 6, 7 and 9)*

*(iv) whether the court below did not misdirect itself on the law concerning the following:*

*(a) when a claim for libel is actionable per se;*  
*(b) Assessment of damages in claims for libel;*  
*(c) Issues of pleadings in claim for libel (Ground 14, 18, 19, 20 & 21) of the amended Notice of Appeal.*

*(v) whether given the procedural errors manifest upon the records and having regard to several unanswered questions by the court below, the lower court properly discharged its judicial responsibilities in the circumstance. (Grounds 8,10,11,15 & 16 of the Amended Notice of Appeal)".*

On the other hand learned counsel for the respondent, JOHN OLUSOLA BAIYESHEA Esq. identified four (4) issues for determination.

The issues are as follows:-

- "1. whether the Court of Appeal was wrong in refusing the application of the appellant herein to amend his statement of claim;*
- 2. whether the Court of Appeal was right in holding that the plaintiff's case for defamation was not proved at the trial court and that the trial Court should not have given judgment for the plaintiff. And whether the Court of Appeal was right and/or justified in setting aside the judgment of trial court.*
- 3. whether the Court of Appeal stated the correct position of the law defence of qualified privilege in an action of this nature and in holding that the defence of qualified privilege was available to the defendant in this suit.*
- 4. whether the Court of Appeal was right in stating that even if the plaintiff's case had succeeded an award of #10,000.00 damages would have been sufficient instead #750,000.00 awarded by the trial court."*

Having gone through the record including the judgment of the lower

court, I am of the view that issues (iv) and (v) formulated by teamed counsel for the appellant are not relevant for the determination of the appeal. It must always be borne in mind that the court is not interested in determining academic questions, a favourable resolution of which would have no adverse effect on the decision of the tower court.

Looking closely at the issues as formulated by both counsel, it is clear that issues one to three are the same and that the appellant has no corresponding issue to respondents issue four (4). From the judgment of the lower court and the grounds of appeal respondents issue No.4 is very relevant in this appeal and will be considered in this judgment along with the first three issues as formulated by both counsel.

On issue one, learned counsel for the appellant referred the Court to the case of *Alsthom S. A. Saraki* (2000) 10 - 11 SC 48 at 56 – 57; *Laguro v. Toku* (1992) 2 NWLR (pt. 223) 278; *Adetutu v. Aderohunmu* (1984) SCNLR 516 at 523, and submitted that the lower court did not exercise its discretion judicially and judiciously when it refused the application for leave to amend the statement of claim of the appellant particularly as the amendment sought covered matters already in evidence which were admitted without objection; that judgment had been delivered by the trial court and no fresh evidence was required; and, the issues raised were matters within the knowledge of the defendant and no surprise or prejudice would be occasioned. Learned counsel further submitted that though it is the law that this court would not readily interfere with the exercise of discretion by the lower court, this is a proper case for such interference because the said lower court did not exercise its discretion judicially and judiciously. For this submission learned counsel cited and relied on *Lauwers v. Jozebson* (1988) 7 S.C. (pt.111) 26 at 53. Finally learned counsel urged the court to resolve the issue in favour of the appellant.

On his part, learned counsel for the respondent submitted that the lower court was right in refusing the application for amendment; that it is the law that an amendment which will cause injustice to the other party will not be granted; that the amendment was intended to overreach the respondent; that the facts which the amendment sought to incorporate did not form part of the case of the appellant at the trial; and, that this case is

distinguishable from, Alsthom S. A. vs. Saraki supra and Adetutu vs. Aderohunmu supra cited and relied upon by counsel for the appellant, on the facts. Learned counsel further submitted that the amendment sought touched directly on some of the grounds of appeal at the lower court upon which argument had been canvassed in the appellant's brief at the said court, and that if the amendment had been granted the appeal would have been prejudiced. Learned counsel then urged the court to resolve the issue against the appellant.

To resolve the issue under consideration, it is necessary to determine whether in refusing the application for amendment the lower court acted judicially and judiciously, which calls for a review of the relevant facts and the applicable law.

The application for leave to amend the statement of claim relates to two paragraphs thereof to with, paragraphs 3 and 5 which originally pleaded thus:-

"3. On or about the 28<sup>th</sup> of January 1993 and in a letter dated the said 28<sup>th</sup> January 1993 addressed to the Branch manager, Trade Bank PLC Kaduna and signed by the Defendant which letter is hereby pleaded, the defendant falsely and maliciously wrote printed and published or caused to be written, printed and published in the said letter and concerning the plaintiff the following words:-

"RE APPLICATION FOR TEMPORARY OVERDRAFT FACILITY

*I hereby affirm that the conclusion we agreed on at the meeting under your reference letter written to us, is still hold, and we still state that the inability to regularize the account in question is as a compulsory bribe taken by Mallam M. T. Mamman, the predecessor Manager which is above #600,000.00 and as mention in the meeting we attribute this predicament to his contribution i.e. compulsory bribe taken ....*

*We request your urgent, intervention on this issue in order to bail us out if we may recall the second meeting held with Mallam M. T. Mamman was with the motive of agreement on how to settle the debt between us. (i.e M. T. Mamman / A.A. Salaudeen) but since nothing come out of this and your letter of today 28<sup>th</sup> January 1993 we still maintained*

*that the payment of the debt should be a joint effort.....”*

*“5. On or about the 27<sup>th</sup> of January 1993 and in the minutes of a meeting held on the same date which minutes is hereby pleaded, the defendant falsely and maliciously caused to be written Printed and published the following words concerning the plaintiff:-*

*“VISITATION REPORT TO ALH A. A. SALAUDEEN SHOP.*

*..... The main issue deliberated on was how to regularize the account in question by the family they however maintained that if they are to pay the debt off, it has to be between the Area manager, the predecessor of the present Branch manager in person of Mr. T. MAMMAN. We latter asked them for the reason why it should be so and we were told as claimed by the customer that his inability to regularize the account is as a result of the compulsory bribe taken by the then Branch Manager which was above #1 million in less than a year... ”*

The proposed amendments sought to add Paragraphs 3 (a) and 5 (a) respectively to the above paragraphs. The paragraphs aver as follows:-

*“3(a) that the defendant published the words in paragraph 3 above to a typist in town and the auditors of Trade Bank PLC also saw it”*

*“5(a) That the defendant told five (5) people who were in attendance in the above mentioned meeting among whom was the defendant’s brother, Alhaji Abudul’aziz Salaudeen that the plaintiff took bribe of over #600,000.00 (Six hundred thousand Naira)”*

It should be borne in mind that at the time the application for leave to amend was presented, the respondent in this appeal had already filed his grounds of appeal and brief of argument against the judgment of the trial court. The relevant grounds of appeal are as follows:-

*“1 The learned trial judge erred in law in holding that qualified privilege does not avail the appellant in this cases because the findings of fact which he utilized in arriving at the conclusion, viz, that the publication was made to another person other than the employer of the respondent, was not pleaded and evidence in proof of that fact was therefore wrongly admitted and the facts which are pleaded in the statement of Defence are adequate to establish the defence of qualified privilege and there is evidence of them offered at the trial and they remain*

undisputed.

PARTICULARS:

(a) *The Respondent in his statement of claim alleged publication of the offending words to the employer of the Respondent. It did not allege publication to any other person but the judge relied on and found that publication was made to a typist, and other persons including the brother of the appellant, issues which are not pleaded, and it was this that enable him to arrive at the conclusion that qualified privilege did not avail the appellant as a defence.*

(b) *The Respondent admitted that the appellant was customer of his employer to whom the words were written.*

2. *The learned trial judge erred in law in holding as follows:-*

*“That there was publication to five people among which was the defendant’s brother (Abdul’aziz) and the auditor, of the Trade Bank. It is an admitted fact that exhibits 4 was published to a typist in follows.”*

*When -*

(a) *Those facts were not pleaded and therefore did not arise for consideration and*

(b) *a judge is duty-bound not to decide issues of fact other than those raised in pleadings.”*

Both parties do not dispute the fact that the defence of the respondent to the claim of libel by the appellant is that of qualified privilege. Looking at the complaints of the respondent in grounds 1 and 2 of the grounds of appeal before the lower court, it is very clear and I hold the view that the proposed amendments in paragraphs 3 (a) and 5 (a) are designed or formulated in relation to the said grounds 1 and 2 reproduced earlier in this judgment.

**Generally speaking the law is that amendment to pleadings for the purpose of determining the real issues in controversy between the parties ought to be allowed at any stage of the proceedings, including on appeal, unless such amendment will result in injustice or surprise or embarrassment to the other party or the applicant is acting mala fide or by his blunder the applicant has done some injury to the respondent which cannot be compensated by way**



of costs or otherwise. In short, a consideration of an application for leave to amend pleadings involves the exercise of discretion by the court and it is the law that in exercising that discretion, the court must not only act judicially but also judiciously. The discretion is therefore to be exercised so as to do what justice and fair play may require having regards to the facts and circumstances of the particular case – see *Adetutu v. Aderohunmu* (1984) SCNLR 515 at 523; *Laguro v. Toku* (1992) 2 NWLR (pt. 223) 278; *Alsthom S.A. v. Saraki* (2000) 10-11 S.C. 48.

**It is trite law that an appellate court, such as the lower court and this court, has the jurisdiction to amend the pleadings of either party, upon application, so as to comply with the facts before the trial court and decision given by that court, so as to prevent the occurrence of substantial injustice. In such situations amendments are more readily granted whenever the grant does not necessitate the calling of additional evidence or the changing of the character of the case.** At pages 294-295 of *Laguro v. Toku* (supra) Akpata JSC stated the law thus:-

*“Justice demands that in order to determine the real matter in controversy pleadings may be amended at any stage of the proceedings, even in the Court of Appeal or this Court (Supreme Court) to bring them in line with the evidence already adduced; provided the amendment is not intended to over-reach and the other party is not taken by surprise and the claim or defence of the said other party would not have been different had the amendment been averred when the pleadings were first filed.”*

In refusing the application in this case, the lower court held, *Inter alia*, thus:-

*“Confining myself to the merit of the application, I have good reason to believe that if the application is granted, some injustice will be occasioned on the appellant by short circuiting his two grounds of appeal, especially, that he had already made submissions on the grounds in his brief of argument. In the circumstances it will be injudicious to grant the application and it is accordingly refused.”*

**The law is that a discretion properly exercised by a court will**

not be lightly interfered with by an appellate court even when the appellate court was of the opinion that it might have exercised the discretion differently. An appellate court will only Interfere where the trial court or lower court exercised a discretion upon a wrong principle or mistake of law or under a misapprehension of the facts or took into account irrelevant or extraneous matters or excluded relevant matters thereby giving rise to injustice see Resident Ibadan province v. Lagunju (1954) 14 WACA 549; Kudoro v. Alaka (1956) SCNLR 255; Williams v. Williams (1987) 2 NWLR (pt. 54) 66; Saraki v. Kotoye (1990) 4 NWLR (Pt.143) 144; Ngwu v. Onuigbo (1999) 13 NWLR (pt. 636) 512; Oyekanmi v. NEPA (2000) 15 NWLR (pt. 690) 414.

I had earlier found that the proposed amendments in paragraphs 3(a) and 5(a) of the statement of claim are intended by the appellant to overreach the respondent particularly as they are directed at neutralizing respondents grounds 1 and 2 of the grounds of appeal. I am of the view that to allow the amendment would have resulted in substantial injustice to the respondent whose defence at the trial was that of qualified privilege and appellant ought to have known that to dislodge that defence he ought to plead publication of the alleged libel to some one or people other than the employer of the appellant as pleaded in paragraphs 3 and 5 of the statement of claim. I therefore hold the view that the lower court in exercising its discretion in refusing the application for leave to amend the statement of claim, acted judicially and judiciously and that under the circumstance this court cannot interfere. It is not the case of the appellant that the lower court exercised its discretion upon a wrong principle or mistake of law or under a misapprehension of the facts or took into consideration irrelevant or extraneous matters or that any injustice has been occasioned the appellant under the circumstances of this case. It is not disputed that the facts sought to be pleaded were hitherto not pleaded and that they were extracted by learned counsel for the appellant during cross- examination. Also not disputed is the fact that the trial judge relied on these unpleaded facts, which in law ought to ground to no issue, in neutralizing the defence of qualified privilege of the respondent thereby

Giving judgment in favour of the appellant. It would therefore have been very unjust to grant the amendment sought. I therefore resolve the issue against the appellant.

On issue No. 2 learned counsel for the appellant submitted that the lower court erred in reversing the finding of the trial court that “*the writing, printing and publishing of Exhibits 4, 5 and 6 as defamatory and also*” I find the publication in Exhibits 4, 5 and 6 to have been made out of spite and malevolence as averred in paragraph 8 of the statement of claim.”

Citing and relying on *Ukatta v. Ndinaeze* (1997) 4 NWLR (Pt. 499) 251 at 263 and *Abidoye v. Alawode* (2001) 3 SC 1 at 10, Learned counsel submitted that the circumstances that would have enabled the lower court to set aside or reverse the clear findings of the trial court did not arise in this case and therefore the lower court erred in so reversing the findings.

On his part, learned counsel for the respondent submitted that ‘the lower court was right in holding that the appellant did not prove his case at the trial; that the appellant did not plead publication of exhibits 4, 5 and 6 properly and adequately as required by law that appellant did not prove that he was defamed by the alleged publications, and that the general conclusion reached by trial court to the effect that exhibits 4, 5 and 6 were defamatory without more was rightly reversed by the lower court. He urged the court to resolve the issue against the appellant.

**The basic question to be answered here is: When can an appellate court reverse a finding of fact by the lower court and whether the circumstance of this case qualifies for such a reversal.**

**The law is that an appellate court will not ordinarily interfere with the findings of the trial court except in circumstances such as where the trial court has not made a proper use of the opportunity of seeing and hearing the witnesses at the trial or where it has drawn wrong conclusions from accepted credible evidence or has taken an erroneous view of the evidence adduced before it or its findings of fact are perverse or unsupported by the evidence – see *Okpiri v. Jonah* (1961) 1 SCNLR 174; *Woluchem v. Gudi* (1981) 5 SC 291; *Ike v. Ugboaja* (1993) 6 NWLR (pt. 301) 539; *Achiakpa v. Nduka* (2001) 14 NWLR (pt.**

**3114** Mamman v. Salaudeen (2005) 12 KLR Onnoghen JSC  
734) 623; Ukatta v. Ndinaeze (1997) 4 NWLR (pt. 499) 251 at 263; Abioye v. Alawode (2001) 3 SC1 at 10.

In reversing the findings of facts by the trial court, the lower court gave reasons for so doing. These include the following: -

B (a) That the publication of exhibit 4 is permitted in the ordinary course of business and therefore privilege.

(b) That appellant did not plead publication of exhibit 5 to four or five persons including the brother of the respondent;

C (c) That exhibit 5 was written by officers of the appellant's employer;

(d) That exhibit 6 having been written by respondent's counsel is privileged and cannot be defamatory.

D There is no doubt that exhibits 5 and 6 are a reproduction of exhibit 4. Both parties and the court agree that exhibit 4 was written by the respondent while exhibit 5 is a report of inspectors of the employer of appellant on debt recovery drive which contains the allegations in exhibit 4. Exhibit 6 contains the same allegation in exhibits 4 and 5 was written by E the solicitor to the respondent.

Learned counsel for appellant admits that appellant did not plead publication of exhibit 5 to four or five persons as held by the lower court. He however stated that the defect was to be cured by the amendment F sought. It should be noted that the said amendment was refused by the lower court and this court has affirmed that holding during the resolution of issue No. 1 supra. It is trite law that parties and the court are bound by the pleadings of the parties and the court cannot base its judgment on a matter or fact not pleaded as facts not pleaded go to no issue. See Ochonma v. Unosi (1965) NWLR 321; Njoku v. Eme (1973) 5 SC 293; Total v. Nwankwo (1978) 5 SC 1 at 16-17. G

**There is no doubt that exhibit 6 is a letter written by a solicitor in the course of his duties to his client. The law is that such a letter cannot be defamatory since it is written on a privileged occasion see Boxsus v. Goblet (1891) 4 All ER 1178 at 1180 where KOPES. LJ stated thus:**  
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*“For the proposals of the present case I am prepared to lay down*

*this rule: that, if a communication made by a solicitor to a third party is reasonably necessary and usual in the discharge of his duty to his client, and in the interest of his client, the occasion is privileged”.*

On exhibit 4 the trial court, contrary to the pleading, considered publication to a typist which fact is not pleaded. I agree with the lower court when it held that *"All that was required of the learned trial judge, having regard to the state of pleadings, was whether the publication was made on a privileged occasion and if he so found he was bound to throw out the respondent's claim. It was not part of the respondents case on the pleadings that there was excess of privilege. The question of appellant exceeding his privilege does not, therefore arise not to talk of consideration and determination thereon"*

The lower court then went on to conclude as follows: -

*“Evidence extracted from appellant in the course of his cross-examination establishing publication to persons other than as pleaded in paragraph 3, 4 and 5 of the statement claim are hereby expunged because they do not arise as parties did not join issues on them”.*

In effect the lower court reversed the finding of the trial court that *“I therefore find the writing printing and publishing of exhibits 4, 5 and 6 as defamatory”*, and I am in full agreement with that holding, Applying the law regulating interference by appellate court with findings of fact by the lower court as reproduced earlier in this judgment to the facts of the case it is very clear and I hold the view that the lower court was duty bound to interfere with the findings in question particularly as they were contrary to the pleadings and applicable law.

The third issue is whether the lower court correctly stated the principles of law governing the defence of qualified privilege; and whether the court was right to have upheld the defence of qualified privilege in the circumstance.

In arguing the issue learned counsel for the appellant stated that the lower court gave two reasons why it upheld the defence or qualified privilege, viz;

(a) Failure of the appellant to file a reply to the statement of defence,

and

(b) Once the occasion where the defamatory statement is made is privileged, it matters not that the statement is untrue nor that he has no reasonable ground for making the allegation and that in any event, no burden rests on the Defendant to prove the truth of his statement.

Learned counsel then submitted that the reasoning of the court runs contrary to the decision of this court in *Ayotebi v. Odudu* (1990) 6 NWLR (pt. 157) 384 at 399 - 401 particularly as this court did not decide that where a defendant pleads qualified privilege and the plaintiff failed to file a reply pleading express malice, such failure is fatal to the case of the plaintiff; that failure to file a reply is only relevant when the defence of qualified privilege had been made out by the defendant and not before, learned counsel further submitted. Learned counsel also submitted that the findings of the trial court that the offending statement is untrue completely knocked off the bottom out of the defence of qualified privilege and urged the court to resolve the issue in favour of the appellant.

In his argument, learned counsel for the respondent submitted that the respondent wrote exhibit 4 in reaction to a letter of demand by Trade Bank PLC, the employer of the appellant for the loan the respondent took from the bank; that the respondent was therefore under a duty to disclose the situation of the loan as regards the money taken from him by the appellant; that the publication was therefore on a qualified occasion; that the respondent did not write exhibit 5 which was actually written by officers of the bank; that the oral version of what the respondent must have told the bank officials who reduced same into exhibit 5 was never pleaded neither was any evidence given on it at the trial; and, that respondent cannot be held responsible for the publication in exhibit 5.

Learned counsel further submitted that the respondent made out the defence of qualified privilege and that appellant can only succeed in the circumstance if he had pleaded malice and produced credible evidence that the said publication was maliciously made by the respondent, which appellant failed to do, learned counsel submitted. Counsel then referred the court to the case of *Emeagwara v. Star publishing Co.* (2000)5 SCNJ 175 at 186 and 198 and urged the court to resolve the issue against the

appellant.

**The essential part of the cause of action in libel is publication of the libellous matter complained of, not in the writing of the libellous matter. That being the case, it is trite law that an action for libel cannot be sustained without proof of publication – Nsirim v. B Nsirim (1990) 3 NWLR (pt. 138) 285.**

There is no doubt that exhibits 4, 5 and 6 being the alleged libellous materials were alleged by the appellant in paragraphs 3, 4 and 5 of the Statement of claim to have been printed and or caused to be printed and published by the respondent to the branch manager of Trade Bank PLC or the said bank which is the employer of the appellant and a banker to the respondent. I had earlier stated in this judgment that exhibits 5 and 6 are mainly a reproduction of the allegation in exhibit 4 which respondent admitted being the author. The question therefore is not whether there was publication of the alleged libel but whether the publication to the person pleaded constitutes actionable libel having regards to the defence of qualified privilege. The main plank of appellant's case is exhibit 4 which respondent admits being the author and publisher.

In TOOGOOD v. SPYRING (1834) 1 CM. and R 181 at 193 PARKE B stated the law on qualified privilege as follows: -

*“ In general an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such occasion prevents the inference of malice which, the law draw from unauthorized communications, and affords qualified defence depending on the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society”.*

In ADAMS v. WARD (1917) A.C. 309 at 334, LORD ATKISON defined qualified privilege inter alia, thus:-

“A *privileged occasion* is ..... an occasion where the person who makes a communication has an interest, or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.” See also HARRISON v. BUSH (1855) EXB 344 at 348–349 per LORD CAMPBELL, CJ.

Classes of statements, which have been held to constitute privileged occasion include the following:-

- C (a) Statements made in the discharge of a public or private duty;
- (b) Statements made on a subject-matter in which the defendant has a legitimate interest;
- (c) Statements made by way of complaint about those with public authority or responsibility;
- D (d) Reports of parliamentary proceedings;
- (e) Copies of or extracts from public registers; and
- (f) Reports of judicial proceedings – See GATLEY ON LIBEL & SLANDER 9<sup>TH</sup> EDITION (1998) Paragraph 14.4

E In ATOYEBI v. ODUDU (1990) 6 NWLR (pt. 157) 384 to 399, this Court stated that reciprocity of interest is an essential element in the law of qualified privilege; that for the defence of qualified privilege to avail a defendant in an action for defamation, there must exist a common interest between the maker of the statement and the person to whom it was made.

F From the principle of law involved in the defence of qualified privilege as reproduced supra, the privileged occasion recognized by the common law can be Classified into one of two classes; viz;

G (a) Where the maker of the statement has a duty (whether legal, social or moral) to make the statement and the recipient has a corresponding interest to receive it, or,

(b) where the maker of the statement is acting in a matter in which he has a common interest with recipient.

H When the test for determining whether the statement was made in a qualified occasion is that of duty to make the statement, EARL LOREBURN in James v. Baird (1916) SC (H.L) 158 at 163 - 164 stated the position thus: -



*“In considering the question whether the occasion was an occasion of privilege, the court will regard the alleged libel and will examine by whom it was published, to whom it was published, when, why, and in what circumstances it was published, and will see whether these things establish a relation between the parties which gives rise to a social or moral right B  
or duty, and the consideration of these things may involve the consideration of question of public policy.”*

On the other hand the test to be used is that of protection of interests, LORD ESHER M.R in HUNTS v. GREAT NORTHERN RAIL- C  
WAY (1891) 2 Q.B 189 at 191, laid down the following:-

*“A privileged occasion arises if the communication is of such a nature that it could be finally said that those who made it had an interest in making such a communication, and those to whom it was made had a corresponding interest in having it made to them when those two things co- D  
exit the occasion is a privileged one.”*

Still on protection of interest as constituting a ground for the defence of qualified privilege, LORD YOUNG in Shaw v. Morgan (1888) 15 R 865 at 870 stated the position, inter alia, as follows:- E

*“If the statement is made ..... in the reasonable attention to a man’s own business and affairs, which gives him legitimate cause to write or speak of his neighbour, the occasion displaces the presumption of malice ..... and he is only answerable if malice be shown to have F  
existed in fact”*

It is very important to note that whether the statement is made in a discharge of a duty or in protection of an interest, there must be reciprocity on the person receiving same otherwise the defence cannot G  
avail the defendant.

Returning to the relevant facts of this case, both parties agree that the respondent was a customer of Trade Bank PLC Kaduna branch where the appellant worked as Branch Manager and later as Area Manager North; that respondent was granted an overdraft facility by the bank and he later H  
defaulted resulting in the bank writing a letter of demand for the facility to him in reaction to which he wrote exhibit 4; which appellant considers libellous of him. In short respondent stated in exhibit 4 that his inability to

repay the loan was due to the fact that appellant collected bribe of about #600,000.00 from him in relation to the transaction and ought to contribute to the liquidation of the facility. Exhibit 4 Is written to respondent's banker who also doubles as the employer of the appellant. The respondent stated at page 30 of the record under cross-examination thus: -

*"If the Bank did not write a letter of demand to me, I will not have written that he took bribe from me."*

We therefore have a situation in which appellant's employer gave a credit facility to the respondent and when the respondent defaulted in repaying the loan appellant's employer caused a letter of demand to be written to the respondent in respect of the facility and the respondent replied the said letter by stating that his inability to repay the loan was due to the fact that part of that credit facility was utilized by the appellant as bribe. The question is whether the letter, exhibit 4, was written in a qualified privilege occasion. The trial court and learned counsel for the appellant contend that qualified privilege does not apply while the Court of Appeal held that it does. It must be noted that paragraphs 3,4 and 5 of the statement of claim did not allege publication to any other person or persons except the employer of the appellant. It is very clear that exhibit 4 was written by the respondent to the employer of the appellant for the purpose of regularizing respondent's account with the said employer.

I hold the considered view that exhibit 4 was made by the respondent in protection of his interest and that appellant's employer has reciprocal Interest in receiving that statement. In GATLEY ON LIBEL AND SLANDER, 9<sup>TH</sup> edition (1998) paragraph 14.9 it is stated thus: -

*"This word 'interest' is not used in any technical sense. It is used in the broadest popular sense, as when we say that a man is 'interested' in knowing and not interested in it as a matter of gossip or curiosity, but as a matter of substance apart from its more quality as news".*

The learned authors went on to state in paragraph 14.10 inter alia:

*"Reciprocity of 'interest' does not mean that there must be some special relationship between the defendant and the person to whom he makes the communication. All it means is that the interest must exist in the party to whom the communication is made as well as in the party making*

it.”

From the totality of the relevant facts, it is very clear that the respondent and the employer of the appellant have reciprocal interests in the subject matter of the communication resulting in the action. **The employer of the appellant is a banker to the respondent and did advance some money to the respondent subject to repayment. Respondent defaulted in repaying the loan making it necessary for the appellant’s employer to cause a letter of demand to be written to the respondent in relation to the account. It is in the process of explaining why the loan remained unpaid that the allegation in exhibit 4 was made. Both respondent and appellant’s employer are definitely interested in the recovery of the loan and why it was not possible to do so as at that time.**

It must be noted that the appellant had not filed a reply to the statement of defence in which the defence of qualified privilege was raised. That being the case appellant never pleaded, in reaction to the defence of qualified privilege, express malice on the part of the respondent in making and publishing exhibit 4. Having held that the defence of qualified privilege availed the respondent, the only way the appellant could have dislodged that defence was to have pleaded and proved express malice on the part of the respondent which he failed to do. In the circumstance, I resolve issue 3 against the appellant.

On the issue of damages which forms a sub-issue in appellant’s issue No.4 and the main issue in respondent’s issue No.4, learned counsel for the appellant submitted that the guiding principles for assessment of damages in claims for libel is as laid down in Ejabulor v. Osha (1990) 5 NWLR (pt 148) 1 at 16 as follows.

- (i) the conduct of the plaintiff;
- (ii) his position and standing;
- (iii) the nature of the libel;
- (iv) the mode and extent of publication;
- (v) the absence or refusal of any retraction or apology;
- (vi) the whole conduct of the defendant from the time when

**the libel was published down to the very moment of the judgment:**

Learned counsel then submitted that the lower court was concerned more with whether the damages awarded by the trial court was either too low or excessive. Counsel then opined that the award by the trial court took cognisance of the relevant guidelines and should be restored by this court.

On his part, learned counsel for the respondent submitted that the lower court was right in reversing the damages of #750,000.00 awarded by the trial court against the respondent; that even if appellant had proved his case an award of nominal damages would have been alright; that the trial judge did not state the principles or basis for the award; that It is not: the case of the appellant that he lost his job due to the publication. Learned counsel for respondent further stated that appellant was not even suspended nor did he lose any position; that the publication in this case was only to the employer of the appellant. Learned counsel then urged the court to resolve the issue against the appellant.

**I agree with learned counsel for the appellant that the principles, guiding the court in assessing damages in an action for libel are as stated by this court in Ejabulor v. Osha supra. I however do not agree with learned counsel in his submission that the lower court was wrong in reversing the award of #750,000.00 damages made by the trial court. It must be noted that with the resolution of the previous three issues against the appellant, the issue of award of damages has become academic.**

**I have to observe that the sub-issues of when a claim for defamation is actionable per se; whether or not an allegation of receipt of bribe or gratification constitutes an offence and sufficiency of pleading in relation to claims for libel as; formulated and argue in appellant's issue No.4 are not relevant to the determination of the issues in the appeal. From the facts of this case and the law applicable thereto as expounded in this judgment the irrelevance of the sub-issues become apparent particularly as a resolution of them in favour of the appellant cannot result in the setting aside of the judgment of the lower court, I hold the view that to consider the said**

**sub-issues amounts to an exercise in futility and a colossal waste of time. The same thing applies to appellant's issue 5.**

**In conclusion I find no merit whatsoever in this appeal which is consequently dismissed** with costs which I assess and fix at #10,000.00 in favour of the respondent and against the appellant.

Appeal dismissed

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### KUTIGI JSC

I have had the advantage of reading in advance the judgment just rendered by my learned brother Onnoghen, JSC. He has exhaustively dealt with all the vital issues in the appeal. I agree with his reasoning and conclusions. The Court of Appeal rightly refused Appellant's application to amend his pleadings. The Defendant/Respondent also clearly and completely established the defence of qualified privilege as found by the Court of Appeal. I also find no merit in the appeal. It is hereby dismissed with costs as assessed.

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### KALGO JSC

I have had the advantage of reading in draft the judgment of my learned brother Onnoghen JSC. I agree with him that there is no merit in the appeal and it ought to be dismissed.

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There are in my respectful view, two main issues in controversy which the learned appellant's counsel raised in his brief of argument. These are:-

(i) Whether having regard to the principles of law governing the amendment of pleadings as laid down by this Honourable Court in several decided cases, the lower court exercised its discretion judicially and judiciously when it refused to grant the appellant leave to amend his Statement of Claim;

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(ii) Whether having regard to the state of pleadings, the law and the evidence at the trial, the Court of Appeal was right to have overturned the clear findings of the trial Judge that Exhibits 4, 5 & 6 were defamatory and

that they were published out of spite and malevolence.”

Issues (iii) and (iv) are merely supportive of issues (i) & (ii) and issue (v) is of general application.

The appellant filed his application to amend his Statement of Claim B in the Court of Appeal and not the trial Court. He was relying, in the application, on the evidence elicited in the trial court through the cross-examination of the respondent. It is essentially on the publication of the alleged libellous statement. The Court of Appeal after hearing the application C refused the amendment at that stage because it was of the opinion that, if granted it will occasion injustice on the Respondent in that it will result in short-circuiting and overreaching the 2 grounds of appeal which the Respondent has fully argued in his brief to that Court.

The general principle of law on amendment of pleadings and as laid D down by the Courts, is that the amendment is generally granted at the discretion of the Court provided that such amendment would not establish any prejudice, unnecessary expense, surprise, irreparable inconvenience to a respondent or show any lack of good faith on the part of the applicant. E See Shell B.P. Petroleum Development Co. Ltd. v. Jammal Engineering (Nigeria) Ltd. (1974) 4 FSC 33 at 74. The rules for amendment of pleadings are very flexible and depends on the discretion of the Court. In Steward v. North Metropolitan Tramways Co. Ltd. (1885-6) 16 Q.B.D F 556, the Court held that:-

*“With regard to question of amendment of pleadings, a rule has been enunciated by the Court which is rather a rule of conduct than a rule of rigid law because the Court might depart from it if there were very exceptional circumstances in any particular case leading the court to think G that it would not be right to apply it. It is nevertheless a rule of conduct which must be generally followed. The rule was thus laid down in Tildesley v. Harper 10 CH.D. 393 by Lord Bramwell who there says:-*

*"My practice has always been to give leave to amend unless I have H been satisfied that the party applying was acting malafide or that by his blunder has done some injury to his opponent which could not have been compensated by costs or otherwise" (Underlining mine)*

See also the case of Clarapede v. Commercial Union Association 32

W. R. 262 where Lord Esher M. R. also stated the same rule.

This Court, in its previous decisions, has also followed the rule to a great extent and for all intents and purposes having regard to the circumstances. See for example the cases of Chief Ojah & Ors v. Chief Eyo Ogboni & ors (1976) 1 NMLR 95 at 99; Amadi v. Thomas Aplin & Co Ltd. (1972) 1 All NLR 409; Adetutu v. Aderohunmu (1984) 6 SC 92 at 108-109 and Laguro v. Toku (1992) 2 NWLR (pt.223) 278 at 291-292.

Although the appellant applied in the Court of Appeal to amend his Statement of Claim, it could still be entertained subject of course to the rule for amendment of pleadings stated above. The appellant sought to amend his Statement of Claim to accommodate evidence extracted from the respondent in cross-examination. This evidence touched on the publication of the alleged libel to 5 bank officials and a typist upon which the whole case stands and involved Exhibits 4 and 5 at the trial. Unfortunately for the appellant, this publication was not pleaded by the appellant in his Statement of Claim. What is even more important in this matter was that the respondent, who was the appellant in the Court of Appeal had filed 2 grounds of appeal on this issue of publication of the libel and failure to plead it, and he argued them extensively in his brief in that court relying on this very strongly for the success of his appeal. Therefore the respondent argued that if the appellant's application to amend the Statement of Claim is allowed or granted in the Court of Appeal, it would certainly embarrass, upset and short-circuit his appeal and render it irrelevant, It is trite law that parties to a case are bound by their pleadings. See *Idahosa v. Oronsaye* (1959) 4 FSC 166 at 170-171 and that any evidence produced at the trial which is not pleaded goes to no issue and should be discountenanced. See *George v. Dominion Flour Mill Ltd.* (1963) 1 All NLR 71, *Usenfowokan v. Idowu & Anor* (1969) 1 All NLR 125.

I have carefully examined the Statement of Claim of the appellant and the evidence produced at the trial, and find that the amendment sought was in respect of evidence elicited during cross examination of the defence witnesses which was not pleaded by the appellant. This evidence should normally and legally be discarded, discountenanced or even expunged from the record. It has no legal value and should not be used for any

purpose in the proceedings.

I have also looked at grounds of appeal 1 and 2 filed by the respondent as appellant in the Court of Appeal and brief of argument in support thereof and find that they all deal with the issue of publication of the alleged libel which was the basis of the claim and which was not pleaded by the respondent as plaintiff at the trial. It is also very clear that this constituted a very strong point in the appeal of the respondent to the Court of Appeal and if the amendment was allowed, it would no doubt embarrass, over-reach and upset the substance of the appeal and render it useless. Therefore since the appellant took no step at the right time before the appeal was filed to amend his Statement of Claim, it would certainly be injurious to the respondent's appeal if allowed by the Court of Appeal and costs could not compensate him. I therefore agree that the Court of Appeal was right in refusing to grant the amendment at that stage, and in my view, it had exercised its discretion judicially and judiciously in the circumstances of this case.

On the second issue raised by the appellant in his brief, there appears to be no doubt that the appellant's Statement of Claim at the trial was insufficient to cover the essential evidence upon which he could succeed in his claim. And his reliance on exhibits 4, 5 and 6 which the learned trial judge used to give judgment in his favour cannot hold any water, since according to law, all these exhibits can properly be considered to avail the respondent of the defence of qualified privilege. These have been carefully examined and considered in the leading judgment and I adopt as mine the reasoning and findings therein of my learned brother Onnoghen JSC on them. I have nothing useful to add.

For the above and more detailed reasons given by my learned brother Onnoghen JSC in his leading judgement, I entirely agree that there is no substance in this appeal. I accordingly dismiss it with costs as assessed in the leading judgment.

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**MUSDAPHER JSC**

I have had the honour to read before now the judgment of my lord



Onnoghen, JSC just delivered with which I entirely agree. For the same with respect as mine, I too find no merit in the appeal and I accordingly dismiss it. I award the respondent costs assessed at N10,000.00 against the appellant.

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### **MUKHTARJSC**

I have had the opportunity of reading in advance the lead judgment delivered by my learned brother Onnoghen, J.S.C.

One of the complaints of the appellant in this appeal is that the lower court refused to grant the appellant leave to amend his statement of claim. In a ruling delivered on 14/1/98, the Court of Appeal refused the following application of the appellant, then a respondent in the substantive appeal :-

*“An order for leave to amend the plaintiffs (now respondent’s/ appellant’s, in this court) statement of claim contained in pages 3 to 7 of the Record of Appeal to this court by adding new paragraphs 3 (a) and 5 (a) as set out in the schedule below and contained in Exhibit A attached hereto and re-numbering paragraphs 3 and 5 of the statement of claim .....*”

#### **Schedule**

3 (a) That the defendant published the words in paragraph 3 above to a typist in town and the auditors of Trade Bank PLC also saw it.

5(a) That the defendant told five(s) people who were in attendance in the above mentioned meeting among whom was the defendant’s brother, Alhaji Abdul’ aziz Salaudeen that the plaintiff took bribe of over N600,000.00 (six hundred thousand naira).

In support of the motion on notice are the following salient depositions in the affidavit in support.

5(b) That applicant is not introducing any new facts or raising any new issues in the case and that the amendment will not require adducing fresh evidence.

(c) That the amendment does not derogate from the preceding paragraphs of the statement of claim and they are based on evidence before the court and will require no reply or response from the appellant.

(d) That the respondent/applicant is acting in good faith and that the appellant will not be prejudiced if the application is granted.

(e) That the amendment if granted will bring pleadings at the court below in conformity with the decision given by it and prevent injustice to B the applicant.

14(c) That the amendment sought does not change the character of the case.

In his brief of argument before this court learned counsel for the C appellant has argued that the deposition in paragraph 5(c) supra was not challenged by the respondent in his counter-affidavit. I disagree, for paragraph (5) of the respondents counter-affidavit addressed the point raised in the said paragraphs 5(a) and (b) even if not by way of out right debunking of the whole content of the deposition. Paragraph (5) of the D counter-affidavit states :-

5. That B. Aluko-Olokun further informed me and I verily believe him to be true and correct as follows :-

(a) That the amendment sought to be made will change the nature E of the claim;

(b) That if leave to amend is granted it will require giving additional evidence on both sides.

I agree with learned counsel for the appellant that authorities abound F that an application of amendment of pleadings can be granted at any stage of proceedings even at the level of an appellate court, but there are principles of law that must be considered in the matter of such application. These principles are set out in the cases of Jessica Trading Co. Ltd. v. Bendel Insurance Co. Ltd. 1993 1 NWLR part 271 page, 538; Metal G Construction (W.A.) Ltd. & Ors. v. D. A. Migliore & Anor (1979) 6-9 SC. 163; Gbogbolulu of Vakpo v. Hodo (1941) 7 W.A.C.A. 164; G. L. Baker Ltd. v. Medway Building & Supplier Ltd. (1958) 1 WLR 1216; A. U. Amadi v. Thomas Applin & Co. Ltd. (1972) 1 All NLR 409; Oyenuga v. H Provisional Council of the University of Ife (1965) NMLR 9; Olu of Warri v. Esi (1958) SCNLR 384; (1958) 3 FSC 94).

Again leave to amend will not be granted if the amendment would not cure the defect in the proceeding (Abasi v. Labiyi (1958) WRNLR 12).

It is quite obvious that the necessity to amend was sequel to grounds (2), (5) and (11) of the appellant's (now respondent's) amended notice of appeal which read thus :-

2. The learned trial judge erred in law in holding as follows :-

*“That there was publication to five people among which was the defendant's brother (Abdulaziz) and the auditor, of Trade Bank. It is an admitted fact that Exhibit 4 was published to a typist in town”*

(5) The judgment of the trial court is erroneous in law in that the statement of the plaintiff did not disclose a good cause of action because there was no allegation in the statement of claim that the alleged offending words were published to any named human being.

(a) Those facts were not pleaded and therefore did not arise for consideration and

(b) A judge is duty-bound not to decide issues of fact other than those raised in pleadings.

11. The judgment is erroneous in law in that the publication which was considered in this case was that made to the typist which was not pleaded.

#### Particulars

(a) Publication to a typist was not pleaded.

(b) No other publication to any other person was pleaded.”

The new paragraphs sought to be added to the statement of claim are to my mind definitely a complete addition to the original statement of claim, which did not contain whom the defamatory words were published to or in fact a typist for that matter. By allowing the addition, a new complexion would have been added to the case, as it will further strengthen the appellant's case in meeting the required principles of the law of libel. The same goes for additional paragraph (5) of the statement of claim. The amendment if granted would have prejudiced the respondent and occasioned miscarriage of justice. The Court of Appeal was therefore right when it refused the application thus :-

*“I have good reason to believe that if the application is granted, some injustice will be occasioned on the appellant by short circuiting his two grounds of appeal....”*

Indeed if the application is granted it would have knocked the bottom of the said grounds. I hold that this is not a proper case to interfere with the lower court's exercise of its judicial discretion, which to my mind it has exercised judicially and judiciously. See *Osenton & Co. v. Johnson* B 1937 A. C. 130; *University of Lagos v. Olaniyan* 1985 1 NWLR part 1 page 156 and *Adejumo v. Ayantegbe* 1989 3 NWLR part 110 page 417.

With the above treatment of issue (1) in the appellant's brief of argument, together with the fuller treatment of the issue and other issues in the lead judgment, I am of the view that the appeal lacks merit and should C be dismissed, I also dismiss it in its entirety. I abide by the consequential orders made in the lead judgment.

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