

SUPREME COURT OF NIGERIA
18TH JANUARY, 2008 SC.88/2001
CORAM:- N. TOBI, G. A. OGUNTADE, M. MOHAMMED,
F. F. TABAI, P. O. ADEREMI, JJSC

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| 1. CHIEF EDMUND I. AKANINWO | |
| 2. ELIJAH OLUDI | |
| 3. G. N. ECHEM | DEFENDANTS |
| 4. O. O. WORGU | /APPELLANTS |
| 5. E. BROWN (for themselves and on behalf of other members of Ogbakor Rumueme Organisation) | |
| AND | |
| 1. CHIEF O. N. NSIRIM | |
| 2. CHIEF A. E. AMADI | PLAINTIFFS |
| 3. CHIEF H. CHUKWU | /RESPONDENTS |
| 4. CHIEF JOHN WOBO (for themselves and on behalf of other members of Rumueme Village Council) | |

PLEADINGS - Amendment - Court's discretion - Principles to consider as to whether to grant the application - Include whether applicant is acting malafide (H1)

PLEADINGS - Amendment - Stage of the proceedings - Refusal of amendment in this case for being too late - Is erroneous - As amendment brought after close of evidence on both sides - Was allowed in Oguntimehin case (H2)

PLEADINGS - Amendment - Necessity - Trial court's finding that the desired amendment - Constitutes the main defence to the case - Was a reason to grant it - So as to prevent injustice to defendants (H3)

COURTS - Records - Discretion - Reliance on facts not contained in the records - In refusing amendment of pleadings - Is not judicial and judicious exercise of discretion (H4)

PLEADINGS - Amendment - admissions - Refusal of amendment of defence - That will lead to abandonment of admissions unto plaintiffs being prejudiced - Is wrongful - Seeing that declarations are not based on mere admissions - But satisfactory evidence (H5)

PLEADINGS - Amendment - Refusal - Where amendment sought is vital - For determination of the real issue between the parties - Its refusal based on wrong principles - Will be reversed by the Supreme Court (H6)

FACTS

Before the Rivers State High Court, Port Harcourt, plaintiffs/respondents filed an action against defendants/appellants. Plaintiffs claimed a declaration that defendants are not members of same village council with them, and sought a perpetual injunction restraining them from holding themselves out as members of the said village council. Plaintiffs, after amending their statement of claim, called two witnesses and defendants called three. However, at the conclusion of evidence in chief/cross examination of the plaintiffs' second witness, defendants filed an application for leave to amend their statement of defence (two months after statement of claim was amended).

The trial Judge felt that the amendment was sought at a late stage, that it will amount to denial of previous admissions and prejudice the plaintiffs. It refused the amendment and hearing was concluded in the case. Judgment was given in the plaintiffs' favour. Defendants appealed to the Court of Appeal where they also secured leave to appeal against the interlocutory ruling of the trial court that refused their application to amend their statement of defence. The Court of Appeal dismissed the appeals and affirmed the trial court's decision in its ruling and judgment. Still dissatisfied, defendants have further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

1. Were the learned Justices of the Court of Appeal right when they upheld the ruling of the learned trial Judge dismissing the defendants application for amendment at a stage when the plaintiffs were yet to close their case? If answered in the negative has the failure to grant the defendants' application for amendment occasioned

any miscarriage of justice?

HELD (Allowing the appeal vide retrial order per **MOHAMMED JSC**, TOBI JSC dissenting)

PLEADINGS - Amendment - Court's discretion

1. In the exercise of the no doubt discretionary power conferred, the court must have more regard to substance. In other words as a general rule, an amendment of any proceeding including pleadings under Order XXXIV quoted earlier, will be granted if it is for the purpose of eliminating all statements which may tend to prejudice, embarrass, or delay the trial of the suit, and for the purpose of determining in the existing suit the real questions or question in controversy between the parties. The law is indeed well settled that an amendment of pleadings should be allowed at any stage of the proceedings unless it will entail injustice to the other side responding to the application. The application should also be granted unless the applicant is acting malafide or by his blunder, the applicant has done some injury to the respondent which cannot be compensated in terms of costs or otherwise. (p. 502 D)

PLEADINGS - Amendment - Stage of the proceedings

2. Taking into consideration of the principles considered and applied by this court in Oguntimehin's case quoted above, it is not difficult to see that in the instant case, the trial Judge was in error when he gave as one of his reasons for refusing the application that it was brought too late which even the court below could not agree. In Oguntimehin's case (supra), the application for amendment of pleadings was brought after the close of evidence on both sides, and the application was granted by the lower court and upheld on appeal by this court. Definitely, on the question of the appropriate time for bringing application to amend pleadings in the course of trial, the position in the present case where the defendants/appellants brought their application to amend their Statement of Defence after the conclusion of their cross-examination of second witness for the plaintiffs, is certainly on a firm ground and the court below having so found, ought to have allowed the amendment. (p. 503 B)

PLEADINGS - Amendment - Necessity

3. Some of the reasons given by the learned trial Judge and endorsed by the court below for refusing the defendants/appellants' application to amend their Statement of Defence include that the amendments which affected 10 out of the 23 paragraphs of the Statement of Defence, amounted to a complete substitution of a new Statement of Defence. Not only that, the learned trial Judge also found that the amendments would have the effect of allowing the defendants/appellants to withdraw or abandon paragraphs in which part of the claim of the plaintiffs/respondents have been admitted, thereby forcing the plaintiffs/respondents to have to file a Reply to the new Statement of Defence with the necessity of having to recall the two witnesses who had already testified. The question is, are these reasons given for refusing the application for amendment justified, most especially taking into consideration of the clear finding of the learned trial Judge at page 160 of the record of this appeal? This is what the learned trial Judge said:-

"The Statement of Defence has 23 Paragraphs out of which ten (10) are affected by the proposed amendment. It is interesting to note that the ten paragraphs being amended constitutes the main defence of the defendants case."

Indeed if the amendments being sought by the defendants/appellants in their application constitutes their main defence to the case against them by the plaintiffs/respondents, that finding alone was enough to have put the trial Court on guard on the need to adhere to the guiding principles in granting or refusing amendments of pleadings. With these findings, both the trial court and the court below ought in my opinion, to have found that the amendment being sought was necessary for the purpose of determining the real questions in controversy between the parties and therefore should have been granted in order to prevent manifest injustice to the defendants/appellants by allowing them to plead their main defence to the case against them. (p. 504 C)

COURTS - Records - Discretion

4. Although in the respondents' Brief of Argument their Learned counsel relied on the statement made by the learned trial Judge as

part of his reasons in his ruling for refusing the application to amend the Statement of Defence that the plaintiffs' counsel on 24/9/86, had told the trial court that P.W.2 was his last witness and that the plaintiffs were not calling any more witnesses, is not supported by the record of the trial court. This is because from the record at pages 114 -120 containing the proceedings of the trial court of 24/9/1986, when both witnesses of the plaintiffs P.W.I and P.W.2 testified at the trial court, the record shows at page 120 that at the end of the evidence-in-chief of P.W.2, the case was adjourned to 8/10/1986 for cross-examination and continuation. There is no statement by the learned counsel to the plaintiffs on record that P.W.2 was his last witness and that he was not calling any other witness for the plaintiffs as wrongly attributed to him by the learned trial Judge in his Ruling now on further appeal to this court. This of course means that the discretion exercised by the learned trial Judge in dismissing the application to amend the Statement of Defence in this case, is not supported by the facts relied upon by him in showing that the plaintiffs would be prejudiced, injured, surprised or over-reached. In this respect, the court below was wrong in failing to examine these facts in coming to the conclusion that the discretion of the trial Court was exercised judicially and judiciously. In other words a discretion exercised by Court in vacuo, unsupported by the relevant facts cannot pass the "judicial and judicious" test. (p. 505 E)

Refusal of amendment of defence

5. Another reason given by the trial Court and endorsed by the Court below for dismissing the application to amend the Statement of Defence was that granting the amendment would lead to allowing the defendants to withdraw or abandon the admissions to the case of the plaintiffs they had earlier made thereby prejudicing the plaintiffs. However, having regard to the fact that the main relief claimed in the plaintiffs' action at the trial Court is a declaratory relief which by law is not granted on admission by the defendants but on proof by evidence to the satisfaction of the trial Court before exercising its discretion of whether or not to grant the relief, the reason given by the learned trial Judge that to allow the withdrawal of the admission would have prejudiced the plaintiffs is not supported by law. This is because

with or without the admission in the Statement of Defence, the duty on the plaintiffs to prove their entitlement to the declaratory relief on their own pleading and evidence, would not have changed. This is because the law is well settled that the court does not make declarations of right either on mere admissions or in default of defence without hearing appropriate evidence and being satisfied with such evidence. (p. 506 C)

Where amendment sought is vital

6. Taking into consideration that the parties are merely disputing over the membership of a Community Village council and the plaintiffs were allowed by the trial court to amend their Statement of Claim in paragraphs 13 and 34 by substitution of new paragraphs on 24/9/86, while barely less than two months later, the defendants application filed on 11/11/86, to amend 10 out of 23 paragraphs of their Statement of Defence was refused by the same trial court, clearly this same discretion of the learned trial Judge can hardly answer the description that it was exercised judicially and judiciously as found by the court below. In otherwords, in the instant case where it had not been shown that the plaintiffs would suffer any prejudice by the defendants' application to amend their Statement of Defence after similar application was granted to the plaintiffs, the fact that the defendants' application was made after the cross-examination of the second witness to the plaintiffs was not enough reason to refuse the application because such application by a defendant may be granted even after the close of the case of the plaintiffs. See *Okolo v. Nwamu* (1973) 2 S.C. 59 at 68; (1973) 2 S.C. (Reprint) 46. This is why I cannot agree with the learned counsel to the respondents that to allow the amendments sought in the present case would be unjust to the respondents. Indeed to me, the proposed amendments have raised points which appear to be vital to the case between the parties, and unless they are adjudicated and pronounced upon, the real issues between the parties will be left undecided. I am therefore satisfied that the plaintiffs/respondents were not misled or embarrassed by the proposed amendments. In reality, the learned trial Judge clearly proceeded on wrong principles in refusing the defendants/appellants' application and the Court below was equally wrong in affirming the

decision of the trial Court. I am not in any doubt in this respect that to allow the Ruling of the trial Court as affirmed by the Court below to stand, would result in a real injustice to the defendants/appellants.

In the result, this appeal succeeds and the same is hereby allowed on the first issue for determination alone. (p. 507 E)

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NOTABLE POINTS OF INTEREST

MOHAMMED JSC

1. Amendment of pleadings - Guiding principles

Important questions of what an amendment is and when it may be refused were considered and answered by this court in Chief Adedapo Adekeye & Anor. v. Chief O. B. Akin Olugbae (1987) 6 S.C. 268 at 280 - 281, where Eso, JSC. said -

“The aim of an amendment is usually to prevent the manifest justice of the cause from being defeated or delayed by formal slips which arise from the inadvertence of counsel. It will certainly be wrong to visit the inadvertence or mistake of counsel on the litigant. The courts have therefore through the years taken a stand that however negligent or careless may have been the slip, however late the proposed amendment, it ought to be allowed, if this can be done without injustice to the other side, for a step taken to ensure justice cannot at the same time and in the same breath be used to perpetuate an injustice on the opposite party. The test as to whether a proposed amendment should be allowed is therefore whether or not the party applying to amend can do so without placing the opposite party in such a position which cannot be redressed by that panacea, which heals every sore in litigation namely costs.” (p. 503 F)

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OGUNTADE JSC

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2. Pleadings - When refusal of amendment - Will amount to denial of fair hearing

It has always been said that justice should not only be done, it should manifestly appear to be done. A follow-up to that is that every opportunity must be afforded the parties to a dispute in court to put their case fully before the court. In a case conducted on the basis of pleadings, it cannot be said that a defendant has been allowed to put his case before the court when the opportunity to amend his plead-

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ings, in this case the Statement of Defence has been denied him. A refusal to allow a defendant the opportunity to amend his Statement of Defence translates into refusing him the liberty to call the evidence which would have been necessary had the amendment sought been granted. The consequence is a denial to him of his right to a fair
B hearing. (p. 509 A)

ADEREMI JSC

3. Pleadings - Function - When to grant amendment

C The importance of pleadings cannot be over-emphasized. The function of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue so disclosed. In any given case, the pleadings of both parties must be considered by the court to enable it decipher what the dispute in the
D case is all about. Each party to the case must therefore, as a matter of necessity, under the law, set out clearly the facts to be relied on in proof of his case, where he is the plaintiff, and in offering a challenge to or disprove the case, where he is the defendant. It is for this reason that the law expects that pleadings should be sufficient, comprehensive and accurate. Suffice it to say that all parties are bound by their
E pleadings. The moment any of the parties is deviating from his pleadings, when giving evidence, he must be stopped generally through a ruling on an objection taken by the opposing party and if no objection is so taken, at the time of the trial, such evidence which is at
F variance with the pleadings goes to no issue. Hence, it is said in law, with all emphasis, that parties to a case, in the superior court of record are bound rigidly to their pleadings. But in the preparation of pleadings, counsels are bound to or may be prone to make mistakes. Then
G must a party lose his right to have the dispute between him and his adversary, decided on its merit simply because a mistake has been made in the preparation of the pleadings? I think not. It must always be remembered that the object of courts is to decide the rights of the parties and not to punish them for the mistakes which they may make
H in the conduct of their cases by deciding otherwise in accordance with their rights. If it is seen that the mistake made in the course of preparing the case of a party to litigation is not fraudulent nor is it calculated to overreach the opponent, the court must be ready to

correct such a mistake upon an application to it. After all, courts do not exist for the sake of discipline but for the sake of deciding issues in controversy. Given the nature of the claims in the suit and the evidence led, balancing the proposed amendment against same, it is my view that substantial justice would have been secured by granting the amendment. (p. 514 A) B

4. Evidence in past proceedings - When not admissible

Going by the above provisions, the defendants/appellants are no parties to Suits Nos. PHC/16/71 and PHC/17/71 and so they could not have had the opportunity to cross-examine the 2nd and 3rd defendants who were only called as witnesses. The issue in contention in the two afore-mentioned suits is libel while the issue in the case at hand is that of status - a declaration that the defendants are not members of Rumueme Community Village Council and an order of perpetual injunction restraining them from so parading themselves. The above provisions are, therefore, not applicable to the present case. It is only proceedings which meet the conditions laid down in Section 34, supra that can be admitted and used in subsequent proceedings. See *Sanyaolu v. Coker* (1983) ALL NLR 157, *Okonji v. Njokanma* (1999) 12 S.C. (Pt. II) 150; (1999) 14 NWLR (Pt.638) 250, and *Onu v. Idu* (2006) 12 NWLR (Pt.995) 657. The reasons for rejecting such piece of evidence as Exhibits "A" and "B" are not far-fetched; similar facts, though in often cogent, moral and weighty, i.e. logically relevant, are rejected as legal evidence on the grounds of policy and fairness; since they tend to waste time, embarrass the enquiry with collateral issues, prejudice the parties with the court and even courage attacks without notice. This principle is well enshrined in the Latin Maxim "*Res Inter Alios Acta Alteri Nocere Non Debet*" which when translated means; a man ought not to be prejudiced by what has taken place between others. See also *Yusuf. v. Adegoke* (2007) II NWLR (Pt. 1045) 332. Finally on this part, I wish to say that a statement made by a person when he sues and/or acts in his personal capacity is not binding on him when he is sued in a representative capacity, neither is that statement binding on him when he is sued or he sues in a representative capacity nor on the members of the group represented by that person. (p. 516 D) H

TOBI JSC (DISSENTING)

5. Amendment of pleadings - Principles to consider

This appeal reopens the old issue of amendment of pleadings. The principles are as old as Hale. Let me take them briefly here. First, the omnibus one. Our adjectival law leans heavily in favour of amendments and is generally against the refusal of amendments. Although the pendulum weighs or tilts in favour of granting amendments, courts of law are entitled to refuse amendments in deserving cases. Trial courts must examine the application for amendment very carefully in the light of the affidavit evidence. In the exercise, the courts will consider the peculiar facts of each case.

In the often cited English case of *Cropper v. Smith* (1884) 26 QBD 700, Bowen, LJ., said:

"Now, I think it is a well established principle that the object of courts is to decide the rights of the parties and not to punish them for the mistakes which they make in the conduct of their cases... I know of no kind of error or mistake which, if not fraudulent... the court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline but for the sake of deciding matters in controversy and I do not regard such amendments as a matter of favour or grace... It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as such a matter of right on his part to have it corrected, if it can be done without injustice." (p. 523 A)

6. Amendment of pleadings - Factors Court should consider

In an application for amendment of pleadings, the court will take into consideration a number of principles or factors, including: (a) the attitude of the parties in relation to the amendment; (b) the nature of the Amendment sought in relation to the suit; (c) the question in controversy; (d) the time when the amendment is sought.

Although the attitude of the respondent may in certain instances be an Important consideration, the attitude of the applicant is the major consideration. In this regard, the court must be satisfied that the application is brought bona fide or in good faith and not de-

signed to abuse the court process. In dealing with the nature of the amendment, the court will take into consideration the totality of the content of the amendment sought vis-a-vis the relief or reliefs sought in the matter. In the consideration of the nature of the amendment sought, the court will examine very closely the real question in controversy in the litigation. The time or stage of the case when the application for amendment is brought is also an important consideration. And here, the court should take into consideration whether the applicant brought the application at the earliest opportunity in the proceedings. This will be considered in certain cases, along with the nature of the amendment sought. If the application for amendment was delayed, the court should be interested to know what caused the delay. If the reason for the amendment was as a result of an important material relevant in the application coming to the applicant's notice late, that will be a consideration in his favour. But the court will take into consideration whether the applicant, a person of due diligence and business acumen ought to have procured the information earlier than the time he obtained it. And here, I am not restricting the words "business acumen" to the usual meaning of buying and selling; rather it covers the business of searching for winning or exculpatory evidence. I do not think the court will be prepared to grant an application if the applicant was indolent in the process of searching for the relevant evidence for the amendment. The court will be very much in order to use the objective test to judge the business acumen of the applicant vis-a-vis an indolent conduct. After all, equity will part ways with an indolent litigant. (p. 524 A)

7. *When amendment of pleadings will be refused*

It is clear from the above analysis of the case law that application for amendment cannot be granted in certain instances. These are: (1) If it will entail injustice to the respondent, (2) If the applicant is acting mala fide, (3) If the application is designed to overreach the respondent, (4) If the blunder of the applicant has done some injury to the respondent which cannot be compensated by costs.

Injustice is the opposite of justice. Therefore where justice will not be done to the respondent, the application will be refused. After all, justice is not only for the applicant. It is also for the respondent. In

dealing with the injustice factor, the trial Judge should take into consideration the totality of the application in the light of the affidavit evidence. The scales of justice are weighed or measured in a make-shift or dummy pendulum and the trial Judge, the weight measurer, so to say, takes the mark where the pendulum tilts. That will give him
B a rough idea as to whether injustice will be done to the respondent if the application is granted. (p. 527 B)

8. Pleadings - Overreaching application clarified

C If an application is designed to overreach the respondent, a trial Judge will not grant it. This principle or factor is related to the one I have just considered. Overreach means to circumvent, outwit or get the better of by cunning or artifice; that is by a clever trick. In the context of amendment of pleadings it connotes or conveys a situation where a
D party, fully aware of the case of the adverse party, applies to amend his pleadings, with trick or craftiness, to put the respondent or adverse party in a state of hopelessness or helplessness that he cannot meaningfully respond for the good of his case. By the amendment, the respondent or adverse party is no more in a position to respond
E positively because the applicant has pre-empted or forestalled his possible reply in exculpation of the amendment. By the overreaching amendment, the respondent has been inculpated knee-deep. A state of overreaching arises where the applicant unnecessarily anticipates the case of the respondent and places a premeditated wedge to
F close any meaningful pleadings in joinder of issues; and meaningful pleadings here means pleadings capable of giving victory to the respondent in the case. A court of law, which is also a court of equity, will not allow an applicant play such an artifice on the respondent.
G After all, litigation is not a booby trap available to a so-called clever party in trouble in his case to outsmart the adverse party. On the contrary, litigation is a process where the parties genuinely and without the cover of ambush and tricks, place the lawsuit before the court for adjudication; with the parties showing only their bias, sentiments
H and slants. (p. 527 G)

9. Trial court's discretion - When not to be disturbed

And that takes me to the discretionary nature of the power. In an

application for amendment of pleadings where the respondent opposes, a trial Judge is called upon to reconcile two competing interests, if possible; a judicial function which requires the careful exercise of his discretionary powers. The law is loud that a court of law must exercise its discretion judicially and judiciously. In other words, the Judge should exercise his discretion according to the law and his intellectual wisdom as Judge qua iudex and not arbitrarily. B

Where a trial Judge correctly exercises his discretionary power, an appellate court cannot interfere. The law does not allow an appellate court to change or metamorphose to a court of trial or take the place of a court of trial and grant the application for amendment as such court, if it heard the application in that capacity. On the contrary, an appellate court should look at the application granted or refused from the cold record of appeal and take an appellate decision borne out from the record. (p. 529 C) D

10. Admissions cannot casually be changed by amendment of pleadings

A fact admitted by a defendant in his pleadings should be taken as established and should form one of the agreed facts of the case. An admission in pleadings basically puts an end to proof. This is because by the admission, the parties no more join Issues on the matter. Since proof presupposes a dispute and since admission drowns the element of dispute, proof becomes superfluous. E

A litigant should not be allowed to speak at the same time or the same moment from the two sides of his mouth. He can only be allowed to speak from one side of the mouth at the same time or the same moment. He cannot make a case in his pleadings and suddenly change or reverse position to make a different case. A party cannot by his complete state of mind make an admission and later decide to change it by an amendment. While a party can do so in very clear instance of mistake or fraudulent misrepresentation by the adverse party; that is not the situation here. F

It is not the case of the appellants that they made a mistake or there was fraudulent misrepresentation by the respondent, which resulted in the admissions. If parties are allowed to retrieve admissions just like that and with ease and comfort, our law of evidence on G H

admissions will not only be porous but will be completely dead and of no significance. As that will make our adjectival law of admission in a state of flux and uncertainty, I will not go along with the submission of counsel for the appellants. After all, admission is the best evidence in the determination of liability. (p. 532 A)

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11. Issue of admissions in declaratory reliefs clarified

I am not comfortable with a general or blanket statement that a party cannot admit a declaratory relief and that the court must go outside the admission to ask for inculpatory arguments. I will rather be more comfortable to distinguish between two types of declaratory reliefs - one which applies to the whole world (in the sense of not restricted to a particular person or persons); for example a declaration that a particular statute or section of a statute is unconstitutional, null and void ab initio and a declaration of a right against a particular person in property, as in this appeal.

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I will be more comfortable with the application of the principle adumbrated in *Metzger* to the former situation because by the nature of the relief, the defendant cannot be said to be the person in possession of the relief which normally he could have freely admitted as the owner. I am not sure I have made myself clear. Let me try another effort. In the first category of declaratory reliefs,, the relief is specifically on a statute and it is based on an issue of law. Parties cannot admit a position which is not law in a litigation as parties are not allowed by law to compromise on an issue of law. And so when a plaintiff seeks declaratory relief on the dry bones of the law and the law only and alone, *Metzger* should apply. In the second situation, which affects the alleged right or right of an individual, admission should totally and completely remove proof by the plaintiff and a court of law, in my view, should give judgment based on the admission of the defendant. (p. 533 A)

12. Courts should act on admissions in certain declaratory reliefs

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In Nigeria where parties are most reluctant to admit the truth, so much so that the obvious is even denied, courts of law should accept with both hands admissions made by parties in their pleadings which are within the provisions of the Evidence Act, particularly Sections 19

to 26 thereof. After all, African witnesses tell more lies than their white counterparts. Therefore if Metzger is good in England and its legal system, it is certainly not good enough for Africa. While I make this comparison, I am not quite sure that Megarry, VC., had this loud, ambitious and omnibus interpretation in mind when he gave the decision in the case in 1973. Litigants are most miserly with their words, in our courts on property rights, particularly under customary law and so courts of law could embrace admissions made by the defendant in favour of the plaintiff. By this, justice will be done to the plaintiff. So too the case before the court. The decisions examined above will certainly result in the delay and or protraction of litigation, if courts of law insist that admitted facts in all declaratory reliefs are not useful to a plaintiff. Why and why, I ask? (p. 535 B)

13. Relief claimed does not discriminate against appellants - S. 39 (2) of 1979 Constitution is not violated

How does this relief offend Section 39(2)? In what way or ways does it violate Section 39(2)? Learned counsel did not provide an answer and I, on my part, do not have a positive answer in favour of the appellants. If I have an answer at all, and I think I do, it is a negative one against the appellants. It is an innocuous declaration which has nothing to do with that unfriendly sociological term discrimination with its aetiology of treating different groups or people in different ways. I do not see any discrimination in the relief. Why should the appellants think they are discriminated against in the light of the evidence of D.W.3, clearly articulating the relief, as to the appellants Aparaa ancestral home or descendancy as traced by the witness at page 176 of the Record after the break-away in 1965?

Section 39(2) of the 1979 Constitution which is now Section 42(2) of the 1999 Constitution is a serious provision in the Constitution to police only clear acts of deprivation based on the circumstances of a citizen's birth. It cannot be invoked in the situation in this case because there is no iota of discrimination of the appellants. It appears to me that learned Counsel gambled with the subsection, as he did not, beyond his one sentence submission, take this court to details as to the discrimination. This court is not a casino but a court of law and the highest court of the country for that matter. (p. 540 D)

REPRESENTATION

H. O. Ozoh, for the Appellants
 Worgu Boms, for the Respondents.

B CASES REFERRED TO

- Adekeye & Anor. v. Ogunbade (1987) 6 S.C. 268 at 280 -281
- Adeleke v. Awoliyi (1962) 1 All NLR 260
- Awani v. Erejuwa II (1976) 11 S.C. 307
- C Adekunle v. Adepeju (1992) 2 NWLR (Pt. 223) 305
- Enekebe v. Enekebe& Anor. (1964) All NLR 95 at 100
- Saffieddine v. C.O.P. (1965) 1 All NLR 545
- Odusote v. Odusote (1971) 1 All NLR 219
- Tildesley v. Harper (1878) 10 Ch. D. 393 at 396
- D Cropper v. Smith (1884) 26 Ch. D. 700 at 710
- Shoe Machinery Co. v. Cutlan (1896) 1 Ch. 108 at 112
- Amadi v. Thomas Aplin & Co. Ltd. (1970) 1 All NLR 409
- Oguntimehim v. Gubere & Anor. (1964) 1 All NLR 176 at 180
- Williams v. Hammond (1988) 1 NWLR (Pt. 71) 481
- E Okaroh v. The State (1990) 1 S.C. 169; (1990) All NLR 130
- Okeowo v. Migliore (1979) 11 S.C 138; (1979) 11 S.C
- Ojah v.Ogboni (1979) 4 S.C. (Reprint) 87, (1976) FSC 69

F STATUTES & RULES REFERRED TO

- F Constitution of the Federal Republic of Nigeria 1999 S.6 (6) (b)
- Constitution of the Federal Republic of Nigeria 1979 Ss. 6 (6), 39 (2) and 236 (1)
- Constitution of the Federal Republic of Nigeria, 1999 Ss. 39 (2), 42
- G (2), and 233 (2), (3)
- Evidence Act, 1990 Cap 112, Ss. 12, 19, 20, 33 (1) (e), and 227 (1)
- Law Procedure Act, S. 185
- Social Security Act, 1975 for the tax year 1976-77; S. 125 (1)
- High Court of Rivers State Civil Procedure O. XXXIV
- H Lagos State Civil Procedure Rules O. 25 r. 1

BOOK REFERRED TO

Black's Law Dictionary (6th edition) p. 860

LEAD JUDGMENT BY MOHAMMED JSC

In the High Court of Justice of Rivers State sitting at Port-Harcourt, the plaintiffs for themselves and on behalf of the members of Rumueme Community Village Council instituted their action against the defendants who were required to defend the action for themselves and on behalf of the other members of the Ogbakor Rumueme Organization and asked for the following declaratory and injunctive reliefs in Paragraph 47 of their Amended Statement of Claim as follows-

“(a) A declaration that the defendants are not members of the Rumueme Community Village Council in the Port Harcourt Local Government Area of the Rivers State but the descendants of Apará resident in Rumueme, Port Harcourt.

“(b) Perpetual injunction restraining the defendants, their agents, servants and privies from holding themselves out as, or claiming to be, or parading themselves as members of the said Rumueme Community Village Council.”

The case of the plaintiffs was heard on their Amended Statement of Claim and the defendants original Statement of Defence after the defendants’ application to also amend their Statement of Defence was refused by the learned trial Judge. In the course of the hearing of the case, the plaintiffs called two witnesses in support of their claim while the defendants in their defence called three witnesses. However at the conclusion of the evidence-in-chief of the plaintiffs’ second witness and the cross-examination of the witness by the learned Counsel to the defendants, the defendants filed their application for leave of the trial court to amend their Statement of Defence. This application was heard and refused by the learned trial Judge before the hearing of the case was concluded. The learned trial Judge in his judgment delivered on 3rd July, 1987, granted the two reliefs sought by the plaintiffs at pages 245 - 246 of the record of this appeal where the learned trial Judge said -

“I am convinced from the facts and circumstances I have so far examined, to hold that the plaintiffs have proved their case on the preponderance of evidence and are therefore entitled to the reliefs

they (sic) seek. I am convinced that the said reliefs if granted will have far reaching consequences to make for peace in Rumueme where both parties will remain to enjoy. I therefore enter judgment in favour of the plaintiffs by granting them the reliefs sought as follows:

B (1) *I hereby declare that the defendants are not members of the Rumueme Community Village Council, otherwise known as Rumueme Village*

Council in the Port Harcourt Local Government Area of Rivers State, but the descendants of Aparu resident in Rumueme, Port Harcourt.

C (2) *I hereby restrain the defendants, their agents, servants and privies perpetually from holding s themselves as members of the said Rumueme Community Village Council. ”*

D All the defendants who were aggrieved by the judgment of the trial High Court, appealed to the Court of Appeal against it. In addition, the defendants also sought and were granted leave by the Court of Appeal to appeal against the interlocutory ruling of the trial High Court refusing their application to amend their Statement of Defence. Upon hearing both defendants’ appeals, the Court of Appeal in its judgment delivered on 15th July, 1997, dismissed the appeals and affirmed the decision of the trial Court in both its Ruling and Judgment. Still dissatisfied with the decision of the Court of Appeal against them, the defendants are now on a further and final appeal to this court.

F Before the appeal came up for hearing, the defendants who are now the appellants in this court have filed their appellants’ Brief of Argument and the appellants’ Reply Brief which were duly adopted by their learned counsel. The plaintiffs who are now respondents in this court also duly filed their respondents’ Brief of Argument which G was deemed adopted by them in their absence and the absence of their learned counsel on the day the appeal was heard in accordance with Order 6 Rule 8(6), of the Rules of this court.

In the appellants’ Brief of Argument, three issues were identified for the determination of the appeal. The issues are -

H 1. Were the learned Justices of the Court of Appeal right when they upheld the ruling of the learned trial Judge dismissing the defendants application for amendment at a stage when the plaintiffs were yet to close their case? If answered in the negative has the fail-

ure to grant the defendants' application for amendment occasioned any miscarriage of justice?

2. Were the learned Justices of the Court of Appeal right when they held that there was nothing inequitable in granting the reliefs sought by the plaintiffs?

3. Were the learned Justices of the Court of Appeal right when they held that Exhibits 'A' & 'B' were legally admissible in instant proceedings and that they constituted admissions against the defendants?

In the respondents' Brief of Argument however, after attacking issue number two in the appellants' Brief that the issue does not arise from the decision of the Court below by way of a Preliminary Objection, the respondents proceeded to formulate the following two issues for the determination.

1. Have the defendants/appellants shown any ground on which this appellate court should interfere with the discretion of the trial Judge as affirmed by the Court below in refusing their application to amend their Statement of Defence at that stage of the proceedings where the respondents have called their last witness.

Whether Exhibits 'A' and 'B' were admissible in evidence; and if not, whether their admission as exhibits occasioned a miscarriage of justice.

Although the respondents in their respondents' Brief have raised Preliminary Objection to the second issue in the appellants' Brief of Argument, and taking into consideration that that issue relates to the grounds of appeal arising from the judgment of the trial court on their substantive case, I shall first treat and dispose of issue number one in both the appellants' and the respondents' Briefs of Argument arising from the interlocutory ruling of the trial court refusing the defendants' application to amend their Statement of Defence. I shall then come back to the issues arising from the judgment of the trial Court affirmed by the Court below on the substantive claims of the respondents as the case may be.

The nature of the dispute between the parties in this appeal as revealed from the record of appeal is quite simple taking into consideration that the parties have lived together as members of Rumueme Community for many years until 1965 when the appellants formed

Ogbakor Rumueme Organization separate from the Rumueme Village Council to which both parties hitherto-for belong. This development gave rise to the dispute as to whether the appellants are indigenes of Rumueme Community eligible to participate in the sharing of the farmlands in the area and also benefit from the compensation money paid to the Community by the Government. While the respondents who were the plaintiffs at the trial court are claiming to be the only indigenes of Rumueme to the exclusion of the appellants who were said to be strangers, the appellants are in turn asserting that they are also indigenes of the area.

Now coming back to the first issue for determination in this appeal, it is whether or not the Court below was right in upholding and affirming the ruling of the trial court dismissing the appellants' application as defendants to amend their Statement of Defence. It was pointed out by the learned counsel to the appellants that the defendants'/appellants' application to amend their Statement of Defence was refused by the learned trial judge in the course of the proceedings while the second witness to the plaintiffs/ respondents was being cross-examined; that although the court below seemed to have agreed with the reasons given by the trial court for refusing the amendment including causing undue delay of the trial with the resultant injustice to the respondents, that court having plainly disagreed with the trial court that it was too late at the stage of the proceedings to have granted the amendment, the appellants' appeal ought to have been allowed by the court below. Learned counsel referred and relied on the cases of *Adekeye & Anor. v. Ogunbade* (1987) 6 S.C. 268 at 280 -281, and *First Bank of Nigeria Plc. v. May Medical Clinics and Diagnostic Centre Ltd. & Anor.* (2001) 4 S.C. (Pt. 1) 108; (2001) 9 NWLR (Pt. 717) 28 at 44, on the principles guiding courts in deciding whether or not to grant application for amendment of pleadings, and argued that the court below was wrong in holding that the trial court was right in refusing the defendants/appellants' application. With regard to one of the reasons given for refusing the application which was affirmed by the Court of Appeal that the affidavit in support of the application was defective having been deposed under the Oaths Law, learned counsel to the defendants/appellants stressed that as the affidavit was only defective in form and not in substance, the trial

Court was permitted under Section 84 of the Evidence Act and the case of Attorney-General of the Federation & 2 Ors. v. Abdullahi Yunusa Bayawo (2000) 7 NWLR (Pt. 665) 351 at 359, to use the affidavit in arriving at its decision. Learned counsel finally concluded that the judgment of the Court below affirming the dismissal of the application to amend the Statement of Defence, had occasioned a miscarriage of justice justifying allowing this appeal to set aside that decision and grant the appellants' application to amend their Statement of Defence. B

For the plaintiffs/respondents, it was contended that the defendants/appellants' application having been brought at the stage in the proceedings when the learned counsel to the plaintiffs/ respondents had told the trial court that he was not calling any other witness after the testimony of P.W.2 who was then being cross-examined by learned counsel to the defendants/appellants, the trial court was right in refusing the application for amendment of the Statement of Defence on the grounds among others that it would have delayed the hearing of the case and cause hardship to the plaintiffs/respondents and for that reason, the court below was right in affirming that decision. Learned counsel emphasized that the amendments sought by the defendants/appellants which abandoned a number of paragraphs in which some of the facts pleaded in the Statement of Claim were admitted, with entirely new facts being brought into the case of the defendants/appellants, would work hardship on the plaintiffs/respondents resulting in filing further amendments and recalling of witnesses. C

The ground of refusal of such application being matters within the discretion of the trial court which exercised that discretion not only judicially but also judiciously, the decision of the court below not to interfere with the exercise of the discretion of the trial court in refusing the application was quite in order, argued the learned counsel, who called in aid many cases in support of his stand. These cases include *University of Lagos & Anor. v. Olaniyan & Ors.* (1985) 1 NWLR (Pt. 1) 156 at 175, *University of Lagos v. Aigoro* (1985) 1 NWLR (Pt. 1) 143 at 148 - 149, *Enekebe v. Enekebe & Anor.* (1964) All NLR 95 at 100, *Saffieddine v. C.O.P.* (1965) 1 All NLR 545, *Odusote v. Odusote* (1971) 1 All NLR 219, and *Awani v. Erejuwa II* (1976) 11 S.C. 307; (1976) 9-10 (Reprint) 217. D

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The circumstances under which a court may grant or refuse leave to amend pleadings are clearly set out in Order XXXIV of the Rules of the High Court of Justice of Rivers State under which the defendants/appellants' application was filed. It reads:-

"The court may at any stage of the proceedings, either of its own motion or on the application of either party, order any proceeding to be amended, whether the defect or error be that of the party applying to amend or not; and all such amendments as may be necessary or proper for the purpose of eliminating all statements which may tend to prejudice embarrass or delay the trial of the suit and for the purpose of determining in the existing suit the real questions or question in controversy between the parties, shall be so made. Every such order shall be made upon such terms as to costs or otherwise as shall seem just."

In the exercise of the no doubt discretionary power conferred, the court must have more regard to substance. In other words as a general rule, an amendment of any proceeding including pleadings under Order XXXIV quoted earlier, will be granted if it is for the purpose of eliminating all statements which may tend to prejudice, embarrass, or delay the trial of the suit, and for the purpose of determining in the existing suit the real questions or question in controversy between the parties. The law is indeed well settled that an amendment of pleadings should be allowed at any stage of the proceedings unless it will entail injustice to the other side responding to the application. The application should also be granted unless the applicant is acting malafide or by his blunder, the applicant has done some injury to the respondent which cannot be compensated in terms of costs or otherwise. See *Tildesley v. Harper* (1878) 10 Ch. D. 393 at 396, *Cropper v. Smith* (1884) 26 Ch. D. 700 at 710, *Shoe Machinery Co. v. Cutlan* (1896) 1 Ch. 108 at 112, *Amadi v. Thomas Aplin & Co. Ltd.* (1970) 1 All NLR 409 and the case of *Oguntimehim v. Gubere & Anor.* (1964) 1 All NLR 176 at 180, where the court upheld an amendment of pleadings after the close of evidence of the parties and in so doing the court observed

"In the present case either party called his surveyor at the start of the trial, and both parties agreed on what was in issue between them by reference to their plans. In effect they proceeded with the contest as if the plaintiffs' pleading had been what it became after the amendment; all that the amendment did was to write down what the defendant had known all along to be the plaintiffs' case. The amendment did not take him by surprise, and he has no just cause for complaint."

Taking into consideration of the principles considered and applied by this court in Oguntimehin's case quoted above, it is not difficult to see that in the instant case, the trial Judge was in error when he gave as one of his reasons for refusing the application that it was brought too late which even the court below could not agree. In Oguntimehin's case (supra), the application for amendment of pleadings was brought after the close of evidence on both sides, and the application was granted by the lower court and upheld on appeal by this court. Definitely, on the question of the appropriate time for bringing application to amend pleadings in the course of trial, the position in the present case where the defendants/appellants brought their application to amend their Statement of Defence after the conclusion of their cross-examination of second witness for the plaintiffs, is certainly on a firm ground and the court below having so found, ought to have allowed the amendment.

Important questions of what an amendment is and when it may be refused were considered and answered by this court in Chief Adedapo Adekeye & Anor. v. Chief O. B. Akin Olugbae (1987) 6 S.C. 268 at 280 - 281, where Eso, JSC. said -

"The aim of an amendment is usually to prevent the manifest justice of the cause from being defeated or delayed by formal slips which arise from the inadvertence of counsel. It will certainly be wrong to visit the inadvertence or mistake of counsel on the litigant. The courts have therefore through the years taken a stand that however negligent or careless may have been the slip, however late the proposed amendment, it ought to be allowed, if this can be done without injustice to the other side, for a step taken to ensure justice

cannot at the same time and in the same breath be used to perpetuate an injustice on the opposite party. The test as to whether a proposed amendment should be allowed is therefore whether or not the party applying to amend can do so without placing the opposite party in such a position which cannot be redressed by that panacea, which heals every sore in litigation namely costs.”

Although the guiding principles in granting or refusing amendments to pleadings outlined in Adekeye’s case (supra) are based on the provisions of Order 25 I Rule 1 of the High Court of Lagos State Civil Procedure Rules which are not in pari materia with the provisions of Order XXXIV of the Rivers State High Court Civil Procedure Rules now under consideration, the guiding principles applicable to the Rules and the Order in practice, are virtually the same.

Some of the reasons given by the learned trial Judge and endorsed by the court below for refusing the defendants/appellants’ application to amend their Statement of Defence include that the amendments which affected 10 out of the 23 paragraphs of the Statement of Defence, amounted to a complete substitution of a new Statement of Defence. Not only that, the learned trial Judge also found that the amendments would have the effect of allowing the defendants/appellants to withdraw or abandon paragraphs in which part of the claim of the plaintiffs/respondents have been admitted, thereby forcing the plaintiffs/respondents to have to file a Reply to the new Statement of Defence with the necessity of having to recall the two witnesses who had already testified. The question is, are these reasons given for refusing the application for amendment justified, most especially taking into consideration of the clear finding of the learned trial Judge at page 160 of the record of this appeal? This is what the learned trial Judge said:-

“The Statement of Defence has 23 Paragraphs out of which ten (10) are affected by the proposed amendment. It is interesting to note that the ten paragraphs being amended constitutes the main defence of the defendants case.”

Indeed if the amendments being sought by the defendants/appellants in their application constitutes their main defence to the case against them by the plaintiffs/respondents, that

finding alone was enough to have put the trial Court on guard on the need to adhere to the guiding principles in granting or refusing amendments of pleadings. With these findings, both the trial court and the court below ought in my opinion, to have found that the amendment being sought was necessary for the purpose of determining the real questions in controversy between the parties and therefore should have been granted in order to prevent manifest injustice to the defendants/appellants by allowing them to plead their main defence to the case against them. Since the claims of the plaintiffs/ respondents their action was for a declaration that the defendants/appellants are not members of the Rumueme Community Village Council and a perpetual injunction restraining the defendants/appellants from asserting that they also belong to the same milage council, it is quite clear that the amendments being sought in the application for amendment revolves around these claims which are the real questions in controversy between the parties.

It is therefore difficult to see how amendment of the Statement of Defence which even the learned trial Judge found to have constituted the main defence of the defendants/appellants in the case against them, could possibly prejudice, injure, surprise, over-reach or embarrass or work any injustice to the plaintiffs/respondents.

Although in the respondents' Brief of Argument their Learned counsel relied on the statement made by the learned trial Judge as part of his reasons in his ruling for refusing the application to amend the Statement of Defence that the plaintiffs' counsel on 24/9/86, had told the trial court that PW.2 was his last witness and that the plaintiffs were not calling any more witnesses, is not supported by the record of the trial court. This is because from the record at pages 114-120 containing the proceedings of the trial court of 24/9/1986, when both witnesses of the plaintiffs PW.I and PW.2 testified at the trial court, the record shows at page 120 that at the end of the evidence-in-chief of PW.2, the case was adjourned to 8/10/1986 for cross-examination and continuation. There is no statement by the learned counsel to the plaintiffs on record that PW.2 was his last witness and that he was not calling any other witness for the plaintiffs as wrongly attributed to him by

the learned trial Judge in his Ruling now on further appeal to this court. This of course means that the discretion exercised by the learned trial Judge in dismissing the application to amend the Statement of Defence in this case, is not supported by the facts relied upon by him in showing that the plaintiffs
 B **would be prejudiced, injured, surprised or over-reached. In this respect, the court below was wrong in failing to examine these facts in coming to the conclusion that the discretion of the trial Court was exercised judicially and judiciously. In other**
 C **words a discretion exercised by Court in vacuo, unsupported by the relevant facts cannot pass the “judicial and judicious” test** See *Buhari v. Obasanjo* (2003) 11 S.C. 74; (2003) (Pt. 850) 587 at 660.

Another reason given by the trial Court and endorsed by
 D **the Court below for dismissing the application to amend the Statement of Defence was that granting the amendment would lead to allowing the defendants to withdraw or abandon the admissions to the case of the plaintiffs they had earlier made thereby prejudicing the plaintiffs. However, having regard to**
 E **the fact that the main relief claimed in the plaintiffs’ action at the trial Court is a declaratory relief which by law is not granted on admission by the defendants but on proof by evidence to the satisfaction of the trial Court before exercising its discre-**
 F **tion of whether or not to grant the relief, the reason given by the learned trial Judge that to allow the withdrawal of the admission would have prejudiced the plaintiffs is not supported by law. This is because with or without the admission in the Statement of Defence, the duty on the plaintiffs to prove their**
 G **entitlement to the declaratory relief on their own pleading and evidence, would not have changed. This is because the law is well settled that the court does not make declarations of right either on mere admissions or in default of defence without hearing appropriate evidence and being satisfied with such**
 H **evidence.** See *Metzger v. Department of Health & Social Security* (1977) 3 All E.R 444 at 451, where Megarry, V.C., said:-

“The court does not make declaration just because the parties to litigation have chosen to admit something. The court declares what

it has found to be the law after proper argument not merely after admission by the parties. There are no declarations without arguments, that is quite plain."

See also Wallensteiner v. Moir (1974) 3 ALL E.R 217, Vincent Bello v. Magnus Eweka (1981) 1 S.C. 101; (1981) 1 S.C. (Reprint) 63, Motunwase v. Sorunqbe (1988) 12 S.C. (Pt. I) 130; (1988) 4 NWLR (Pt. 92, 90; Okedare v. Adebara (1994) 6 NWLR (Pt. 349) 157 at 185, Qua Vadis Hotels and Restaurants Limited v. Commissioner of Lands Midwestern State & Ors. (1973) 6 S.C. 71 at 96; (1973) 6 S.C. (Reprint) 50, Agbaje v. Agboluaje (1970) 1 ALL NLR 1 at 26 and Fabunmi v. Agbe (1985) 1 NWLR (Pt. 2) 299 at 318, where Obaseki, JSC., Said -

"A claim for declaration of title is not established by admissions as the plaintiff must satisfy the court by credible evidence that he is entitled to the declaration. The court does not grant declaration on admission of parties. It has to be satisfied that the plaintiff owns the title claimed."

In any case, the court below in its judgment now on appeal agreed with the trial court that in refusing the application for the amendment of Statement of Defence, the trial court had exercised its discretion judicially and judiciously hardly giving any room for interference by the lower court. However **taking into consideration that the parties are merely disputing over the membership of a Community Village council and the plaintiffs were allowed by the trial court to amend their Statement of Claim in paragraphs 13 and 34 by substitution of new paragraphs on 24/9/86, while barely less than two months later, the defendants application filed on 11/11/86, to amend 10 out of 23 paragraphs of their Statement of Defence was refused by the same trial court, clearly this same discretion of the learned trial Judge can hardly answer the description that it was exercised judicially and judiciously as found by the court below. In otherwords, in the instant case where it had not been shown that the plaintiffs would suffer any prejudice by the defendants' application to amend their Statement of Defence after similar application was granted to the plaintiffs, the fact that the defendants' application was made after the cross-examination**

of the second witness to the plaintiffs was not enough reason to refuse the application because such application by a defendant may be granted even after the close of the case of the plaintiffs. See *Okolo v. Nwamu* (1973) 2 S.C. 59 at 68; (1973) 2 S.C. (Reprint) 46. This is why I cannot agree with the learned counsel to the respondents that to allow the amendments sought in the present case would be unjust to the respondents. Indeed to me, the proposed amendments have raised points which appear to be vital to the ease between the parties, and unless they are adjudicated and pronounced upon, the real issues between the parties will be left undecided. I am therefore satisfied that the plaintiffs/respondents were not misled or embarrassed by the proposed amendments. In reality, the learned trial Judge clearly proceeded on wrong principles in refusing the defendants/appellants' application and the Court below was equally wrong in affirming the decision of the trial Court. I am not in any doubt in this respect that to allow the Ruling of the trial Court as affirmed by the Court below to stand, would result in a real injustice to the defendants/appellants.

In the result, this appeal succeeds and the same is hereby allowed on the first issue for determination alone. The judgment of the Court below delivered on 15th July, 1997, dismissing the defendants/appellants' appeal and affirming the Ruling and Judgment of the trial Court, is hereby set aside. In place of that, judgment set aside, judgment is hereby entered for the defendants/appellants granting their application to amend their Statement of Defence. Consequently, the case between the parties is hereby remitted to the trial High Court of Justice of Rivers State for hearing by another Judge on the pleadings of the parties as amended.

With this conclusion, there is now no need to consider the appeal on the remaining two issues for determination.

I am not making any order on costs.

OGUNTADE JSC

I have had the advantage of reading in draft a copy of the lead

judgment by my learned brother, Mohammed, JSC. I agree with him that this appeal is meritorious. It has always been said that justice should not only be done, it should manifestly appear to be done. A follow up to that is that every opportunity must be afforded the parties to a dispute in court to put their case fully before the court. In a case conducted on the basis of pleadings, it cannot be said that a defendant has been allowed to put his case before the court when the opportunity to amend his pleadings, in this case the Statement of Defence has been denied him. A refusal to allow a defendant the opportunity to amend his Statement of Defence translates into refusing him the liberty to call the evidence which would have been necessary had the amendment sought been granted. The consequence is a denial to him of his right to a fair hearing. B C

It seems to me that the proper method to discourage the bringing of an application to amend pleadings late in the course of proceeding is the award of compensatory costs in favour of the party adversely affected by the application brought late in the proceedings. I would also allow this appeal and remit the case to the trial court for re-hearing by another Judge of the Rivers State High Court. D E

TABAI JSC

I had a preview of the lead judgment prepared by my learned brother, Mahmud Mohammed, JSC and I am in full agreement with the reasoning and conclusion. I also allow the appeal. I too abide by the consequential orders contained in the lead judgment. F

ADEREMI JSC

The appeal here is against the judgment of the Court of Appeal (hereinafter referred to as the court below) Port Harcourt Judicial Division which was delivered on the 15th of July, 1997 in appeal No. CA/PH/12/93 - Edmund I. Akaninwo & 4 Ors. v. Chief O.N. Nsirim & 3 Ors. I shall now preface the consideration of this appeal with the salient facts leading to it: the plaintiffs who now are the respondents in the present appeal had brought an action against the defendants, who now are the appellants (before us), claiming against them at the High Court of Justice, Port Harcourt per paragraph 47 of G H

their Amended Statement of Claim, the following reliefs: -

“(1) A declaration that the defendants are not members of the Rumueme Community Village Council in the Port Harcourt Local Government Area of the Rivers State but the descendants of Apará residents of Apará resident in Rumueme, Port Harcourt.

B (2) Perpetual injunction restraining the defendants, their agents, servants and privies from holding themselves out as, or claiming to be, or parading themselves as members of the said Rumueme Community Village Council.”

C Pleadings were ordered, filed in the court Registry and exchanged between the parties. To prove their case, the plaintiffs/ respondents called two witnesses while the defendants/appellants, to counter the claim, called three witnesses. Through their pleadings, the plaintiffs/respondents have averred that they are descendants of

D Ozuruoha who migrated from Isiokpo and that the defendants/appellants were descendants of Akubudike, a farm labourer of Ozuruoha.

The plaintiffs, for all intent and purposes, accorded the defendants the status of indigenes of Rumueme and they were allowed to enjoy the rights and privileges enjoyed by Rumueme indigenes until 1965

E when, according to the plaintiffs, the defendants broke away from Rumueme Community village Council to form the Ogbako Rumueme Organisation. The defendants’ case going by their pleadings is that they, as well as the plaintiffs, migrated from Isiokpo and that they are

F indigenes of Rumueme. They further averred that three groups - Ebara, Anwomuo and Agbolu migrated from Isiokpo to prosecute the Rumuirenta war and that after the successful prosecution of the war, the said three groups settled at the present day Rumueme.

As I have said, the plaintiffs/respondents called two witnesses G and while the second witness was still being cross-examined, the defendants applied to the court for leave to amend their pleadings. The trial Judge refused the application. Upon the conclusion of the trial, the trial Judge entered judgment in favour of the plaintiffs/respondents. Dissatisfied with the said judgment, the defendants appealed

H to the court below and also sought and obtained the leave of the court below to appeal against the interlocutory ruling of the trial court against the refusal of their application to amend their pleadings. The court below, after entertaining arguments of counsel on the respec-

tive Briefs of their clients, in a considered judgment delivered on the 15th of July, 1997, dismissed the entire appeal and in so doing had reasoned thus: -

“From the foregoing, after a cool, calm view of the facts, the pronouncements, findings of the learned trial judge for his refusal to allow the appellants to amend their statement of defence with respect, I came to the irresistible conclusion that from all angles there has not been wrongful exercise of the judicial discretion by the learned trial judge for his refusal to allow the appellants to amend their Statement of Defence as it would entail undue delay of the trial with injustice to the respondents even though the stage of the application was not too late.....there has not been wrongful exercise of the judicial discretion by the learned trial Judge. The refusal was amply justified in fact and in law thereby giving this court no legal basis nor justifiable reason to interfere with the order of refusal of amendment of the Statement of Defence by the appellants.....”

In his judgment Exhibits A and B were treated as admissible under Sections 19 and 20 of the Evidence Act, Cap 112 aforesaid, it is this treatment as admissions that appellants complained and attacked as erroneous leading to miscarriage of justice.

In opening this judgment, I stated that the crux of this appeal turns out on the issues of status and pedigree of the appellants. It is trite law that the evidence of pedigree is an exception to the rule of evidence under *the hearsay rule*.....

From the foregoing, the testimonies were about 20 the ancestries of the appellants vis-a-vis Aparara. The 3rd D/W, the 1st appellant when cross-examined about his statement in Exhibit B

As Exhibits A and B were about the ancestry and the pedigree of the appellants, they were clearly admissible under Section 33 (1)(e) of Evidence Act, supra.

After due consideration of the contention of the appellants on the admissibility of Exhibits A and B being certified true copies of public documents and having been pleaded there is no cog (sic) in their admissibility, they were validly admitted in law. In addition, they are relevant being statements made about appellants’ pedigree. From

all considerations, appellants' complaint about the, admissibility of Exhibits A and B lack merit and devoid of substance thereby unmeritorious.

In conclusion all the issues raised by the appellants in this appeal are unmeritorious thereby leading to no other option than the dismissal of the appellants' appeal....."

Being dissatisfied with the aforesaid judgment of the court below, the defendants/appellants have appealed to this court by a Notice of Appeal filed on 15th October, 1997 which contains eight grounds of appeal. Distilled from the said grounds are three issues which, as set out in the Brief of Argument of the appellants; they are in the following terms: -

"(1) Were the learned Justices of the Court of Appeal right when they upheld the ruling of the learned trial Judge dismissing the defendants' application for amendment at a state when the plaintiffs were yet to close their case? If answered in the negative, has the failure to grant the defendants' application for amendment occasioned any miscarriage of justice?"

(2) Were the learned Justices of the Court of Appeal right when they held that there was nothing inequitable in granting the reliefs sought by the plaintiffs?"

(3) Were the learned Justices of the Court of Appeal right when they held that Exhibits A and B were legally admissible in the instant proceedings and that they constituted admissions against the defendants?"

The respondents in their Brief of Argument raised a Preliminary Objection as to issue No. 2 in the appellants' Brief, on the ground that it did not arise from the judgment appealed against. They later identified two issues for determination in this appeal and as couched in their Brief of Argument, they are as follows:

"(1) Have the defendants/appellants shown any ground on which this appellate court should interfere with the discretion of the trial Judge at affirmed by the court below in refusing their application to amend their Statement of Defence at that state of the proceedings where respondents have called their last witness?"

(2) Whether Exhibits A and B were admissible in evidence and if not, whether their admission as exhibits occasioned a miscarriage

of justice?”

When this appeal came before us for argument on the 22nd of October, 2007, neither the respondents nor their counsel were in court. But the court noted that the respondents had already filed their Brief of Argument. We therefore, relying on the rules of this court, took it that the appeal was argued. Mr. Ozoh, who appeared for the appellants, referred to, adopted and relied on the appellants' Brief filed on the 8th of November, 2002 and the appellants' Reply Brief filed the same date; he urged that the appeal be allowed, the judgment of the court below be set aside and an order for re-trial of the case be made.

I have had a careful reading of the issues raised for determination by both parties. It is my humble view that Issue No. 1 on each of the appellants' Brief and the respondents' Brief can be conveniently addressed together; issue No. 3 on the appellants' Brief is similar to issue No. 2 on the respondents' Brief. I shall therefore take them together. Lastly, I shall address issue No. 2 on the appellants' Brief.

Issue No. 1 on each of the Briefs deals with the refusal of the trial court to grant the defendants/appellants' application to amend their pleadings. Hearing of the case commenced before the trial court and at a stage when the PW.2 was being cross-examined, the defendants now appellants before this court, brought an application to amend their pleadings by making averments in relation to their family lineage or what is generally called family tree. The proposed amendment was attached to the application for amendment filed on the 11th of November, 1986. After taking arguments of counsel on the application, the learned trial Judge, in a considered ruling, dismissed the application. But, curiously enough, after refusing the application to amend, D.W.3 - Chief Edmund Akaninwo, (the 1st defendant/ appellant), gave evidence throwing up all the averments relating to the proposed amendments to the Statement of Defence and it was recorded by the trial Judge apparently on the face of the record, without any objection. There is nothing on record to show that at the conclusion of evidence on both sides, any application was brought by the defendants/ appellants to bring the pleadings in line with the evidence already on record, for the purpose of making use of the evidence of D.W.3 in that respect. Be that as it may, an earlier appli-

cation for an amendment, as I have said, had been rejected. The importance of pleadings cannot be over-emphasized. The function of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue so disclosed. In any given case, the pleadings of both parties must be considered by the court to enable it decipher what the dispute in the case is all about. Each party to the case must therefore, as a matter of necessity, under the law, set out clearly the facts to be relied on in proof of his case, where he is the plaintiff, and in offering a challenge to or disprove the case, where he is the defendant. It is for this reason that the law expects that pleadings should be sufficient, comprehensive and accurate. Suffice it to say that all parties are bound by their pleadings. The moment any of the parties is deviating from his pleadings, when giving evidence, he must be stopped generally through a ruling on an objection taken by the opposing party and if no objection is so taken, at the time of the trial, such evidence which is at variance with the pleadings goes to no issue. Hence, it is said in law, with all emphasis, that parties to a case, in the superior court of record are bound rigidly to their pleadings. But in the preparation of pleadings, counsels are bound to or may be prone to make mistakes. Then must a party lose his right to have the dispute between him and his adversary, decided on its merit simply because a mistake has been made in the preparation of the pleadings? I think not. It must always be remembered that the object of courts is to decide the rights of the parties and not to punish them for the mistakes which they may make in the conduct of their cases by deciding otherwise in accordance with their rights. If it is seen that the mistake made in the course of preparing the case of a party to litigation is not fraudulent nor is it calculated to overreach the opponent, the court must be ready to correct such a mistake upon an application to it. After all, courts do not exist for the sake of discipline but for the sake of deciding issues in controversy. See *Ojah & Ors v. Ogoni & Ors* (1976) 4 S.C. (Reprint) 87; (1976) 1 ALL NLR (pt. 1) 346.) Given the nature of the claims in the suit and the evidence led, balancing the proposed amendment against same, it is my view that substantial justice would have been secured by granting the amendment. See *Shomade & Anor. v. Ogunbiyi & Anor.* 3 WACA 48. The court below, in affirming the

judgment of the trial court refusing the application for amendment had reasoned: -

“From the foregoing after a cool calm view of the facts, the pronouncements, findings of the learned trial Judge for his refusal to allow the appellants to amend their Statement of Defence with respect, I came to the irresistible conclusion that from all angles there has not been wrongful exercise of the Judicial discretion by the learned trial Judge for his refusal to allow the appellants to amend their Statement of Defence as it would entail undue delay of the trial with injustice to the respondents even though the stage of the application was not too late.”

With due respect, the above reasoning of the court below is a far cry from doing justice to the matter on the ground. Issue No. 1 on the appellants’ Brief is consequently answered in the negative; while I answer issue No. 1 on the respondents’ Brief in the affirmative. I bear in mind the decisions of this court that all issues formulated by the parties in any given appeal must be addressed. Hence I shall address issues 2 and 3 in the appellants’ Brief and issue No. 2 in the respondents’ Brief. But I shall be circumspect in order not to prejudice the order to be finally made in this appeal.

I now proceed to issue No. 3 on the appellants’ Brief and issue No. 2 on the respondents’ Brief. Exhibits A and B are proceedings relating to ancestry and pedigree of the defendants/appellants in Suit No. PHC/16/7 and PHC/17/ 7, in which the 2nd and 3rd defendants gave evidence for one Mr. Chinda in which they admitted that their family were known as Aparara and that they formed Ogbako Rumueme in 1965 when they broke away from the plaintiffs’ council. The two documents were clearly pleaded in paragraphs 39 and 40 of the Amended Statement of Claim. The two documents were admitted in evidence by the trial court The court below in upholding the decision of the trial court on the two documents said and I quote: -

“As Exhibits A and B were about the ancestry and pedigree of the appellants they were clearly admissible under Section 33 (1) (e) of the Evidence Act, supra.”

Section 33 of the Evidence Act, which is now Section 34 (1) of the Evidence Act, provides:

“Evidence given by a witness in a judicial proceedings, or be-

fore any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the fact which it states, when the witness is dead or cannot be found, or is incapable, of giving evidence, or is kept out of the way by the adverse party, or when his presence cannot be obtained without an amount of delay or expense which, in the circumstances of the case, the court consider, unreasonable

Provided-

(a) that the proceedings was between the same parties or their representatives in interest.

(b) that the adverse party in the first proceeding had the fight and opportunity to be cross-examined; and

that the question in issue were substantially the same in the first as in the second proceeding. ”

Going by the above provisions, the defendants/appellants are no parties to Suits Nos. PHC/16/71 and PHC/17/71 and so they could not have had the opportunity to cross-examine the 2nd and 3rd defendants who were only called as witnesses. The issue in contention in the two afore-mentioned suits is libel while the issue in the case at hand is that of status - a declaration that the defendants are not members of Rumueme Community Village Council and an order of perpetual injunction restraining them from so parading themselves. The above provisions are, therefore, not applicable to the present case. It is only proceedings which meet the conditions laid down in Section 34, *supra* that can be admitted and used in subsequent proceedings. See *Sanyaolu v. Coker* (1983) ALL NLR 157, *Okonji v. Njokanma* (1999) 12 S.C. (Pt. II) 150; (1999) 14 NWLR (Pt.638) 250, and *Onu v. Idu* (2006) 12 NWLR (Pt.995) 657. The reasons for rejecting such piece of evidence as Exhibits “A” and “B” are not far-fetched; similar facts, though in often cogent, moral and weighty, i.e. logically relevant, are rejected as legal evidence on the grounds of policy and fairness; since they tend to waste time, embarrass the enquiry with collateral issues, prejudice the parties with the court and even encourage attacks without notice. This principle is well enshrined in the Latin Maxim “*Res Inter Alios Acta Alteri Nocere Non Debet*” which when translated means; a man ought not to be

prejudiced by what has taken place between others. See also Yusuf. v. Adegoke (2007) II NWLR (Pt. 1045) 332. Finally on this part, I wish to say that a statement made by a person when he sues and/or acts in his personal capacity is not binding on him when he is sued in a representative capacity, neither is that statement binding on him when he is sued or he sues in a representative capacity nor on the members of the group represented by that person. This court in the case of Ideson & Anor. v. Ordia Ors. (1997) 3 NWLR (Pt. 491) 17, amplified this point when at pages 27/28 per Adio, JSC, (of blessed memory) said and I quote: -

“The present action was instituted by the appellants as representatives of their family against the respondents also in, a representative capacity. A person’s family is a body consisting of the members of the family and it is a legal entity which is separate and distinct from each member of the family. So, as rightly pointed out by the trial Judge and rightly affirmed by the court below, what Tobi Onomiruren, did or said would not be binding on the Onomiruren family”

Issue No. 3 on the appellants’ Brief is therefore answered in the negative. I also answer the first part of Issue No. 2 on the respondents’ Brief in the negative and the second part in the affirmative.

On issue No. 2 on the appellants’ Brief of Argument which goes to the merit of the case, I shall refrain from treating it comprehensively, in view of the final order to be made. Having refused leave to the defendants/appellants to amend their pleadings even though the plaintiffs/respondents had earlier been granted leave to amend their own pleadings to allow paragraphs 43 and 45 of the Amended Statement of Claim to stand uncontroverted, even though clear intention to controvert same was made by the defendants/appellants but disallowed, is to disallow a level playing ground to the defendants. And, there lies the inequity. I shall not go further in order not to prejudice the judex at the re-hearing of the case. Issue No. 2 afore-said is consequently answered in the negative.

In the final analysis, for all I have been saying above, but most especially for the comprehensive and lucid reasoning contained in the leading judgment of my learned brother, Mohammed JSC, it is my judgment that this appeal is meritorious and it is hereby allowed. The judgment of the court below delivered on the 15th of July, 1997

is hereby set aside. I abide by all other orders contained in the leading judgment including the order as to costs.

TOBI JSC (DISSENTING)

The appellants were the defendants in the High Court. The respondents were the plaintiffs. The dispute is in respect of Rumueme Community Village Council. The plaintiffs asked for two reliefs: (i) a declaration that the defendants are not members of Rumueme Community Village Council and (ii) perpetual injunction to restrain them from holding out as members of the Council. It is the claim of the plaintiffs that they are descendants of Ozuruoha who migrated from Isiokpo. They said that the defendants are descendants of Akubudike, a farm labourer to Ozuruoha. The plaintiffs said that the defendants were for all intents and purposes treated as indigenes of Rumueme until 1965, when they broke away from Rumueme Community Village Council to form the Ogbako Rumueme Organisation.

It is the case of the defendants that they, as well as the plaintiffs, migrated from Isiokpo and that they are indigenes of Rumueme. They said that three groups - Ebara, Anwonwo and Agbolu migrated from Isiokpo to prosecute the Rumuirenta War and that after the successful prosecution of the war, the three groups settled at the present day Rumueme.

In the course of the proceedings and while PW2 was still being cross-examined, the appellants applied for an amendment of their pleadings. The learned trial Judge refused the application. He entered judgment in favour of the respondents. An appeal to the Court of Appeal was dismissed. This is a further appeal to this court.

Briefs were filed and exchanged. The appellants formulated three issues for determination:

“3.01. Were the learned Justices of the Court of Appeal right when they upheld the ruling of the learned trial Judge dismissing the defendants application for amendment at a stage when the plaintiffs were yet to close their case? If answered in the negative, has the failure to grant the defendants’ application for amendment occasioned any miscarriage of justice?”

3.02 Were the learned Justices of the Court of Appeal right when they held that there was nothing inequitable in

granting the reliefs sought by the plaintiffs?

3.03 Were the learned Justices of the Court of Appeal right when they held that Exhibits 'A' & 'B' were legally admissible in the instant proceedings and that they constituted admissions against the defendants?"

The respondents formulated two issues for determination:

"5.01 Have the defendants-appellants shown any ground on which this appellate court should interfere with the discretion of the trial Judge as affirmed by the court below in refusing their application to amend their Statement of Defence at that stage of the proceedings where respondents have called their last witness.

5.02 Whether Exhibits 'A' and 'B' were admissible in evidence; and if not, whether their admission as exhibits occasioned a miscarriage of justice."

Learned counsel for the appellants, Mr. H. O. Ozoh, submitted on Issue No. 1 that the Court of Appeal was wrong in upholding the ruling of the learned trial Judge on the ground that the grant of the amendment would entail undue delay to the hearing of the case. Citing *Adekeye v. Ohigbade* (1987) 6 S.C. 268, and *First Bank of Nig. Plc v. May Medical Clinics and Diagnostic Centre Ltd.* (2001) 4 S.C. (Pt. I) 108; (2001) 9 NWLR (Pt. 717) 28, learned counsel submitted that the fact that the amendment if granted will entail the filing of a fuller defence or a reply should not be a ground for disallowing an application for amendment. He submitted that a party is perfectly entitled to withdraw an admission previously made by means of an amendment. He cited *Bank of the North Ltd, v. Na'Bature* (1994) 1 NWLR (Pt. 319) 235.

Learned counsel submitted on Issue No. 2 that even though courts have unlimited power to make declaration of rights, a declaration will not be granted if it will not confer any meaningful benefit to the plaintiff. He pointed out that as the whole object of the declaration sought is to portray the defendants as descendants of slaves and strangers in Rumueme and deny them rights enjoyed by them over the years and before them their ancestors including the right to partake in the sharing of Rumueme communal farm land, it offends Section 39(2) of the Constitution which forbids discrimination of any sort on ground of circumstances of birth. He contended that the Court

of Appeal was wrong when it held that there is a justiciable and equitable issue and dispute between the parties.

On issue No. 3, learned counsel submitted that the Court of Appeal was in error when it held that Exhibits A and B were validly received in evidence. He argued that Exhibits A and B, cannot be admitted in the proceedings against the appellants who were sued in a representative capacity as an admission against interest. He indicated at page 11 of the Brief instances when evidence in previous proceedings can be admitted in subsequent proceedings. Citing Sections 34 and 199 of the Evidence Act and the case of *Ajide v. Kelani* (1985) 3 NWLR (Pt. 12) 248, counsel submitted that Exhibits A and B were wrongly received in evidence as admissions. He submitted further that Exhibits A and B do not in law amount to an admission. He cited *Ogunnaike v. Ojayemi* (1987) 3 S.C. 213. He urged the court to allow the appeal.

Learned counsel for the respondents, Mr. Worgu Boms, raised Preliminary Objection on issue No. 2. He submitted that there is no single argument in support of the complaint that the plaintiffs' claim is not justiciable and that the issue as framed does not cover the complaint of justiciability of the plaintiffs' claim or arise from the judgment. He cited *Anyaoke v. Adi* (1986) 3 NWLR 731, *Okpala v. Okafor* (1991) 7 NWLR (Pt. 204) 510; *Alakija v. Abdulahi* (1998) 5 S.C. 1; (1998) 5 SCNJ 1, *Commerce Assurance Ltd, v. Ali* (1992) 4 SCNJ 145, *Atoyebi v. Military Governor. Oyo State* (1994) LRCN 73, *Uhuwangho v. Okojie* (1985) 5 NWLR (Pt. 122) 471, *Akinluyi v. Ejidike* (1996) 5 NWLR (Pt. 449) 381, and Section 233(2) and (3) of the Constitution of the Federal Republic of Nigeria, 1999.

Learned counsel submitted on Issue No. 1 that as the discretion exercised by the learned trial Judge in refusing the amendment was confirmed by the Court of Appeal judicially and judiciously, this court should not interfere with it. He cited *University of Lagos v. Olaniyan* (1985) 1 NWLR (Pt. 1) 156, *University of Lagos v. Aigoro* (1985) 1 NWLR (Pt. 1) 143. *Enekebe v. Enekebe* (1964) All NLR 95, *Saffieddine v. Commissioner of Police* (1965) 1 All NLR 545. *Awani v. Erejuwa II* (1976) 11 S.C. 307; (1976) 9-10 S.C. (Reprint) 271, and *Oduote v. Oduote* (1971) 1 All NLR 219.

Learned counsel submitted that having announced in open

court that they would call no further witness and thus closed their case, and appellants having commenced extensively to cross-examine the witness for the respondents, and subsequently bringing a motion to amend, are rightly held to be acting mala fide in order to overreach the respondents. He cited *George v. Dominion Flour Mills Limited* (1963) All NLR 71. *Okolo v. Union Bank of Nigeria Ltd.* (1999) 6 S.C. (Pt. II) 26; (1999) 10 NWLR (Pt. 623) 429. Citing *Civil Procedure by Fidelis Nwadialo* (2nd edition) at page 467, learned counsel argued that the time an application for amendment is brought is crucial for the consideration of the application.

On the withdrawal of the admissions in the amendment sought, learned counsel submitted that the case of *Bank of the North Ltd, v. Na'Bature* (supra) cited by counsel for the appellants, is not apposite as the issue in this appeal is not whether a party through amendment can withdraw an admission already made, but whether at that stage of the proceedings such amendment of pleading in which evidence had been led can be allowed to be made which in effect, will mean withdrawing the admission without disclosing the new facts warranting same to be withdrawn. Distinguishing *Na'Bature's* case, learned counsel cited *Mosheshe General Merchants Limited v. Nigeria Steel Producing Limited* (1987) 2 NWLR (Pt. 55) 110. He argued that as the appellants did not state the new facts which necessitated the withdrawal of the admission, the Court of Appeal was right in affirming the decision of the High Court.

On issue No. 2, learned counsel submitted that as Exhibits A and B, were admitted without objection and the fact that they do not belong to the class of documents which are inadmissible for all purposes, like unregistered instruments and unsigned deeds of grant, the appellants can no longer raise the issue of their admissibility in an appellate court. He cited *Etim v. Ekpo* (1983) 3 S.C 12. Counsel argued in the alternative that as the exhibits are public documents duly tendered by PW1, the officer having custody of them, he is a competent witness to tender them; and the documents were admissible. He cited *Williams v. Hammond* (1988) 1 NWLR (Pt. 71) 481, *Adekunle v. Adepeju* (1992) 2 NWLR (Pt. 223) 305, *Okaroh v. The State* (1990) 1 S.C. 169; (1990) All NLR 130 and Sections 12 and 227(1) of the Evidence Act, 1990.

Taking issue No. 2 in the appellants' Brief, learned counsel submitted that the issue was academic, irrelevant and of no moment. He contended that the appellants did not argue the point in their Brief but were content only to refer to Section 39(2) of the Constitution which forbids discrimination without showing how it applies to the case. He urged the court to dismiss the appeal.

Learned counsel for the appellants in his Reply Brief argued that Issue No. 2 arises from the judgment of the Court of Appeal and therefore relevant in the determination of the appeal. He referred to the submission of Chief Ofodile, SAN., at page 188 of the Record of Appeal and the reaction of the learned trial Judge at page 242 thereof. He also dealt with the issue of the respondents closing their case after the testimony of PW.2 and cited the case of *Professor Shyllon v. Asien* (1994) 6 NWLR (Pt. 353) 670. On the evidence of D.W.3, learned counsel submitted that the witness gave copious evidence in respect of his own ancestry and that the respondents are wrong in their argument that he gave a terse evidence contrary to the averments in the proposed Amended Statement of Defence.

Let me first take the Preliminary Objection. The issue came up at the trial court when learned Senior Advocate for the plaintiffs,

Chief Ofodile, submitted that "it is inequitable to make such a declaration after staying together for decades..." In reaction to the submission, the learned trial Judge said that he did not "find anything inequitable in the circumstances".

At the Court of Appeal, the appellants argued in their Brief at page 277 of the Record that a declaration is an equitable remedy and will not be granted where it will be unjust or inequitable to do that and that the instant case affords a good example of a case where a declaration should be refused because of the unpleasant consequences it will have on the defendants.

The Court of Appeal reacted as follows at page 416 of the Record:

"With regard to the second claim of injunction from parading themselves as members of Rumueme Community Village Council, there is an equitable issue and dispute between the parties. The respondents with respect satisfied that they had equitable issue as defined above and also that there was dispute between the parties."

In the light of the above, I disagree with learned counsel for the respondents that Issue No. 2 does not arise from the judgment of the court. It arises and clearly too. The objection therefore fails.

This appeal reopens the old issue of amendment of pleadings. The principles are as old as Hale. Let me take them briefly here. First, the omnibus one. Our adjectival law leans heavily in favour of amendments and is generally against the refusal of amendments. Although the pendulum weighs or tilts in favour of granting amendments, courts of law are entitled to refuse amendments in deserving cases. Trial courts must examine the application for amendment very carefully in the light of the affidavit evidence. In the exercise, the courts will consider the peculiar facts of each case.

In the often cited English case of *Cropper v. Smith* (1884) 26 QBD 700, Bowen, LJ., said:

"Now, I think it is a well established principle that the object of courts is to decide the rights of the parties and not to punish them for the mistakes which they make in the conduct of their cases... I know of no kind of error or mistake which, if not fraudulent... the court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline but for the sake of deciding matters in controversy and I do not regard such amendments as a matter of favour or grace... It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as such a matter of right on his part to have it corrected, if it can be done without injustices."

The case has been cited in a number of Nigerian cases. See *Okeowo v. Migliore* (1979) 11 S.C 138; (1979) 11 S.C. (Reprint) 87, *Ojah v. Ogboni* (1979) 4 S.C. (Reprint) 87, (1976) FSC 69.

In *Adeleke v. Awoliyi* (1962) 1 All NLR 260, Ademola, CJF. (as he then was), said at page 262:

"It is part of the duty of a Judge to see that everything is done to facilitate the hearing of an action pending before him wherever it is possible to cure an unintentional blunder in the circumstances of a case and it will help to expedite the hearing of an action, the Court is to award costs against any delinquent party rather than dismiss or strike out a case for a fault in the proceedings prior to hearing of the

case.”

See also *Collins v. Vestry of Paddington* (1880) 5 QBD 368.

In an application for amendment of pleadings, the court will take into consideration a number of principles or factors, including: (a) the attitude of the parties in relation to the amendment; (b) the nature of the Amendment sought in relation to the suit; (c) the question in controversy; (d) the time when the amendment is sought. (see *Alsthom S. A. v. Chief Dr. Saraki* (2000) 10-11 S.C. 48; (2000) 14 NWLR (Pt. 687)

Although the attitude of the respondent may in certain instances be an Important consideration, the attitude of the applicant is the major consideration. In this regard, the court must be satisfied that the application is brought bona fide or in good faith and not designed to abuse the court process. In dealing with the nature of the amendment, the court will take into consideration the totality of the content of the amendment sought vis-a-vis the relief or reliefs sought in the matter. In the consideration of the nature of the amendment sought, the court will examine very closely the real question in controversy in the litigation. The time or stage of the case when the application for amendment is brought is also an important consideration. And here, the court should take into consideration whether the applicant brought the application at the earliest opportunity in the proceedings. This will be considered in certain cases, along with the nature of the amendment sought. If the application for amendment was delayed, the court should be interested to know what caused the delay. If the reason for the amendment was as a result of an important material relevant in the application coming to the applicant's notice late, that will be a consideration in his favour. But the court will take into consideration whether the applicant, a person of due diligence and business acumen ought to have procured the information earlier than the time he obtained it. And here, I am not restricting the words “business acumen” to the usual meaning of buying and selling; rather it covers the business of searching for wining or exculpatory evidence. I do not think the court will be prepared to grant an application if the applicant was indolent in the process of searching for the relevant evidence for the amendment. The court will be very much in order to use the objective test to judge the business acumen of the

applicant vis-a-vis an indolent conduct. After all, equity will part ways with an indolent litigant.

Amendment could be sought in respect of evidence already led in court whether through examination-in-chief or through cross-examination. Normally, evidence not pleaded will go to no issue. There are however instances when as a result of inadvertence or carelessness of counsel for the opposing party, evidence not pleaded goes into the record of the trial judge. In such a situation, counsel, the originator of the evidence through his witness, conscious of the fact that the evidence, not duly pleaded, could be expunged from the record at the judgment stage, formally applies for the amendment of the pleadings. The trial Judge must take into consideration whether the evidence is relevant in the light of the claim and the reliefs sought.

And the final consideration is the justice of the case. Justice, which generally means fairness, the quality of being just and the disposition of disputes in court to render every party his due, is the barometer on which the case revolves or rotates in the judicial process. It is the cynosure in the judicial process and a Judge in the performance of his adjudicatory functions must look out for it, in almost the same way a child looks out for sweet on the lunch table, and do it or make sure that it is done in the case. The situation is not open ended. There is a caveat, if I may use that expression unguardedly. A Judge cannot involve himself in doing justice or arrogate to himself that he is doing justice in a case where a statute is clear and unequivocal on a point. In such a situation, the Judge must bow or kowtow to the statute because his main hire is to interpret the statute. It is only when the wordings of a statute can liberally accommodate the justice principle that the Judge can apply it. I think Lord Denning, had this in mind when he said in his well written book, *The Family Story*, at page 174 that, the Judge can only apply the principles of justice if it is legitimate to do so, as in his words, "the Judge is himself subject to the law and must abide by it." In my view, it will be illegitimate to apply the justice principle if it is antithetical or diametrically opposed to a statutory provision.

The impression is created in the Brief of the appellants that application for amendment is granted as a matter of course or rou-

time. While it is the position of the law that a party should not be inhibited to present his case in court, there is the other side of the coin; and it is that a party owes the administration of justice and the judicial process a duty to present his case in whole or in one block and not instalmentally. And so, when a party applies to amend his pleadings, the trial Judge must be satisfied of the bona fide of the application.

I should perhaps allow myself to say here that the often cited English case of *Cropper v. Smith* as opposed to the popular view, did not decide that, applications for amendment must be granted routinely and just for the asking. That cannot be part of our adjectival law and happily Bowen, LJ, did not say so. The learned Lord Justice placed three restrictions or limitations. The first one is that the error or mistake should not be fraudulent. While it is not quite easy to fathom when an error or mistake is fraudulent, it is a restriction or limitation. The expressions are in the English language and Bowen, LJ., was the owner of the language and I will not question him. I was thinking that an error or mistake, if it is really one, can hardly be fraudulent. This is because fraud, as a crime, "is an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right." See *Black's Law Dictionary* (6th edition) p.860. Let me not take the issue further. It is not in the main stream of this case. I was merely thinking aloud 2 and I do not want to go astray in my thoughts.

The second one is that an application for amendment can be granted if it will do no injustice to the other party. As I intend to take this anon, I should drop it for now; but certainly not before I mention that Bowen, LJ., used the expression "without injustice" twice in his dictum. My understanding of the repetition is for emphasis in the light of the importance the Lord Justice attached to it. And the Lord Justice is very correct in his emphasis.

The third and final one is, and putting it in the negative side, is that if the way in which a party has framed his case will not lead to a decision on the real matter in controversy, an application for amendment will not be granted by the court. I think I should leave *Cropper* and return home. In *Adeleke Ademola*, C/F., (as he then was) placed

restrictions or limitations when he said “wherever it is possible to cure an unintentional blunder”. Putting it negatively, an application for amendment will not be granted wherever it is impossible to cure an unintentional blunder. The second situation is that if a blunder is intentional, an application for amendment will not be granted. While an unintentional blunder could be a mistake, an intentional blunder is not. An intentional blunder could, at times, be fraudulent. B

It is clear from the above analysis of the case law that application for amendment cannot be granted in certain instances. These are: (1) If it will entail injustice to the respondent, (2) If the applicant is acting mala fide, (3) If the application is designed to overreach the respondent, (4) If the blunder of the applicant has done some injury to the respondent which cannot be compensated by costs. C

Injustice is the opposite of justice. Therefore where justice will not be done to the respondent, the application will be refused. After all, justice is not only for the applicant. It is also for the respondent. In dealing with the injustice factor, the trial Judge should take into consideration the totality of the application in the light of the affidavit evidence. The scales of justice are weighed or measured in a makeshift or dummy pendulum and the trial Judge, the weight measurer, so to say, takes the mark where the pendulum tilts. That will give him a rough idea as to whether injustice will be done to the respondent if the application is granted. D E

Mala fide is the opposite of bona fide. It simply means bad faith as opposed to bona fide which is good faith. Mala fide projects a sinister motive designed to mislead or deceive another. Mala fide is more than bad Judgment or mere negligence. It is a conscious doing of a wrong arising from dishonest purpose or moral obliquity. Mala fide is not a mistake or error but a deliberate wrong emanating from ill-will. And so when a trial Judge comes to the conclusion that an application for amendment of pleadings is mala fide, he will not grant it. F G

If an application is designed to overreach the respondent, a trial Judge will not grant it. This principle or factor is related to the one I have just considered. Overreach means to circumvent, outwit or get the better of by cunning or artifice; that is by a clever trick. In the context of amendment of pleadings it connotes or conveys a H

situation where a party, fully aware of the case of the adverse party, applies to amend his pleadings, with trick or craftiness, to put the respondent or adverse party in a state of hopelessness or helplessness that he cannot meaningfully respond for the good of his case. By the amendment, the respondent or adverse party is no more in a position to respond positively because the applicant has pre-empted or forestalled his possible reply in exculpation of the amendment. By the overreaching amendment, the respondent has been inculcated knee-deep. A state of overreaching arises where the applicant unnecessarily anticipates the case of the respondent and places a pre-meditated wedge to close any meaningful pleadings in joinder of issues; and meaningful pleadings here means pleadings capable of giving victory to the respondent in the case. A court of law, which is also a court of equity, will not allow an applicant play such an artifice on the respondent. After all, litigation is not a booby trap available to a so-called clever party in trouble in his case to outsmart the adverse party. On the contrary, litigation is a process where the parties genuinely and without the cover of ambush and tricks, place the lawsuit before the court for adjudication; with the parties showing only their bias, sentiments and slants.

The learned trial Judge in his Ruling said at page 150 of the Record:

“Order for pleadings in this case was made on 14th I day of May, 1984. The plaintiffs filed their Statement of Claim on the 27th September, 1984 and the defendants filed their Statement of Defence on the 22nd of February, 1985.

The 2nd and only material plaintiffs’ witness, Chief O. N. Nsirim, testified for the plaintiffs on the 24th September, 1985. That the plaintiffs would call no further witness was announced by plaintiffs’ counsel in open court. P.W.2 was extensively cross-examined on the 27th October, 1985 by defendants counsel and the case adjourned to 17th and 18th November, 1985 for further cross-examination,”

It is my understanding that the learned trial Judge had in mind the principle or factor of overreaching when he made the above statement. As the appellants realized that in the absence of adequate defence, they were likely to fail in the matter, amendments were introduced to overreach the case of the respondents. I do not think a

court of justice should allow that. Parties should not be allowed to make their case in cunning and crafty installments.

Finally on this point, where the blunder of the applicant does some injury to the respondent which cannot be compensated by costs, a trial Judge will refuse an application for amendment. Costs are a palliative to the wronged party, who is the party in victory in the litigation. Although it is not adequate compensation to the party in victory, it cushions in some way, the litigation expenses of the party. And so when the amendment could be paid for by costs, a Judge should grant it. And most amendments could be paid for by costs.

And that takes me to the discretionary nature of the power. In an application for amendment of pleadings where the respondent opposes, a trial Judge is called upon to reconcile two competing interests, if possible; a judicial function which requires the careful exercise of his discretionary powers. The law is loud that a court of law must exercise its discretion judicially and judiciously. In other words, the Judge should exercise his discretion according to the law and his intellectual wisdom as Judge qua judex and not arbitrarily.

Where a trial Judge correctly exercises his discretionary power, an appellate court cannot interfere. The law does not allow an appellate court to change or metamorphose to a court of trial or take the place of a court of trial and grant the application for amendment as such court, if it heard the application in that capacity. On the contrary, an appellate court should look at the application granted or refused from the cold record of appeal and take an appellate decision borne out from the record.

I think I have talked enough law. I should now go to the facts leading to the refusal of the application for amendment by the learned trial Judge. One reason why the learned trial Judge refused the application for amendment was that the appellants denied facts in the Proposed Amended Statement of Defence, which they had earlier admitted in the Statement of Defence. The Judge took time to enumerate the admissions and the subsequent denials at page 156 of the Record. I should reproduce them here:

“1. Paragraphs 6, 7, 8, 9, 10 and 11 of the Statement of Claim are admitted in paragraph 3 of the Statement of Defence but paragraph

11 of the Statement of Claim is denied in paragraph 3 of Exhibit 'A'.

2. The existence of Ogbako Rumueme Organisation is admitted in paragraph 4 of the Statement of Defence but the existence of that body is denied in paragraph 4 of Exhibit 'A'.

3. Paragraph 12 of the Statement of Defence admits paragraphs 26 and 27 of the Statement of Claim. But in Paragraph 12 of Exhibit 'A' paragraphs 26 and 27 of the Statement of Claim are denied.

4. Paragraph 19 of the Statement of Defence admits paragraphs 43 and 44 of the Statement of Claim but paragraph 19 of Exhibit A, denies the said paragraphs.

5. In paragraph 10 of the Statement of Defence the defendants admit Azi as one of their ancestors. They pleaded therein that Azi was infact the first son of Ebara, not a grandson of Aparara.

But in paragraph 10 of Exhibit A, the defendants aver that Azi is no longer a human being but an animal - a leopard."

Is the learned trial Judge correct? Of the five admissions enumerated at page 156 of the Record by the learned trial Judge, four are correct. They are admissions 1, 2, 3 and 5. In admission 4, paragraph 19 of the Statement of Defence admitted paragraphs 43 and 44 of the Statement of Claim as enumerated by the learned trial Judge but my problem is that I did not see paragraph 19 of the Proposed Amended Statement of Defence as enumerated in paragraph 4 thereof by the learned trial Judge. In other words. I did not find in the Record paragraph 19 of Exhibit A . The little hitch in respect of paragraph 19 of Exhibit A notwithstanding, I entirely agree with the learned trial Judge that Exhibit A denies admissions already made in the Statement of Defence. And the admissions affect averments in respect of ancestral genealogy, the existence of Ogbaku Rumueme Organisation and the disturbance of some of the plaintiffs by some of the defendants when the plaintiffs went to share farmland to some members of Rumueme Village Council. In my humble view, some of the admissions, if not all, are material to the determination of the reliefs sought by the plaintiffs, one of which reads:

"A declaration that the defendants are not members of the Rumueme Community Village Council in the Port Harcourt Local Government Area of the Rivers State but the descendants of Aparara

residents in Rumueme, Port Harcourt.”

In his submission on the admissions, learned counsel for the appellants cited the case of *Bank of the North Ltd, v. Na’Bature* (supra) as authority that a party is entitled to withdraw an admission previously made by means of an amendment. In that case, Achike, JCA., (as he then was), said at page 247:

“In this connection, it will be observed first, that the affidavit in support of the motion for amendment... stated clearly the circumstances that necessitated the amendment. The admission in the original pleading, cannot in the light of the averments in the supporting affidavit, be said to have been made intentionally. Second, it has not been shown that any person has acted on the declaration for it to be now inequitable to permit the appellant to resile from the position which he had represented to the respondent in his original pleading or by his declaration, act or omission... Indeed, that is the principle of equitable estoppel as enshrined in Central London Property Trust Ltd, v. High Trees Houses Ltd. (1947) 1 KB 130. That principle, with respect, is completely inapplicable in this case... It is clear the amendment could be granted only upon the lower court being satisfied that the admission sought to be retracted or withdrawn was made unintentionally for it may be slow to order the grant if it is also satisfied that it had been acted upon by the opposing side. That is not the case here.”

Na’Bature is, with the greatest respect, not direct authority that an admission can be withdrawn any time just for the asking. Achike, JCA., (as he then was), did not say so, and I should have been surprised if he said so. Achike, JCA., (as he then was), was a Judge of good and capable law. It is my feeling that the case is against the appellants. The appellants have not proved that the admissions were made unintentionally.

In *Mosheshe General Merchant Ltd, v. Nigeria Steel Products Limited* (1987) 1 NWLR (Pt. 55) 110, this court dealt with the issue. It was held that an admission of debt is a solemn declaration of indebtedness of the defendant to the plaintiff in the sum admitted. It was also held that when a case comes up for hearing, in the presence of the parties, counsel informs the court that he admits liability of either the entire sum or part of the amount claimed by the plaintiff,

the court is competent to enter judgment for the amount admitted, even if on the pleadings, the admitted amount was denied.

A fact admitted by a defendant in his pleadings should be taken as established and should form one of the agreed facts of the case. See *Chief Okparaekwe v. Ogbuonu* (1941) 7 WACA 53, *Olubode v. Oyesina* (1977) 5 S.C. 79; (1979) 5 S.C. (Reprint) 47.) An admission in pleadings basically puts an end to proof. This is because by the admission, the parties no more join Issues on the matter. Since proof presupposes a dispute and since admission drowns the element of dispute, proof becomes superfluous. see *Veritas Insurance Co. Ltd, v. CM Trust Investments limited* (1993) 3 NWLR (Pt. 281) 349. See also Sections 19 to 26 of the Evidence Act.

A litigant should not be allowed to speak at the same time or the same moment from the two sides of his mouth. He can only be allowed to speak from one side of the mouth at the same time or the same moment. He cannot make a case in his pleadings and suddenly change or reverse position to make a different case. A party cannot by his complete state of mind make an admission and later decide to change it by an amendment. While a party can do so in very clear instance of mistake or fraudulent misrepresentation by the adverse party; that is not the situation here.

It is not the case of the appellants that they made a mistake or there was fraudulent misrepresentation by the respondent, which resulted in the admissions. If parties are allowed to retrieve admissions just like that and with ease and comfort, our law of evidence on admissions will not only be porous but will be completely dead and of no significance. As that will make our adjectival law of admission in a state of flux and uncertainty, I will not go along with the submission of counsel for the appellants. After all, admission is the best evidence in the determination of liability.

It is argued that declaratory reliefs are not granted on mere admission but after proper argument by the parties. The English case of *Metzger v. Department of Health and Social Security* (1977) 3 All ER 444, and other Nigerian cases are cited. In that case, Megarry, VC, said at page 451:

“The court does not make declarations just because the parties to litigation have chosen to admit something. The court declares what

it has found to be the law after proper argument, not merely after admissions by the parties. There are not declarations without argument; that is quite plain."

Metzger has been applied in a number of Nigerian cases. I am not comfortable with a general or blanket statement that a party cannot admit a declaratory relief and that the court must go outside the admission to ask for inculpatory arguments. I will rather be more comfortable to distinguish between two types of declaratory reliefs - one which applies to the whole world (in the sense of not restricted to a particular person or persons); for example a declaration that a particular statute or section of a statute is unconstitutional, null and void ab initio and a declaration of a right against a particular person in property, as in this appeal.

I will be more comfortable with the application of the principle adumbrated in Metzger to the former situation because by the nature of the relief, the defendant cannot be said to be the person in possession of the relief which normally he could have freely admitted as the owner. I am not sure I have made myself clear. Let me try another effort. In the first category of declaratory reliefs the relief is specifically on a statute and it is based on an issue of law. Parties cannot admit a position which is not law in a litigation as parties are not allowed by law to compromise on an issue of law. And so when a plaintiff seeks declaratory relief on the dry bones of the law and the law only and alone, Metzger should apply. In the second situation, which affects the alleged right or right of an individual, admission should totally and completely remove proof by the plaintiff and a court of law, in my view, should give judgment based on the admission of the defendant.

I think I should examine some of the cases cited. In the English case of Metzger, the plaintiffs claimed declarations inter alia (i) that the Social Security Benefits Up-dating Order 1976, had not been made pursuant to a review carried out in accordance with Section 195(1) of the Social Security Act, 1975 for the Tax year 1976-77; (ii) that the defendant, the Secretary of State for Social Services, was under a duty to carry out such a review for that Tax year and to prepare such additional up-dating order as was appropriate having regard to his conclusions on such review. The main plank of the ac-

tion was that the Social Security Benefits Up-dating Order, 1976 was not made under Section 125(1) of the Social Security Act, 1975. The action falls under the first category I mentioned above, thus justifying the position taken by Megarry, VC.

In *Quo Vadis Hotels Ltd, v. Commissioner of Lands Mid-Western State* (1973) 6 S.C. 50; (1973) 6 S.C. (Reprint) 50, the Supreme Court held that in order to succeed in a claim for declaration, the plaintiff must prove his case and rely on the strength of his case. In *Agbaje v. Aqboluaje* (1970) All NLR 21, the Supreme Court relied on the decision of the Privy Council in *Ibeneweka v. Egbuna* (1964) 1 WLR. 219. The issue was whether it was a proper case to grant a declaration. The court held that it was not a proper case to grant a declaration. In *fabunmi v. Agbe* (1985) 1 NWLR (Pt. 2) 999, the Supreme Court, following Metzger, held that a claim for declaration whether of title or not is not established by admission as the plaintiff must satisfy the court by credible evidence that the claimant is entitled to the declaration. With respect, Metzger did not say so. The decision was based on the 1976 Order and the 1975 Act and not on declaration of title to land.

In *Bello v. Eweka* (1981) 1 S.C. 63; (1973) 6 S.C. (Reprint) 50, the Supreme Court held that the onus was on the plaintiff to establish title to land. Like *Quo Vadis*, the court held that in a case seeking declaration of title to land, the onus lies on the plaintiff to establish the title he claims, and he would in that process, have to rely on the strength of his case and not on the weakness of the defendant's case. The court relied on *Kodilinye v. Odu* (1935) 9 WACA 336. In *Motunwase v. Sorunbe* (1988) 12 S.C. (Pt. I) 130; (1988) 5 NWLR (Pt. 92) 90, the Supreme Court followed *Bello* in a matter in which declaration of title was sought under native law and custom.

In my humble view, *Fabunmi v. Agbe* *Bello v. Eweka* and *Motunwase v. Sorunbe*, did not need any evidence outside the admissions because they relate specifically to the property rights of individuals and not a declaration affecting a particular statute. After all, it is the law that an admission against interest is relevant and admissible evidence. See *Ojiegbe v. Okwaranyia* (1962) All NLR 604.

I would like to end this aspect of the case by saying that although Nigeria shares common features of the common law with

England in their legal system, as our Legal System was born by the English Legal System, there is the need for us to realize that ours is not always the same as theirs. Therefore we should appreciate the differences in our legal systems, which have come to stay, not by any accident, but by clear difference in our traditions, cultures and ethos.

In Nigeria where parties are most reluctant to admit the truth, so much so that the obvious is even denied, courts of law should accept with both hands admissions made by parties in their pleadings which are within the provisions of the Evidence Act, particularly Sections 19 to 26 thereof. After all, African witnesses tell more lies than their white counterparts. Therefore if Metzger is good in England and its legal system, it is certainly not good enough for Africa. While I make this comparison, I am not quite sure that Megarry, VC., had this loud, ambitious and omnibus interpretation in mind when he gave the decision in the case in 1973. Litigants are most miserly with their words, in our courts on property rights, particularly under customary law and so courts of law could embrace admissions made by the defendant in favour of the plaintiff. By this, justice will be done to the plaintiff. So too the case before the court. The decisions examined above will certainly result in the delay and or protraction of litigation, if courts of law insist that admitted facts in all declaratory reliefs are not useful to a plaintiff. Why and why, I ask?

That takes me to the claim of the respondents that there was an announcement by counsel in the High Court that no other witness will be called after P.W.2. There is a dispute here. While appellants say that the respondents did not at any stage of the proceedings give an indication that they will not call any other witness other than P.W.2, the respondents say that there was such an indication. Who is correct? I am bound by the Record and I go to the Record. In his Ruling at page 151 of the Record, the learned trial Judge said:

"The 2nd and only material plaintiffs' witness, Chief O. N. Nsirim, testified for the plaintiffs on the 12th September, 1985. That the plaintiffs would call no further witness was announced by plaintiffs' counsel in open court. P.W.2 was extensively cross-examined on the 27th October, 1985 by defendant's counsel and the case adjourned to 17th and 18th November, 1985 for further cross-examination."

Going by the above, the respondents are right and the appellants are wrong. And so when the appellants brought an application for amendment of their Statement of Defence, the respondents opposed it. Perhaps, the learned trial Judge had this and other points in mind when he said at page 164 of the Record:

B “The true nature of the amendment sought and the time it is brought are suggestive that the defendants intend thereby to overreach the plaintiffs and that the application to amend is not made in good faith.”
P.W.2 was cross-examined on 27th October, 1986 and on 11th November, 1986. Counsel for the appellants filed a motion for amendment of the statement of defence. In other words, the application for amendment was filed within fifteen days after P.W.2 was cross-examined and counsel announced in open court that he will not call any other witness. I think the learned trial Judge correctly made the point
C that considering the time the application for amendment was sought, the appellants, who were the defendants in the High Court, intended to overreach the respondents.
D

I do not think I am wrong in saying that the appellants tried to take advantage of the announcement by the respondents that they will
E call no other witness after P.W.2, to amend their Statement of Defence to overreach the respondents. That was the basis for their new additional sub-paragraphs and the amendment of the 10 out of the 23 paragraphs of the Statement of Defence. I think it is appropriate to quote here what the learned trial Judge said at page 160 of the
F Record:

*“I shall now consider the extent of the amendment sought to be made. The Statement of Defence has 23 paragraphs, out of which ten (10) are affected by the proposed amendment. It is interesting to
G note that the ten paragraphs being amended constitute the main defence of the defendants’ case. That is not all. To the said paragraphs are added ten additional sub-paragraphs, viz: paragraphs 6(a), (b), (c); 9(a); 14(a); 15(a); 17(a), (b), (c) and (d). The plaintiffs have not joined issues with the new additional facts pleaded in the 10 sub-
H paragraphs. The effect of the defendants exercise is to substitute their Statement of Defence with an entirely new Statement of Defence in the guise of an amendment. The court has not been given sufficient facts and circumstances on which this type of application intended to*

be used as estoppel, res judicata or any other special defence, the pleadings must clearly indicate that.”

What did the Court of Appeal say about the proposed amendment? The court agreed entirely with the Ruling of the learned trial Judge. Onalaja, JCA., said at page 412 of the Record:

“From the foregoing after a cool calm view of the facts, the pronouncements, findings of the learned trial Judge for his refusal to allow the appellants to amend their Statement of Defence with respect, I come to the irresistible conclusion that from all angles there has not been wrongful exercise of the judicial discretion by the learned trial Judge for his refusal to allow the appellants to amend their Statement of Defence as it would entail undue delay of the trial with injustice to the respondents even though the stage of the application was not too late... The refusal was amply justified in fact and in law thereby giving this court no legal basis or justifiable reason to interfere with the order of refusal of amendment of the Statement of Defence by the appellants.”

I cannot fault the conclusion of the Court of Appeal. That court is correct. I should say in addition that the Ruling of the learned trial Judge refusing the application for amendment is sound. Issue No. 1 therefore fails

I go to Issue No. 2. Learned counsel for the appellants vegetated on the principles of equity and Section 39(2) of the 1979 Constitution. In response, counsel for the respondents submitted that there are three elements in the relief, viz: (i) The defendants are residents in Rumueme. (ii) Although so resident, they are not indigenes but of Aparas descent, (iii) They are not members of the Community Village Council. D.W.3, in his evidence-in-chief, said at page 174 of the Record:

“I live in Rumueme. My father is dead. He lived in Rumueme when he was alive. My grandfather also lived in Rumueme. I am a contractor and farmer. I have not heard of Rumueme Community Village Council. None of the defendants belong to Rumueme Community Village Council.”

Giving evidence in respect of the organizations that the appellants’ ancestors belonged to, witness said at page 176 of the Record:

“There are two organizations: (1) Aparas Owbor holders and

peoples” meeting. (2) *Apara Council of Chiefs. My late father Chief Israel Akinwo, Jackson Akaniwon, Late Chief Tobia Ehule, Late Sunday Worgu, Late Jonathan Chukwu, Late Josiah Woke were members of the first body. Apara council of Chiefs - Myself, 5th defendant are members up till today.*”

B Under cross-examination, witness said at page 178 of the Record:

“Those who formed the Ogbako Rumueme Organisation are indigenes of Rumueme who broke away from Rumueme Village Council. Myself and other defendants were among the founding members of the Ogbako Rumueme Organisation. Ogbako Rumueme Organisation was on before 1965.”

The first relief is a “declaration that the defendants are not members of the Rumueme Community Village Council...” D.W.3, in his evidence-in-chief said that he had not heard of Rumueme Community Village Council and that none of the defendants belong to the Village Council. Is that not really the end of the dispute? By the evidence, D.W.3 agrees with the relief sought that they are not members of the Rumueme Community Village Council. The relief is not at large but is strictly tied to the Rumueme Community Village Council, which D.W.3 said “none of the defendants belong to.”

Learned counsel for the appellants made so much weather from the evidence of P.W.2, Chief O. N. Nsirim. He specifically relied on the following evidence at page 124 of the Record:

“Before 1965, none of the defendants or their ancestors was a chief except the 1st defendant’s father who was a court chief. There had been trouble between us and the defendants but it was in 1965 they broke away finally. They continued to live where they were. Before 1965, they (defendants) were part and parcel of Rumueme.”

Based on the above evidence, learned counsel for the appellants contended that “the defendants even if they were strangers in Rumueme have been enjoying all the rights and privileges enjoyed by members of Rumueme Community right from birth until 1965 when they broke away from Rumueme Community Village Council to form a rival organization - Ogbako Rumueme Organization, and that the plaintiffs now want to deny them all rights and privileges hitherto enjoyed by them and before them their ancestors.”

It is clear to me from the totality of the evidence of both parties

that they were together until 1965 when the appellants broke away. Both P.W.2 and D.W.3 agree on that issue. While I do not know why the appellants broke away, as that is not quite apparent from the Record, I am in grave difficulty to agree with the contention of learned counsel that the respondents “now want to deny them all rights and privileges hitherto enjoyed by them and before them their ancestors.” If a person, for reasons best known to him, breaks away from an organization, can he still claim property in that Organization? In other words, can the person really eat his cake and still have it intact in his hands? How can equity look at the matter? In favour of the break away party? I think not. And that is the crux of the matter.

Taking the second relief of injunction, Onalaja, (JCA) said at page 416 of the Record:

“With regard to the second claim of injunction from parading themselves and members of Rumueme Community Village Council, there is an equitable issue and dispute between the parties. The respondents with respect satisfied that they had justiciable issue as defined above and also that there was dispute between the parties. For the above reasons, Issue 6 of appellants’ Brief of Argument lacks merit in that there are justiciable issues firmly raised before the learned trial Judge and which he had the jurisdiction under Sections 6(6) and 236(1) of the 1979 Constitution to adjudicate upon. Issue 6 is unmeritorious and resolved against the appellants.”

Learned counsel for the appellants is not happy with the above and so he made it an issue. That is issue No. 2. It is elementary law that injunction is an equitable relief. The Court of Chancery in England granted injunctions to restrain a person from proceeding in common law courts or from executing judgments obtained. Such injunctions were referred to or called common injunctions. Although the Law Procedure Act, 1854 empowered the Common Law Courts to grant injunctions in certain cases, the situation changed for the good of the court system in 1875 when the courts were amalgamated and the power to grant injunctions was vested on all Divisions of the High Court. But history is clear that injunction had its origin and evolution from the Courts of Equity. I have taken the above brief historical stuff to drown the argument of learned counsel that the Court of Appeal was wrong in finding equity in the relief of injunc-

tion. Injunctive relief is founded on equity and the case law is in great proliferation.

I think learned counsel also involved Section 39(2) of the 1979 Constitution. I should take it. The subsection provides:

B *“No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth.”*

C *Counsel did not say much on the violation or proposed violation of Section 39(2). He merely submitted that “the declaration sought offends the provisions of Section 39(2) of the Constitution which forbids discrimination of any sort on ground of circumstances of one’s birth.” Learned counsel did not help this court as to how the declaration offends Section 39(2). But let me revisit the declaration. It is that the “defendants are not members of the Rumueme Community Village Council in the Port Harcourt Local Government Area*
D *of Rivers State but the descendants of Apará resident in Rumueme, Port Harcourt.”*

How does this relief offend Section 39(2)? In what way or ways does it violate Section 39(2)? Learned counsel did not provide an answer and I, on my part, do not have a positive answer in favour
E of the appellants. If I have an answer at all, and I think I do, it is a negative one against the appellants. It is an innocuous declaration which has nothing to do with that unfriendly sociological term discrimination with its aetiology of treating different groups or people in
F different ways. I do not see any discrimination in the relief. Why should the appellants think they are discriminated against in the light of the evidence of D.W.3, clearly articulating the relief, as to the appellants Apará ancestral home or descendancy as traced by the witness at page 176 of the Record after the break-away in 1965?

G Section 39(2) of the 1979 Constitution which is now Section 42(2) of the 1999 Constitution is a serious provision in the Constitution to police only clear acts of deprivation based on the circumstances of a citizen’s birth. It cannot be invoked in the situation in this case because there is no iota of discrimination of the appellants. It
H appears to me that learned Counsel gambled with the subsection, as he did not, beyond his one sentence submission, take this court to details as to the discrimination. This court is not a casino but a court of law and the highest court of the country for that matter.

And that takes me finally to issue No. 3 on whether Exhibits A and B were legally admissible in evidence. Exhibit A, is the certified true copy of Suit No. PHC/16/71. Exhibit B, is the 2 certified true copy of Suit No. PHC/17/71. They were tendered through P.W.I, Ntaseleari Isaac.

Learned counsel for the appellants rightly said that the object of tendering Exhibits A and B is to rely on the evidence of D.W.2 and D.W.3 in the previous proceedings in proof of the fact that the defendants were Aparas Settlers and that the exhibits are admissions against interest. Learned counsel advanced reasons at pages 11 and 12 why the exhibits are not admissible in evidence. Learned counsel for the respondents argued at pages 21 to 24 that the exhibits were properly admitted.

I do not think I should waste time on the issue. Both parties agree as to the purpose of tendering the two exhibits. The exhibits were to prove that the appellants are from Aparas. There is enough evidence on that in the Record. I had earlier referred to that. I should repeat it at the expense of prolixity. The evidence of D.W.3 is very clear in respect of their Aparas nativity when he said that the ancestors of the appellants belonged to two organizations: Aparas Owbor holders and peoples meeting and Aparas Council of Chiefs. It is clear from the evidence that appellants became members of Aparas community when they broke away from Rumueme in 1965. I am almost repeating myself beyond expectation. I should not. And so I am of the view that the question of admissibility of Exhibits A and B is a non-sequitor. It is neither here nor there as the evidence of D.W.3 is unequivocal on the issue.

It is for the above reasons that I am unable to go along with the majority decision. I therefore dissent. In sum, the appeal has no merit and I dismiss it. I award N 10,000.00 costs in favour of the respondents.