

SUPREME COURT OF NIGERIA
18TH APRIL, 2008 SC. 340/2002
CORAM:- N. TOBI, G. A. OGUNTADE, F. F. TABAI, I. T. MUHAMMAD, C. M. CHUKWUMA-ENEH, JJSC

1. RAPHEAL EJEZIE	
2. GODFREY ISOFOR APPELLANTS
AND	
1. CHRISTOPHER ANUWU	
2. DENNIS OHANEHI RESPONDENT
3. JOSEPH OKEYIKA	
4. JAMES ANOZIE	

ACTIONS - Representative actions - Rule - Flexibility of - Rule permitting representative action - Is a rule of convenience - And ought not to be treated with rigidity - As did the trial judge in the instant case (H1)

PARTIES - Representative actions - Plaintiffs - At cross purposes - Power of court in such suits - High Court Rules of Eastern Nigeria O. VI, rr. 1 & 3 - Empowers Court to resolve dispute - By ordering joinder of parties - According to perceived interests (H2)

PARTIES - Plaintiffs - Representative actions - Interests - Representatives and those represented - Must have same interests in the matter - Which is as stated in statement of claim - Representatives are not allowed to go contrary to it - Unless in unanimity (H3)

FACTS

In 1976, the original Plaintiffs representing themselves and the family of Umudike of Uzoakwa, Ihiala, instituted an action for declaration of title to land, damages for trespass and injunction. Following the death of all the original Plaintiffs, the Plaintiffs/Appellants and the Plaintiffs/Respondents were substituted for the original Plaintiffs in 1992. The suit was brought against the Defendants/Respondents for themselves and on behalf of the Umumneri family of Ihiala. It appears that the Plaintiffs/Respondents had gone into negotiations with

the Defendants/Respondents for an out-of-court settlement of the dispute against the wish of the Plaintiffs/Appellants. Consequently, on 6/2/1996, four persons claiming to be members of the Plaintiffs' family brought an application praying to be admitted into the proceedings as representatives of the family in substitution for the Plaintiffs/Respondent who had allegedly expressed an intention not to participate further in the proceedings as representatives of the Plaintiffs' Umudike family. Six various affidavits were deposed to in support of the application. To one of those affidavits deposed to by the 1st Applicant, was attached Exhibit 'A' dated 4/11/1995 and purporting to be a resolution of members of the plaintiffs' Umudike family in support of the application. No counter affidavit was filed by either the Defendants/Respondents or the Plaintiffs/Respondent. But the 1st Plaintiff/Respondent deposed to an affidavit which, though not specifically denying the facts in the affidavits in support of the application, sought to show cause why the application should not be granted. He contended in his depositions that the Plaintiffs/Respondents were the only legal representatives of Umudike family for purposes of the suit. And that they had already debriefed their original lawyer – G.R.I Egeonu, SAN – and replaced him with N. N. Anah, SAN. Accordingly, the application brought by Egeonu as counsel for the Plaintiffs' Umudike family was brought without authority and should be discountenanced by the court.

After hearing the respective counsel for the parties on the application, the learned trial court held that the Plaintiffs were in disarray. And that it was impossible to get on with the suit one way or the other in the circumstances especially in view of the fact the suit is brought in a representative capacity which entails that there were unnamed Plaintiffs whose interests are at stake and whose mandate the two sets of Plaintiffs on record were each claiming to the exclusion of the other. Accordingly, he refused the application and struck out the suit stating that the Plaintiffs could come for re-listing after sorting themselves out. Both the Applicants and the Plaintiffs/Applicants appealed to the Court of Appeal against the decision of the trial court but the appeal was dismissed. Plaintiffs/Appellants therefore brought this further appeal to the Supreme Court against the judgment of the Court of Appeal but the Applicants are not party to the

further appeal.

ISSUE FOR DETERMINATION

"The propriety of the order made by the trial court which was affirmed by the court below striking out the suit because of the dispute within the plaintiffs' Umudike family as to who should pursue the suit as the representatives of the family."

HELD (Allowing the appeal per **OGUNTADE JSC**, Tobi JSC dissenting)

Representative actions - Rule - Flexibility of

1. The trial court was obviously dissatisfied with the situation in the case arising from the plaintiffs' failure to speak with one voice on behalf of their Umudike family. This informed its decision to strike out the case. But I think, with respect, that the trial court was wrong. It did not sufficiently bear in mind that the suit was capable of being prosecuted to conclusion by the two plaintiffs/appellants as the representatives of Umudike family. The rule permitting representative action is a rule of convenience and as such ought not to be treated with any rigidity but as a flexible tool of convenience in the administration of justice - See Anatogu & Ors. v. The Attorney-General of the East Central State & Ors. (1976) 11 S.C. 109; (1976) 11 S.C (Reprint) 59. (pp. 1748 A/1749 A)

Representative actions - Plaintiffs - At cross purposes

2. Under Order IV Rule 3 of the applicable High Court Rules, there is power vested in the trial court to resolve disputes of this nature as to who should pursue a suit as representatives of a family or group of persons. Rules 1 and 3 of Order IV of the High Court Rules of Eastern Nigeria, 1963, provide:-

"1. If the plaintiff sues, or any defendant counter-claims in any representative capacity, it shall be expressed on the writ. The court may order any of the persons represented to be made parties either in lieu of, or in addition to the previously existing parties.

3. Where more persons than one have the same interest in one suit, one or more of such persons may, with the approval of the court, be authorized by the other persons interested to sue or to defend in such suit for the benefit of or on behalf of all parties so

interested.”

In this case, no one had challenged the authority of the plaintiffs/appellants to pursue the suit as representatives of the Umudike family. The plaintiffs/respondents on the other hand indicated that they as the representatives of the same family wanted the suit which they joined in bringing to be withdrawn. It seems to me on the facts of this case that the insistence of the plaintiffs/respondents in this case not to pursue the suit against the defendants/respondents would appear to portray them as having an identical interest with the defendants in the suit. The proper order to make in my view is to join them to the suit as the 2nd set of defendants whilst the original defendants remain the 1st set of defendants.

The four members of the Umudike family who brought the application to be substituted for the plaintiffs/respondents have not filed an appeal against the order of the trial court striking out the suit and thus, refusing their application. Indeed, their application was not even considered on its merit. Instead, the trial court, believing that the plaintiffs were needlessly delaying the hearing of the suit, struck out the suit.

But this case has been so long in court that I ought to consider and grant the said application in order to save time. Accordingly, the applicants Geoffrey Ifebuzor, Chief James Ohakaba, Chief Hyacinth Christopher Nwachukwu Nzeribe and Nze Godwin Anyamele all of the Umudike family are substituted for the plaintiffs/respondents in the case. (pp. 1748 C/1749 G/1750 A)

Representative actions - Interests

3. I observed earlier that all the plaintiffs had originally brought the suit as the representatives of Umudike family. They did not, acting together, file a Statement of Claim or process making a concession that the land in dispute did not belong to the family. It is settled law that in a representative action, persons who are to be represented and the person or persons representing them should have the same interest in the cause or matter. In view of the fact that the extant Amended Statement of Claim filed on all the plaintiffs' behalf made a claim to the ownership of the land in dispute, it could not be allowed for the plaintiffs/respondents to pursue a line of action which gives

the lie to the Amended Statement of Claim before the court or which shows the plaintiffs as not acting together. As it was, the contention of the plaintiffs/respondents would amount to a support for the defendants/respondents case whilst that of the plaintiffs/appellants was in pursuit of the plaintiffs' original claim. I do not of course file out a possibility that the plaintiffs may, acting together compromise their suit and reach a settlement with the defendants but they could not split themselves into two groups in order to blow hot and cold. It seems to me that whilst there remained in the suit the representatives of the Umudike family who were ready and willing to prosecute the suit as originally conceived to conclusion, the suit ought not to have been struck out. (pp. 1748 G/1749 C/H)

NOTABLE POINTS OF INTEREST

TABAI JSC

1. The striking out order amounted to denial of fair hearing

Learned counsel for the respondents did not address the specific issue of the striking out order without the parties being heard on the point.

On this issue it is pertinent to point out that at the court of trial neither learned counsel for 1st, 2nd, 3rd, and 6th plaintiffs/ respondents nor counsel for the defendants/respondents urged a striking of the suit for whatever reason. They opposed the application for substitution and only urged that the application be struck out. And so the issue was raised by the learned trial Judge suo motu and he proceeded to strike out the suit without hearing from the parties. Can such a procedure be justified? I shall answer this question in the negative. The settled principle of law is that no court has the authority to raise an issue suo motu and relying thereon, decide the case one way or the other without inviting the parties to be heard. Such a procedure would be a fundamental flaw and a mistrial in breach of the rule of fair hearing. The learned trial Judge was clearly wrong in proceeding to strike out the suit without hearing from the parties. There is, in my view, substance in this complaint. The striking out order cannot in any conceivable sense be sustained. I hold in the circumstances that the court below erred in affirming the trial court's decision of striking out the suit. (pp. 1753 B/1754 A)

TOBI JSC (Dissenting)

2. Preliminary objection should be precise, concise and clear

A Preliminary Objection must be precise, concise and clear and not vague and rigmarole. Where a respondent attacks a ground of appeal as being one of mixed law and fact, the respondent must state in what respect the ground is one of mixed law and fact. This will enable the appellate court give a meaningful decision. I do not think it is open to the plaintiffs/respondents to say generally and nebulously that “the entire appeal is a bundle of mixed law and fact.” What does counsel mean by that expression? Is counsel really complaining about the appeal as a bundle of mixed law and fact or the grounds of appeal? I know of no Preliminary Objection attacking an entire appeal as a bundle of mixed law and fact. Certainly, an appeal when argued is a combination of law and facts. And that is what a good Brief should contain and that is what the Brief of the plaintiffs/appellants contain. I think counsel wanted to submit that the grounds of appeal are a bundle of mixed law and fact. Since he did not say so, I will not say that he said so. I should take the sentence in paragraph 4-1, page 4 of the Brief in its plain content. Even if he had said so, this court could not have taken the submission seriously because it is vague and nebulous, lacking specificity. The Preliminary Objection therefore fails. (p. 1761 F)

3. Conflict in documents should be resolved by oral evidence

What is the legal position where documentary evidence is in conflict, as in this appeal? It is clear that there is conflict in the letters in respect of the representation and substitution in this matter. How can this be resolved? The law seems to be silent. It is my humble view that in such a situation, oral evidence should be led to resolve the conflict in the documentary evidence. This should be taken as an exception to the law that oral evidence should not add or subtract from documentary evidence which speaks for itself. Again both the learned trial Judge and the Court of Appeal did not bother to resolve the conflict in the letters in respect of the representation and substitution. Again, they ought to have bothered. Again, they are wrong in not bothering. (p. 1766 H)

4. There was no denial of fair hearing in the striking out order

That takes me to the order of striking out. Learned counsel for the plaintiffs/appellants submitted that as the plaintiffs/ appellants were not given an opportunity to address the court before the matter was struck out, their right to fair hearing was breached. That is a curious one. It is also a very new one. I do not think I am willing to learn that. I know of no such procedure. By the submission, counsel expected the learned trial Judge to tell him something like this or to the effect:-

“Learned counsel, I am intending to strike out the suit and so I want you to address me on that.”

There is no such procedure in law. Once a motion is argued, the trial Judge can rule on it as the law directs him. He has no duty to tell counsel mid-stream what he intends to do and require a reply from counsel. Procedurally, two orders are available to a trial Judge after the parties have argued the motion. One is to grant the motion. The other is to refuse it. And refusal entails striking out, as was done by the learned trial Judge. I think counsel expected too much from the trial Judge to give him an opportunity to respond to a possible order of striking out. He wanted a second bite. That is not available to him. No Judge ever does that and no rule of court foists on a Judge such a duty. I am of the view that the appellants’ right to fair hearing was not breached. The issue fails. (p. 1768 G)

5. Plaintiffs should pursue a common purpose and have common representation

In whatever way it goes, the law is that the plaintiffs present a common cause of action with a common set of reliefs. They proceed to the court with a common purpose and that purpose is to present their common case to the court to obtain or win a common victory. A court of law should not see plaintiffs quarreling. That will be a taboo; not known to any rule of court. Plaintiffs, by their judicial capacity in the judicial process, are always championing the same cause of action. And this is the position, either in the trial court or in the appellate court. The only difference is that in the appellate court, they acquire one additional name to reflect their appellate status. That name could be appellant or respondent, depending on what side

they are. And so there could be plaintiffs/appellants or plaintiffs/respondents in the plural. In the singular, it could be plaintiff/appellant or plaintiff/respondent.

In this appeal, it is not so. The plaintiffs are in two sectors, segments or categories: plaintiffs/appellants and plaintiffs/respondents. That is the strangeness that the plaintiffs/respondents pointed out in their Brief. Although plaintiffs/appellants did not see any strangeness in it, I do. I do not expect them to see any strangeness in the nomenclature. After all, they invented it and they have a duty to defend it. Is the invention known to our procedural law? No. Is it proper for two counsel to represent plaintiffs in the High Court merely because the so-called plaintiffs/ appellants have divided the parties unilaterally? Is it proper for the same questions which resulted in the commencement of the action in the High Court be artificially divided merely because the so-called plaintiffs/appellants want it to be so? Is it proper for the plaintiffs in an action which they brought together in the High Court, part ways on appeal and swear to competing affidavits with so much line of demarcation and deep conflict and aggression? How can this court resolve a quarrel between two plaintiffs merely because the so-called plaintiffs/appellants want it so? As I said earlier, courts of law should not see plaintiffs quarrel. Nothing should make plaintiffs in a case to take opposing views. Defendants can, but certainly not plaintiffs. I have never seen it. That is a taboo.

(pp. 1769 H/1774 A)

REPRESENTATION

D. I. Umeji, Esq. for the Appellants.

C. O. Anah, SAN., (with him; O.R. Onyibor, Esq.), for the Respondents.

CASES REFERRED TO

Kotoye v. Central Bank of Nigeria & Ors. (1989) 2 S.C. (Pt.I) 1; (1989) 1 NWLR (Pt.98) 419 at 444,

H Chief Oyeyemi v. Commissioner for Local Govt. Kwara State (1992)2 NWLR (Pt.226) 661 at 678.

Chief Dokubo Akile Aseimo & Ors. v. Chief Anthony Amos & Ors. (1975) 2 S.C. 57 at 68; (1975) 2 S.C. (Reprint) 54

Etim Ekpeyong & Ors. v. Inyang Effiong Effiong (1975) 2 S.C. 71 at 80-81; (1975) 2 S.C. (Reprint) 65

Rekku Fulani & Anor. v. Ephraim Danladi Idi (1990) 5 NWLR (Pt. 150) 311 at 318,

Chief Kafaru Oje & Ors. v. Chief Ganiyu Babalola & Ors. (1991) 4 NWLR (Pt.185) 267 at 28 B

STATUTES & RULES REFERRED TO

Constitution of the Federal Republic of Nigeria 1999, s. 233 (3)

Evidence Act, ss. 86, 87, 88, 89, 93

High Court Rules of Eastern Nigeria, 1963, O. 3 rr. 1& 3

Supreme Court Rules, 1985, 0.2 R 9 (1) C

BOOK REFERRED TO

Blacks Law Dictionary Sixth Edition, page 1150 D

LEAD JUDGMENT BY OGUNTADE JSC

This is an interlocutory appeal arising out of a suit which was commenced 32 years ago on 14-4-76. Remarkably, when on 17-4-96, the trial court gave the ruling which is the foundation of this appeal, the trial of the suit to conclusion had been aborted a few times. The plaintiffs, who brought the suit had been locked in a bitter dispute as to who of them should pursue the suit as representatives of their Umudike family. E

At the commencement of the suit, six persons initiated the suit as plaintiffs for and on behalf of Umudike family of Uzoakwa Ihiala against 13 persons who were sued as the representatives of Umummeri family of Ihiala. The plaintiffs claimed the ownership of a parcel of land known as “Okpuno Dike Ezeala”. They claimed for declaration of title, N5, 000.00 damages for trespass and injunction restraining the defendants from Committing further acts of trespass on the land. F

The defendants denied that the plaintiffs were the owners of the land. They claimed to be the owners of the land. H

Problems arose on 6/2/96, when four persons claiming to be members of the plaintiffs’ family brought an application praying to be admitted into the proceedings as representatives of the Umudike

family in substitution for the original 1st, 2nd, 3rd and 6th plaintiffs who were said to have expressed an intention not to participate further in the proceedings as the representatives of the plaintiffs' Umudike family.

Paragraphs 2 to 6 of the affidavit sworn to by the applicants are
B eye-opening and read thus:-

"2. That I am one of the persons represented in the above suit by the named plaintiffs-respondents.

3. That Christopher Anuwu, Dennis Ohanehi, Joseph Okeyika and James Anozie, the 1st, 2nd, 3rd and 6th plaintiffs-respondents
C *have now expressed their intention not to participate further in the prosecution of this suit.*

4. That I and the other applicants and the other members of Umudike family of Uzoakwa, Ihiala including the 4th and 5th plain-
D *tiffs-respondents are determined to prosecute the above suit to its just determination.*

5. That exhibited hereto and marked Exhibit 'A' is a certified true copy of the resolution of members of Umudike family of Uzoakwa to pursue and prosecute the above suit to its final and just determina-
E *tion.*

6. That I and the other applicants were selected by members of Umudike family of Uzoakwa to make this application to enable us join the 4th and 5th plaintiffs-respondents in prosecuting the above
F *suit."*

The three other applicants swore to affidavits similar to the above. It is apparent that the applicants applying to be admitted as plaintiffs wished to join the original 4th and 5th plaintiffs in order to prosecute the suit.

G The four plaintiffs sought to be replaced by the applicants resisted the attempt to remove them. Each of them deposed to an affidavit. Paragraphs 10 to 13 of the affidavit of Christopher Anuwu which would appear to represent the views of the other three plaintiffs read:-

H *"10. That the Honourable Court take judicial notice of the Resolutions of Umudike family meeting at a General Assembly on September 10th, 1994, already before this court.*

This Resolution mandates only the four (4) plaintiffs:

(a) Chief Christopher Anuwu.

(b) Chief Joseph Okeyika.

(c) Chief James Anozie Mbonu.

(d) Mr. Dennis Ohanehi.

to continue to represent us in this Suit No.HN/12/76.

11. That by the above Resolution, the mandate given to Chief Godfrey Nsofor and Raphael Ejezie to continue to be part of the representatives of Umudike Village was withdrawn. They, therefore, have no right to continue to purport to represent the Umudike family, let alone asking others to join them.

12. That this court takes further judicial notice of our letter of November 13th, 1995, hereby marked Exhibit 'C', applying to withdraw this case. It was signed by the four (4) plaintiffs and the Chairman and Secretary respectively of Umudike family meeting.

13. That this court also take judicial notice that by our letter of January 23rd, 1995, we have replaced Barrister G.R.I. Egeonu, SAN., as our attorney on this case and put in his place Barrister N. N. Amah, SAN. The continued presence of Mr. Egeonu on this case, is therefore, illegal and must not be tolerated further."

This was the background to the dispute which led to the present appeal. The applicants had tried by their application to replace four of the original six plaintiffs. They wished to come into the suit in their stead. They however sought to retain in the suit the original 4th and 5th plaintiffs. Four of the original six plaintiffs resisted the attempt to have them substituted. Against this background, counsel addressed the trial court. After hearing arguments from counsel, the trial court on 17-4-96, in its ruling on the application concluded thus:

"In the midst of this confusion, what is the court expected to do? Is it to grant an application filed to remove some of the plaintiffs who were even served with the application; and an application filed by counsel whose Brief the said plaintiffs allege they had terminated earlier. I must say that I find myself unable to grant such an application. There are also so many irreconcilable conflicts in the affidavits that I do not think that even oral evidence will cure the dilemma of the plaintiffs. The truth of the matter is that the plaintiffs in this suit are in disarray and it is impossible to move forward or even stand still in this case. In the light of the foregoing. I make the following orders:

“(a) This motion for substitution dated 5/2/96 and filed on 6/2/96 is hereby refused.

(b) This Suit No. HN/12/76, is hereby struck out. If the plaintiffs eventually reconcile, they can apply to relist this suit.

(c) I make no order as to costs.”

- B The tenor of the passage of the trial court’s ruling reproduced above reveals the exasperation of the trial court with a problem unnecessarily created by the plaintiffs. The 4th and 5th of the plaintiffs brought an appeal against the ruling of the trial court. They were identified in the notice of appeal as plaintiffs/appellants. Their erstwhile co-plaintiffs were identified as plaintiffs/respondents whilst the defendants were the defendants/respondents. The Court of Appeal, Enugu (hereinafter referred to as the court below) heard the appeal. On 14-1-2002, the court below in its judgment dismissed the appeal.
- D The leading judgment of the court below per Olagunju, JCA., concluded thus:-

- “On the two major issues raised in the appeal, I wish to recapitulate that, firstly, the rejection of the application for substitution was due to the fact that it was ill-conceived and lacked the basic requirement for sustenance, namely, evidence. Secondly, striking out the case summarily is an ineluctable corollary of an irredeemable stalemate between the representative of the plaintiffs who forced the proceedings to a halt. In the static state ‘to which the proceedings were steered by the plaintiffs’ agents who were reveling in the deadlock the learned trial Judge found himself helmed to a corner from where he could not ‘move forward or stand still’. As the appellants and the plaintiffs/ respondents have by their conduct proclaimed the nunc dimittis of the proceedings the advancement of which had been put on hold by the appellants and plaintiffs/respondents the dispersal of the antagonists became inevitable for the common good. A Judge finding himself in a situation where the control of the proceedings was taken out of his hands by the cantankerous elements masking as representatives of the plaintiffs the honourable recourse that is compatible with his office is to get at the root of their ostensible reason for herding together. Against that factual backdrop, the learned trial Judge had a duty to preserve the honour of his office even if in doing so he had to strike out the case as the only way of abating what was be-*

coming a nuisance within the precincts of the law court.

For the various reasons hereinbefore canvassed the appeal fails and it is dismissed. In effect, the decision of the learned trial Judge, Ononiba, J., delivered on 3/6/98, is affirmed. I award N5,000.00 costs against the appellants.

Appeal dismissed."

B

The plaintiffs/appellants before the court below, who were the 4th and 5th plaintiffs before the trial court were dissatisfied with the judgment of the court below. They have brought this final appeal before this court. In their appellants' Brief, the issues for determination in the appeal were identified as the following:-

C

"1. Whether the lower court was right in dismissing the plaintiffs-appellants' appeal and in affirming the order of the trial court striking out Suit No.HN/12/76.

2. Whether the lower court was right in holding that the trial court was justified in refusing the application for substitution and that the only course open to it thereafter was striking out the suit.

3. Whether the lower court was right in holding that the trial court was justified in failing to determine the application for substitution on the merits.

E

4. Whether the lower court was right in holding that the plaintiffs-appellants unilaterally changed the capacity in which the plaintiffs-respondents were 'operating' and was the lower court not precluded by its previous decision if CA/E/116M/96 from entertaining the plaintiffs-respondents' purported 'Preliminary Objection,'"

F

The plaintiffs-respondents' who were to be substituted by the applicants before the trial court have filed a respondents' Brief wherein they identified the issues for determination in the appeal as these:-

"1. Was the court below namely the Court of Appeal right in confirming the refusal of the High Court to substitute plaintiffs/respondents namely the other set of four plaintiffs on record representing Umudike family of Ihiala to just like (sic) the appellants.

2..... whether the court below was right in confirming the striking out of the plaintiffs' suit by the High Court in the midst of separate representation by two counsel on two inconsistent objectives and of course the case or suit not being in a fit and proper condition to go to trial."

H

It seems to me that the simple issue for determination in this appeal is the propriety of the order made by the trial court which was affirmed by the court below striking out the suit because of the dispute within the plaintiffs' Umudike family as to who should pursue the suit as the representatives of the family.

B I observed earlier that this was a land dispute between two families each claiming ownership of the land in dispute. The representatives of the plaintiffs and the defendants were members of the Umudike and Umumneri families respectively. The panics, at the
C time the application for substitution was brought had filed their respective pleadings. The plaintiffs in paragraphs 13 to 16 of their Amended Statement of Claim had pleaded thus:-

"13. The portion of land verged Black within the area verged Pink on the Plan No. P.O./E90/78, is known as "Akaba Uke Ezeala D Dike" or "Okpuno Dike Ezeala". The plaintiffs granted farming tenancies of portions of the area verged Black on the Plan No. P.O./E90/78, to the defendants and to some other people. In 1977, the defendants refused to pay to the plaintiffs then annual tributes for farming on 'Okpuno Dike Ezeala' without reference to the plaintiffs.

E *14. In March, 1976, the defendants started to clear 'Okpuno Dike Ezeala' land preparatory to farming thereon without reference to the plaintiffs and when the plaintiffs warned them against their acts of trespass on the said land the defendants started to claim 'Okpuno Dike Ezeala's land as their own.*

F *15. At the trial of this suit the plaintiffs will rely on the proceedings and the order in the Onitsha High Court Suit No.O/140/66, the judgment in the Nnewi High Court Suit No. HN/14/76 and on the Report of the Inquiry into the Ihiala Chieftaincy dispute - Official G Document No. 18 of 1963.*

16. Despite repeated warning by the plaintiffs, the defendants intend, unless restrained by an order of the court, to continue with their acts of trespass on the plaintiffs' 'Okpuno Dike Ezeala's land."

H The defendants in paragraphs 24 to 26 of their Amended Statement of Defence pleaded: -

"24. The defendants deny paragraph 13 of the Amended Statement of Claim and the averments therein and state that the land

therein mentioned is known as Akabo Uke and not Akabo Uke Ezeala Dike or Okpuno Dike Ezeala. That the said land is the bona fide property of Umummeri, members of Umummeri have been farming in Akabo Uke as original owners of the land and have crops therein.

The defendants of Umummeri have never disputed the area with anybody or paid any tribute or tax to anyone for the use of the said land and need not make any reference whatsoever to the plaintiffs over the said land.

25. Paragraph 14 of the Amended Statement of Claim is false. In answer thereto the defendants repeat paragraph 24 above and further add that the plaintiffs - people of Umudike have never farmed on Akabo Uke land to date. Defendants of Umummeri have always farmed on Akabo Uke land from time immemorial without any permission, let or hindrance from plaintiffs or any quarter in Ihiala.

26. In answer to paragraph 15 of the Amended Statement of Claim which is denied, the defendant herein further stated that:-

'(a) They were not parties to Suit No.0/140/66.

(b) Suit No.0/140/66, was struck out and no judgment was entered in favour of the plaintiffs against the defendants herein.

(c) Reliance would be placed at the hearing on the claim in Suit No.0/140/66, as well as proceedings of 7th November. 1966, in the said suit."

A close comparison of the above extracts of the parties' pleadings before the trial court reveals that the parties had drawn a battle line between themselves as to the ownership of the land in dispute. In other words, issues had been joined as to the said ownership. It is against this background that the application to substitute four of the representatives of Umudike family as plaintiffs ought to be considered.

The standpoint of the four plaintiffs/respondents who were to have been substituted under the application before the court was that their Umudike family wanted to withdraw the suit in court against the defendants/ respondents. In manifestation of their intention they filed a letter marked Exhibit 'C' before the trial court which said letter was signed by the Chairman and Secretary respectively of Umudike family.

The plaintiffs/appellants however resisted the attempt to with-

draw the suit. This informed the emergence of the application to substitute the plaintiffs/respondents with the applicants before the trial court. ***The trial court was obviously dissatisfied with the situation in the case arising from the plaintiffs' failure to speak with one voice on behalf of their Umudike family. This informed its decision to strike out the case. But I think, with respect, that the trial court was wrong. It did not sufficiently bear in mind that the suit was capable of being prosecuted to conclusion by the two plaintiffs/appellants as the representatives of Umudike family.*** It ought to have been borne in mind, that on the extant pleadings of parties, there was a clear dispute made out as between the parties. As the pleadings remained unamended there was a dispute to be tried. ***Under Order IV Rule 3 of the applicable High Court Rules, there is power vested in the trial court to resolve disputes of this nature as to who should pursue a suit as representatives of a family or group of persons. Rules 1 and 3 of Order IV of the High Court Rules of Eastern Nigeria, 1963, provide:-***

"1. If the plaintiff sues, or any defendant counter-claims in any representative capacity, it shall be expressed on the writ. The court may order any of the persons represented to be made parties either in lieu of, or in addition to the previously existing parties.

3. Where more persons than one have the same interest in one suit, one or more of such persons may, with the approval of the court, be authorized by the other persons interested to sue or to defend in such suit for the benefit of or on behalf of all parties so interested."

G (Underlining mine)

I observed earlier that all the plaintiffs had originally brought the suit as the representatives of Umudike family. They did not, acting together, file a Statement of Claim or process making a concession that the land in dispute did not belong to the family. It is settled law that in a representative action, persons who are to be represented and the person or persons representing them should have the same interest in the cause or matter: See S. Oragbade v. S.J.M. Onitiju (1962) All NLR 32.

Further, ***the rule permitting representative action is a rule of convenience and as such ought not to be treated with any rigidity but as a flexible tool of convenience in the administration of justice - See Anatogu & Ors. v. The Attorney-General of the East Central State & Ors. (1976) 11 S.C. 109; (1976) 11 S.C (Reprint) 59.*** An extension of this principle is that all persons who join as plaintiffs in the same suit cannot set up conflicting claims between themselves. In other words, plaintiff must act together. See Re: Mathews (1905) 2 Ch. 460 and Re: Wright (1895) 2 Ch. 744. It is also the law that no person can in the same suit be both plaintiff and the defendant even in different capacities See Ellis v. Keri (1910) 1 Ch. 537. B

Now, ***in view of the fact that the extant Amended Statement of Claim filed on all the plaintiffs' behalf made a claim to the ownership of the land in dispute, it could not be allowed for the plaintiffs/respondents to pursue a line of action which gives the lie to the Amended Statement of Claim before the court or which shows the plaintiffs as not acting together. As it was, the contention of the plaintiffs/respondents would amount to a support for the defendants/respondents case whilst that of the plaintiffs/appellants was in pursuit of the plaintiffs' original claim. I do not of course file out a possibility that the plaintiffs may, acting together compromise their suit and reach a settlement with the defendants but they could not split themselves into two groups in order to blow hot and cold.*** D

Where the authority of persons who have brought an action in a representative capacity is challenged, the onus is on the person who has brought the action to satisfy the court that they have been duly authorized. See Duke & Ors. v. Henshaw (1940) 6 WACA 241. ***In this case, no one had challenged the authority of the plaintiffs/appellants to pursue the suit as representatives of the Umudike family. The plaintiffs/respondents on the other hand indicated that they as the representatives of the same family wanted the suit which they joined in bringing to be withdrawn. It seems to me that whilst there remained in the suit the representatives of the Umudike family who were ready and willing to prosecute the suit as originally conceived to conclusion,*** E

the suit ought not to have been struck out.

It seems to me on the facts of this case that the insistence of the plaintiffs/respondents in this case not to pursue the suit against the defendants/respondents would appear to portray them as having an identical interest with the defendants in the suit. The proper order to make in my view is to join them to the suit as the 2nd set of defendants whilst the original defendants remain the 1st set of defendants.

The four members of the Umudike family who brought the application to be substituted for the plaintiffs/respondents have not filed an appeal against the order of the trial court striking out the suit and thus, refusing their application. Indeed, their application was not even considered on its merit. Instead, the trial court, believing that the plaintiffs were needlessly delaying the hearing of the suit, struck out the suit.

But this case has been so long in court that I ought to consider and grant the said application in order to save time. Accordingly, the applicants Geoffrey Ifebuzor, Chief James Ohakaba, Chief Hyacinth Christopher Nwachukwu Nzeribe and Nze Godwin Anyamele all of the Umudike family are substituted for the plaintiffs/respondents in the case.

In the final conclusion, I make an order striking out the names of the original 1st, 2nd, 3rd and 6th plaintiffs as plaintiffs in this suit. It is ordered that the said 1st, 2nd, 3rd and 6th plaintiffs be classified as 2nd set of defendants. The plaintiffs/appellant and the applicants on the motion are to continue as plaintiffs to enable them prosecute the suit to conclusion. The appeal accordingly succeeds.

This being an intra-family dispute, I make no order as to costs.

TABAI JSC

This is a unique and interesting appeal with the plaintiffs being the appellants as well as the respondents. It has arisen from an interlocutory decision of the Nnewi Judicial Division of the High Court of Anambra State on the 17th April, 1996.

The suit itself was filed on the 14/4/1976. The plaintiffs claim a declaration of title over a parcel of land, trespass and an injunction.

And for the prosecution of this suit the six plaintiffs acted together for themselves and on behalf of the Umudike family of Uzoakwa, Ihiala in Anambra State. And they so acted for about twenty years before the emergence of cracks within their fold and which prompted the motion filed on the 6/2/96. The motion sought the substitution of the 1st, 2nd, 3rd and 6th plaintiff with the four applicants and it was filed by G.R.I Egonu, SAN., as counsel and solicitor for the applicants. B

The motion was supported by six various affidavits. The first was deposed to by the 1st applicant Gedfrey Ifebuzor to which was attached Exhibit "A" dated 4/11/95. The said Exhibit "A" purports to be a resolution of members of the plaintiffs' Umudike family of Uzoakwa Ihiala and is signed by 86 persons. The others were deposed to by the 3rd applicant, Chief Hyacinth Christopher Nwachukwu Nzeribe, Linus Akuim Ighoezue who claimed to be a member of the plaintiffs' Umudike family, Edmund Onyeso Okeyika who also claimed to be a member of the Umudike family and the 4th plaintiff Raphel Ejezie. The 6th affidavit headed "Affidavit in Reply" was again deposed to by the 3rd applicant. The ground for the application as deposed to in all these affidavits is that the 1st, 2nd, 3rd and 6th plaintiffs sought to be substituted had expressed their intention not to participate further in the prosecution of the suit. C
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Although no counter-affidavit was filed, the 1st plaintiff/ respondent, Christopher Anuwu deposed to a 14 paragraph affidavit in opposition to the application. He deposed in paragraph 9 thereof that himself and the 2nd, 3rd and 6th plaintiffs/respondents had opted to settle the matter with defendants and which terms of settlement were before the court. And he deposed in paragraph 13 that they had replaced Barrister G.R.I. Egonu, SAN., with Barrister N.N. Anah, G SAN. Counsel for the two factions addressed the court. F
G

In his ruling which has given rise to this appeal the learned trial Judge, G.U. Ononiba, reasoned and concluded as follows:

"In the midst of the confusion, what is the court expected to do? Is it to grant an application filed to remove some of the plaintiffs who were not even served with the application; or an application filed by counsel whose Brief the said plaintiffs allege they had terminated earlier. I must say I find myself unable to grant such an applica- H

tion. There are also so many irreconcilable conflicts in the affidavits that I do not think that even oral evidence will cure the dilemma of the plaintiffs. The truth of the matter is that the plaintiffs in this suit are in disarray and it is impossible to move forward or even stand still in this case. In the light of the foregoing I make the following orders:-

B (a) This motion for substitution dated 5/2/96 and filed on 6/2/96, is hereby refused.

(b) This Suit No. HN/12/76, is hereby struck out. If the plaintiffs eventually reconcile they can apply to relist this suit.

C (c) I make no order as to costs."

Aggrieved by this decision, the applicants and the 4th and 5th plaintiffs appealed to the court below. By its judgment on the 14/1/2002, the decision of the trial court was affirmed and the appeal dismissed. Still not satisfied the 4th and 5th plaintiffs and the applicants have come on appeal to this court.

I have taken the pains to embark upon the above narrative to make my reasoning comprehensible. Other details as to the facts and issues formulated are well set out in the leading judgment of my learned brother, Oguntade, JSC., and I need not repeat them.

E In the appellants' Brief Chief G.R.I. Egonu, SAN., formulated four issues for determination. In my consideration the 2nd and 3rd issues effectively determine the appeal and I shall therefore deliberate briefly only on the two. The respondents two issues are to the same effect as the appellants 2nd and 3rd issues. The two issues are:-

F (a) Whether the lower court was right in holding that the trial court was justified in refusing the application for substitution and that the only course open to it thereafter was striking out the suit?

(b) Whether the lower court was right in holding that the trial court was justified in failing to determine the application for substitution on the merits?

H The first question posed is whether the lower court was right in striking out the suit without the appellants being heard on the point. It was the submission of learned senior counsel for the appellants that the striking out order amounted to a denial of fair hearing. Reliance was placed on Kotoye v. Central Bank of Nigeria & Ors. (1989) 2 S.C. (Pt.I) 1; (1989) 1 NWLR (Pt.98) 419 at 444, Chief Oyeyemi v. Commissioner for Local Govt. Kwara State (1992) 2 NWLR (Pt.226)

661 at 678. Chief Dokubo Akile Aseimo & Ors. v. Chief Anthony Amos & Ors. (1975) 2 S.C. 57 at 68; (1975) 2 S.C. (Reprint) 54 and Etim Ekpeyong & Ors. v. Inyang Effiong Effiong (1975) 2 S.C. 71 at 80-81; (1975) 2 S.C. (Reprint) 65. C. O. Anah for the respondents argued that in the split situation of the plaintiffs with each faction having a separate legal representation, it was nigh impossible to achieve a satisfactory trial and the only course open to the court was to strike out the suit. He relied on the English case of Lewis v. Daily Telegraph (1964) 1 All ER 705 at 714. Learned counsel for the respondents did not address the specific issue of the striking out order without the parties being heard on the point. B C

On this issue it is pertinent to point out that at the court of trial neither learned counsel for 1st, 2nd, 3rd, and 6th plaintiffs/ respondents nor counsel for the defendants/respondents urged a striking of the suit for whatever reason. They opposed the application for substitution and only urged that the application be struck out. And so the issue was raised by the learned trial Judge suo motu and he proceeded to strike out the suit without hearing from the parties. Can such a procedure be justified? I shall answer this question in the negative. The settled principle of law is that no court has the authority to raise an issue suo motu and relying thereon, decide the case one way or the other without inviting the parties to be heard. Such a procedure would be a fundamental flaw and a mistrial in breach of the rule of fair hearing. See Rekku Fulani & Anor. v. Ephraim Danladi Idi (1990) 5 NWLR (Pt. 150) 311 at 318, Ugo v. Obiekwe (1989) 2 S.C (Pt.II) 41; (1939) 1 NWLR (Pt.99) 566. In Chief Kafaru Oje & Ors. v. Chief Ganiyu Babalola & Ors. (1991) 5 S.C. 128; (1991) 4 NWLR (Pt.185) 267 at 280, this court per Nnaemeka-Agu, JSC, stated of the principle thus:- D E F G

“There are occasions when a court may feel that a point which has not been raised by one of the parties is necessary for consideration in order to reach a correct decision in a case. In the few cases when this situation does arise it is always necessary for the Judge to bring to the notice of the parties, or their counsel as the case may be so that they may address him on the point before he could base his decision on it. It is not competent for the Judge to raise the point and decide it without hearing the parties. If he does so, he will be in breach H

of the party's right to fair hearing."

The principles stated above applies in this case. The learned trial Judge was clearly wrong in proceeding to strike out the suit without hearing from the parties. There is, in my view, substance in this complaint. The striking out order cannot in any conceivable sense be sustained. I hold in the circumstances that the court below erred in affirming the trial court's decision of striking out the suit.

The second issue is whether the Court of Appeal was right in affirming the decision of the trial court in refusing the substitution sought. It was the submission of learned senior counsel for the appellants that there were no such irreconcilable conflicts in the affidavit evidence that could not have been resolved to determine the issue of substitution. While I agree that there were conflicts in the affidavit evidence it is also clear that the main ground for the trial court's refusal to grant the substitutions was the conflict in the affidavit. No other reason was advanced for refusing the application.

There are however a number of undisputed facts. The first is that all the six plaintiffs and the four applicants/appellants are members of the Umudike family of Uzoakwa, Ihiala. All the 6 plaintiffs were, up to the events culminating in the application for substitution, accredited representatives of the said family. The 1st, 2nd, 3rd and 6th plaintiffs/respondents have now opted for a settlement with the defendants/respondents. The appellants felt that the 1st, 2nd, 3rd and 6th plaintiffs/respondents were acting beyond the scope of their mandate and that prompted their application for substitution. As stated earlier the application is supported by a resolution of members of the Umudike family which is Exhibit "A" attached to the affidavit of the 1st applicant. In paragraph 7 of the affidavit deposed to by the 1st plaintiff/ respondent he alleged that the said Exhibit "A" is a forgery. No particulars of the forgery are given. In my consideration the assertion does not weaken the potency of that document. It is clear from all the circumstances that the mandate of the 1st, 2nd, 3rd and 6th plaintiffs/respondents from those they represent cannot to said to remain the same before their option for settlement with the defendants/respondents. Against this background, I am inclined to the view of my learned brother, Oguntade, JSC. , the substitution sought be granted.

In view of the above and particularly having regard to the fuller reasons articulated in the leading judgment of my learned brother, I will also allow the appeal. I also abide by the consequential orders contained in the said judgment.

B

MUHAMMAD JSC

I read before now the judgment just delivered by my learned brother, Oguntade, JSC. I agree with him that the appeal should succeed. Accordingly, I too, allow the appeal. I abide by all orders made in the leading judgment of my learned brother, Oguntade, JSC., including no other as to costs.

D

CHUKWUMA-ENEH JSC

I have had the advantage of a preview of the judgment of my learned brother, Oguntade, JSC., just delivered with which I entirely agree. Respectfully I adopt it as mine and accordingly the appeal succeeds, I abide by the consequential orders in the leading judgment.

E

TOBI JSC (Dissenting)

This is a unique appeal in terms of the parties. They are the plaintiffs/appellants on the one hand and the plaintiffs/respondents on the other. As it is, the plaintiffs are put in two sectors, segments or categories. It appears that the defendants/respondents on the record are not involved. The plaintiffs/respondents correctly described the case as strange at page 2, paragraph 2-1 of the Brief as follows:

G

“This strange case where the plaintiffs are both appellants and at the same time respondents started as far back as 27 years ago in 1976.”

In an answer to the above, the plaintiffs/appellants stated at pages 1 and 2, paragraphs (i), (ii), and (iii) of their Reply Brief:

H

“This case is not in any way strange. The respondents in this appeal are those plaintiffs who do not want to continue with the prosecution of the case as well as the defendants in the said case. Suit

No. HN/12/76, was not settled. The plaintiffs-respondents wanted to terminate the suit against the wishes of the plaintiffs-appellants and their people of Umudike who want to prosecute the same to its just determination. The plaintiffs-appellants never wanted to force out the plaintiffs-respondents from Suit No. HN/12/76, rather it was the
 B *plaintiffs-respondents themselves that voluntarily opted not to continue with the prosecution of the said case."*

I will suspend for now my reaction to the above. Let me take the facts of the case which do not seem to be in any meaningful
 C controversy. On 14th April, 1976, in Suit No. HN/12/ 76, the original plaintiffs representing themselves and the family of Umudike of Uzoakwa, Ihiala, instituted an action for declaration of title to land, damages for trespass and injunction. Following the death of all the
 D plaintiffs, the plaintiffs/appellants and the plaintiffs/respondents on record were substituted for the deceased plaintiffs. That was on 26th June, 1992.

Thirteen defendants were originally sued for themselves and on behalf of the Ummumeri family of Ihiala. Ten of the defendants died. And that leaves three of them who now defend the action in a
 E representative capacity. The case has suffered quite a number of reverses. It has been part-heard on four occasions. It has been in the Cause List of the court for a period of about thirty-two years. It is quite an experience to the parties.

As the years passed, the case was telling on some of the plain-
 F tiffs. They were getting weary, if not thoroughly worn out. They split into two factions: four against two. The four explored the avenue of settlement of the case out of court. The exploration yielded fruit. The four agreed with the defendants/respondents to settle the matter out
 G of court. That was opposed by the plaintiffs/ appellants, who insisted that the matter must go on in court. I should like to note that the number "four" doubles the number "two" and people say that democracy is a matter of numbers. The learned trial Judge touched the point. I will get to it anon and precisely in the next few lines.

H Following the decision of the plaintiffs/respondents not to continue with the matter on the basis of their version of settlement, the plaintiffs/appellants caused a motion to be brought in the High Court, Nnewi, for substitution of the plaintiffs/ respondents by some other

willing plaintiffs. The learned trial Judge refused the motion for substitution. Ononiba, J. (as he then was), said at pages 62 and 64 of the record: -

"Then four out of the plaintiffs stated that the matter has been settled out of court and asked the court to strike out the case. This was sequel to an earlier application granted to a prominent member of the plaintiffs' community to settle the matter out of court. The 4th and 5th plaintiffs however objected and said the matter was not settled. This court then adjourned the case to enable the plaintiffs put their house in order. I specifically asked counsel for the plaintiffs to reconcile his clients to enable the case move forward..... In the midst of this confusion, what is the court expected to do? Is it to grant an application filed to remove some of the plaintiffs who were even served with the application; and an application filed by counsel whose Brief the said plaintiffs allege they had terminated earlier. I must say that I find myself unable to grant such an application. There are also so many irreconcilable conflicts in the affidavits that I do not think that even oral evidence will cure the dilemma of the plaintiffs. The truth of the matter is that the plaintiffs in this suit are in disarray and it is impossible to move forward or even stand still in this case. In the light of the foregoing, I make the following orders:-

'(a) This motion for substitution dated 5/2/96 and filed on 6/2/96 is hereby refused.

(b) This Suit No. HN/12/76, is hereby struck out. If the plaintiffs eventually reconcile, they can apply to relist this suit. '"

An appeal to the Court of Appeal was dismissed. Olagunju. JCA., said at pages 136, 137, 138 and 144 of the Record, and I will quote him in very large relevant parts:

"With the representatives of Umudike family bristling with rancour and intrigue it would have been a disservice for the learned trial Judge who swore to do justice to encourage the disintegration of the plaintiffs' case without the defendants firing a shot. Therefore, I agree with the submission of learned Senior Advocate for the plaintiffs/respondents that where several persons sued in a representative capacity and they cannot act together the court is left with no choice but to strike out the action. I also subscribe to the raison d'etre of that principle which accords with justice that such a measure is to enable the unnamed plaintiffs as the principal to review their position

over the case and if necessary to reconstitute their body of delegates with a view to substituting a crop of cross-patch with a breed of amiable team who can act together for the common good of the Family.

From the foregoing analysis the core of the issue raised by the appellants is wider than the impossibility of reconciling the appellants and the plaintiffs/respondents. It extends to the paramount interest of the unnamed plaintiffs who are the principal and are, *ipso facto* entitled to the benefit of a review of the presentation of their case after a sojourn of quarter of a century on the Cause List with no appreciable result. Argument of learned Senior Advocate for the appellants that the appellants are determined to prosecute the action to its final determination on the merits is self-serving. It ignores the interest of the family and the court to both of whom is appropriate the maxim *interest reipublicae ut sit finis litium*, implying that it is for the common good that there should be an end to litigation.

On the one hand, if the generation of the plaintiffs' representatives who initiated the action over 25 years ago have all died the unnamed plaintiffs as the donors of the power to conduct the court action are entitled to a pause to review their strategy for seeking justice. On the other hand the court as a custodian of justice is entitled to review its position with a view to removing any impediment in the wheel of justice that has operated unfairly against the unnamed plaintiffs.

.....In my judgment the learned trial Judge came to the right conclusion by striking out the plaintiffs' case as the only way of breaking the deadlock of their delegates whose penchant is battle of wills. Therefore, I will resolve issue one against the appellants.

.....For the various reasons hereinbefore canvassed the appeal fails and it is dismissed. In effect, the decision of the learned trial Judge, Ononiba, J., delivered on 3/6/98, is affirmed. I award N5,000 costs against the appellants."

Still dissatisfied, the plaintiffs/appellants have come to the Supreme Court. Briefs were filed and exchanged. The plaintiff/appellants formulated the following four issues for determination:

"(1) Whether the lower court was right in dismissing the plaintiffs-appellants' appeal and in affirming the order of the trial court striking out Suit No.HN/12/76.

(2) *Whether the lower court was right in holding that the trial court was justified in refusing the application for substitution and that the only course open to it thereafter was striking out the suit.*

(3) *Whether the lower court was right in holding that the trial court was justified in failing to determine the application for substitution on the merits.* B

(4) *Whether the lower court was right in holding that the plaintiffs-appellants unilaterally changed the capacity in which the plaintiffs-respondents were 'operating' and was the lower court not precluded by its previous decision in CAE/116M/96 from entertaining the plaintiffs-respondents' purported 'Preliminary Objection'.* C

The plaintiffs/respondents formulated the following two issues for determination:

"3.2 Was the court below namely the Court of Appeal right in confirming the refusal of the High Court to substitute plaintiffs/respondents namely the other set of four plaintiffs on record representing Umudike family of Ihiala to just like the appellants?" D

3.2 Whether the court below was right in confirming the striking out of the plaintiffs' suit by the High Court in the midst of separate representation by two counsel on two inconsistent objectives and of course the case or suit not being in a fit and proper condition to go to trial?" E

Learned counsel for the plaintiffs/appellants. Mr. D. I. Umeji, arguing issues 1, 2 and 3 together, submitted that the Court of Appeal was wrong in affirming the decision of the trial court refusing the application for substitution when the refusal was not based on good grounds. Relying on Falobi v. Falobi (1976) 9-10 S.C. 1; (1976) 9-10 S.C. (Reprint) 1 and Ebohon v. Attorney-General Edo State (1997) 5 NWLR (Pt.505) 298, learned counsel contended that the trial Judge ought to have reconciled the conflicts in the affidavit evidence by calling for oral evidence and that it was wrong for the trial Judge to speculate that oral evidence could not resolve the alleged conflicts in the affidavits. He submitted that the learned trial Judge had the jurisdiction to grant the application for substitution. He relied on Atanda v. Akunyun (1988) 4 NWLR (Pt.89) 394 and Chief Jaja v. Chief Pepple (1995) 2 NWLR (Pt.375) 65. F G H

Learned counsel also contended that the learned trial Judge

was wrong in striking out the suit without hearing the plaintiffs/ appellants on the issue . To counsel, that amounted to a denial of fair hearing. He relied on Kotoye v. Central Bank of Nigeria (1989) 2 S.C. (Pt.I) 1; (1989) 1 NWLR (Pt.98) 419, Chief Aseimo v. Chief Amos (1975) 2 S.C. 57; (1975) 2 S.C. (Reprint) 54, Ekpenyong v. Effiong (1975) 2 S.C. 71; (1975) 2 S.C. (Reprint) 65. Counsel pointed out that the statement of the Court of Appeal at page 136, lines 15 to 19 of the Record is wrong law as the courts have jurisdiction to substitute a person represented in a case for the party originally representing the community. He did not agree with the two courts that there were conflicts in the affidavits. He referred to paragraphs 7, 8, 10 and 11 of the counter affidavit and relied on Sections 86, 87, 88, 89 and 93 of the Evidence Act.

On issue No.4, learned counsel submitted that the plaintiffs/ appellants did not unilaterally change the capacity in which the plaintiffs/respondents were operating. He submitted that the Court of Appeal was precluded at the hearing of the appeal No.CA/E/61/99, from entertaining the Preliminary Objection at page 127 of the record. He urged the court to allow the appeal.

Learned counsel for the plaintiffs/respondents, Mr. C. O. Anah, SAN., raised a Preliminary Objection on the grounds of appeal. He submitted that the entire appeal is a bundle of mixed law and fact, which require leave of court under Section 233(3) of the Constitution. He did not say more. He stopped there on his Preliminary Objection; sounding magisterial.

On issue No. 1, learned Senior Advocate submitted that the Court of Appeal was right in confirming the refusal of the High Court to substitute the plaintiffs/respondents with other persons from the Umudike family. He contended that the decision of the two courts accords with the case of Otapo v. Sunmonu (1987) 2 NWLR (Pt.58) 587, decided by this court. He argued that the plaintiffs/appellants cannot remove the plaintiffs/respondents or vice versa because none has greater power than the other.

On issue No.2, learned counsel submitted that the Court of Appeal rightly upheld the decision of the High Court striking out the suit. Relying on the English case of Lewis v. Daily Telegraph (1964) 1 All ER 705 at 714, learned Senior Advocate submitted that as there

was no way of achieving satisfactory trial in the confusion the case stood, the learned trial Judge had no option than to strike out the suit. He urged the court to dismiss the appeal.

In his Reply Brief, counsel for the appellants submitted that the case is not strange as the plaintiffs/respondents do not want the suit to continue but want it to be terminated. He claimed that the plaintiffs/appellants never wanted to force out the plaintiffs/respondents; rather the plaintiffs/respondents voluntarily opted not to continue with the prosecution of the case. I seem to be repeating this.

On the Preliminary Objection, learned counsel submitted that the plaintiffs/respondents ought to state clearly and specifically their grounds of objection and not just to say that the entire appeal is a bundle of mixed law and fact. He relied on Order 2 Rule 9(1) of the Supreme Court Rules, 1985, as amended. He argued that Section 233(3) of the Constitution does not apply to the appeal as the plaintiffs/appellants were not required to seek the leave of the Court of Appeal or the Supreme Court. Counsel urged the court to dismiss the Preliminary Objection on the ground that it is incompetent. He relied on Chief Otapo v. Chief Sunmonu, (supra). Counsel contended that the facts of the case of Lewis v. Daily Telegraph, (supra), are not the same as those of this case and urged the court not to apply it in this appeal. He relied on Adegoke Motors Ltd. v. Dr. Odesanya (1989) 5 S.C. 113; (1989) 3 NWLR (Pt.109) 250 and Chief Odugbo v. Chief Abu (2001) 7 S.C. (Pt.1) 168; (2001) 14 NWLR (Pt.732) 45.

A Preliminary Objection must be precise, concise and clear and not vague and rigmarole. Where a respondent attacks a ground of appeal as being one of mixed law and fact, the respondent must state in what respect the ground is one of mixed law and fact. This will enable the appellate court give a meaningful decision. I do not think it is open to the plaintiffs/respondents to say generally and nebulously that “the entire appeal is a bundle of mixed law and fact.” What does counsel mean by that expression? Is counsel really complaining about the appeal as a bundle of mixed law and fact or the grounds of appeal? I know of no Preliminary Objection attacking an entire appeal as a bundle of mixed law and fact. Certainly, an appeal when argued is a combination of law and facts. And that is what a good Brief should contain and that is what the Brief of the plaintiffs/

appellants contain. I think counsel wanted to submit that the grounds of appeal are a bundle of mixed law and fact. Since he did not say so, I will not say that he said so. I should take the sentence in paragraph 4-1, page 4 of the Brief in its plain content. Even if he had said so, this court could not have taken the submission seriously because it is vague and nebulous, lacking specificity. The Preliminary Objection therefore fails.

Let me take the issue of the refusal of the application for substitution. In order to fully appreciate the dispute on the issue of substitution, there is need to reproduce the competing affidavits. Chief Hyacinth Christopher Nwachukwu, the 3rd applicant in the motion for substitution, in his affidavit deposed as follows

“1. That I am the third applicant in the above matter and I make this affidavit for myself and on the other applicants and with their authority

2. That I and the other applicants are members of Umudike family of Uzoakwa, Ihiala, and we are amongst the persons represented in the above suit by the named applicants-respondents.

3. That Christopher Anuwu, Dennis Ohanehi, Joseph Okeyika and James Anozie, the 1st, 2nd, 3rd and 6th plaintiffs-respondents have decided not to participate further in the prosecution of this suit.

4. That I and the other applicants and the other members of Umudike family of Uzoakwa, Ihiala shall prosecute the above case to its final and just determination by this Honourable Court.

5. That I and the other applicants were selected by members of Umudike family of Uzoakwa, Ihiala, to make this application to enable us and the 4th and 5th plaintiffs-respondents carry on the prosecution of the above suit.

6. That I and the other applicants were advised by our counsel and solicitor, George Rowland Ifeanyichukwu Egonu, Senior Advocate of Nigeria, and we verify believe him that this application is necessary to enable me and the other applicants and the 4th and 5th plaintiffs respondents carry on the prosecution of the above suit to its final determination.”

Christopher Anuwu, the 1st plaintiff/respondent, deposed in his affidavit as

“1. That at all material times I remain the 1st plaintiff in Suit

No. HN/12/76 and that I have not withdrawn my consent to the above suit.

2. That I am one of the four (4) Okparas of the Umudike Village as the Okpara and oldest man of the Umu-Anabi family of Umudike. As the head of the family and without blemish of any kind I have not authorized anybody and neither has the Umudike Village authorized anybody to replace me as the plaintiff in this case. B

3. That as the 1st plaintiff, my representation and testimonies in this case have been recorded by this Honourable Court in this case and remain part of history and essential ingredients of the case. C

4. That by an order of this court, the Umudike Village on whose behalf I am the 1st plaintiff, has negotiated a peaceful settlement of Suit No. HN/12/76 and it has been filed in this court and already part of its records.

6. That Messrs Gedfrey Ifebuzor, Chief James Ohakaba, Chief D Hycinth C. N. Nzeribe and Nze Godwin Anyamele are not representatives of the Umudike Village of Uzoakwa and have not been mandated by the Umudike Village to represent her in any case or court of law.

7. That the purported resolution of the members of Umudike family annexed as Exhibit A in their affidavit has already been proved to be mere forgeries as can be seen in our letters to this Honourable Court of December 10th, 1995 and our prayers to the Honourable Chief Judge of Anambra State dated November 3rd, 1995. E

8. That we hereby ask that this court inquire into the forgeries as complained and impose stiff penalties for those act capable of misleading this Honourable Court. F

10. That the Honourable Court take judicial notice of the "Resolutions of Umudike family meeting" at a General Assembly on September 10th, 1994 already before this court. G

11. That by the above Resolution, the mandate given to Chief Godfrey Nsofor and Raphael Ejezie to continue to be part of the representatives of Umudike Village was withdrawn. They, therefore, have no right to continue to purport to represent the Umudike family, let alone asking others to join them. H

12. That this court takes further judicial notice of our letter of November 13th, 1995, hereby marked Exhibit C, applying to with-

draw this case. It was signed by the four (4) plaintiffs and the Chairman and Secretary respectively of Umudike family meeting.

13. *That this court also takes judicial notice that by our letter of January 23rd, 1995, we have replaced Barrister G.R.I. Egeonu, SAN., as our attorney on this case and put in his place Barrister N.N. Anah, SAN. The continued presence of Mr. Egeonu on this case, is therefore, illegal and must not be tolerated further.*

14. *Also the Honourable Court take note that while Chief Godfrey Nsofo, Hycinth C. N. Nzeribe depose in paragraph 2 of their affidavit to represent other applicants, that there is no instrument of donor of such authority, while Messrs Edmund Okeyika, Linus Igboezue did not disclose any move of even being members of Umudike Village claiming representation in this case. Their affidavits are, therefore, mere forgeries and fantasies and should be thrown out."*

By the above depositions, Chief Nzeribe, Geoffrey Ifebuzor, Chief Ohakaba and Nze Anyamele on the one hand and the plaintiffs/respondents on the other clearly joined issues on the substitution. The plaintiffs/respondents deposed that the resolution in respect of Chief Nzeribe and the three others for the substitution as in Exhibit A was a forgery. The depositions urged the trial court to take judicial notice of letter dated 13th November, 1995, in which the parties applied to withdraw the case. The letter of withdrawal was duly signed by the plaintiffs/respondents and the Chairman and Secretary of Umudike family at a meeting. That is in Exhibit C. It is important to note that the 1st plaintiff/ respondent, the deponent to the affidavit, is one of the Okparas and the oldest man of the Umu Anabi family of Umudike, a fact not denied by the plaintiffs/appellants.

In his affidavit in Reply. Raphael Ejezie deposed as follows: -

"4. *That this Honourable Court never ordered the Umudike family to negotiate any peaceful settlement of the above case with anybody and the purported settlement by Christopher Anuwu, Dennis Ohanehi, Joseph Okeyika and James Anozie with people from some families in Uzoakwa, Ihiala, was completely their own personal affair and I and the other members of the Umudike family of Uzoakwa. Ihiala, were not parties to the purported settlement.*

5. *That paragraphs 5, 6, 7, 10 and 11 of the affidavit of Chris-*

topher Anuwu sworn to at the High Court Registry, Nnewi, on the 15th day of March, 1996, in the above matter are completely untrue.

6. That Exhibit A to the affidavit of Godfrey Ifebuzor sworn to at the High Court Registry, Nnewi, on the 6th day of February, 1996, in the above matter is wholly genuine and there is no forgery whatsoever in the said document. B

7. That the Umudike family did not hold any "General Assembly" on the 10th day of September, 1994, and did not on the alleged date mandate only Chief Christopher Anuwu, Chief Joseph Okeyika, Chief James Anozie Mbonu and Mr. Dennis Ohanehi to continue to represent the Umudike family in the above case. C

8. That Christopher Anuwu, Dennis Ohanehi, Joseph Okeyika, James Anozie and the Purported Chairman and Secretary of the Umudike family had no power and have no power whatsoever to withdraw the above suit D

11. That my right to represent the Umudike family in the above case as well as that of the fifth plaintiff-respondent was not in any withdrawn by the Umudike family of Uzoakwa, Ihiala, or by any other body, " E

The above is a further act of joining of issue of substitution. By the Reply, the deponent denied that Exhibit A, the affidavit of Godfrey Ifebuzor was a forgery and that the plaintiffs/respondents, the Chairman and Secretary of the Umudike family has no power to F withdraw the suit.

The learned trial Judge described the contents of the affidavit as "many irreconcilable conflicts", The Court of Appeal said at page 136 of the Record on the affidavits:

"A reading of the affidavit evidences show such fundamental conflicts on the question of representation by the plaintiffs and the maneuver over suppression that justifies the opinion of the learned trial Judge that it was well nigh impossible to cure the conflicts by oral evidence. Confronted with such a welter of conflicts the opinion of di the learned trial Judge is equally justified that the plaintiffs were in a dilemma....." H

The million naira questions are these: Should this court ignore the very deep rooted conflicts in the affidavit evidence in respect of

the representation and order a substitution? Is that justice to the plaintiffs/respondents? Is that justice to those the Court of Appeal rightly called as “unnamed plaintiffs”? How can this court make such a decision in the light of the allegations of fraud in respect of the substitution and the reactions of the plaintiffs/appellants that there is no forgery? How can this court order a substitution when there is a dispute as to the power of the plaintiffs/respondents, the Chairman and Secretary of the Umudike family to withdraw the suit? While the plaintiffs/respondents deposed that the suit was withdrawn by them and the Chairman and Secretary of the Umudike family. Raphael Ejezie deposed that they had no power to withdraw the suit. Whose affidavit evidence should have more weight in the absence of further proof? Is it the evidence of the plaintiffs/appellants who are ordinary members of the family or that of the 1st plaintiff/respondent who is Okpara and the oldest member of Umu Anabi family and also the Chairman and Secretary of the Umudike family. Allowing the appeal will make nonsense of the status of the three men. So many disputes are in the matter and this court, in my humble view, cannot ignore them and allow the appeal of the plaintiffs/appellants.

It is clear law of procedure that where there is a conflict in affidavit evidence, it should generally be resolved by oral evidence. See Garba v. University of Maiduguri (1988) 1 NWLR (Pt. 18) 550, Atanda v. Olanrewaju (1988) 10-11 S.C. 1; (1988) 4 NWLR (Pt.89) 394, Nwosu v. Imo State Environmental Sanitation Authority (1990) 4 S.C. 71; (1990) 2 NWLR (Pt. 135) 688, Military Administrator, FHA v. Aro (1991) 1 NWLR (Pt. 168) 405. Both the learned trial Judge and the Court of Appeal did not bother to resolve the conflicts in the affidavit evidence. They ought to have bothered. They are wrong in not bothering. The above general principle of law will not apply where there is documentary evidence that can resolve the conflict. See Ezegbu v. FATB Limited (1992) 1 NWLR (Pt.220) 697, Pharmacist Board v. Adebeshin (1978) 5 S.C. 43; (1978) 5 S.C. (Reprint) 31, Uku v. Okumagba (1974) 3 S.C. 35; (1974) 3 S.C. (Reprint) 24.

What is the legal position where documentary evidence is in conflict, as in this appeal? It is clear that there is conflict in the letters in respect of the representation and substitution in this matter. How can

this be resolved? The law seems to be silent. It is my humble view that in such a situation, oral evidence should be led to resolve the conflict in the documentary evidence. This should be taken as an exception to the law that oral evidence should not add or subtract from documentary evidence which speaks for itself. Again both the learned trial Judge and the Court of Appeal did not bother to resolve the conflict in the letters in respect of the representation and substitution. Again, they ought to have bothered. Again, they are wrong in not bothering. Should this court ignore the conflicting affidavits and give judgment in favour of the so-called plaintiffs/ appellants, I ask once again?

The learned trial Judge was correct when he said at page 64 of the Record:

“The truth of the matter is that the plaintiffs in this suit are in disarray.....”

The Court of Appeal was also correct when that court accepted the decision of the learned trial Judge that the plaintiffs are in disarray. The court said at page 136 of the Record and I quote the portion at the expense of prolixity:

“Confronted with such a welter of conflicts the opinion of the learned trial Judge is equally justified that the plaintiffs were in disarray and if I may add with the impasse the plaintiffs case was on the edge of the precipice from where a journey to the abyss is propelled by schism within the ranks of the representation of the plaintiffs unaided by the defendants.”

The learned trial Judge used the expression “disarray” in describing the position of the plaintiffs/appellants in the suit. The Court of Appeal accepted it. I also accept it. There cannot be a better expression to describe the position the plaintiffs/appellants find themselves in this matter. In such a state of complete disorder, can this court or any court for that matter assist the plaintiffs/ appellants? I think not. In their state of hopelessness and helplessness, this court or any other court for that matter cannot commence repair work to obviate the debris. The state of the confusion is beyond this court to repair or remedy. That was why the learned trial Judge in his order said that if “the plaintiffs eventually reconcile they can apply to relist this suit.” I also agree with the learned trial Judge when he said that “it is impossible to move forward or even stand still in this case.”

There is no hiding place. There is no habitation. But there is a stalemate. This court cannot resolve the stalemate in favour of the appellants.

B An application for substitution of a person in litigation is generally an innocuous one granted as a matter of routine. This is because of the state of our adjectival law that parties should have free hand to change persons in the litigation process. And so applications for substitution do not generally give any problem. But the one in this appeal has given rise to problem because there is a dispute as to the representation which will give rise to the substitution. And so this case does not involve the niceties of the principles governing substitution of parties. We are not there. We are where we are and it is a dispute between plaintiffs in a case. Courts of law are established to adjudicate on disputes between plaintiffs and defendants. They are not established to adjudicate on “disputes” in inverted comas between two plaintiffs. It is the province of the law that plaintiffs qua complainants or claim or relief seekers cannot have disputes between or amongst themselves. Learned counsel for the plaintiffs/appellants did not cite any case in which courts have given blanket approval as in this case where there are two sectors, segments or categories of plaintiffs. I cannot blame him. I know of no such case. Most substitutions arise as a result of the death of a party and not the one in this appeal.

F Learned counsel for the plaintiffs/appellants submitted that the learned trial Judge was speculative when he held that there are many irreconcilable conflicts in the affidavits that he did not think even oral evidence will cure the dilemma of the plaintiffs. I entirely agree with him. A court of law has no jurisdiction to speculate or conjecture. A court of law must confine itself to the evidence before it and give judgment on the evidence and evidence alone. But is that enough for me to order that the matter be tried by another Judge or competent jurisdiction? I think not, particularly in the light of the final order I am likely to make in the light of the parties before this court.

H That takes me to the order of striking out. Learned counsel for the plaintiffs/appellants submitted that as the plaintiffs/ appellants were not given an opportunity to address the court before the matter was struck out, their right to fair hearing was breached. That is a curious one. It is also a very new one. I do not think I am willing to learn that.

I know of no such procedure. By the submission, counsel expected the learned trial Judge to tell him something like this or to the effect:-

“Learned counsel, I am intending to strike out the suit and so I want you to address me on that.”

There is no such procedure in law. Once a motion is argued, the trial Judge can rule on it as the law directs him. He has no duty to tell counsel mid-stream what he intends to do and require a reply from counsel. Procedurally, two orders are available to a trial Judge after the parties have argued the motion. One is to grant the motion. The other is to refuse it. And refusal entails striking out, as was done by the learned trial Judge. I think counsel expected too much from the trial Judge to give him an opportunity to respond to a possible order of striking out. He wanted a second bite. That is not available to him. No Judge ever does that and no rule of court foists on a Judge such a duty. I am of the view that the appellants’ right to fair hearing was not breached. The issue fails.

I now return to the beginning. I touched it above. It is in respect of the nomenclature of the parties to this appeal: plaintiffs/ appellants and plaintiffs/respondents. I started with it and I should end with it. Who is a plaintiff, I ask? Blacks Law dictionary defines the expression “as a person who brings an action; the party who complains or sued in a civil action and is so named on the record. A person who seeks remedial relief for an injury to rights.” See Sixth Edition, page 1150.

A plaintiff is the party who commences an action in a court of law. A plaintiff in an action should be one who has a right of action, the person who had been wronged. See Green v. Green (1987) 3 NWLR (Pt.61) 480, Ogunsanya v. Dede (1990) 6 NWLR (Pt. 156) 347. A plaintiff is also known in some jurisdictions as the complainant, demandant, objectant or pursuer. All the expressions have a common denominator in the word “initiation” which conveys the responsibility for starting a thing.

There could be more than one plaintiff in a case. As a matter of our adjectival law, there is no limit to the number of plaintiffs in a case. So too defendants. In other words, there could be a proliferation of plaintiffs and defendants in a case. There could also be co-plaintiffs and co-defendants. In whatever way it goes, the law is that

the plaintiffs present a common cause of action with a common set of reliefs. They proceed to the court with a common purpose and that purpose is to present their common case to the court to obtain or win a common victory. A court of law should not see plaintiffs quarreling. That will be a taboo; not known to any rule of court. Plaintiffs, by their judicial capacity in the judicial process, are always championing the same cause of action. And this is the position, either in the trial court or in the appellate court. The only difference is that in the appellate court, they acquire one additional name to reflect their appellate status. That name could be appellant or respondent, depending on what side they are. And so there could be plaintiffs/appellants or plaintiffs/respondents in the plural. In the singular, it could be plaintiff/appellant or plaintiff/respondent.

In this appeal, it is not so. The plaintiffs are in two sectors, D segments or categories: plaintiffs/appellants and plaintiffs/respondents. That is the strangeness that the plaintiffs/respondents pointed out in their Brief. Although plaintiffs/appellants did not see any strangeness in it, I do. I do not expect them to see any strangeness in the nomenclature. After all, they invented it and they have a duty to defend it. Is E the invention known to our procedural law? No.

I know of no law which places plaintiffs into sectors, segments or categories as the one in this appeal. Litigation does not have any sectors, segments or categories or plaintiffs. To me, it is a hostile proceeding against the so-called plaintiffs/respondents and a clear abuse F of the court process. Appeals involve the plaintiff and the defendant. They are the opposing parties.

Appeals do not involve the plaintiffs *per se* or the defendants *per se*. I have never come across a case in which the plaintiffs are both G appellants and respondents. A court process in which plaintiffs are made to take opposing positions is nothing but a clear abuse of judicial process because plaintiffs are supposed to present a common position in union and in unison.

The Court of Appeal took time in its judgment to protect the H interest of the unnamed plaintiffs. In a representative action, there are unnamed plaintiffs and the Court of Appeal rightly decided to protect their interest when the court said, and I quote the court in repetition:

“On the other hand, if the generation of the plaintiffs’ representatives who initiated the action over 25 years ago have all died the unnamed plaintiffs as the donors of the power to conduct the court action are entitled to a pause to review their strategy for seeking justice. On the other hand the court as a custodian of justice is entitled to review its position with a view to removing any impediment in the wheel of justice that has operated unfairly against the unnamed plaintiffs.” B

The Court of Appeal made a very sound point. The law should protect the unnamed plaintiffs. Equity is clearly on their side. Both law and equity are not on the side of the plaintiffs/appellants, with a hostile and oppressive litigation on their hand. C

In the English case of *Lewis v. Daily Telegraph*, (supra), dealt with competing applications for consolidation and deconsolidation of action. The Court of Appeal, refusing the second application for deconsolidation, held that the consolidation order of September, 1963, should continue. I will quote what the three learned Justices said in some detail. Pearson, LL., said at page 714:-

“.....It would be extremely inconvenient and awkward, so far as one can see, to have any separate representation in a matter of that kind. Many difficult problems would arise. How would the opening speech (or speeches) be made? Would it be right that the plaintiffs should have a against the defendants the advantage of two opening speeches instead of one? Then, in the conduct of the case, if there were two plaintiffs separately represented would each plaintiff be allowed to cross-examine the other plaintiff’s witnesses and have the advantage of being able (as Lord Gardiner pointed out) to put leading questions to a witness who would be substantially on the same side? And again, when the defendants’ witnesses were called, would it be right that both plaintiffs, separately represented, should be allowed to cross-examine those witnesses? The same problem would arise in respect of the final speeches at the end of the case. Would separately represented plaintiffs be allowed to have two speeches? Then it was suggested, in the interesting draft order which counsel for Mr. Lewis very helpfully submitted this morning, that there could be separation of the issue of liability from the issue of damages. That is perfectly possible and can not inconveniently be done in some H

cases, but not, in my view, in an action for libel, because in an action for libel questions of liability and questions of damages are in practice very closely connected and cannot conveniently be separated - particularly (as I have said) because there is a jury involved, and the matter of interest to a jury is how much should be awarded to each particular plaintiff, and they would not be expected to take much interest in a somewhat theoretical division between the issue of liability on the one hand and that of damages on the other.

It seems to me, therefore, that there are very strong reasons against allowing deconsolidation in this case. I have considered the matter on its own merits: but of course the proper question for this court is whether there were material on which the learned Judge could properly come to his decision, in the exercise of his discretion, that no deconsolidation order should be made. In my view there are ample reasons in support of his order exercising his discretion, and his exercise of discretion ought not to be interfered with. We have, of course, considered what the future progress of this action or this set of actions ought to be. I have not been persuaded that there is any possibility of achieving a satisfactory trial with some system of separate representations.....”

Russel, LJ., in his contribution said at page 715:

“..... I will only add to what has been said a word on the question of representation. *Prima facie*, co-plaintiffs, whether in one original action or in an action consisting of consolidated actions, must be jointly represented by solicitor and counsel. In a proper case, an order may be made authorizing severance in point of representation; but this must be, I think, rare and should only be done to avoid injustice. Here a suggestion is made that a special order should be made for separate representation at the trial of the consolidated actions, either wholly or on the issue of damages. I do not think that it would be right to make an order for complete separate representation: it would impose an unfair burden on the defendants which such differences as there are between the two plaintiffs do not justify. Common representation on liability, followed by separate representation on damages, is not really a practical idea in defamation proceedings,.....”

Sellers, L.. said at page 716:-

"I also agree. The confusion in this case has been very largely brought about by what was done irregularly in or about July. 1963, when first Mr. Lewis changed his solicitors and became separately represented from his co-plaintiff, the company, and a little later the company took a separate solicitor. They had previously had a common solicitor representing both, which was in accordance with the rules and requirements, for which there is authority which has been cited in the judgment of Pearson, L.

It is that confusion which has been the basis of a good deal of the argument which we have heard in this case. I entirely agree with the views which have been expressed - that, as the matter stands, it is so irregular that it is not in a proper state to go for trial and should. I think, without doubt be rectified. It may well be that a method can be found for applying for an order of the court to have separate representation....."

While I concede to learned counsel for the plaintiffs/ appellants that the facts of *Lewis v. Daily Telegraph Ltd.*, are not the same as those in this case, they have one thing in common, and it is the creation of sectors, segments or categories of plaintiffs. Four actions for libel were begun in respect of similar publications in the Daily Telegraph and the Daily Mail. In two, Mr. Lewis was plaintiff and in two a company, of which he as managing director until it went into liquidation, was plaintiff. The Statements of Claim closely resembled each other, and the alleged innuendo in each was substantially to the same effect. In May, 1959, the two actions in which the Daily Telegraph Limited was defendant were consolidated, and the two actions in which Associated Newspapers Limited was defendant were consolidated. The plaintiffs succeeded at the trials, but the verdicts were set aside on appeal, new trials being ordered and costs of the trials being directed to abide the result of the re-trials. The plaintiff company went into liquidation. The defendants applied for the two consolidated actions to be consolidated into one. Differences had arisen between Mr. Lewis and the plaintiff company. Mr. Lewis gave notice of application for deconsolidation of the four actions which was refused. The Court of Appeal held that as a single question is involved, application for deconsolidation of the actions and the separate representation of plaintiffs was not appropriate. The court held that the

consolidation order of September, 1963, should continue.

Like the questions Pearson, L., asked, I can also ask a few questions. Is it proper for two counsel to represent plaintiffs in the High Court merely because the so-called plaintiffs/ appellants have divided the parties unilaterally? Is it proper for the same questions which resulted in the commencement of the action in the High Court be artificially divided merely because the so-called plaintiffs/appellants want it to be so? Is it proper for the plaintiffs in an action which they brought together in the High Court, part ways on appeal and swear to competing affidavits with so much line of demarcation and deep conflict and aggression? How can this court resolve a quarrel between two plaintiffs merely because the so-called plaintiffs/appellants want it so? As I said earlier, courts of law should not see plaintiffs quarrel. Nothing should make plaintiffs in a case to take opposing views. Defendants can, but certainly not plaintiffs. I have never seen it. That is a taboo. I am repeating myself. I have no apology for doing so. The thing bothers me so much.

Like Pearson, LJ., I “ have not been persuaded that there is any possibility of achieving a satisfactory trial with same system of separate representation.” I also agree with Sellers, L., who said that “as the matter stands, it is so irregular that it is not in a proper state to go for trial and should, I think, without doubt be rectified.” And the only way to rectify the matter is for the parties to put the family house of Umudike of Uzoakwa, Ihiala, in order. And this court will not do it for them. And here, I entirely agree with the suggestion of the learned trial Judge that “when the plaintiffs is commencing a fresh action. I do not think the doctrine of res judicata will avail the defendants, as the matter has not been finally decided. And the alternative suggestion will meet the justice of this case.

In sum, I am of the view that this appeal is incompetent and it is hereby struck out. Allowing this appeal will result in grave injustice to what the Court of Appeal called “unnamed plaintiffs’ who, like all other members of the Umudike family, need the protection of this court. In Otapo v. Sunmonu (1987) 2 NWLR (Pt.58) 487, this court held that a named plaintiff is not free in take any step that might prejudice the rights of the other unnamed plaintiffs. The Court of Appeal rightly, in my view, called them “the donors of the power to

conduct the court action.” And what is more, I do not see my way clear in disturbing the concurrent findings of the two courts below. I do not see any perversity in them. I award N50.000.00 costs in favour of the plaintiffs/respondents, although I hate to call them so, I have no choice than to do so, as they are the parties on the record.

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