

SUPREME COURT OF NIGERIA

10TH JULY 2009. SC. 60/2003

**COARM:- N. TOBI, A. M. MUKHTAR I. F. OGBUAGU,
J. O. OGEBE, J. A. FABIYI**

SHELL PETROLEUM DEVELOPMENT DEFENDANT/
COMPANY NIGERIA LIMITED APPELLANT
AND

1. CHIEF TIGBARA EDAMKUE
2. MR. BARNABAS DEEKAE
3. MR. GOTE GBARANWI
4. CHIEF SAM SINNAAOE
5. CHIEF NWIKUKU NWIKANEE 1ST SET OF PLAINTIFFS/
6. MR. GBENEBANU KWANGTE RESPONDENTS

*[for themselves and on behalf of the
Ga-Gbeneyee Lukpa, Gah-Genetee
Nyoku, Gah-Nyotee Ludue,
Gah-Gbenemene Lumene, Gah-Kwanter
Lutem and Gah-Nwikanne Gui Families
of Duboro Community Ken-Khana,
Local Government Area]*

AND

7. MR. STEPHEN KORO
*[Gah-Gbenegba, Teenwa
Lugah-Lumene Duboro] -*
8. CHIEF MUDA JAMES DEEYOR
[Paramount Chief Duboro]
9. MR. GODWIN YAAKOR
[Gah- Vaakaraban, Lumene, Duboro]
10. MR. SUNDAY GBENEENYE
[Guh-Gbenenye, Lukpa, Duboro]
11. MR. GOOGO LOVE NAGBO
[Gah-Deny Kuru Lukpa, Duboro]
12. MR. EDWARD TUGUBEE 2ND SET OF PLAINTIFFS/
[Gah-Tugubee, Lukpa, Duboro] RESPONDENTS
13. MR. CHRISTIAN NWIBUI
[Gah-Ekun, Gui, Duboro]
14. MR. DEEKAE GBARAMANA
[Gah-Gbene-Ebukwa, Duboro]

15. MR. MWIBARI EDO

[Gah-Edo, Ludue, Duboro}

16. MR. DEEBARI NWIDUDEE

[Gah-Kinea, Lutem, Duboro}

17. MR. CHRISTOPHER NWIKORI

[Gah-Nwitori, Lutem, Duboro}

18. MR. DEEGBARA YAAKARANWA

[Gah-Yaakaranwa, Lukpa]

*[for themselves and as representing
the various other families in Lukpa, Nyokuru,
Ludue, Lumene, Lutem and Gui Compounds
which are not mentioned by the 1st Plaintiff
in this suit of Duboro Community, Ken Khana,
Khana Local Government Area]*

AND

1. CHIEF NWOKE NWUIKUNEE

2. CHIEF BEFI PIUS TEAKOR

3. CHIEF MGBARA EKORO 3RD SET OF PLAINTIFFS/

4. CHIEF MONDAY BOR RESPONDENTS

5. MR. LETAM FELIX YORKOR

*for themselves and on behalf of Gan-Gui,
Ga-Buagbaezu, Ga-Bara Gaken, Ga-Luuzue
Ga-Gbara Nyonwii Families of Baen Community]*

APPEALS - Issues - Competence - Issue (i) of appellant is incompetent - Because it complains against judgment of High Court - As Supreme Court does not deal directly with complaints against High Courts (H1)

PARTIES - Representative capacity - Judgment in - Propriety - Once pleadings and evidence show that a case is fought in that capacity - Court can enter judgment in that capacity - Even if an amendment to reflect the capacity - Has neither been sought nor obtained (H2)

EVIDENCE - Admissibility - Objection - Applicability of waiver - Where a counsel or party consents to admissibility of a document - Or regularity of a procedure - The consent amount to a waiver of his right -

To subsequently object thereto (H3)

APPEALS - Points not appealed - Binding effect - Such points whether of law or fact are deemed to have been conceded - By the party against whom it was decided - So they remain valid and binding on the parties (H4)

PARTIES - Representative capacity - Objection by appellant - Propriety - Appellant lacked locus standi to question same - As he is not a member of those being represented - Only such a member can challenge the representation (H5)

ORDERS OF COURT - Leave to sue - Variation - By a court of equal jurisdiction - Such order does not constitute a decision of a judge - That cannot be varied by a judge of equal jurisdiction - Therefore it was properly varied (H6)

EVIDENCE - Uncontroverted evidence - Reliance by court - Propriety - Court is entitled to rely thereon - In such situation there is nothing to weigh on the imaginary scale - And onus is discharged on minimum proof (H7)

FACTS

Two separate suits were filed against the defendant/appellant. The first was by the 1st set of plaintiffs/respondents while the second was by the 3rd set of plaintiffs/respondents. In both suits the claims were for damages suffered by the respective respondents as a result of explosion and spillage of crude oil from appellant's station. Both suits were consolidated for hearing. Although the 2nd set of plaintiffs/respondents were joined at their own instance by the trial court, the 1st set of plaintiffs/respondents contested the joinder successfully in an appeal resulting in their name being struck out leaving only the 1st and 3rd set of plaintiffs/respondents.

After hearing, the trial court gave judgment to the two sets of respondents against the appellant. Aggrieved, appellants appealed to the Court of Appeal, which appeal was dismissed. This is a further appeal by appellant. Appellant contends *inter alia*, that Court of Appeal was wrong to have entered judgment for the respondents when

they had not established that the land was communally owned; and to have held that trial court was right to have amended the capacities in which the actions were originally brought.

ISSUES FOR DETERMINATION

B (i) *Whether on the evidence before the Court in view of the fact that the Plaintiffs sued and claimed the authority so to do as representatives of the DUBORO Community in the first action and BAEN Community in the second action, it was proper for the trial Court to have entered judgment in favour of the Plaintiffs in each case;*

C (ii) *Whether the Lower Court was right in finding that the Oil Spillage which took place on 31st July, 1994, was as a result of the negligence, default or other wrongful action on the part of the Defendant/Appellant as contended by the Plaintiff/Respondent and not as a result of the deliberate act of an unknown person as contended by the Defendant/Appellant.*

(iii) *Whether the Lower Court was right in entering judgment in favour of the Plaintiffs when they had not established communal ownership of the assets injuriously affected by the spillage;*

E (iv) *Whether there was credible evidence before the Court to sustain the award of damages by the Lower Court*
[the underlining mine]

F **HELD** (Unanimously dismissing the appeal per **OGBUAGU JSC**)
APPEALS - Issues - Competence

G 1. A reading of Issue (i) of the Appellant, by me, puts me in no doubt that the said issue, is grossly incompetent. This is because, on decided authorities, this Court, does not deal directly, with appeals or complaints or facts or issues arising or emanating from the High Court which includes the Federal High Court. In the result the said issue (i) together with the arguments in respect thereof, is discountenanced by me and in fact, being incompetent, it is accordingly struck out.
(p. 2154 B)

H **Representative capacity - Judgment in - Propriety**

2. It is also settled that once the pleadings and evidence, establish conclusively, a representative capacity and that the case has been fought throughout in that capacity, a trial or Appellate Court, can

and will be entitled to enter judgment for or against the party in that capacity, even if an amendment to reflect that capacity, had not been applied for or obtained. It will be otherwise, if the case is not made out in a representative capacity. There need not be a formal application to this/that effect either in the trial or Appellate Court.
(pp. 2155 H / 2156 D)

B

EVIDENCE - Admissibility - Objection - Applicability of waiver

3. It is conceded that when the application to amend came up for hearing, that the Appellant's learned counsel, did not oppose the same.

C

I note that at page 66 of the Records, the learned counsel for the Appellant, even asked for costs which were duly awarded. See page 162 of the Records. If a counsel or party, treats a document, or procedure or matter, as admissible, or regular *etc.*, then he cannot be heard or be at liberty, to object or complain later or before an Appellate Court. Having consented to the said application, the Appellant, with respect, cannot now resile or complain. The consent, in my respectful view, was and amounted to an undertaking that they had permanently, waived their right, if any, to object or complain.
(p. 2157 B)

E

APPEALS - Points not appealed - Binding effect

4. I note in fact, that the said Orders of Sanyaolu, J. made on 7th February, 1995, amending the capacities the Respondents prosecuted both suits, were not appealed against. The effect is that those orders subsist in law.

F

In the concurring Judgment of Onnoghen, JSC in the case of *Chief Ogunyade v. Oshunkeye & anor. (2007) 15 NWLR (Pt.1057) G 218 @ 257* cited and relied on in paragraph 3.3 (6) at page 7 of the Respondent's Brief, His Lordship stated inter alia:

"..... as the law is settled that any point(s) of law or facts not appealed against is deemed to have been conceded by the party against whom it was decided and that the said point(s) remain(s) valid and binding on the parties" (p. 2157 F)

H

Representative capacity - Objection by appellant - Propriety

5. As regards evidence of any authorization from the two families or

communities of the 1st and 3rd sets of Plaintiffs/Respondents to initiate the two suits on their behalves/behalf, I hold that the Appellant has no *locus standi* to object to the said representation not being a member of those families or Communities. It is settled that once the Plaintiff/Plaintiffs, expressed on a writ or Statement of Claim that the action, was brought in a representative capacity as appears in the two consolidated suits, it is/was *prima facie*, though not conclusive evidence of authority by his/their group, family or Community to sue in that capacity. It is only a member of that group, family or Community, who can dispute, intervene or challenge, the proper representation or the capacity in which the plaintiff/plaintiffs sued. (p. 2158 B)

Leave to sue - Variation - By a court of equal jurisdiction

6. The court below, at pages 1113 to 1115, dealt with this issue (1) of the 1st and 3rd sets of Plaintiff/Respondents and in resolving the question as to whether the learned trial Judge, had the power to grant the prayer in the motion on notice before him in which the 1st and 3rd sets of Plaintiffs/Respondents, prayed the Court for an Order varying the terms of the leave granted to them by Sanyaolu, J. to institute the consolidated suits in representative capacities respectively on behalf of the said two Communities. It held at page 1113 *inter alia*, as follows:

The approval order therefore, in my view, is in respect of a preliminary requirement prior to in commencement of an action. I therefore do not believe that such an order comes within what can constitute a decision of a Judge which cannot be varied, reversed or allied by another Judge of coordinate or equal jurisdiction.

I believe that the earlier order made *ex-parte* by Sanyaolu, J. formed part of the proceedings in the case before Aina, J. who later assumed jurisdiction in the case. He (Aina, J.) therefore has the power to entertain the application to amend the said earlier order in the 'proceedings as requested in the motion filed by the plaintiffs in that end'.

I agree. (p. 2161 C)

Uncontroverted evidence - Reliance by court - Propriety

7. At the close of the trial, there was no evidence from the Appellant,

to controvert the said evidence of the PW2 who and in fact, produced Exhibits “A” and “Al”. The law is well settled that a trial court, is entitled to rely and act on the uncontroverted or uncontradicted evidence of a plaintiff or his/its witness/witnesses. In such a situation, there is nothing to put or weigh on the imaginary or proverbial scale. In such a case, the onus of proof, is naturally discharged, on a minimum of proof. It is beyond doubt therefore, that the trial court, was justified, when it relied on the said evidence of the PW2. The court below, rightly, in my respectful view, affirmed the said decision of the trial court. I so hold. (p. 2163 H)

NOTABLE POINTS OF INTEREST

TOBI JSC

1. Amendment of parties is an inherent right of court

Amendment in the course of proceedings is an inherent right of the court. Accordingly, if a trial Judge embarks on an amendment for the purposes of determining in the existing suit the real question or questions in controversy between the parties, an appellate court will not interfere. That is the essence of Order 32 of the Federal High Court (Civil Procedure) Rules. I am not with learned Senior Advocate for the appellant that Aina, J. had no jurisdiction to make an order granting leave to the plaintiffs to represent a limited number of specified families and Duboro/Baen Communities. The argument is too technical as it does not tally with the wide powers of a trial Judge to amend parties in a matter before him. (p. 2166 D)

2. Rule in Rylands v Fletcher applies

I entirely agree with the submission of learned counsel for the 1st and 3rd set of plaintiffs/respondents that the Court of Appeal based its findings on the rule in Rylands v Fletcher (1868) L.R 3 HL 330 and the maxim *of res ipsa liquitur*. The House of Lords said in the case of Rylands v Fletcher:

“We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is prima facie answerable for all the damage which is the natural consequences of its escape. He can excuse himself by showing that the escape was owing to the plaintiffs default; or

perhaps that the escape was the consequence of vis major or the act of God, but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient."

The above is what is now regarded as the Rule in *Rylands v Fletcher*, a rule that has been applied in our courts. (p. 2167 D)

B

FABIYI JSC

3. Res ipsa loquitur - Mere occurrence implies negligence

Put briefly the maxim *res ipsa loquitur* provides that in some circumstances, the mere fact of an accident's occurrence raises an inference of negligence so as to establish a *prima facie* case. The defendant is left to give an explanation that is satisfactory to the contrary.

The pronouncement of the House of Lords in the case of *Rylands v Fletcher* (1868) L.R. 3 HL 330 points at the same direction captured by the above stated maxim: This court in *C. Ducland v. R. A Ginoux v. Anr* (1969) 1 ALL NLR 25 Pronounced that if a plaintiff relies on *res ipsa loquitur* as basis for proving negligence of the defendant, then, once the primary facts of the occurrence have been accepted, the burden shifts on the defendant to establish a defence.

E (p. 2170 D)

REPRESENTATION

T. E. Williams, Esqr., (SAN), for the Appellant, with him, Mohammed Sallau, Esq. and O. S. Osunbade, Esq.

F J. T. O. Ugbooduma, Esq., for the 1st and 3rd sets of Plaintiffs/Respondents.

CASES REFERRED TO

G Adah v. Adah (2001) 2 SCNJ. 90 @ 97

Bob Manuel (1967) 1 ANLR 113 @ 121

Mefifonwu v. Egbuyi (1982) 9 S.C. 145 @ 159

Shoe Machinery Co. V. Curtlam (1896) 1 CH. 108 @ 112

Balogun v. UBA. Ltd (1992) 6 NWLR (Pt.247) 336 @ 354

H Obodo & anor. v. Ogba & ors. (1987) 3 S.C. 459 @ 460-461

Onwunaju Ndidi & anor. v. Osademe (1971) 1 ANLR 14 @ 16

Otunba Oguntayo & 9 ors. (2004) 7 SCNJ. 298 @ 310 - 311

Olukade v. Alade (1976) All NLR. 67; (1976) 2 S.C. 183 @ 189

Osho v. Anor. v. Michael Ape (1998) 6 SCNJ. 139 @ 151 - 152

Mba Orié & anor. v. Okpan Uba & anor. (1976) 9 - 10 S.C 123 @ 133

Nwabuko v. Ottih (1961) 2 SCNL& 232; (1961) 1 ANLR 487 @ 490

Chief Olatunde & anor. v. Abidogun & anor. (2001) 12 SCNJ. 225 @ 234

Ogunyade v. Oshunkeye & anor. (2007) 15 NWLR (Pt.1057) 218 @ 257

Alhaji Gegele v. Alhaji Layinka & 6 ors. (1993) 3 SCNJ. 39 @ 45; (1993) 4 KLR 51

STATUTES & RULES REFERRED TO

Constitution of Federal Republic of Nigeria, 1979, s. 234

Federal High Court (Civil Procedure) Rules, O. 32

LEAD JUDGMENT BY OGBUAGU JSC

At the trial court, there were two separate suits against the Defendant/Appellant. The first suit, was instituted by the 1st set of Plaintiffs/Respondents in Suit No. FHC/PH/84/94, while the second suit, was instituted by the 3rd set of Plaintiffs/Respondents in Suit No. FHC/PH/85/94, In both suits, the claims were/are for damages each of them suffered as a result of a serious explosion and spillage of crude oil from the Appellant's Yorla Oil Field or station in the Khana Local Government Area of Ogoni land in Rivers State which occurred on the 31st July, 1994. Both suits were consolidated for trial by the trial court on 12th December, 1995. After hearing and addresses of the learned counsel for the parties, in my respectful view, the trial court, - Aina J. in a very well considered Judgment (spanning from pages 618 to 730 of the Records) delivered on 28th June, 1999, entered judgment in favour of the 1st stand 3rd sets of Plaintiffs/Respondents. It/he granted their respective claims. The Appellant appealed to the Court of Appeal which affirmed the said Judgment of the trial court. Dissatisfied with the Judgment of the Court of Appeal, Port-Harcourt Division (hereinafter called the "*court below*") delivered on 27th March, 2003 - per Akintan, JCA (as he then was), the Appellant has now, appealed to this Court.

I note that although the 2nd set of Plaintiffs were joined at their own instance by the trial court, the 1st set of Plaintiffs/Respon-

dents, successfully, challenged the said joinder in an appeal to the court below which struck out their names. The decision striking out their names, is contained in the Judgment of the court below. The 2nd set of Plaintiffs therefore, are not a party to the instant appeal, as they have not appealed against the said decision of the court below striking out their names.

I also note that upon the dismissal of its appeal by the court below, the Appellant, pursuant to the Order of the court below that the Appellant should furnish a Bank Guarantee to secure the payment of the total judgment debt due to the Plaintiffs/Respondents in the event of the dismissal of its appeal to the court below, the Appellant, accordingly, furnished the Bank Guarantee from the Union Bank of Nigeria PLC. See pages 1216 to 1220 of the Records. Upon the dismissal of the said appeal, the Bank, duly paid the total judgment debt amounting to the sum of N225,806,601.00 to the Plaintiffs/Respondents. See the photo copy of the/its cheque dated 27th March, 2003 appearing at page 1222 of the Records:

The Appellant, in its/their Brief, have formulated four (4) issues for determination, namely,

"(i) *Whether on the evidence before the Court in view of the fact that the Plaintiffs sued and claimed the authority so to do as representatives of the DUBORO Community in the first action and BAEN Community in the second action, it was proper for the trial Court to have entered judgment in favour of the Plaintiffs in each case;*

(ii) Whether the Lower Court was right in finding that the Oil Spillage which took place on 31st July, 1994, was as a result of the negligence, default or other wrongful action on the part of the Defendant/Appellant as contended by the Plaintiff/Respondent and not as a result of the deliberate act of an unknown person as contended by the Defendant/Appellant.

(iii) Whether the Lower Court was right in entering judgment in favour of the Plaintiffs when they had not established communal ownership of the assets injuriously affected by the spillage;

(iv) Whether there was credible evidence before the Court to sustain the award of damages by the Lower Court

[the underlining mine]

On its part, the 1st and 3rd sets of Plaintiffs/Respondents, have

formulated two issues for determination. They read as follows:

“(1) *Whether the Court of Appeal was justified in law when it held that the trial court had jurisdiction to amend the capacities in which the actions at the trial court were brought (grounds 1 and 2 of the grounds of appeal).*

(2) *Whether the Court of Appeal was justified when it held that the Defendants/Appellants was liable for the claims of the Plaintiffs/ Respondents under the doctrine of res ipsa loquitur and or the rule in Rylands v. Fletcher, ground 3 of the grounds of appeal”.*

When this appeal came up for hearing on 28th April, 2009, the learned leading Counsel for the Appellant - Williams, Esq. (SAN) adopted their Brief. He referred to some pages of the Records and their List of Authorities. He specifically, referred to their issue (i) and submitted that the appeal should and ought to be allowed on this issue. He referred to the issue of damages and submitted that the Estate Surveyor, is/was not competent to give expert evidence on it. He finally urged the Court, to allow the appeal.

The learned counsel for the 1st and 3rd sets of Plaintiffs/Respondents- Ugbooduma, Esqr, also adopted their Brief. As to the said issue (i) of the Appellant, which he stated is covered at page 6 of the Appellant’s Brief, he submitted that it is not covered by any of its ground of appeal and that in fact, all the issues formulated by the Appellant, are not supported by the grounds of appeal at pages 1145 to 1146 in Vol. 2 of the Records. He finally urged the Court to dismiss the appeal.

Thereafter, Judgment was reserved till to-day.

I note that the Appellant, did not state or disclose under which ground or grounds of appeal, the said issues were/are formulated. It is now firmly settled that the general rule, is that issue or issues for determination, must relate to or be derived from a ground or grounds of appeal, otherwise, it/they will be incompetent and must therefore, be discountenanced or struck out. See the cases of Alhaji Animashaun v. University College Hospital (1996) 12 SCNJ. 179 @ 184; Chief Agbaisi & 3 ors. v. Ebikorefe & ors. (1997) 4 NWLR (Pt. 502)630; (1997) 4 SCNJ. 147 @ 157; Biocon Agrochemicals (Nig.) Ltd. & 3 ors. V. Kudu Holding (PTY) Ltd. & anor. (2000) 12 SCNJ. 272 @ 285; Adah v. Adah (2001) 2 SCNJ. 90 @ 97 and Adelesola & 4 ors. v. Akinola & 3 ors. (2004) 12 NWLR (Pt. 887) 295; (2004) 5 SCNJ.

235 @ 246 just to mention but a few. However, since the 1st and 3rd sets of Plaintiffs/Respondents, have stated under which ground or grounds their own issues have been formulated, I will, in the interest of justice, ignore the error or omission by the Appellant in not doing the same. This is notwithstanding that the Plaintiffs/Respondents, have
 B submitted in paragraph 2.0 page 4 of their said Brief, “*that those issues do not arise for determination in this appeal*”.

A reading of Issue (i) of the Appellant, by me, puts me in no doubt that the said issue, is grossly incompetent. This is because, on decided authorities, this Court, does not deal directly, with appeals or complaints or facts or issues arising or emanating from the High Court which includes the Federal High Court. See Section 233(1) of the Constitution of the Federal Republic of Nigeria, 1999 and the cases of *Harriman v. Chief Harriman*
 C *D (1987) 3 NWLR (Pt.60) 244 @ 217; (1987) 6 SCNJ. 218; Chief Olatunde & anor. v. Abidogun & anor. (2001) 12 SCNJ. 225 @ 234 and Engr. Agbi v. Barrister Alabi (2004) 6 NWLR (Pt.868) 78 @ 143 - 144; (2004) 2 SCNJ. 1 @ 52.)* ***In the result the said issue (i) together with the arguments in respect thereof, is discountenanced by me and in fact, being incompetent, it is accordingly struck out.***
 E

I will therefore, take first, issue (1) of the 1st and 3rd sets of Plaintiffs/Respondents. The court below at page 1113 of the Records, referred to the provisions of Order 32 of the Federal High Court
 F (Civil Procedure) Rules (hereinafter called “*the Rules*”) which it reproduced and then stated inter alia as follows:

“*I believe that the earlier order made ex parts by Sanyaolu, J. formed part of the proceedings in the case before Aina, J. who later assumed jurisdiction in the case. He (Aina J.) therefore has the power to entertain the application to amend the said earlier order in the proceeding an requested in the motion filed by the plaintiffs to that end*”.

In order to show that the court below was right and justified in
 H its holding, I too will reproduce the provision of the said Rules. It reads as follows:

“*The court may at any stage of the proceedings, either of its own motion or on the application of either party, order any proceedings to be amended or notand for the purpose of determining*

in the existing suit the real questions or question in controversy between the parties, shall be so made.....”.

This Rule is so clear and unambiguous, that it needs no further interpretation. This provision, is similar to the provision in some other High Court Rules of various jurisdictions in Nigeria and has, received judicial support in many decided authorities. See the cases of *Amadi v. Thomas Aplin & Co. Ltd* (1972) 1 All NLR (Pt.1) 409; *Okeowo v. Migliore* (1979) 11 S.C. 138; *Osho v. Anor. v. Michael Ape* (1998) 6 SCNJ. 139 @ 151 - 152; *Alsthom S. A. & anor. v. Chief (Dr.) Saraki* (2000) 4 SCNJ. 249; (2000) 11 S.C. 1 just to mention but a few.

As a matter of fact, a substitution, is held as an amendment. See the case of *Alhaji (Chief) Agbabiaka v. Saidu & 11 ors.* (1998) 7 SCNJ. 305. Indeed, an amendment, relates back to the date of the suit, process or document as amended. See the case of *Oduwaiye v. Oresanya* (1968) NMLR 430 and *Vulcan Gases Ltd, v. Gesellschaft Fur Industries Gasvernwertung A.G. (G.IV.)* (2001) 9 NWLR (Pt...) 610; (2001) 5 SCNJ. 55 @ 76.

I am aware that there is only one High Court in a State with Judicial Divisions, created for administrative convenience or purposes. The Judges of the Federal High Court, sit in different States or separate courts as in the Federal Capital Territory. Both courts, are bound by one Statutory Rule of Court. See the cases of *S. O. Ukpai v. Okoro & ors.* (1983) 2 S.C. NLR 380 @ 388, 390. 391; *Skenconsult Nig. Ltd v. Ukey* (1981) 1 S.C. 6 interpreting Section 234 of the 1979 Constitution, *Egbo v. Laguma* {1988} 2 NWLR (Pt. 80) 109 and *Chief Egbo & 16 ors. v. Chief Agbara 4 ors.* (1997) 1 NWLR (Pt.481) 292; (1997) 1 SCNJ. 91 per Iguh, JSC.

As regards representation, in the case of *Afolabi & ors. v. Adekunle & anor.* {1983} 2 SCNLR 141; (1983} 8 S.C 98 @ 103, 117-123; (1983) NSCC Vol. 14 P.398, it was held that an amendment can or could be made, to reflect the representative capacity under which the first plaintiff should have sued and any such amendment, was and would be justified by the evidence in the case which was or is dictated by the justice and merits of the case. See also the case of *Omogigere & ors. v. Itietie & anor* (1972) 5 S.C. 334 @ 340 - 342.

It is also settled that once the pleadings and evidence,

establish conclusively, a representative capacity and that the case has been fought throughout in that capacity, a trial or Appellate Court, can and will be entitled to enter judgment for or against the party in that capacity, even if an amendment to reflect that capacity, had not been applied for or obtained.

- B It will be otherwise, if the case is not made out in a representative capacity.** See the cases of *Shella v. Chief Asajon* (1957) 2 FSC 68; *Dokubo v. Bob Manuel* (1967) 1 ANLR 113 @ 121; *Onwunaju Ndidi & anor. v. Osademe* (1971) 1 ANLR 14 @ 16; *Mba Nta & ors. v. Ede Nweke Anigbo & anor.* (1972) 5 S.C. 156 @ 174 - 175; *Mba Orie & anor. v. Okpan Uba & anor.* (1976) 9 - 10 S.C 123 @ 133; *Taiwo Ayeni v. William Sowemimo* (1982) 5 S.C. 60 and *Oba Oseni & 14 ors. v. Dawodu & 2 ors.* (1994) 4 NWLR (Pt. 339) @ 405 - 406, 411 - 412; (1994) 4 SCNJ. (Pt. 1) 197 @ 209 just to mention but a few. **There need not be a formal application to this/that effect either in the trial or Appellate Court.** See the case of *Chief Fagbayi Oloto v. The Attorney-general* (1957) 2 FSC 74 and *Afolabi v. Adekunle* (*supra*).

- Even where a person sued in a personal capacity instead of in a representative capacity, an Appellate Court, can, in the interest of justice, amend the plaintiff's capacity to reflect the evidence and enter judgment for the plaintiff as representing his family or community. See the case of *Osinrinde & 7 ors. v. Ajomogun & 5 ors.* (1992) 6 NWLR Pt. 246) 156; (1992) 7 SCNJ. (Pt.1) 79 @ 114 - 115. In fact, in the case of *Prince Ladejobi & 2 ors. v. Otunba Oguntayo & 9 ors.* (2004) 7 SCNJ. 298 @ 310 - 311 - per Uwaifo, JSC, it was held that the law is that a person, has the right to protect his family's interest in a property or title and can sue for himself and on behalf of his family, in a representative capacity. The case of *Sogunle v. Akerele* (1967) NMLR 58; *Nta. V. Anigbo* (*supra*); *Mefifonwu v. Egbuyi* (1982) 9 S.C. 145 @ 159 and *Chief Atanda & ors. v. Akunyun* (stated therein as Olanrewaju) 1988 4 NWLR (Pt.89) 394 were therein referred to, (it is also reported in (1988) 10 - 11 SCNJ. 11). See also the cases of *Coker v. Oguntola & ors.* (1985) 1 ANLR (Pt. 1) 278; *Alhaji Gegele v. Alhaji Layinka & 6 ors.* (1993) 3 SCNJ. 39 @ 45; (1993) 4 KLR 51 and *Awudu & anor. v. Daniel & anor.* (2005) 3 NWLR (Pt. 909) 199 @ 222 - 223 CA.

Even if the trial court did not effect the amendment, as shown

above in the decided cases, the court below, has the power to amend if it deemed it fit and just to do so. It is settled that an Appellate court can even *suo motu*, amend the capacity in which a plaintiff sued. See the cases of *Amadi v. Thomas - Aplin & co. Ltd*, (*supra*); *Ibanga & ors. v. Usanga & ors.* (1982) 5 S.C 103 @ 126 - 127; (1982) 1 ANLR (Pt....) 88 @ 100; *Afolabi & ors. v. Adekunle & anor.* (*supra*); *Shoe Machinery Co. V. Curtlam* (1896) 1 CH. 108 @ 112 and *Chief Akinnubi & anor. v. Akinnubi (Mrs.) & 2 ors.* (1997) 1 SCNJ. 202 just to mention but a few.

It is conceded that when the application to amend came up for hearing, that the Appellant's learned counsel, did not oppose the same.

I note that at page 66 of the Records, the learned counsel for the Appellant, even asked for costs which were duly awarded. See page 162 of the Records. If a counsel or party, treats a document, or procedure or matter, as admissible, or regular etc., then he cannot be heard or be at liberty, to object or complain later or before an Appellate Court. See for example, the cases of *Chief Bruno Eitit & ors. v. Chief Okon Udo Ekpe & anor.* (1983) 3 S.C. 12 @ 36 - 37 - per Aniagolu, JSC and *Egbaram & 2 ors. v. Akpotor & 3 ors.* (1997) 7 NWLR (Pt.514) 559 & 574; (1997) 7 SCNJ. 392 @ 407, 408. **Having consented to the said application, the Appellant, with respect, cannot now resile or complain. The consent, in my respectful view, was and amounted to an undertaking that they had permanently, waived their right, if any, to object or complain.** See the case of *Olukade v. Alade* (1976) All NLR. 67; (1976) 2 S.C. 183 @ 189.

I note in fact, that the said Orders of Sanyaolu, J. made on 7th February, 1995, amending the capacities the Respondents prosecuted both suits, were not appealed against. The effect is that those orders subsist in law. See the case of *Chief Ogunyade v. Oshunkeye & anor.* (2007) 15 NWLR (Pt.1057) 218 @ 257 cited and relied on by the Respondents in their Brief (it is also reported in (2007)7 SCNJ. 170).

In the concurring Judgment of Onnoghen, JSC in the case of *Chief Ogunyade v. Oshunkeye & anor.* (2007) 15 NWLR (Pt.1057) 218 @ 257 cited and relied on in paragraph 3.3 (6) at page 7 of the Respondent's Brief, His Lordship stated

inter alia:

"..... as the law is settled that any point(s) of law or facts not appealed against is deemed to have been conceded by the party against whom it was decided and that the said point(s) remain(s) valid and binding on the parties".

B As regards evidence of any authorization from the two families or communities of the 1st and 3rd sets of Plaintiffs/ Respondents to initiate the two suits on their behalves/behalf, I hold that the Appellant has no locus standi object to the said representation not being a member of those families or Communities. It is settled that once the Plaintiff/Plaintiffs, expressed on a writ or Statement of Claim that the action, was brought in a representative capacity as appears in the two consolidated suits, it is/was prima facie, though not conclusive evidence of authority by his/their group, family or Community to sue in that capacity. It is only a member of that group, family or Community, who can dispute, intervene or challenge, the proper representation or the capacity in which the plaintiff/ plaintiffs sued. It will be futile for a defendant who is not one of those the plaintiff/plaintiffs purport to represent, to challenge his/their said authority for or because, if the plaintiff/plaintiffs wins/win, the losing defendant, cannot share in the victory and if the plaintiff/plaintiffs case be dismissed, such dismissal, can never affect the defendant adversely. See the cases of *Chief P.O. Anatogu & ors. v. Attorney-General, East Central State* (1974) 4 ECSLR 36; (1976) 11 S.C. 109; *Oyemuze & ors. v. Okoli & ors.* (1973) 3 ECSLR 150; *Alhaji/Chief Otapo & ors. v. Chief Sunmonu & ors.* (1987) 2 NWLR (Pt.58) 587 @ 603; (1987)5 SCNJ. 57; (1987) 2 NSCC Vol. 18 P. 677 and *Daniel Awudu & anor. v. Bautha & anor.* (2005) 2 NWLR (Pt.909) 199 @ 222-223 C.A. citing the cases of *Analogy v. Attorney-General, East Central State*; *Chief Otapo v. Sunmonu* (supra) and *Busari v Oseni* (1992) 4 NWLR (Pt.237) 557.

H I note that the court below, affirmed the Ruling or decision of the learned trial Judge in respect of the said order of amendment. In other words, there are concurrent findings and holdings of the two lower courts and on the decided authorities, this Court, cannot disturb or interfere. However, I am aware and concede and this is also settled, that no Judge, can or is entitled, to reverse, vary or alter the

order or decision of another Judge of co-ordinate jurisdiction except on issue of jurisdiction. See the cases of *Akporue & anor. v. Okei* (1973) 12 S.C. 137; (1973) 3 ECSLR 1010 @ 1014; *Orewere & ors. v. Abiegbo & ors.* (1973) 3 ECSLR 1164 @ 1167- that the proper action is to go on appeal); *National Insurance Corporation of Nigeria v. Power Industrial Engineering Co. Ltd.* (1990) 1 NWLR^B (Pt.29) 697 @ 707C.A. - per Akpata, JCA (as he then was). In other words, in the absence of Statutory authority, one Judge, has no power to set aside or vary the Order of another Judge of concurrent and co-ordinate jurisdiction. See the cases of *Amanabu v. Okafor* (1966)^C 1 ANLR 205 @ 207 and *Uku v. Okumaba* (1974) 1 ANLR Pt. 1) 475 cited in the case of *Wimpey (Nig.) Ltd & anor. v. Alhaji Balogun* (1986) 3 NWLR (Pt.28) 324 @ 339. This is especially, when such order, has been entered or drawn up. See the cases of *Obiekwuite v. Z. Umumma & ors.* (1957) 2 FSC. 70; *Okorodudu v. Ajuetami* (1967) D NMLR 282 @ 283; *B.B. Apugo & Sons Ltd* (1990) 1 NWLR (Pt.129) 652. But compare the case of *Skenconsult (Nig.) Ltd. & anor. v. Ukey* (1981) 1 S.C. 6 @ 39 - which in interpreting section 234 of the 1979 Constitution, this Court held that since there is one High Court, he/it can.^E

I note that in the instant case leading to this appeal, the two orders which granted leave to the 1st and 3rd sets of Plaintiffs/Respondents to sue in representative capacities, were made by Sanyaolu J. See pages 62 and 159 of the Records. The subsequent Orders allowing the Respondents to amend their Particulars of Claim in the two suits by stating that the said suits were instituted for and on behalf of their respective family, were also made by Sanyaolu, J. As I stated earlier in this Judgment, the said two motions/applications, were not opposed by the learned counsel for the Appellant who asked for costs that were also awarded. So, it was the same Judge that made the two orders. See the case of *Gordian Obioma & ors. v. Edemanya* (1974) 4 ECSLR 174.^F

In my respectful but firm view, Aina, J. in his lengthy Ruling at pages 296 to 317 of the Records, at pages 311 and 316, thereof, ^Hadequately, dealt with some of the said principles relating to application for leave to sue in a representative capacity. At page 315, His Lordship stated Inter alia, as follows:

"It is the law of this Country that - even if an order for leave is

not specifically sought it will be presumed that leave to sue in that capacity was given:-

- (a) *The title and the Statement of Claim reflect that capacity;*
- (b) *The suit was prosecuted in that capacity to judgment;*
- (c) *Judgment was given for or against the plaintiff in that capacity.*

B

The presumption that leave to sue in a representative capacity was given will be stronger if objection to sue in the representative capacity in limine is overruled by the learned trial Judge. Failure to obtain leave to sue in a representative capacity does not vitiate the validity of the action.

C

Where a person sues in a representative capacity and was capable of being so easily understood, the action will not be struck out because the Party could have been better described”.

D

His Lordship referred to the cases of Ibezim v. Ndulue (1992) 1 NWLR (Pt. 216) 153 ratio 15, C.A. citing @ 173. Amida v. Oshobayo (1984) 7 S.C. 68 & 78-79; Anabaronye v. Nwakihe (1997) 1 NWLR (Pt.482) 374 at 382 ratio 7 (It is also reported in (1997) 1 SCNJ. 161 and Melifonwu v. Egbuji {supra} the facts of each of these cases, he briefly stated. At page 317 thereof, His Lordship held inter alia, that,

E

“It is not every representative action that express authority of the persons represented should be obtained or even more so is the approval of the court should he obtained. (sic) A representative action could be implied from the circumstances surrounding the action.....”.

F

His Lordship then concluded inter alia, thus:

G

“It is equally damaging for the Defendant, not being a member of the families or a member of the Bean or Duboro Community to come at this stage of the proceedings to challenge the proper representation of the Plaintiffs after the Plaintiffs have closed their case and the Statement of Defence had been filed, it will not serve the interest of justice at this stage of the proceedings to shut out the plaintiffs in these consolidated suits.”.

H

He proceeded to dismiss the application and called on the defence to open their defence. I agree. I have earlier in this Judgment, touched on or dealt with some of the facts and law in respect of the said Appellant’s grouse. I note that remarkably and significantly, the

Appellant in paragraph 7 (3) of its Further Amended Statement of Defence, at page 186 of the Records, averred as follows:

“That the cause of the said spillage was occasioned by acts of vandalism and wanton destruction of the Defendant’s installations at its Yorla Flow station, maliciously perpetrated by the Plaintiffs and members of the Families which they purport to represent and other natives of Ogoni sympathetic to the clamorous and turbulent agitation of the Movement for the Survival of Ogoni People 2 (MOSOP), to willfully sabotage the economic activities and business of the Defendant in Ogoni Land”.

[the underlining mine]

However, **the court below, at pages 1113 to 1115, dealt with this issue (1) of the 1st and 3rd sets of Plaintiff/Respondents and in resolving the question as to whether the learned trial Judge, had the power to grant the prayer in the motion on notice before him in which the 1st and 3rd sets of Plaintiffs/Respondents, prayed the Court for an Order varying the terms of the leave granted to them by Sanyaolu, J. to institute the consolidated suits in representative capacities respectively on behalf of the said two Communities. It held at page 1113 inter alia, as follows:**

“..... it is necessary to take into consideration the fact that the application was made ex parte under Order 4 Rule 3 of the Federal High Court (Civil Procedure) Rules, It is also an approval which has to be sought and given before an action is commenced. The approval order therefore, in my view, is in respect of a preliminary requirement prior to in commencement of an action. I therefore do not believe that such an order comes within what can constitute a decision of a Judge which cannot be varied, reversed or allied by another Judge of coordinate or equal jurisdiction. It is therefore not one envisaged in the dictum of Nasir PCA in Fawehinmi v. Attorney-General of Lagos Stale (supra) and by Lewis, JSC in Ekpere v. Aforije. (supra)

I believe that the earlier order made ex-parte by Sanyaolu, J. formed part of the proceedings in the case before Aina, J, who later assumed jurisdiction in the case. He (Aina, J.) therefore has the power to entertain the application to amend the said earlier order in the ‘proceedings as re-

quested in the motion filed by the plaintiffs in that end".

I agree.

I have earlier held that there are concurrent findings of fact and Judgments of the two lower courts and that this Court or myself, cannot and will not disturb or interfere. This should have been the
B end of this appeal. My answer therefore, to the said issue (1) of the 1st and 3rd sets of Plaintiffs/Respondents, is rendered in the Affirmative/Positive.

In respect of Issue (ii) of the Appellant and issue (2) of the 1st
C and 3rd set of Pontiffs/Respondents, it is now firmly established in a line of decided authorities by this Court firstly, that civil cases, are proved by preponderance or weight of evidence. See the case of The Liquidator of Efufu (P.M.S.) Ltd v. Adeyefa (1970) 1 AMLR 13; (1971) U.K. R. 42. Secondly, it is not the business of a Court of
D Appeal to substitute its own views for the views of a trial court which is in a much better position to assess the credibility of all those who testified before it. See the cases of Akinloye v. Eyiola (1968) NMLR 92 @ 95; Egri v. Uperi (1974) (i) NMLR 22 and Woluchem v. Gudi (1981) 5 S.C 291. The duty of appraising evidence given in a trial, is
E pre-eminently, that of the trial court. See the case of Ogundulu & ors. v. Chief Phillips & ors. (1973) 2 S.C. 71 @ 80. When there is evidence as in the instant case, to support the conclusion of a trial court/Judge either in granting or dismissing a claim or relief, a Court
F of Appeal, will not interfere. See the cases of Olugbolu v. Okeluwa (1981) 6-7 S.C 99 @ 105-107 citing some other cases therein; and Obodo \$ anor. v. Ogba & ors. (1987) 3 S.C. 459 @ 460-461. 466; (1987) 3 SCNJ. 82; (1987) 2 NWLR (Pt. 54) 1.

I say so because, the findings and holdings of the trial court,
G are adequately, in my respectful view, supported by the Records The 1st set of Plaintiffs/Respondents pleaded at paragraph 7 (a) of their Amended Statement of Claim at page 176 of the Records, that there was an explosion preceding the occurrence of the spillage. But the Appellant, in the said paragraph 7(3) of its Further Amended State-
H ment of Defence referred to by me earlier in this Judgment, averred that the spillage, was caused by the malicious acts of vandalism and wanton destruction of its installation at its said station, by the Respondents and members of their families which they purport to represent. However, the trial court at pages 709 to 710 of the Records, held

that the said averment of the Appellant in the said paragraph afore-stated, amounted to or constituted criminal allegation and that the Appellant, failed to prove the same beyond reasonable doubt. I note that the Appellant, did not appeal against this finding and holding by the trial court. The consequence of course, is that not only did that finding and holding, subsist, but they are deemed to have been accepted by the Appellant. See also the case of *Calabar Central Co-operative Thrift & Credit Society Ltd & 2 ors, v: Ekpo* (2008) 6 NWLR (Pt. 1083) 362 @ 388 cited in the Respondents' Brief (it is also reported in (2008) 2 SCNJ. 307 and (2008) 1 - 2 S.C. 229.

The court below, at pages 1121 to 1125 of the Records, dealt with this issue and issue (iv) of the Appellant and thereafter, affirmed the said finding of fact and holding of the trial court. Thus, there are concurrent findings of fact and holdings or Judgments by the two lower courts and on the decided authorities, this Court, cannot and will not disturb or interfere. This again, should have been the end of the appeal. My answer therefore, to the two issues differently couched by the parties, is also in the Positive/Affirmative.

Let me for the avoidance of doubt, say that in respect of issue (iv) of the Appellant, I note that the Appellant, in paragraph 16(1) of its Further Amended Statement of Defence at page 191 of the Records, pleaded inter alia,, that the Estate Surveyors and Valuers of the PW2, did not carry out any proper appraisal of the losses caused by the said oil spillage. Then, at paragraph 16 (4) and at page 192 thereof, it pleaded that it will rely on the appraisal Reports produced by its Valuers in respect of the said oil spillage. I note that at the trial, it never called its own Valuers. So, **at the close of the trial, there was no evidence from the Appellant, to controvert the said evidence of the PW.2 who and in fact, produced Exhibits "A" and "A1". The law is well settled that a trial court, is entitled to rely and act on the uncontroverted or uncontradicted evidence of a plaintiff or his/its witness/witnesses. In such a situation, there is nothing to put or weigh on the imaginary or proverbial scale. In such a case, the onus of proof, is naturally discharged, on a minimum of proof.** (See the cases of *Nwabuko v. Ottih* (1961) 2 SCNL& 232; (1961) 1 ANLR 487 @ 490; *Oguma Associated Companies (Nig.) Ltd, v, IBWA Ltd.* (1988) 1 NWLR (Pt. 73) 658 @ 682; (1988) 3 SCNJ. 13 and *Balogun v. UBA. Ltd*

(1992) 6 NWLR (Pt.247) 336 @ 354; (1992) 7 SCNJ. 61 just to mention but a few. **It is beyond doubt therefore, that the trial court, was justified, when it relied on the said evidence of the PW2. The court below, rightly, in my respectful view, affirmed the said decision of the trial court. I so hold.**

B I hold that issue (iii) of the Appellant, with respect, is irrelevant in this appeal and I will therefore, discountenance it. In concluding this perhaps, lengthy Judgment, I have no hesitation, in holding that this appeal, with respect, lacks substance and it is unmeritorious. It fails and it is accordingly dismissed. Costs follow the event. The 1st and 3rd sets of Plaintiffs/Respondents, are entitled to costs which is fixed at N50,000.00 (fifty thousand naira) payable to them by the Appellant. I wish the Rules of this Court, had given me a discretion in respect of award of costs as this is one of the appeals, where the costs D to the 1st and 3rd sets of Respondents, should have been more in the circumstances of this case.

TOBI JSC

E This case has to do with oil spillage in one of the oil wells in Kana Local Government Area of Rivers State. Although there were originally three sets of plaintiffs, the 2nd set of plaintiffs were struck out by the Court of Appeal in its judgment of 27th March, 2003. And so this appeal involves the 1st set of plaintiffs as respondents and the 3rd F set of plaintiffs also as respondents. The appellant is defendant in the High Court. It is the Shell Petroleum Development Company of Nigeria Limited.

The plaintiffs who are respondents in the appeal made several G claims for special damages in two consolidated suits which were awarded by the learned trial Judge. The Court of Appeal affirmed the awards. This appeal is in respect of the judgment of the Court of Appeal dated 25th June, 1999 (a) dismissing the appeal of the appellant against the final judgment of the Appeal dated 25th June, 1999 H and (b) dismissing the appeal of the appellant against the decision of the trial court dated 17th March, 1997.

Briefs were filed and duly exchanged. The appellant formulated four issues for determination:

“(1) Whether on the evidence before the court and in view of

the fact that the plaintiffs sued and claimed the authority so to do as representatives of the DUBORO Community in the first action and the BAEN Community in the second action, it was proper for the trial court to have entered judgment in favour of the plaintiffs in each case;

(2) Whether the lower court was right in finding that the oil spillage which took place on 31st July, 1994, was as a result of the negligence, default or other wrongful action on the part of the Defendant/appellant as contended by the plaintiff/respondent and not as a result of the deliberate act of an unknown person as contended by the defendant/appellant;

(3) Whether the lower court was right in entering judgment in favour of the plaintiffs when they had not established communal ownership of the assets injuriously affected by the spillage;

(4) Whether (here was credible evidence before the court to sustain the award of damages by the lower court.”

The 1st and 3rd set of respondents formulated two issues for determination:

“(1) Whether the Court of Appeal was justified in law when it held that the trial court had jurisdiction to amend the capacities in which the actions at the trial court were brought.

(2) Whether the Court of Appeal was justified when it held that the defendant/appellant was liable for the claims of the plaintiffs/respondents under the doctrine of res ipsa loquitur and or the rule in Rylands v Fletcher.”

Learned Senior Advocate for the appellant, Mr. T. E. Williams submitted on Issue 1 that the complaint against the order of amendment ought to be sustained and the appeal against the order whereby the Court of Appeal refused to strike out the consolidated actions allowed. He cited a number of cases. He submitted on Issue 2 that the Court of Appeal was wrong in finding that the oil spillage which took place on 31st July, 1994 was as a result of the negligence, default or other wrongful action on the part of the appellant and not as a result of the deliberate act of unknown person. He argued that none of the so-called expert witnesses for the plaintiffs can be described as specially skilled in the science of engineering. He cited a number of cases.

Taking Issues 3 and 4, learned Senior Advocate submitted

that the Court of Appeal was wrong in entering judgment in favour of the plaintiffs when they did not establish communal ownership of the assets injuriously affected by the spillage. He dealt in some considerable detail on expert evidence. He submitted that there was no credible evidence before the court to sustain the award of damages
 B by the Court of Appeal, Again, he cited a number of cases and urged the court to allow the appeal.

Learned counsel for the 1st and 3rd set of respondents, Mr. J. T. O. Ugbooduma submitted on Issue 1 that the Court of Appeal was
 C justified in law when it held that the trial Judge had jurisdiction to amend the capacities in which the actions were brought. He cited a number of cases.

Arguing Issue 2, counsel submitted that the Court of Appeal was justified when it held that the appellant was liable for the claims
 D of the plaintiffs/respondents under the doctrine of *res ipsa loquitur*; and or the rule in *Rylands v Fletcher*. Again, he cited a number of cases and urged the court to dismiss the appeal.

Amendment in the course of proceedings is an inherent right of the court. Accordingly, if a trial Judge embarks on an amendment
 E for the purposes of determining in the existing suit the real question or questions in controversy between the parties, an appellate court will not interfere. That is the essence of Order 32 of the Federal High Court (Civil Procedure) Rules. I am not with learned Senior Advocate for the appellant that Aina, J. had no jurisdiction to make an
 F order granting leave to the plaintiffs to represent a limited number of specified families and Duboro/Baen Communities. The argument is too technical as it does not tally with the wide powers of a trial Judge to amend parties in a matter before him. With respect, I do not see
 G the relevance of the cases counsel cited. I am rather in agreement with my learned brother in his lead judgment that “*amendment can or could be made, to reflect the representative capacity under which the first plaintiff should have sued and any such amendment was and would be justified by the evidence in the case which was or is dictated*
 H *by the justice and merits of the case*”.

That takes me to Issue 2. The Court of Appeal said at pages’ 1121 and 1122 of the Record:

“The point is that if proper care is taken such a spillage would not have occurred. The onus was therefore on the appellant as de-

defendant to prove that there was no negligence on its part. In an effort to discharge the onus placed on it to disprove that it was not negligent, the defendant alleged that the accident was caused by the hostile act of some people who caused the damage that resulted in the spillage. That allegation was however in conflict with the evidence of the policemen at the scene whose account was quite different from that given by the defendant."

The allegation that the spillage was caused by hostile act of some people is an allegation of a criminal act which needs to be proved beyond reasonable doubt by virtue of section 138 (1) of the Evidence Act. See *Bakare v The State* (1987) 1 NWLR (Pt.52) 579; and *Ezike v Ezeugwu* (1992) 4 NWLR (Pt. 236) 462. The defendant failed to prove the criminal allegation and as such it failed to discharge the onus placed on it under the rule laid down in *Rylands v Fletcher*, *supra* and the maxim *res ipsa loquitur*.

I entirely agree with the submission of learned counsel for the 1st and 3rd set of plaintiffs/respondents that the Court of Appeal based its findings on the rule in *Rylands v Fletcher* (1868) L.R 3 HL 330 and the maxim *of res ipsa liquitur*.. The House of Lords said in the case of *Rylands v Fletcher*:

"We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is prima facie answerable for all the damage which is the natural consequences of its escape. He can excuse himself by showing that the escape was owing to the plaintiffs default; or perhaps that the escape was the consequence of vis major or the act of God, but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient."

The above is what is now regarded as the Rule in *Rylands v Fletcher*, a rule that has been applied in our courts.

The Latinism *res ipsa liquitur* means the thing speaks for itself. The maxim connotes that in some circumstances., the mere fact of an accident occurrence raises an inference of negligence so as to establish a *prima facie* case. In other words, an accident may, by its nature be more consistent with its being caused by negligence for which the defendant is responsible than other causes, and that in such a case, the mere fact of the accident is *prima facie* evidence of

such negligence. In such a case, the burden of proof is on the defendant to explain and to show that the accident occurred without fault on his part. Again our courts have applied the maxim in many cases.

What was the evidence by the appellant to the effect that the spillage was owing to the plaintiffs' default or as a result of an act of God? I do not see any such evidence. Learned Senior Advocate relied on the evidence of DW.3 and DW.8.

With respect I do not agree with him.

As the issue of award of damages flows from the above, I do not intend to take it further here. I am of the view that there was credible evidence before the trial court to sustain the award of damages by the Court of Appeal.

In sum, the appeal fails and it is dismissed. I abide by the order as to costs in the judgment of my brother, Ogbuagu, JSC.

D

MUKHTAR JSC

E I have had the opportunity of reading in advance the lead judgment delivered by my learned brother Ogbuagu JSC. I endorse the reasoning and conclusion reached in the lead judgment, and I am in complete agreement that the appeal lacks merit and should be dismissed. I abide by the consequential orders made in the lead judgment.

F

OGEBE JSC

G I had a preview of the lead Judgment of my learned brother Ogbuagu, JSC just delivered and I agree entirely with his reasoning and conclusion. Accordingly, I also dismiss the appeal with costs as assessed in the lead Judgment.

FABIYI JSC

H I have had a preview of the judgment just delivered by my learned brother, Ogbuagu, JSC. I agree with, the reasons-therein advanced to arrive at the conclusion that the appeal lacks merit and should be dismissed.

There was oil spillage from one of the oil wells owned by the

defendant/appellant in Khana Local. Government Area of Ogoni land in Rivers State. At the on set, the 1st and 3rd sets of plaintiffs sued the defendant. The 2nd set of plaintiffs were joined at their own instance. Thereafter, (he suits were consolidated and heard by Aina, J. at the Federal High Court, Port-Harcourt. In his judgment which was delivered on 28th June, 1999, he granted the respective claims of the 1st and 3rd sets of plaintiffs. B

The appellant, which was not pleased with the decision of the trial court, appealed to the Court of Appeal (court below). Thereat, the appeal was dismissed on 27th March, 2003. The 2nd set of plaintiffs was struck out. C

The appellant still decided to try his chance by further appealing to this court. The appellant, in its brief of argument, decoded four issues for the due determination of the appeal. They read as follows:-

“(i) Whether on the evidence before the court in view of the fact that the plaintiffs sued and claimed the authority so to do as representatives of the Duboro Community in the first action and Bean Community in the second action, it was proper for the trial court to have entered judgment in favour of the plaintiffs in each case; D

(ii) Whether the lower court was right in finding that the oil spillage which took place on 31st July, 1994, was as a result of the negligence, default Or other wrongful action on the part of the defendant/appellant as contended by plaintiff/respondent and not as a result of the deliberate act of an unknown person as contended by the defendant/appellant; E F

(iii) Whether the lower court was right in entering judgment In favour of the plaintiffs when they had not established communal ownership of the assets injuriously affected by the spillage;

(iv) Whether there was credible evidence before the court to G sustain the award, of damages by the lower court.”

On behalf of the respondents, the two issues formulated for determination read as follows:-

“(I) Whether the Court of Appeal ‘was justified in law when it held that the trial court had ‘jurisdiction to amend the capacities in which the actions at the trial court were brought. H

(2) Whether the Court of Appeal was Justified when it held that the Defendant/Appellant was’ liable for the claims of the Plaintiffs/respondents under the doctrine of res ipsa loquitur and/or the

rule in *Rylands v. Fletcher*.

I wish to state that the first issue relating to amendment has been dealt with at great length in *the lead*, judgment. Perhaps I need to say it briefly that where the evidence in Use case shows that the parties prosecuted same in a representative capacity, is open to the trial court to amend the writ *suo motu* in order to reflect the real situation. *See Joseph Afolabi & Ors v. John Adekunle & Anr (1983) 2 SC NLR 141: (1983) 8 SC 98 at 102; Anusiem v. Anusiem (1993) 2 NWLR (Pt. 276) 485*

In the present, matter, pleadings and evidence in (he consolidated cases clearly depict that, they were prosecuted in representative capacities. The trial court was right in giving judgment in such capacities. The court below was on firm ground in affirming same.

The 2nd issue couched by both parties, in essence, relates, to the applicability of the maxim *res Ipsa loquitur* and the rule in *Rylands v. Fletcher* to the peculiar facts of this matter.

Put briefly the maxim *res ipsa loquitur provides* that in some circumstances, the mere fact of an accident's occurrence raises an inference of negligence so as to establish a prima facie case. The defendant is left to give an explanation that is satisfactory to the contrary.

The pronouncement of the House of Lords in the case of *Rylands v. Fletcher* (1868) L.R. 3 HL 330 points at the same direction captured by the above stated maxim: This court in that if a plaintiff relies on *res ipsa loquitur* as basis for proving negligence of the defendant, then, once the primary facts of the occurrence have been accepted, the burden shifts on the defendant to establish a defence. In *Machine Umudje v. Shell B-P Petroleum Dev. Co. of Nigeria Ltd. & Anr* (1975) 9-11 SC 155 which had to do with escape of oil waste, this court pronounced that the maxim *res ipsa loquitur* and the rule in *Rylands v. Fletcher* are applicable.

In this case, mere was an oil spillage which caused damage to a vast area. The courts below found that if proper care was taken, such a spillage would not have occurred to cause damage to the plaintiffs/respondents. The onus shifted to the defendant/respondent to prove that there was no negligence on its part. As found by the trial court and supported by the court below, the defendant, in an effort to discharge the onus placed on it to disprove that it was not negligent,

alleged that the accident was caused by the hostile act of some people who caused the damage that resulted in the spillage. The allegation conflicted with the evidence of policemen at the scene.

The court below at page 1122 of the record of appeal, per Akintan, JCA (as he then was) stated as follow:-

“The allegation that the spillage was caused by hostile act of some people is an allegation of criminal act which needs -to be proved beyond reasonable doubt by virtue of section 137(1) of the Evidence Act.. See Bakare v, The State (1987) 1 NWLR (Pt. 52) 579; and Eziike v, Ezeugwu (1992) 4 NWLR (Pt. 236) 462. The defendant failed to prove the criminal allegation and as such it failed to discharge the onus placed on it under the rule laid down in Rylands v. Fletcher, supra and the maxim res ipsa loquitur”

I completely agree. From the whole gamut of this matter and the evidence (that is extant in the record of appeal, the maxim *res ipsa loquitur* is clearly evocable. As well, the rule in *Ryland v. Fletcher* is-applicable. The courts below, rightly in my view, applied them in depicting the negligence of the defendant which failed to give any tenable explanation that is satisfactory to the contrary.

In short, this issue is resolved against the appellant and in favour of the respondents.

I wish to touch briefly on the last live issue in this appeal. It is whether there was credible evidence before the court to sustain the award of damages by the lower court.

Put succinctly, the plaintiffs’ witness, PW2 an Estate Surveyor and Valuer, tendered Exhibits A and Al relating to valuation of the losses suffered by the plaintiffs. The defendant which promised to tender its own valuation report failed to do so to its peril. This is because the valuation made by the ‘PW2 remained unchallenged, his the law that uncontroverted and unchallenged evidence stands and should be accepted. See *Omoreghe v. Lawani* (1980) 3-4 S.C 108, 117; *Fasoro v. Beyioku & Ors.* (1988) 2 NWLR (Pt 76) 263 271; *Mogaji v. Cadbury Nig. Ltd* (1972) 2 S.C. 97.

The trial court, rightly in my view, relied on uncontradicted evidence of the plaintiffs in awarding damages to them. The court below affirmed same. I cannot see my -way clear in tampering with the concurrent findings of the two courts below, shall not interfere. See *Seven-Up Bottling Co. v. Adewale* (2004) 4 NWLR (pt. 862)

183, Fajemirokun v. C.B, Nig Ltd. (2009) 5 NWLR (pt. 1135) 588 en page 599.

This issue is also resolved against the appellant and in favour of the respondents.

B For the above reasons and those ably set out in the lead judgment, I also feel that the appeal should be dismissed, I order accordingly. The respondents are entitled to costs assessed at N50,000.

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