

**SUPREME COURT OF NIGERIA**  
9TH DECEMBER, 2011. SC. 150/2004  
**CORAM: - A. M. MUKHTAR, F. F. TABAI, I. T.**  
**MUHAMMAD, S. GALADIMA, N. S. NGWUTA, JJSC**

1. EGBULEFU ONYERO  
2. EMMANUEL U. OKEKE ..... APPELLANTS  
AND  
AUGUSTINE NWADIKE ..... RESPONDENT

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PLEADINGS - Statement of claim - Relevance - Statement of claim supersedes writ of summons - As such court should consider the content of same - In determining a case (H1)

APPEALS - Orders of court - Retrial order - Propriety - Since Court of Appeal did not pronounce on whether or not it has granted the reliefs sought - The order of trial de novo is valid (H2)

**FACTS**

Plaintiffs/appellants instituted this action at the then East Central State High Court, Aba (now High court of Abia State). 1<sup>st</sup> appellant contends that the land in dispute formed part of a larger parcel of land known and called 'UKATARA' and belonged to his family who leased it to 2nd appellant for a term of 99 years. Defendant/respondent somehow acquired the land through one Mr. Okoye Eloagu to whom the land was leased by 1st appellant's brother Azunna Onyero. Respondent has commenced building on the land. Consequently, appellants claim declaration of title to the said parcel of land, N700.00 (seven hundred) naira damages for trespass and an injunction restraining respondent and his agents from trespassing into the land.

On the other hand, respondent contends that 1st appellant's brother leased the land in dispute to Okoye Eloagu and a deed of lease was executed before a Magistrate on the 4th of November 1957. He stated that the said Okoye Eloagu with consent of 1st appellant, assigned his rights on the land to respondent, and that respondent has since erected a storey building on the land. Two witnesses gave evidence for appellants' case. Respondent did not ad-

duce evidence. The learned judge appraised the evidence before him and entered judgment in favour of appellants. Dissatisfied, respondent appealed to Court of Appeal, Port Harcourt Division. The court allowed the appeal. Aggrieved, appellants have appealed to Supreme Court.

**ISSUE FOR DETERMINATION**

*“Whether the learned justices of the Court of Appeal were right in setting aside the entire judgment of the learned trial judge and making an order of a retrial de novo before another judge at the High Court, when there was no such relief or new triable issue before the Court of Appeal as well as the fact that the appeal before the Court of Appeal was not against the whole decision at the trial court?”*

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

***Statement of claim - Relevance***

1. It was not until when they filed their statement of claim that they added the relief of declaration of title to the land in dispute, a relief that is far weightier than those sought in the Writ of Summons. In fact in most cases the reliefs sought in the writ are invariably hinged on the claim for declaration of title. Be that as it may the appellants sought this relief after taking out the writ of summons. Authorities abound that a statement of claim supersedes a writ of summons, and so the content of a statement of claim is what a learned trial judge should consider in determining a case. (p. 2987 E)

***Retrial order - Propriety***

2. In fact, none of the particulars of error touched on the striking out. It is instructive to note that apart from striking out the relief for the declaration of title to land, it definitely did not pronounce on whether it has granted the said relief or not. That being the position of the appeal, the lower court was in firm ground when in the lead judgment it made the following observation:-

*“To meet the justice of the case as the lower court struck out the claim of declaration to statutory right of occupancy adopting the statement of LORD DENNING in the Privy Council case of MACFOY v. U.A.C. 1962 A. C. 152 that you cannot build something on nothing as it is bound to collapse since the lower court made no pronouncement whether to grant the prayer such an exercise will be*

*ultra vires the appellate powers of this court. ”*

I subscribe to the above. The order of trial de novo made by the lower court is in order and cannot be faulted in the circumstance of this appeal. The single issue in this appeal is resolved in favour of the respondent, and the grounds of appeal to which it is married fail. The end result is that this appeal fails in its entirety. The judgment and order of the Court of Appeal for a trial de novo is hereby affirmed. (p. 2989 F)

### **NOTABLE POINT OF INTEREST**

#### **MUHAMMAD JSC**

##### ***1. Plaintiff succeeds on strength of his case and not on weakness of defense***

Further, the trite position of the law is that a plaintiff succeeds on the strength of his case and not on the weakness of the defendant's case. It is for this reason that a trial court does not form the habit of granting declaratory relief(s) except where the plaintiff discharges the burden of proof placed on him by the law. Since no evidence was called in the establishment of the claim in paragraph 17[1] of the statement of claim that was why the court below ordered for a retrial before another judge as the trial court made no pronouncement whether it granted or refused the declaration on the claim of title to the land in dispute. That, in my view, was the only way to meet the ends of justice of the case. It is the practice of appellate courts to send back to a trial court for making pronouncement[s] upon any issue/issues that was/were not pronounced upon by that court when it first treated the case, provided the trial court has jurisdiction over the issue/issues. (p. 2994 G)

### **REPRESENTATION**

K. C. Nwufo, Esq. for the Appellants

K. I. Amadi, Esq. for the Respondent

### **CASES REFERRED TO**

Osasona v. Ajayi (2004) 5 SC (Pt. 1) 88

Onyebuchi v. INEC (2002) 1 NWLR (Pt. 769) 417

Din v. A - G Federation (1981) 1 NWLR (Pt. 17) 471

Ojora v. Odunsi (1984) 1 All NLR 55

- Engr. Goodness Agbei & Anor v. Audu Ogbeh & Ors (2006) 5 SCNJ 314  
R. I. Ikweki & Ors. v. James Ebele & Anor 2005 2 SCNJ 242  
NTA v. Anioho (1972) S SC 156  
Udechukwu v. Okwuka (1956) 1 FSC 70  
B Chief J. O. Lahan & Ors v. R. Laayetan & Ors (1972) 6 SC 190  
Nwankwo v. Nwankwo (1992) 4 NWLR (Pt. 238) 693  
Overseas Construction Ltd v. Creek Ent. Ltd (1985) 3 NWLR (pt. 13) 407  
C Union Beverages Ltd v. Owolabi (1988) 1 NWLR (pt. 68) 128  
Abusomwan v. Mercantile Bank (Nig.) Ltd (No.2) 1987 3 NWLR (pt. 60) 196  
Kodilinye v. Mbanefo Odu (1935) 2 WACA 336  
Aromire v. Awoyemi (1972) 1 All NLR (Pt. 1) 101

D

**STATUTE REFERRED TO**

Court of Appeal Act, s. 16

**LEAD JUDGMENT BY MUKHTAR JSC**

- E This is an appeal against the decision of the Court of Appeal, Port Harcourt Division, wherein the appeal of the plaintiffs was allowed, and an order of retrial de novo was made. The issue for determination reads as follows:- The plaintiffs' case at the then East  
F Central State High Court was that the land in dispute formed part of a larger parcel of land known and called 'UKATARA' and belonged to his family who leased it to the 2nd plaintiff for a term of 99 years, and he has since then been the 1st plaintiff's family tenant. The defendant somehow acquired the land through one Mr. Okoye Eloagu to  
G whom the land was leased by the 1st plaintiff's brother Azunna Onyero. The defendant is building on the land, and it is in view of the activities going on the land that the plaintiffs claimed the following reliefs against the defendant:-

- H "(i) A declaration of title to all that piece and parcel of land known as and called "UKATARA" land situate at Eziukwu-Aba Division of the East Central State of Nigeria which piece or parcel of land is delineated PINK in Survey PLAN NO. OKE/D50/74 filed together with this statement of claim.  
(ii) N700.00 (Seven hundred Naira) being damages for trespass;

(iii) An injunction to restrain the Defendant, his servants or agents from trespassing into the said land by continuing with the building in dispute.”

The case of the defendant is that the 1st plaintiff’s brother Azunna Onyero leased the land in dispute to Okoye Eloagu and a deed of lease was executed before a Magistrate on the 4th of November 1957. The defendant denied most of the allegations and claims of the plaintiffs, and stated that the said Okoye Eloagu with consent of the 1st plaintiff assigned his rights on the land to the defendant, and the defendant has since erected a storey building on the land. Two witnesses gave evidence for the plaintiffs’ case. The defendant did not adduce evidence. The learned judge appraised the evidence before him and entered judgment in favour of the plaintiffs. Dissatisfied with the judgment, the defendant appealed to the Court of Appeal which allowed the appeal thus:-

*“In conclusion the appeal is allowed with an order of retrial de novo before ABA High Court not NJIRIBEAKEO. The judgment of NJIRIBEAKEO J in suit A/73/74 delivered on 10th day of July, 1981 is hereby reversed and set aside.”*

The plaintiffs were dissatisfied again, and they have appealed to this court on two grounds of appeal, from which a single issue for determination was distilled. In compliance with the rules of this court, learned counsel for the parties exchanged briefs of argument which were adopted at the hearing of the appeal.

*“Whether the learned justices of the Court of Appeal were right in setting aside the entire judgment of the learned trial judge and making an order of a retrial de novo before another judge at the High Court, when there was no such relief or new triable issue before the Court of Appeal as well as the fact that the appeal before the Court of Appeal was not against the whole decision at the trial court?”*

Mr. Amadi, of counsel for the respondent, in the respondent’s brief of argument also raised a single issue for determination. The issue is:-

*“Whether the learned Justices of the Court of Appeal were wrong in setting aside the judgment of the learned trial Judge and making an order for trial de novo before another judge of the Aba High Court of justice?”*

The submission of the learned counsel for the appellant is that

the lower court erred by setting aside the whole judgment of the learned trial court, when the relief sought in the notice of appeal was:” That the judgment of the Aba High Court be varied by the inclusion of the relief of declaration of title sought by the plaintiffs/appellants as per paragraph 17 (1) of the statement of claim”

B It is his contention that he did not appeal against the whole decision of the trial court, and the respondent did not cross appeal against the judgment seeking the setting aside of the judgment. He referred to the cases of Nurudeen Adebisi Adeye & Ors v. Chief Sanni Agbatogun Adesanya & Ors. 2001 2 SCNJ page 79. The learned  
C counsel submitted that the court below was wrong when it held that the learned trial judge did not make any pronouncement whether to grant or refuse the declaration, and ordered a trial de novo, giving the following reason:-

D *“Since the lower court made no pronouncement whether to grant or refuse the declaration, it will be invidious on the part of this court to grant the prayer as such an exercise will be ultra vires.”*

According to the learned counsel the learned trial judge had made a pronouncement when in his judgment he posited thus:-

E *“In the present case, a declaration of title to the land in dispute was not part of the plaintiffs’ claim. There was no application to amend the writ and therefore the court cannot take any notice of paragraph 17 (1) of the statement of claim which is hereby struck out.”*

F It is a further submission of the learned counsel that the learned trial judge having struck out the said paragraph 17(1) of the statement of claim, he had made a pronouncement, and refused to grant the said declaration of title. On the principles governing an order for trial de novo, reliance was placed on the case of Patrick Adesomwan  
G v. G. O. Awerieba & Anor 1996 3 SCNJ page 1.

In replying the above submissions, the learned counsel for the respondent has submitted that the lower court was right in setting aside the judgment of the learned trial court and ordering a trial de novo. His reasons being that a court will not grant to a party a relief  
H he did not seek, and an appellate court will not hear an appeal or make decisions in respect of an appeal on matters that did not arise from the decision of the lower court. He placed reliance on the cases of Engineer Goodness Agbei & Anor v. Audu Ogbeh & ors 2006 5 SCNJ page 314 and R. I. Ikweki & Ors. v. James Ebele & Anor 2005

2 SCNJ 242.

According to learned counsel the learned trial court did not make a pronouncement as to whether or not to grant the declaration of title sought by the appellant, and even though there was no cross appeal by the respondent at the Court of Appeal, the justices were not bound to swallow hook line and sinker the submissions of the appellants and enter judgment. He further argued that the trial court did not try the issue of declaration of title to the land simply because the court was under the mistaken impression that the appellants ought to have amended their Writ of Summons rather than including the Declaratory relief in their statement of claim. Having not tried that issue, it was a new issue before the Court of Appeal which requires the remittance of the case to the trial court for trial de novo before another judge.

Indeed appellants in their Writ of Summons sought for only:-  
 “(a) N700.00 (Seven hundred Naira) damages for the said trespass.  
 (b) Injunction to restrain the Defendant, his servants and workmen from repeating or continuing the said trespass or in any way interfering with the plaintiffs’ possession of the said land.”

***It was not until when they filed their statement of claim that they added the relief of declaration of title to the land in dispute, a relief that is far weightier than those sought in the Writ of Summons. In fact in most cases the reliefs sought in the writ are invariably hinged on the claim for declaration of title. Be that as it may the appellants sought this relief after taking out the writ of summons. Authorities abound that a statement of claim supersedes a writ of summons, and so the content of a statement of claim is what a learned trial judge should consider in determining a case.*** See Otanioku v. Alli 1977 11-12 SC. 9. Udechukwu v. Okwuka 1956 1 F.S.C. 70, and Chigbu v. Tonimas (Nig.) Ltd. (1999) 3 NWLR part 593 page 115. Now, what facts did the plaintiffs plead in their statement of claim in support of the claim for declaration of title to land, and were issues joined. I will reproduce the salient averments at this juncture. They read:-

“5. The land in dispute which forms part of a large parcel of land known as and called. “UKATARA” belonging to the Onyero family of Eziukwu Aba was leased to the 2nd Plaintiff for a term of 99 years at an annual rent of N1.00. (one Naira).

6. About 20 years ago there were negotiations between the first Plaintiff's brother Azunna Onyero (now deceased) and one Okorie Eloagu for the lease of the land in dispute to him.

7. The first Plaintiff's deceased brother and or his successor was entitled to an annual rent of N1.00 during the currency of the term to be granted by the lease.

8. After the said negotiations referred to in paragraph 6 of this statement of claim, and before the Nigerian Civil War the said Okorie Eloagu was not... Until, sometime in January, 1974, when he the said Okorie Eloagu came and offered arrears of rents of 7 years to the 1st plaintiff.

9. Sometime in (sic) about January, 1974 Mr. Eloagu approached the first Plaintiff to accept money covering rent for 7 years; but the first Plaintiff refused the money and told Mr. Eloagu that the land now belonged to the second Plaintiff."

The defendant in his statement of defence averred the following:-

"4. In particular answer to paragraphs of the statement of claim, the defendant avers that the first Plaintiff by deed of lease executed before a Magistrate on the 4th of November 1957, leased the land now in dispute to the defendant.....

5. At a later date the aforesaid Okoye Eloagu with consent of the 1st plaintiff assigned his rights and interests in the land now in dispute to the defendant. Defendant will at the trial tender and rely on the aforesaid mentioned Deed of Lease and Deed of Assignment.

14. As for paragraph 17 (seventeen) of the statement of claim the defendant avers that the plaintiffs are entitled to any of the reliefs which they are claiming."

Issues were joined, and the plaintiffs testified in support of their joint averments, at the end of which the learned counsel for the plaintiffs/appellants closed their case and asked for judgment. It is worthy of note that the defendant and his counsel (according to the record) had stopped appearing in court, hence no evidence of the defendant was recorded, and the learned trial judge adjourned the case for judgment.

The learned trial judge before evaluating the evidence before him reviewed the reliefs sought by the plaintiffs/appellants in the writ of summons vis a vis the statement of claim, thus:-



*“A claim for declaration of title was not part of the original claim stated in the writ of summons. This new claim was included in the statement of claim without an order of court where a plaintiff wishes to include claims which have not appeared in the writ of summons served on the defendant he has to apply for an amendment of the writ to include the fresh claim. Where he fails to do so and arbitrarily sets up a fresh claim in his statement of claim the court will not take any cognizance of it. It will be completely ignored.”*

Thereafter, the learned judge struck out the said paragraph 17(1) supra, and it is on record that he did not consider the merit or demerit of the relief contained in the said paragraph. Having struck out the said relief, the learned trial judge discountenanced the relief and based his judgment on the reliefs in the writ of summons. It is instructive to note that the appellants did not appeal against the striking out of the controversial relief, as can be seen from the notice of appeal of the appellants in the Court of Appeal. The single ground of appeal in the notice of appeal merely quarrels with the learned trial judge’s refusal to grant the relief as it reads thus:-

“ERROR IN LAW: The learned trial judge erred in law by refusing or failing to grant the relief of declaration of title sought by the Plaintiffs/ Appellants on the ground that paragraph 17(i) of the statement of claim was inconsistent or at variance with and not contained in the writ contrary to established judicial authorities that the statement of claim supersedes the writ.”

***In fact, none of the particulars of error touched on the striking out. It is instructive to note that apart from striking out the relief for the declaration of title to land, it definitely did not pronounce on whether it has granted the said relief or not. That being the position of the appeal, the lower court was in firm ground when in the lead judgment it made the following observation:-***

***“To meet the justice of the case as the lower court struck out the claim of declaration to statutory right of occupancy adopting the statement of LORD DENNING in the Privy Council case of MACFOY v. U.A.C. 1962 A. C. 152 that you cannot build something on nothing as it is bound to collapse since the lower court made no pronouncement whether to grant the prayer such an exercise will be ultra vires the appellate***

***powers of this court.”***

***I subscribe to the above. The order of trial de novo made by the lower court is in order and cannot be faulted in the circumstance of this appeal. The single issue in this appeal is resolved in favour of the respondent, and the grounds of appeal to which it is married fail. The end result is that this appeal fails in its entirety. The judgment and order of the Court of Appeal for a trial de novo is hereby affirmed. I assess costs at N50,000.00 in favour of the respondent, against the appellants.***

### **TABAI JSC**

I have read the lead judgment prepared by my learned brother Mukhtar, JSC. I agree with the reasoning and conclusion therein that the appeal lacks merit. It is settled law that the reliefs claimed in the Statement of Claim supersede those in the writ of summons. See OVERSEAS CONSTRUCTION LTD Vs CREEK ENT. LTD (1985) 3 NWLR (part 13) 407; UNION BEVERAGES LTD Vs OWOLABI (1988) 1 NWLR (part 68) 128.

In the writ of summon, the plaintiffs claimed two reliefs for damages for trespass and injunction. In paragraph 17 of the Statement of Claim however, they claimed as follows:-

- (i) A declaration of title to all that piece or parcel of land known as and called “UKATARA” land situated at EZIUKWU-ABA, Aba Division of East Central State of Nigeria which piece or parcel of land is delineated PINK in survey plan No. OKE/D50/74 filed together with this Statement of Claim.
- (ii) N700.00 (Seven Hundred Naira) being damages for trespass.
- (iii) An injunction to restrain the Defendant; his servants or agents from further trespassing into the said land by continuing with the building on the land in dispute.

The Defendants/Respondents filed their Statement of Defence after the exchange of pleadings. The matter was tried. In his judgment, the learned trial judge Njiribeako J. persevering under the mistaken belief that the claim for declaration of the in the statement of claim was not properly before the court concluded as follows:-

*“A claim for declaration of title was not part of the original*

*claim in the writ of summons. This new claim was included in the statement of claim without an order of court. Where a plaintiff wishes to include claims which have not appeared in the writ of summons served on the defendant, he has to apply for amendment of the writ to include the fresh claim. Where he fails to do so and arbitrarily sets up a fresh claim in this statement of claim the court will not take any cognizance of it. It will be completely ignored. In the present case declaration of title to the land in dispute was not part of the plaintiffs' claim. There was no application to amend the writ and therefore the court cannot take any notice of paragraph 17(i) of the Statement of Claim which is here by struck out."*

The plaintiffs were understandably dissatisfied with the judgment and proceeded on appeal to the court below. The only relief sought in the Notice of Appeal was for an order to vary the judgment of the trial court by the inclusion of the relief for declaration of title in paragraph 17(i) of the Statement of Claim. In its judgment on the 11th day of July, 1996, the appeal was allowed. But rather than varying the judgment of the trial court by including the relief for declaration of title as prayed by the plaintiffs/Appellants, the Court of Appeal made an order for re-trial. The plaintiffs have thus come on further appeal to this Court.

The single issue which calls for determination is whether the Court of Appeal was right to make the order for retrial. It is trite law that where a trial court fails to properly evaluate evidence and make findings on matters on which the parties have joined issues, the appropriate order is that for retrial. This is particularly so where the evaluation would entail the court's assessment of the credibility of witnesses. In *AYINDE ADEYEMO Vs OKUNOLA AROKOPO* (1988) 1 N.S.C.C. 991 at 995 this court per Obaseki JSC restated the principle succinctly thus:-

*"The duty of the trial court or president is to consider all the evidence adduced carefully and make findings on them before coming to his judgment. He had the advantage of seeing the witnesses testify and forming an impression about their demeanour so as to come to a decision about their credibility. A Court of Appeal is deprived of the opportunity of seeing and hearing the witness testify. Even if the Court of Appeal judges may have come to a different decision, if they were sitting as trial judges, having been deprived of*

*the opportunity of seeing the witnesses and judging their credibility, the Court of Appeal's duty as an appellate court is to send the case back to the trial court or High Court for either the same judge or another judge to re-hear the case."*

I will simply like to adopt the principle evidence in the above statement. In paragraph 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16 of the Statement of Claim filed on or about the 7th of April, 1974 quite a number of matters have been pleaded. They pleaded negotiations, offers by Mr. Okone Eloagu to pay 7 years arrears of rents, force applied on the first plaintiff to accept N100. 00 (One hundred Naira) as payment for the said 7 years arrears of rents etc. All these were controverted in a 17 paragraph Statement of Defence. Not all these matters could be proved by documentary evidence. In my view, the proof or disproof of these would necessarily entail some and testimonies at a trial and where the trial court would have the opportunity to watch the demeanour of witnesses, form its impression about their credibility and make the necessary findings of facts - a duty which is the exclusive preserve of the trial court. See *ABUSOMWAN Vs MERCHANTILE BANK (NIG) LTD (No.2) 1987 3 NWLR (part 60) 196*. The court below cannot and could not have embarked on that trial exercise. In the circumstances, the court below was properly on course when it ordered a retrial so that all the issues including the issue of title could be tried and determined. A retrial is the only way to meet the ends of justice in this case.

For the foregoing reasons and the fuller reasons contained in the lead judgment, I also dismiss the appeal.

I abide by the order on costs contained in the lead judgment.

G

### **MUHAMMAD JSC**

By a writ of summons the plaintiffs before ABA State High Court of Justice, claimed as follows:

- a) The sum of N700.00 being damages for trespass
- b) An injunction to restrain the defendant, his servants or agents from further trespassing into the said land by continuing with the building on the land in dispute.

Further claim as contained in paragraph 17[1] of the statement of claim of the plaintiff is for a declaration of title to the land

which relief was not originally contained in the writ of summons.

The defendant filed his statement of defence. Trial was had. At the end, the learned trial judge granted the other reliefs in the statement of claim but refused and struck out the relief of title to land contained in paragraph 17[1] of the statement of claim on the basis that the plaintiff ought to amend the statement of claim so as to bring it in the contents of paragraph 17[1] of the statement of claim. B

The appellants appealed to the court below. The court below allowed the appeal, set aside the trial court's judgment and ordered for a trial de novo.

The appellants further appealed to this court on two grounds of appeal. C

Learned counsel for the appellant formulated the following lone issue for determination,

"Whether the learned Justices of the court of appeal were right in setting aside the entire judgment of the learned trial judge and making an order of a retrial de novo before another judge at the Aba High Court, when there was no such relief or new triable issue before the Court of Appeal as well as the fact that the appeal before the court of appeal was not against the whole decision of the trial court?" D E

Now, after having gone through the submissions of learned counsel for the respective parties, the record of appeal including the judgments of the two courts below, what this appeal reminds me of are the basic and elementary principles of pleadings. The specific one under reference here is the superiority between a claim in a writ of summons and a plaintiff's statement of claim. A plethora of decided authorities have, for quite some time now, made it abundantly clear that a claim in a statement of claim which discloses a reasonable/good cause of action, supersedes the one contained in a writ of summons. See: Udechukwu v. Okwuka (1956) NLR 158; Lahan v. Lajoyetan (1972) 6 SC 190. In 1994, this court, per Belgore, JSC (as he then was), in the case of Enigbokan v. American International Insurance Co. Nig. Ltd. (1994) 4 NWLR (Pt.348) 1, at 19, held, inter alia, as follows: F G H

*"In all actions in our superior courts of record where pleadings set out the facts relied upon by each party, a writ must first be taken out of the court's registry. But once the pleadings are filed and exchanged, the statement of claim therefrom supersedes the writ. It is*

*the law that the writ itself must disclose reasonable cause of action. In many cases the statement of claim more than a writ amplifies through facts averred the real action a party pursues.* "NTA v. Anioho (1972) S SC 156; Udechukwu v. Okwuka (1956) 1 FSC 70 at 71, 1956 1 SC NLR 189.

B It is however necessary for the statement of claim to aver clearly its purport and the practice whereby at the conclusion of the statement of claim the plaintiff avers "the plaintiff therefore claims as per writ of summons" should be discouraged. It is in the interest of justice to state clearly all that a party claims and reference to writ of summons is a lazy way of pleadings Keshiru v. Bakare (1967) 1 All NLR 280 at 284; see also Iguh, JSC at page 20 paras F - H."

C On the appeal on hand, paragraph 17[1] of the statement of claim avers in clear and unequivocal terms a claim for declaration of title which was not claimed in the particulars of claim in the writ of summons. The respondent in paragraph 14 of his statement of defence joined issues with the appellants on the matter. Thus, the claim for declaration of title was well pleaded. It was thus, wrong of the trial court to have struck same out on the premises that the appellants ought to have applied to amend the writ before the claim could be maintainable. What the lower court did, in my view, is quite in order. This is in view of the fact that although the claim for a declaration of title to the land in dispute was validly pleaded, its grant or refusal by the trial court was at the discretion of that court. It is the law that all discretion must be exercised judicially and judiciously. And for the trial court to do so in this case, there must be sufficient materials which will influence the court's exercise of discretion. See Egbunike v. Muonweokwu (1962) 1 SCNLR at p. 97; University of Lagos v. Aigoro (1985) 1 NWLR (Pt.1) 143; Elendu v Ekwoaba (1 998) 12 NWLR (Pt. 578) 320; ACME Buildings Ltd v. K. S. W B. (1999) 2 NWLR (Pt. 590) 288.

F Further, the trite position of the law is that a plaintiff succeeds on the strength of his case and not on the weakness of the defendant's case. See: Kodilinye v. Mbanefo Odu (1935) 2 WACA 336 at 337; Aromire v. Awoyemi (1972) 1 All NLR (Pt. 1) 101 at 112.

H It is for this reason that a trial court does not form the habit of granting declaratory relief(s) except where the plaintiff discharges the burden of proof placed on him by the law. Since no evidence was

called in the establishment of the claim in paragraph 17[1] of the statement of claim that was why the court below ordered for a retrial before another judge as the trial court made no pronouncement whether it granted or refused the declaration on the claim of title to the land in dispute. That, in my view, was the only way to meet the ends of justice of the case. It is the practice of appellate courts to send back to a trial court for making pronouncement[s] upon any issue/ issues that was/were not pronounced upon by that court when it first treated the case, provided the trial court has jurisdiction over the issue/issues. See: *Osasona v. Ajayi* (2004) 5 SC (Pt. 1) 88; *Onyebuchi v. INEC* (2002) 1 NWLR (Pt. 769) 417 at 439 - B - D; *Din v. A - G Federation* (1981) 1 NWLR (Pt. 17) 471 at 508; *Ojora v. Odunsi* (1984) 1 All NLR 55. B C

For this and the more detailed reasons given in the leading judgment of my learned brother, Mukhtar, JSC, I too find no merit in this appeal and same is hereby dismissed by me. I abide by all orders, including that of costs, made in the leading judgment. D

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### **GALADIMA JSC**

I have had the opportunity of reading in advance, the draft of the Judgment just delivered by my learned brother, MUKHTAR JSC. I agree completely with the reasoning and conclusions. E

This case has a chequered history and tortuous journey of over 37 years through Courts. The Appellants as plaintiffs commenced action at ABA High Court in the then EAST-CENTRAL STATE OF NIGERIA, now in ABIA STATE of Nigeria, with a writ of summons. F

The concluding part of the particulars of claim reads:

“3. Whereof the plaintiffs’ claim from the Defendant as follows:- G

(a) N700.00 (Seven hundred Naira) damages for the said Trespass.

(b) Injunction to restrain the Defendant, his servants and Workmen from repeating or continuing the said trespass or in any way interfering with the plaintiffs’ possession of the said land.” H

The Defendant now Respondent was served with the writ of summons in accordance with the Rules of the trial High Court. Pleadings were ordered, and filed, delivered and exchanged. Appellant

concluded their statement of claim in paragraph L7 thus:

*“17. WHEREFORE the plaintiffs claim against the Defendant for:*

*(i) A declaration of title to all that piece and parcel of land known and called “UKATARA” land situate at EZIUKWU-ABA, ABA Division of the East Central State of Nigeria which piece or parcel of land is delineated PINK in Survey plan No.OKE/D50/74 filed together with this Statement of Claim.*

*(ii) N700.00 (Seven Hundred Naira) being damages for trespass.*

*(iii) An injunction to restrain the Defendant, his servants or agents from further trespassing into the said land by continuing with the building on the land in dispute”.*

At the trial High Court, upon completion and exchange of pleadings, the case was set down several times for trial, but it suffered many adjournments at the instance of the Respondent. On 12/05/1981, as the Respondent and his counsel had stopped appearing in the case, the Appellants opened their case and called two witnesses, after which the Judgment was reserved for 10/09/1981. On that day NJIRIBEAKO (J) of ABA High Court delivered his Judgment at page 24 of the Record of proceedings. After referring to paragraph 17 of the Statement of Claim supra he stated thus:

“A claim for declaration of title was not part of the original claim stated in the Writ of Summons. This new Claim was included in the Statement of Claim without an order of Court. Where a plaintiff wishes to include claims which have not appeared in the Writ of Summons served on the defendant, he has to apply for an amendment of the Writ to include the fresh claim. Where he fails to do so and arbitrarily sets up a fresh claim in this Statement of Claim, the court will not take any cognizance of it. It will be completely ignored.

In the present case declaration of title to land in dispute was not part of the plaintiffs’ claim. There was no application to amend the writ and therefore the court cannot take any notice of paragraph 17((1-) of the Statement of Claim which is hereby struck out.”

The Appellants were dissatisfied with that decision and filed a Notice of Appeal in Port Harcourt Division of the Court of Appeal on 23/07/1981. The only relief on the Notice and Ground of Appeal filed by the Appellants was for the Judgment of the trial court to be



varied by the inclusion of the first relief of declaration of title sought by the Appellants as per paragraph 77(1) of the statement of claim.

The Respondent did not file any brief of argument before the court below and neither did he appear before the court. Consequently the Appellants filed an application for the appeal to be heard and determined on the appellants' Brief of Argument. The application was eventually argued and granted on 16/03/1994. The order granting the said application was set as follows:-

“COURT: Abonta (Esq.) moves in terms of the motion. Order as prayed. This appeal shall be heard on the Appellant (sic) brief alone, the Respondent having neglected to file his brief. Adjourned to 29/09/1994 for hearing.”

The Appeal was heard on 13/02/96 and Judgment fixed for 25/04/96. It was not delivered and further adjourned to be delivered on 09/05/96 and later to 21/05/96. On the said 21/05/96, the court below urged the appellants' counsel to reargue the appeal for obvious reasons. Counsel reargued the said appeal whereupon Judgment was fixed for 11/07/96.

On 11/07/96 judgment was eventually delivered and order made in the following terms:-

*“In conclusion the appeal is allowed with an order of retrial de novo before ABA High Court not NJIRIBEA KO. The Judgment of NJIRIBEA KO (J) in Suit/A/73/74 delivered on 10th day of July 1981 is hereby reversed and set aside.”*

Dissatisfied, the Appellants further appealed to this Court filing Notice of Appeal on 13/08/96, containing TWO GROUNDS of Appeal which are reproduced below without their particulars:

“(a) GROUND ONE: ERROR IN LAW

The learned Justice of the Court of Appeal erred in Law when they held that, “.....Applying Section 16 of Court of Appeal Act supra after due and careful consideration of the principle to guide the Court on retrial of this case is remitted to the High Court of Aba, Abia High Court for retrial de novo before another Judge when a relief/remedy for an order of retrial of the said suit was not before the Court and this occasioned a miscarriage of justice to the Appellants”

GROUND TWO: ERROR IN LAW

The learned Justice of the Court of Appeal erred in law when they held in effect that they could not grant the said relief and the

Appellants did not prove same but because the trial Court did not know that a relief in a statement of claim not contained on the writ of summons superseded the latter, they would have held otherwise in as far as the trial court granted the appellant reliefs in the statement of claim as claimed.”

B Appellants’ counsel distilled single issue for determination thus:  
 1) Whether the learned Justices of the Court of Appeal were right in setting aside the entire Judgment of the learned trial Judge and making an order of a retrial de novo before another Judge at the Aba High Court, when there was no such relief or new triable issue before the Court of Appeal as well as the fact that the appeal before the Court of Appeal was not against the whole decision of the trial court?”

On his part the Respondent’s counsel presented sole issue for determination as follows:

D “Whether the Learned Justices of the Court of Appeal were wrong in setting aside the Judgment of the learned trial Judge and making an order for trial de novo before another Judge of the Aba High Court of Justice?”

E On 27/09/2011, at the hearing of the appeal, learned counsel for the Appellants, K.C. Nwifo Esq. adopted his brief of argument and urged the court to allow the appeal set aside the Judgment of the court below and restore the Judgment of the trial court and to grant relief as contained in paragraph 17(1) of the statement of claim.

F In the brief of argument, learned counsel for the Appellants has submitted that the Learned Justice of the Court of Appeal erred in law when they made an order setting aside the whole judgment of the trial court and remitting same for trial de novo before another Judge of the Aba High Court. That at a glance the ,relief sought by the Appellants was that the Judgment of the trial court be varied by the inclusion of the relief of declaration of title sought as par paragraph 17 (1) of the Statement of Claim.

H K. I. AMADI Esq. learned counsel for the Respondent, having adopted the brief has urged this Court to dismiss the appeal. It is submitted that the learned Justice of the Court of Appeal were right in setting aside the Judgment of the Court below and ordering a retrial. Relying on this Court decision in R. I. Ikwe. & Ors’ V. MR. JAMES EBELE & ANOR (2005) 2 SCNJ Page 242, and ENGINEER GOODNESS AGBEI & ANOR. V. AUDU OGBEH & ORS. (2006) 5 SCNJ

314 learned counsel submitted that a court does not make it a practice to grant a party a relief he did not seek and therefore the Appellants are not entitled to be granted the declaration of title sought in paragraph 17(1) of their Statement of Claim. That the trial court did not try the issue of declaration of title to the land and therefore this became a new issue before the lower court which requires the remittance of the case to the trial court for trial before another Judge. B

Since the Appellants did not only dwell on the propriety of the lower court to order for retrial in the circumstance of this case, but went further on some polemics rather than the substance of the matter, I am bound to state and explain what the law is on these points. C

In appropriate cases a court will make an order of retrial when a trial court fails in its duty to make appropriate findings and all the issue of fact. In the case at hand, the trial court had not made any pronouncement as to whether or not to grant the declaration of title sought by the plaintiffs/Appellants in paragraph 1-7 (1) of their Statement of claim. By virtue of s.16 of court of Appeal Act the court of Appeal is vested with the powers to make an order which a lower court can make. It can re-hear a case on appeal, but it does so on the record and where evidence has been led in the lower court which establishes a fact. The trial court did not try the issue of declaration of title to the land simply because the Court was under the impression (mistakenly though) that the appellants ought to have amended their writ of summons rather than including the Declaratory Relief in their statement of claim. Having not tried that issue, I agree with the learned counsel for the Respondent, that it was therefore a new issue before the Court of appeal which required the remittance of the case to the trial court for trial de novo before another Judge. D E F

It is in the light of the foregoing and for the detailed reasoning G in the lead Judgment of my learned brother MUKHTAR JSC that I also will dismiss this appeal, affirming the Judgment of the court below remitting the case for retrial expeditiously before another Judge of the ABIA STATE High Court. I abide by order as to costs. H

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### NGWUTA JSC

In a writ of summons issued at the Registry of the High Court, Aba, in the then East Central State of Nigeria on 16th April, 1974 the

Appellants, then Plaintiffs, claimed against the Respondent, then Defendant, as follows:

“7. The plaintiff’s (sic) claim is for the sum (sic) N700.00 being damages for trespass.

2. Injunction to restrain the defendant, his servants and workmen from repeating or continuing the said trespass or in any way interfering with the plaintiff’s possession of the land, vide full particulars of claim hereto attached overleaf.”

Neither the claim nor the particulars thereof included a declaration of title to the land allegedly trespassed upon by the Respondent (as Defendant).

On 25/3/75, Umezina, J. granted the Appellants; application for extension of time to file their Statement of Claim and Plan. Within the time extended, the Appellants filed their Statement of Claim and Survey Plan on 4/4/75. The Statement of Claim included an additional claim for:

“(1) A declaration of title to all that piece and parcel of land known as and called ‘KATARA’ land situate at Eziukwu-Aba, Aba Division of the East Central State of Nigeria which piece or parcel of land is delineated PINK in Survey Plan No.OKE/D50/74 filed together with this Statement of Claim.” (See page 12 of the Record).”

Appellants’ motion for judgment in default of a Statement of Defence was withdrawn and struck out on(sic) and on his own motion the Respondent was granted 30 days within which to file and serve his Statement of Defence. The Statement of Defence was filed on 15th January, 1976.

On 12/5/81, the presiding Judge Njiribeako, J. was informed that “the Respondents and his counsel have stopped appearing in the case for over one year now”. See page 30 of the Record. His Lordship then asked the appellants to open their case. On the same date the 1st and 2nd Appellants testified as PW1 and PW2, respectively in the absence of the Respondent or his counsel. 2nd Appellant testified in conformity with paragraph 17 of the Statement of Claim. The case was adjourned to 10th July, 1981.

In the judgment delivered on schedule, Njiribeako, J., on the claim for declaration of title, held as follows.

“A claim for declaration of title was not part of the original claim stated in the Writ of Summons. This new claim was included in

the statement of claim without an order of court.”

His Lordship, in his view, stated the law thus:

*“Where a Plaintiff wishes to include claims which have not appeared in the writ of summons served on the defendant he has to apply for an amendment of the writ to include the fresh claim. Where he fails to do so and arbitrarily set up a fresh claim in his statement of claim, the court will not take any cognizance of it. It will be completely ignored.”* (see page 34 of the Record (lines 18 to 27)).

True to his statement of law, the learned trial Judge found for the Appellants on the claim for damages for trespass and injunction, ignoring completely the claim for a declaration of title.

Aggrieved by the portion of the judgment in which the learned trial Judge declined to take cognizance of their claim for declaration of title set out in paragraph 17(1) of their Statement of Claim, the Appellants approached the Court of Appeal (then Federal Court of Appeal) sitting at Enugu on a lone ground of appeal. The sole ground of appeal is herein reproduced, shorn of its particulars:  
ERROR IN LAW:

The learned trial Judge erred in law by refusing or failing to grant the relief of declaration of title sought of by the Plaintiffs/Appellants on the ground that paragraph 17(1) of the Statement of Claim was inconsistent or at variance with and not contained in the Writ contrary to the established judicial authorities that the State of Claim supersedes the Writ.” (See page 44 of the Record).

The appeal was heard and determined ex parte as the Respondent filed no brief and showed no interest in the appeal, even though relevant processes were served on the Respondent in person. This was pursuant to the order on the Appellants’ application that the appeal be heard and determined on the Appellants’ brief alone, made by the Court of Appeal Port Harcourt Division on 16/3/94.

On 21/5/86 learned counsel for the Appellants adopted and relied on his brief of argument and judgment was reserved till 11/7/96.

In a well reasoned judgment, concurred in by Okezie, JCA and Rowland, JCA (May God rest his soul), Onalaja, JCA, concluded thus:

*“In conclusion, the appeal is allowed with an order of retrial de*

*novo before Aba High court not NJIRIBEAKEO. The judgment of NJIRIBEAKEO, J in Suit No.A/73/74 delivered on 10th day of July 1981 is hereby reversed and set aside.”*

Again, the Appellants were dissatisfied with the judgment and appealed to this Court on two grounds, herein and reproduced shorn  
B of the particulars:

GROUPS OF APPEAL:

(a) GROUND ONE - ERROR IN LAW:

The learned Justices of the Court of Appeal erred in law when they  
C held that... Applying section 16 Court of Appeal Act (supra) after  
due and careful consideration of the principle to guide the court on  
retrial this case is remitted to the High court, Aba, Abia High court for  
retrial de novo before another Judge...’ when a relief/remedy for an  
order of retrial of the said suit was not before the Court and this  
D occasioned a miscarriage of justice to the Appellants.

(b) GROUND TWO - ERROR IN LAW:

The learned Justices of the court of Appeal erred in law when  
they held in effect that they would not grant the said relief and the  
Appellants should prove their entitlement to the said relief and this  
E occasioned a miscarriage of justice to the Appellants.”

Briefs of argument were filed and exchanged by learned counsel  
for the Parties. Though learned counsel for the Appellants, in para-  
graph 2.0 of his brief indicated he had more than one issue for deter-  
F mination, only the following single issue was raised and argued in his  
brief:

(i) Whether the learned Justices of the Court of Appeal were  
right in setting aside the entire judgment of the learned trial Judge  
and making an order of a retrial de novo before another Judge of  
G the Aba High Court when there was no such relief or new triable  
issue before the Court of Appeal as well as the fact that the appeal  
before the court of Appeal was not against the whole decision of the  
trial Court?”

In his own brief of argument, learned counsel for the Respond-  
H ent formulated the following issue for determination:

“Whether the learned Justices of the Court of Appeal were right in  
setting aside the judgment of the learned trial Judge and making an  
order for trial de novo before another Judge of the Aba High Court  
of Justice-”

The issue formulated in the Appellants' brief appears more comprehensive than the Respondent's issue, capturing all the relevant facts before the trial Court upon which the lower Court predicated its decision. It encompasses the Respondent's issue. I will therefore determine the appeal on the issue in the Appellants' brief of argument. B

Arguing the lone issue in his brief, learned counsel for the Appellants made reference to the relief the Appellants sought in the lower Court - "that the judgment of the Aba High Court be varied by the inclusion of the relief of declaration of title sought by the plaintiffs/Appellants as per paragraph 17(1) of the Statement of Claim." C He argued that the Appellants did not appeal against the entire judgment of the lower Court nor did they pray for an order of trial de novo.

Learned counsel referred to Nurudeen Adebisi Adeye & Ors. D vs. Chief Sanni Agbatogun Adesanya & ors (2001) 2 SCNJ page 79 and submitted that a Court is without powers to grant a relief not sought by a party before it. He contended that having agreed that the Statement of Claims supersedes the Writ of Summons, the lower Court ought not to have set aside the entire judgment. He referred E to page 57 of the record for the issue for determination before the lower Court. Learned counsel-reproduced a portion of the judgment of the lower Court wherein Onalaja, JCA in the lead judgment held thus:

*"Since the lower Court made no pronouncement whether to grant or refuse the declaration, it will be invidious on the part of this court to grant the prayer as such an exercise with be ultra vires." and argued that the lower court contradicted its finding that "the issue and submission of the Appellants is meritorious and sound in law thereby having no alternative than to allow the appeal and which is hereby allowed"* F G

In support of his argument that the lower court erred when it held that the trial court did not make any pronouncement whether to grant or refuse the declaration, counsel reproduced and relied on H the following passage in the judgment of the trial Court: "In the present case, declaration of title to the land in dispute was not part of the Plaintiffs' claim. There was no application to amend the Writ and therefore the court cannot take any notice of paragraph 17(1) of the

Statement of claim which is hereby struck out”; stressing the conclusion - “which is hereby struck out” to show that the trial court made a pronouncement of his claim for declaration of title.

Counsel argued that in the absence of a cross—appeal’ the lower Court had no basis for the order for trial de novo; more so when the principles of trial de novo set out by this Court in Patrick A. Abusomwan vs G. O Awerioba & Anor (1996) 3 SCNj 1 at 5 paragraphs 21-24 do not apply to this case. He referred to Adeyemi vs Arokopo (1988)2 NWLR (Pt.2) page 703 at 211 for the decision of this Court that:

*“An order of the retrial is not necessary if an appeal Court can, in the exercise of its appellate jurisdiction’ do justice in the case and bring the litigation to an end.”*

In summary, learned counsel impugned the decision of the lower Court to order a retrial after allowing the appeal. He added that the trial court found for the Appellants but erred in law in its refusal to grant the declaration on the ground that it was not claimed in the writ and no amendment was sought in respect of the claim for declaration of title.

Learned counsel urged the Court to allow the appeal’ set aside the judgment of the lower Court, restore the judgment of the trial Court and grant the relief as contained in paragraph 17(1) of the Appellants’ Statement of Claim.

Learned counsel for the Respondent filed a document which literally is what it purports to be “brief”. Learned counsel’s argument was compressed within about one page of the two page brief of argument.

In his argument, learned counsel stated that a court will not grant a party a relief not sought. He relied on Engineer Goodness Agbei & Anor vs Audu Ogbeh & ors (2006) 5 SCNj 314. He argued further that a court of Appeal cannot hear an appeal on a matter that did not arise from the decision appealed against He relied on R. I. Ikweke & Ors v. Mr. James Ebele & Anor (2005) 2 SCNj 22. He contended that the trial court made no pronouncement to grant or refuse the declaration of title sought in paragraph 17(1) of the Statement of Claim. He added that the fact that there is no counter-claim does not justify the lower Court in granting a relief on which the trial Court did not decide one way or the other. He urged the Court to



dismiss the appeal.

The law regarding the Writ of Summons vis-a-vis the Statement of Claim is that the latter supersedes the former. In consequence if a relief claimed in the Writ is not also claimed in the Statement of Claim, it means that so much of the claim is abandoned. In the same vein, a relief not claimed in the Writ but added to the Statement of Claim will be deemed as claimed before the Court. See Chief J. O. Lahan & Ors v. R. Laayetan & Ors (1972) 6 SC 190 at 192 and Nwankwo v. Nwankwo (1992) 4 NWLR (Pt.238) 693 at 711. B

The learned trial Judge found, in effect, albeit erroneously, that the Court had no jurisdiction to entertain the claim for declaration of title in the Statement of Claim paragraph 17(1). Since there was no order for amendments, the Court therefore struck out the relief. Learned Counsel for the Appellant relied heavily on the order striking out the claim for declaration to say that the Court refused to grant same. This argument is misconceived for a court that comes to the conclusion that it has no jurisdiction over a matter erroneously as in this case has a duty and jurisdiction to strike out the matter. After all judgment delivered without justification is a nullity. See *Timitimi & ors. v. Chief Amabebe & ors* (1953) 14 WACA 374 at 377; *Nana Nyarko v. Nana Akowuah* (1954) 14 WACA 426 relied on by Iguh, JSC in *Pares v. Afribank* (2000) 4 SC (Pt.11) 240. The trial court was right to have found for the Appellants on their claims for damages for trespass and injunction based on the unchallenged and uncontroverted evidence at the trial. The lower Court rightly, in my humble view, affirmed the decision of the trial Court on the two reliefs. C  
D  
E  
F

I stated earlier in this judgment that the trial Court did not decide, contrary to the claim of the Appellants, to grant or refuse the claim for declaration of title. The Court below would not have dealt with the claim for declaration as the trial court did not pronounce on it. G

On the facts before the two courts below, a claim for damages for trespass and injunction raised the issue of title to the land in dispute. It is the person in possession or who has a legal right to possession of a piece of land that can sue for damages for trespass and injunction and since the issue of possession or legal right to possession is at large the claim for trial de novo was rightly made. H

Also when a claim for damages for trespass is combined with a

claim for injunction as in this case title to the land is in issue and the issue of title has to be resolved before the claims for damages for trespass and injunction could be determined.

I was privileged to have a preview of the judgment delivered this morning by my learned brother, Tabai, JSC, and I entirely agree with the reasoning and conclusion reached. Based on the above, and the fuller reasons in the lead judgment, I also dismiss the appeal and adopt the consequential orders therein.

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