

**SUPREME COURT OF NIGERIA**  
FRIDAY 1<sup>ST</sup> MARCH, 2013. SC. 125/2003  
**CORAM:- M. MOHAMMED, M. S. MUNTAKA-  
COOMASSIE, S. GALADIMA, N. S. NGWUTA,  
S. S. ALAGOA, JJSC**

1. CHIEF EMMANUEL EYO ETA  
2. MISS AGNES EYO ITA ..... APPELLANTS  
AND  
ELDER CHIEF OKON H. A. DAZIE ..... RESPONDENT

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APPEALS - Issues - Basis - Any issue not distilled from ground of appeal - Goes to no issue in appeal - And is liable to be struck out (H1)

APPEALS - Courts - Findings of facts - C.A. did not overrule trial court's findings - As the operative findings of facts is the one - Made after the oral application for amendment had been granted (H2)

ADMINISTRATION OF ESTATES - Will - Propounder of - Respondent as the propounder of the will - Has a duty to plead and prove due execution of same (H3)

ADMINISTRATION OF ESTATES - Will - Evidence - Unpleaded facts - Evidence led on facts not pleaded - Go to no issue and is liable to be expunged (H4)

COURT PROCESSES - Statement of defence - Amendment - Granting of the oral application to amend the statement - Brought the pleadings in line with evidence on record - As per due execution of the will (H5)

COURT PROCESSES - Error - Amendment - Mistake which is not intended to overreach the court can be corrected - And it must be done without injustice to the other party (H6)

**FACTS**

Before the High Court of Cross River State Calabar Judicial

Division, plaintiffs/appellants claimed against defendant/respondent, a declaration that the pretended Will of the deceased is invalid, an order setting aside the said will and an injunction restraining respondent from executing the will. The parties called three witnesses each and rested their respective cases. On the application of learned counsel for respondent, the matter was adjourned for rejoinder. In his rejoinder on points of law, learned counsel for respondent realized that he did not expressly deny paragraph 23 of the statement of claim nor did he plead due execution of the Will in his statement of defence.

He therefore made an oral application to amend the statement of defence in line with the evidence on record by adding that *“the Will was duly executed in accordance with the law”* to paragraph 33 of the statement of defence. Appellants opposed the oral application, arguing that there should be a formal application to enable appellants react. Appellants contended that the application at the stage it was made would bring untold hardship to them. In his ruling, the learned trial Judge granted the application with cost to appellants. The matter was equally dismissed by the court. Aggrieved, appellants filed appeal at the Court of Appeal, Calabar Division. The court found no merit in the appeal and accordingly dismissed it. Appellants have further appealed to Supreme Court.

### **ISSUES FOR DETERMINATION**

*“(1) Was it right for the Court below to affirm the decision of the trial Court granting the oral application to amend the Statement of Defence in line with the evidence led?”*

*“(2) Was it right for the Court of Appeal to reverse a finding of fact by the trial Court which was not appealed against by the respondent?”*

**HELD** (Unanimously dismissing the appeal per

**NGWUTA JSC)**

*APPEALS - Issues - Basis*

**1. Moreover, of the three issues formulated by the respondent only the second issue can be traced to the appellant’s grounds of appeal. Issues one and three particularly issue one appear**

**to have come from the blues. Any issue not distilled from the ground or grounds of appeal and argument thereon go to no issue in the appeal and are liable to be struck out.**

**Issues 1 and 3 in the respondent's brief are hereby struck out as irrelevant in the determination of the appeal. (p. 1277 C)**

*APPEALS - Courts - Findings of facts*

**2. In his argument that the lower Court reversed the finding of fact of the trial Court not appealed against, learned Counsel for the appellant did not appreciate that the finding of fact affirmed by the lower Court is the one made by the trial Court after it granted the oral application to amend the defendant's pleading and not the one made before the amended pleadings. It is therefore not correct to say that the lower Court overruled the trial Court's finding of fact not appealed against. The operative findings of fact as to the due execution of the Will is the finding made after the oral application for amendment had been granted. The issue is resolved against the appellant.**

(p. 1279 B)

*ADMINISTRATION OF ESTATES - Will - Propounder of*

**3. In addition to the general traverse, the respondent, as the propounder of the Will, has a duty to plead and prove due execution of same. Respondent failed to discharge the burden in the pleadings. (p. 1279 F)**

*ADMINISTRATION OF ESTATES - Will - Evidence*

**4. As strenuously argued by learned Counsel for the appellant, evidence led on facts not pleaded goes to no issue and is liable to be expunged. Issues are joined on the pleadings, not on the evidence.**

**Failure to call evidence in support of averment denied means that the averment is abandoned.**

**Conversely, evidence led on unpleaded facts goes to no issue in the case.**

**This was the position when the learned trial Judge started reading the judgment of the Court. The evidence of the DW1-3 relating to the due execution of the Will went to no issue in the**

**matter as the due execution of the Will was not pleaded in the Statement of Defence. At this point the non-execution of the Will in accordance with the law was deemed admitted by the respondent who chose not to plead to the contrary.**

(p. 1280 D)

B

*Statement of defence - Amendment*

**5. However, the scenario changed the moment the trial Court granted the oral application to amend the pleading by pleading due execution of the Will, though much later in the judgment, the amendment made in line with the evidence on record spoke from the date of the original Statement of Defence and the original Statement of Defence was discarded as it were.**

**Once the amendment was granted to bring the pleadings in line with the evidence on record, the amended Statement of Defence superseded the Writ or Claim. (p. 1280 G)**

*COURT PROCESSES - Error - Amendment*

**6. On the propriety vel non of the amendment granted at the time it was sought, the law is that no kind of error or mistake, which if not fraudulent or intended to overreach the Court cannot be corrected, if it can be done without injustice to the other party.**

**Amendment will be allowed if by so doing the real issue in dispute can be raised and resolved.**

**The grant of the application did not cause an undue delay in the proceedings nor is the amendment irrelevant or useless. There is no evidence that it was intended to overreach or ambush the appellant. The learned Counsel for the appellant cross-examined the witnesses who gave the evidence in line of which the respondent sought to amend the Statement of Defence. It is not enough to say that the application was brought in bad faith. I see no fact or facts which show bad faith or from which the inference of bad faith can be drawn.**

**Though the amendment came extremely late at the trial, it did not introduce a new case. It was meant to, and did, bring into focus the main issue in contention between the parties - that is, whether or not the Will was duly executed in accor-**

***dance with the law. And the appellant was compensated by order for costs.*** (p. 1281 A)

## NOTABLE POINTS OF INTEREST

### **NGWUTA JSC**

#### ***1. Appeal – Meaning of***

An appeal is a resort to a superior Court to review the decision of an inferior court and find out whether on the facts placed before it, and applying the relevant and applicable law the inferior court came to a right or wrong decision. (p. 1276 G)

#### ***2. Appeal – Role of respondent***

The traditional role of learned counsel for the respondent, in contradistinction to that of learned counsel for the appellant, is to support the judgment appealed against. Where, however, learned Counsel for the respondent cannot, in good conscience, support the judgment appealed against, he should make his position known to his client with a view to either conceding the issues raised by the appellant or withdrawing from the appeal if his client persists in his pursuit of same. Learned counsel cannot indulge in ambivalence. In his brief of argument, learned counsel for the respondent dwelt on a critique of the judgment of the trial Court and presented a thesis on the High Court (Civil Procedure) Rules of Cross River State to demonstrate that the Court of Appeal, in the judgment appealed against, misapplied the rules, an issue not raised by the appellant, and the respondent did not file a respondent's notice. (p. 1276 H)

### **REPRESENTATION**

J. O. Obono-Obla (Mrs.) with O. S. Ogar, for the Appellants  
Dafe Diegbe, with Mrs. A. Uche-Aniduobi, for the Respondent

### **CASES REFERRED TO**

Ponnamma v. Arumagun (1905) AC 390  
Ogunupebi v. Senilon (1982) 7 SC 164  
Ali v. CBN (1997) 4 NLCR (pt. 498) 152  
Nwudenyi v. Aleke (1996) 4 NWLR (pt. 442) 349  
Labiya v. Anretidea (1992) 10 SCNJ 1

- Bamgboye v. University of Ilorin (1999) 6 SCNJ 295  
 Yusuf v. Oyetunde (1998) 10 SCNJ 1  
 Ndoma-Egba v. Chukwuogor (2004) 2 KLR (pt.173) 671  
 Rotimi v. Macgregor (1974) 11 SC 133  
 Sneade v. Watherton (1904) 1 KB 295  
 B Adewunmi v. A.G. Ekiti State (2002) 93 LRCN 43  
 Amadi v. Thomas Aplin & Co. Ltd (1972) 1 All NLR (pt. 1) 409  
 Shell BP v. Johnmal Eng. Ltd. (1974) 4 SC 33  
 Melifeonwu v. Egbunike (2001) 1 NWLR (Pt.4) 271  
 C Okafor v. Ikeanyi (1979) 3-4 SC 99

### **RULES REFERRED TO**

Cross River State High Court (Civil Procedure Rules) 1987,  
 O. 23 r. 1

D

### **LEAD JUDGMENT BY NGWUTA JSC**

This is an appeal against the judgment of the Court of Appeal, Calabar, delivered on 23rd November, 1999. In the said judgment, the Court below dismissed the appellants' appeal against the judgment of the High Court of Cross River State sitting at Calabar in which the trial Court dismissed the suit filed by the appellants as plaintiffs.

In the High Court, the appellants then plaintiffs had claimed against the respondent (then defendant) as follows:

F “(1) *A declaration that the pretended Will of the deceased is invalid.*

(2) *An order setting aside the pretended will of the deceased for want of due execution and form and as being inconsistent and unconscionable and failing totally of its purpose and intention.*

G (3) *An injunction restraining defendant from executing said pretended will.”*

At the trial in the High Court each side called three witnesses and rested its case. The main addresses of learned counsel for the parties were concluded on 29th October, 1997. On the application of learned counsel for the defendant (now respondent), the case was adjourned to the next day 30/10/97 for rejoinder (See page 68 of the record.)

In his rejoinder on points of law on 30/10/97, learned counsel

for the defendant (now respondent) realized that he did not expressly deny paragraph 23 of the statement of claim nor did he plead due execution of the Will in his Statement of Defence. Learned Counsel for the respondent then made an oral application to amend the Statement of Defence in line with the evidence on record by adding that “the Will was duly executed in accordance with the law” to paragraph 33 of the Statement of Defence. Learned Counsel for the appellant opposed the oral application, arguing that there should be a formal application to enable the appellants react. He said that the application at the stage it was made would bring untold hardship to the appellants. B C

The learned trial Judge did not rule on the application but rather adjourned the case with the consent of both counsels to 8th December, 1997 for judgment. (See page 70 of the record.)

In the judgment eventually delivered on the 28th day of January 1998, the learned trial Judge, after exhaustive review of the case, concluded thus: D

*“Consequently, it is my considered opinion that the action be and is hereby dismissed for want of merit.”*

Earlier in the judgment, the learned trial Judge had granted E the application for amendment thus:

*“I do not think that the application ought to have been formal as proposed by learned Counsel for the plaintiffs. The facts are already before the Court. I am however of the opinion that the defendant be made to pay the cost of the application which is hereby F granted as prayed with N2,000,00 costs to the plaintiffs.”* (See pages 98-99 of the record.)

Aggrieved by the judgment, the plaintiffs (now appellants) challenged same at the Court of Appeal, Calabar Division. The lower G Court found no merit in the appeal and accordingly dismissed it. The appellants further appealed to this Court on six grounds.

In accordance with the rules and practice of the Court the parties through their counsel, filed and exchanged briefs of argument. In his brief, as amended, learned Counsel for the appellants abandoned H ground one in his Notice of Appeal (which is hereby struck out) and formulated five issues from his remaining five grounds of appeal. The five issues are:

*“1. Was the Court of Appeal right when it held that the evi-*

dence of the three witnesses called by the respondent was pleaded?

2. Is it the practice and in fact the Law that a party can bring an application to amend its pleadings in order to bring such pleadings in line with evidence already adduced by it but which was based (sic) upon un-pleaded facts?

B 3. Was the amendment sought by the respondent of such simple error or mistake that an application on notice was not necessary?

4. Was it right for the Court of Appeal to reverse a finding of fact by the trial Court which was not appealed against by the respondent?

C 5. What is the standard of proof required from the appellants in view of fact that the respondent did not (sic) led evidence in support of his pleadings?"

In his brief of argument, learned Counsel for the respondent D formulated the following three issues for determination by the Court:

"1. Whether an oral application for amendment of Pleadings irrespective of the nature and scope of such amendment is contemplated by the High Court (Civil Procedure) Rules 1988 and if it is, whether respondent's pleadings as amended covered the evidence E of respondent's witnesses regarding due execution of the Will.

2. Whether the complaint that the Court of Appeal reversed portions of the decisions of the trial Court not appealed against is justified having regards to the totality and purport of the decision of the said trial Court.

F 3. Whether having regard to the evidence adduced by appellant and respondent the Court of trial was justified in dismissing their claims in their entirety and the Court of Appeal correct in affirming the decision."

G I am constrained to comment on the briefs filed by learned counsel for the parties. I will start with the respondent's brief.

An appeal is a resort to a superior Court to review the decision of an inferior court and find out whether on the facts placed before it, and applying the relevant and applicable law the inferior court H came to a right or wrong decision. See *Ponnamma v. Arumagun* (1905) AC 390 applied by *Oputa*, JSC in *AG of Oyo State & Anor v. Fairlakes Hotel Ltd* SC.169/1986 delivered on 2nd December, 1988.

The traditional role of learned counsel for the respondent, in contradistinction to that of learned counsel for the appellant, is to



support the judgment appealed against. Where, however, learned Counsel for the respondent cannot, in good conscience, support the judgment appealed against, he should make his position known to his client with a view to either conceding the issues raised by the appellant or withdrawing from the appeal if his client persists in his pursuit of same. Learned counsel cannot indulge in ambivalence. In his brief of argument, learned counsel for the respondent dwelt on a critique of the judgment of the trial Court and presented a thesis on the High Court (Civil Procedure) Rules of Cross River State to demonstrate that the Court of Appeal, in the judgment appealed against, misapplied the rules, an issue not raised by the appellant, and the respondent did not file a respondent's notice. B

***Moreover, of the three issues formulated by the respondent only the second issue can be traced to the appellant's grounds of appeal. Issues one and three particularly issue one appear to have come from the blues. Any issue not distilled from the ground or grounds of appeal and argument thereon go to no issue in the appeal and are liable to be struck out.*** (See *Ogunupebi v. Senilon* (1982) 7 SC 164; *Ali v. CBN* (1997) 4 NLCR (Pt.498) 152). ***Issues 1 and 3 in the respondent's brief are hereby struck out as irrelevant in the determination of the appeal.*** D

Learned counsel for the appellant formulated five issues from his five grounds of appeal. This, by itself, has no adverse effect on the appeal though it is not a commendable practice. Issues are not formulated to coincide with the number of grounds of appeal. An issue is preferably framed from a combination of grounds of appeal. (See *Nwudenyi & Ors. v. Aleke* (1996) 4 NWLR (Pt. 442) 349; *Labiya v. Anretidea* (1992) 10 SCNJ 1 at 2). F

Shorn of its extravagant build up and reduced to its true dimensions, the main issue in the appeal is the propriety vel non of the order for amendment at the time it was sought and granted. There is also the alleged reversal of a finding by the trial Court against which there was no appeal. I will determine the appeal on the following two issues: G

*“(1) Was it right for the Court below to affirm the decision of the trial Court granting the oral application to amend the Statement of Defence in line with the evidence led?”* H

(2) *Was it right for the Court of Appeal to reverse a finding of fact by the trial Court which was not appealed against by the respondent?"*

All the other issues in the appellant's brief are peripheral in the resolution of the two issues above. I will deal with the second issue first. Issue 2 (appellant's issue 4):

*"Was it right for the Court of Appeal to reverse a finding of fact by the trial Court which was not appealed against by Respondent?"*

In his argument on the issue, learned Counsel for the appellant reproduced page 97 of the record of the trial Court:

*"It is trite law that it is the duty of the propounder of a Will to prove the validity of the Will. To do this he must plead the relevant facts. Equally related to the issue of burden of prove (sic) in probate matters is the trite law that he who alleges the positive must prove. It is therefore the considered opinion of this Court that the duty placed on the plaintiffs is to allege that the Will was not duly executed as required by law which they have discharged. Going through the pleading in this case, it is clear and this Court hereby finds and holds that the defendant failed to plead due execution of the Will despite the directive attach (sic) at it in paragraph 23 of the Statement of Claim..."*

On the face of it and read in isolation of the rest of the judgment of the trial Court, it does appear to be a finding of fact settling the question of whether or not the respondent, as the propounder of the Will, discharged the burden placed on him to plead and prove the due execution of the Will. The said finding was obliterated, or displaced or overtaken as it were, when the trial Court granted the respondent's oral application to amend the Statement of Claim to bring the pleading in line with the evidence on record. The trial Court, on the oral application, held:

*"The facts are already before this Court. I am however of the opinion that the defendant be made to pay the cost of the application which is hereby granted as prayed with N2,000.00 costs to the plaintiffs. ...I do not agree that there are any material contradictions in the evidence of DW1-3 as to due execution of Exhibit B. I believe their evidence and therefore find and hold that Exhibit B was duly executed as required by law." (See page 99 of the record).*

*The Court below in its judgment affirmed the finding on the due execution of the Will. It held at page 543 of the record:*

*“There is no way that this finding can be faulted as there is overwhelming evidence to establish that the respondent has discharged its duty to prove that Exhibit B was made by a free and capable testator that it represents his intention and instructions and that it was duly executed in accordance with the law.”*

***In his argument that the lower Court reversed the finding of fact of the trial Court not appealed against, learned Counsel for the appellant did not appreciate that the finding of fact affirmed by the lower Court is the one made by the trial Court after it granted the oral application to amend the defendant’s pleading and not the one made before the amended pleadings. It is therefore not correct to say that the lower Court over-ruled the trial Court’s finding of fact not appealed against. The operative findings of fact as to the due execution of the Will is the finding made after the oral application for amendment had been granted. The issue is resolved against the appellant.***

Issue 1 questions the propriety of the oral application to amend the Statement of Defence granted by the trial Court and endorsed by the Court below. In their Statement of Claim the appellants as plaintiffs, impugned the due execution of the Will. In paragraph 23 of the Statement of Claim, it was pleaded thus:

*“23. The purported witnesses to the Will did not all sign in the presence of each other and the testator as required by law.”*

***In addition to the general traverse, the respondent, as the propounder of the Will, has a duty to plead and prove due execution of same. Respondent failed to discharge the burden in the pleadings.***

Be that as it may, the evidence of DW1-3 which the trial Court believed, showed that the Will was duly executed even though the evidence; as rightly argued by learned Counsel for the appellants, went to facts not pleaded at the time it was adduced. Tardy as he was, learned Counsel for the respondent woke up from slumber after learned Counsel for the appellants had addressed the trial Court, urging the Court to expunge the evidence of DW1-3 as going to no issue in the case. The record, at page 68, shows that learned Counsel for the plaintiffs (now appellants) concluded his address on 29/10/97 and the matter was adjourned to the next day 30/10/97 for rejoinder.

der. It was at the stage of rejoinder that learned Counsel for the respondent orally applied to amend his Statement of Defence to bring the pleading in line with the evidence by adding: “*The Will was duly executed in accordance with the law*” to paragraph 33 of the Statement of Defence.

B The application was opposed. The trial Court did not rule one way or the other. The ruling was incorporated in the judgment. In fact, the judgment dismissing the case was predicated on the amendment granted to the respondents. I think that the ruling on the application to amend the Statement of Defence should have been made C before the judgment. Also the amendment should have been reflected in the Statement of Defence. However, in my view, these are mere irregularities which do not affect the substance or validity of the order made or the proceedings in the matter.

D ***As strenuously argued by learned Counsel for the appellant, evidence led on facts not pleaded goes to no issue and is liable to be expunged. Issues are joined on the pleadings, not on the evidence.*** See *Bamgboye v. University of Ilorin* (1999) 6 SCNJ 295 at 324. ***Failure to call evidence in support of averment denied means that the averment is abandoned.*** See Yusuf v. Oyetunde (1998) 10 SCNJ 1 at 18-19. ***Conversely, evidence led on unpleaded facts goes to no issue in the case.*** See *Ndoma-Egba v. Chukwuogor* (2004) 2 KLR (pt.173) 671. ***This was the position when the learned trial Judge started reading the judgment of the Court. The evidence of the DW1-3 relating to the due execution of the Will went to no issue in the matter as the due execution of the Will was not pleaded in the Statement of Defence. At this point the non-execution of the Will in accordance with the law was deemed admitted by the respondent who chose not to plead to the contrary.***

***However, the scenario changed the moment the trial Court granted the oral application to amend the pleading by pleading due execution of the Will, though much later in the judgment, the amendment made in line with the evidence on record spoke from the date of the original Statement of Defence and the original Statement of Defence was discarded as it were.*** See *Rotimi v. Macgregor* (1974) 11 SC 133 at 152; *Sneade v. Watherton* (1904) 1 KB 295 at 297; *Adewunmi v. A.G. Ekiti State*

(2002) 93 LRCN 43 at 64 & 65. **Once the amendment was granted to bring the pleadings in line with the evidence on record, the amended Statement of Defence superseded the Writ or Claim.** See *Ewarami v. ACB Ltd* (1978) 4 SC 99 at 107.

**On the propriety vel non of the amendment granted at the time it was sought, the law is that no kind of error or mistake, which if not fraudulent or intended to overreach the Court cannot be corrected, if it can be done without injustice to the other party.** See *Amadi v. Thomas Aplin & Co. Ltd* (1972) 1 All NLR (Pt.1) 409; *Shell BP Petroleum Development Company v. Johnmal Eng. Ltd.* (1974) 4 SC 33. **Amendment will be allowed if by so doing the real issue in dispute can be raised and resolved.** See *Engr. Samuel Melifeonwu v. Egbunike* (2001) 1 NWLR (Pt.4) 271. **The grant of the application did not cause an undue delay in the proceedings nor is the amendment irrelevant or useless. There is no evidence that it was intended to overreach or ambush the appellant. The learned Counsel for the appellant cross-examined the witnesses who gave the evidence in line of which the respondent sought to amend the Statement of Defence. It is not enough to say that the application was brought in bad faith. I see no fact or facts which show bad faith or from which the inference of bad faith can be drawn.**

**Though the amendment came extremely late at the trial, it did not introduce a new case. It was meant to, and did, bring into focus the main issue in contention between the parties - that is, whether or not the Will was duly executed in accordance with the law. And the appellant was compensated by order for costs.**

In *Okafor v. Ikeanyi* (1979) 3-4 SC 99 the Court held that amendment can be granted at any stage if it is in the interest of justice. In my considered view, the order for amendment was justified on the facts of the case at the time it was granted. An application for amendment calls for exercise of the Court's discretion and it has not been shown that the exercise was not judicial and judicious. (See *Shell PB v. Jonmal* (supra)).

In my view, the appeal is devoid of merit and consequently it is hereby dismissed. Appellant to pay N100, 000.00 costs to the respondent.

**MOHAMMED JSC**

This appeal is against the judgment of the Court of Appeal Calabar delivered on 23rd November, 1999. In that judgment, the Court of Appeal dismissed the Appellants' appeal against the judgment of the trial High Court of Justice of Cross-River State dismissing the Plaintiffs/Appellants action challenging the validity of their fathers Will dated 24th March, 1992. Although at the hearing of this appeal on 11th December, 2012 the Appellant's brief of argument upon which the appeal was heard had raised as many as 5 issues for the determination of the appeal, while in the Respondent's brief of argument 3 issues were identified, all the issues formulated by the parties revolved around a central issue on the complaint of the Appellant on the validity of the amendment to the Defendant/Respondent's Statement of Defence by the trial court on an oral application after the parties had closed their respective cases. The oral application for amendment was made pursuant to the provision of Order 23 Rule 1 of the High Court (Civil Procedure Rules) of Cross-Rivers State 1987.

The guiding principles of cardinal importance which guides the Court in an application for leave to amend the Writ of Summons or pleadings is that such amendment is made for the purpose of enabling the Court to determine the real question in controversy between the parties or correcting any defect or error in the proceedings. See *Amadi v. Thomas Applin & Co. Ltd.* (1972) 1 All N.L.R. 409 and *Alhaji Karim Laguro & Ors. v. Honsu Toku (Bale of Itoga) & Ors.* (1992) 2 N.W.L.R. (Pt.223) 278 at 287 and 290 - 291.

Some of the guiding principles for granting amendments of pleadings include, the consideration of the Justice of the case and the rights of the parties before the Court, the duty of a Judge to see that everything is done to facilitate the hearing of any action pending before him and whenever it is possible to cure and correct an honest or unintentional blunder or mistake in the circumstances of the case and where such amendment will help to expedite the hearing of the action without injustice to the other party.

Furthermore, amendments are more easily granted whenever the grant does not necessitate the calling of additional evidence or the changing of the character of the case, and in that aspect no prejudice or injustice can be said to result from such amendment. See *Writ*

v. Wuche (1980) 1 - 2 S.C. 12; Afolabi v. Adekunle (1983) 2 S.C.N.L.R 141; Akinkuowo v. Fafimoju (1965) N.M.L.R. 349; Oguntimeyin v. Gubere (1964) N.M.L.R. 55; Dominion Flour Mills Ltd v. George (1960) L.L.R 53; Adetutu v. Aderohunmu (1984) 1 S.C.N.L.R. 515; Amadi v. Thomas Applin & Co. Ltd (1972) 1 All N.L.R. (Pt.1) 409; Adekeye v. Akin Olugbade (1987) 3 N.W.L.R. (Pt.60) 214; Akoh v. Abuh (1988) 3 N.W.L.R. (Pt. 85) 696; England v. Palmer 14 W.A.C.A. 659; Metal Construction (W.A.) Ltd. v. Migliore (1979) 6 - 9 S.C. 163.

In the present case the Defendant now Respondent in this court merely applied at the trial court to amend paragraph 33 of his statement of defence by adding the sentence-

*“The Will was duly executed in accordance with the law.”*

At this stage the application was made, the record shows there was enough evidence already led by the Defendant/Respondent’s witnesses DW1-DW3 who were also cross-examined by the Appellants’ Counsel as shown in the record in support of the fact that the Will of the deceased was properly executed and that the deceased had the required capacity to execute the same. It is quite clear therefore that the application to amend that paragraph of the statement of defence was made in order to bring the evidence that was already on the ground in line with the pleadings without calling additional evidence and without over-reaching the other parties being the Plaintiffs now Appellants. The amendment therefore, in my view, was merely made to cure an honest or unintentional blunder or mistake by the learned Counsel to the Defendant/Respondent and hence was rightly granted by the learned trial Judge and rightly affirmed by the Court below.

For the above and fuller reasons in the leading judgment of my learned brother Ngwuta JSC which has just been delivered, I also dismiss this appeal and abide by the orders in the leading judgment including the order on costs.

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### **MUNTAKA-COOMASSIE JSC**

I have had a preview of the lead judgment just delivered by my learned brother, Sylvester Ngwuta, JSC. I completely agree with the reason and conclusion therein adumbrated. I adopt them as mine. The reasons for dismissing the appeal tally with my understanding of

the law on the subject. Actually the position taken by the respondent's counsel is quite ambivalent. It is neither here nor there. The amendment ordered by the trial court was in order and it was made judiciously and judicially in the exercise of the discretion of trial court within the law. That being the case I have no reason to disagree with the conclusion of my learned brother, Sylvester Ngwuta, JSC. I too hold that the appeal before us lacks merit and same is hereby dismissed by me. One hundred thousand naira costs (N100,000.00) in favour of the respondent.

C \_\_\_\_\_

### ***GALADIMA JSC***

I have had the privilege of a preview of the lead Judgment of my learned brother, Ngwuta, JSC just delivered. I am in complete and total agreement with his reasoning and conclusion leading to the dismissal of this appeal. I adopt same as my own. The Appeal lacks merit and is liable to dismissal. Accordingly it is dismissed. I abide by the consequential order made on costs.

E \_\_\_\_\_

### ***ALAGOA JSC***

This is an appeal against the judgment of the Court of Appeal Calabar Division delivered on the 23<sup>rd</sup> November, 1999 which upheld the judgment of the High Court of Justice Calabar, Cross River State delivered on the 28<sup>th</sup> January, 1998.

The appellant as plaintiffs in the High Court Calabar took out a Writ of Summons against the Respondent as Defendant claiming the following reliefs:

G 1. A Declaration that the pretended Will of the deceased dated 24th March, 1992 is invalid and therefore null and void.

2. An order setting aside the pretended Will of the deceased for want of due execution and form and as being inconsistent and unconscionable and failing totally of its purpose and intention; and

H 3. An order of perpetual injunction restraining the Defendant from executing the said pretended Will.

It is perhaps necessary to put the records straight by saying that one Madam Maria Eyo Ita wife of the deceased testator was one of the Plaintiffs at the institution of this action at the High Court but



following her demise in the course of proceedings in the High Court her name was dropped from the suit. One Chief Sylvester O. Neil was also the 2<sup>nd</sup> Defendant as executor of the will at the commencement of this suit at the High Court Calabar but following his request to be discharged from the suit his name was struck out from the suit. B

At the commencement of the suit at the High Court, Calabar, the 1<sup>st</sup> and 2<sup>nd</sup> Appellants were the only surviving son and daughter of the deceased testator Etubom Joseph Eyo Ita and in contention was the will of the said Etubom Joseph Eyo Ita who had real and personal estates among which were No. 50 Mayne Avenue, Calabar C and No.5 Probyn Street, Calabar. With respect to No. 50 Mayne Avenue Calabar, the deceased testator declared in the will as follows:

*"I direct that my house at No. 50 Mayne Avenue Calabar shall be rented out and the rents accruing therefrom together with my assets hereinbefore mentioned used for the distribution of legacies hereinbefore contained..."* With respect to No.5 Probyn Street, Calabar the will stated as follows: *"I direct that my house at No.5 Probyn Street, Calabar together with all the furniture therein shall remain a family house to be used in common by all direct members of my family; in particular my said wife shall live in the said house for life..."* E  
*None of my property should be sold."*

Dissatisfied the Appellants as Plaintiffs instituted the aforementioned, action subject matter of this further appeal.

Pleadings were filed and exchanged. In paragraph 23 of the Statement of Claim the Appellants as Plaintiffs stated as follows: F

*"The purported witnesses to the will did not all sign in the presence of each other and the Testator as required by law."*

None of the paragraphs of the Statement of Defence dealt with or made any attempt to respond to Section 23 of the Statement of Claim. The matter proceeded to be heard with the parties calling three witnesses each. At the address stage Respondent's counsel addressed first after which the appellants' counsel addressed. The Appellants' Counsel in his address raised the issue that the Respondent did not deny paragraph 23 of the Statement of claim. Appellants' H  
 Counsel also raised the issue that the Respondents in their Statement of Defence did not plead the due execution of the will according to law. The Respondent's counsel conceded that there were omissions in the Statement of Defence but raised the issue that pleadings can

be amended at any stage of the proceedings provided it is not intended to overreach and sought that oral amendments be allowed so as to bring the pleadings in line with evidence already led.

B He sought to add the words, “the will was duly executed in accordance with the law to paragraph 33 of the Statement of Defence. Appellants’ Counsel objected to this request for amendment contending that a formal application for amendment would better meet the ends of justice. The learned trial Judge Onnoghen, J. (as he then was) did not rule on this application to amend the Respondent’s C pleadings but adjourned the entire suit for judgment. In a considered judgment delivered on the 28<sup>th</sup> January, 1998, the learned trial Judge not only granted the application to amend the Respondent’s Statement of Defence but also found no merit in the claim of the Appellants and dismissed same.

D Aggrieved the Appellants appealed to the Court of Appeal which dismissed the appeal and hence a further appeal to the Supreme Court. The Appellants filed six grounds of appeal and after abandoning ground 1, formulated five issues from the remaining five Grounds of Appeal:

E 1 - Was the Court of Appeal right when it held that the evidence of the three witnesses called by the Respondent was pleaded?

F 2. Is it the practice and in fact the law that a party can bring an application to amend its pleadings in order to bring such pleadings in line with evidence adduced by it but which was based on unpleaded facts?

3. Was the amendment sought by the Respondent of such simple error or mistake that an application on notice was not necessary?

G 4. Was it right for the Court of Appeal to reverse a finding of fact by the trial court which was not appealed against by the Respondent?

H 5. What is the standard of proof required from the Appellants in view of fact that the

Respondent did not lead evidence in support of his pleading? The Respondent formulated the following issues for determination:

## 2. ISSUES FOR DETERMINATION

2.1 Whether an oral application for amendment of pleadings

irrespective of the nature and scope of such amendment is contemplated by the High Court (Civil Procedure) Rules, 1988 and if it is, whether Respondent's pleadings as amended covered the evidence of Respondent's witnesses regarding due execution of the Will?

2.2. Whether the complaint that the Court of Appeal reversed portions of the decision of the trial court not appealed against is justified having regards to the totality and purport of the decision of the said trial court? B

2.3. Whether having regard to the evidence adduced by Appellants and Respondent the court of trial was justified in dismissing their claims in their entirety and the Court of Appeal correct in affirming the decision? C

This court has time without number condemned the proliferation of issues in a Brief of Argument as would appear to have been done by the Appellant. See *Omega Bank Nigeria Plc V. O. B. C. Ltd.* (2005) 8 NWLR (PART 928) 547; *Iwuoha V. Nipost Ltd.* (2003) 8 NWLR (PART 822) 308.

I shall however steer a mid course in considering these Issues. Order 26 Rules 2 and 3 of the High Court (Civil Procedure) Rules 1988 allow an amendment to be made at any stage of the proceedings for the purpose of determining the real questions in controversy between the parties. E

What undoubtedly appears worrisome in this matter is the late stage of the proceedings at which the application to amend the Statement of Defence was made - at the address stage by Counsel but even this is allowed under the Rules of Court if it is not intended to over reach the other party. Where evidence has been led on a particular point through witnesses, an application to amend the pleadings to fall in line with the evidence so already given is not one intended to over reach. There is nothing sacrosanct in such an application being made orally. In *Imonikhe V. A-G Bendel State* (1992) NWLR (PART 248) 396, this Court held that an amendment of pleadings should be allowed unless it will entail injustice to do so or the person so applying for the amendment is acting mala fide. See generally the following cases on this subject matter. F

*Olu of Warri V. Esi* (1958) SCNLR 384; *Union Bank V. Ogbah* (1995) 2 NWLR (PART 380) 647; *Salami V. Oke* (1987) NWLR (PART 631) 1. H

There is no doubt at all that at the time the application to amend the

Respondent's Statement of Defence was made, it could not have been possible for a formal application to amend to be made and the learned trial Judge did what he considered best to do out of a difficult situation without compromising fairness. The learned trial Judge did what the law allowed him to do. The judgment of the High Court was affirmed by the Court of Appeal... with Akamkpa Local Government Council as Senior Personnel Officer. I know the parties. I knew late Etubom Joseph Eyo Ita. On the 24/3/92 Etubom Joseph Eyo Ita called on me to witness the signing of his Will in his house at No.5 Probyn Street, Calabar. I went there and he explained the Will to me. It was written. After that he signed and I signed as one of the witnesses. After that I left. We were two witnesses. One Gloria Eniang Offiong. She was present when I signed the Will. I left with the girl. She signed last before I left." It can thus be seen that the Will was duly executed and the amendment sought and granted only brought the pleaded facts sought for in the amendment in line with this evidence.

Another very important aspect of his matter that I will like to lend my voice to is the issue of joint ownership of No. 50 Mayne Avenue. The 1<sup>st</sup> Appellant's contention was that he was joint owner of that property with his late deceased father and testator Etubom Joseph Eyo Ita. This is very doubtful because the deceased testator Etubom Joseph Eyo Ita made bequests in the Will which were suggestive of his sole ownership of the property. It was much the same with No. 5 Probyn Street, Calabar. That the testator was of sound mind when he made the Will can be seen from evidence of the 1<sup>st</sup> Appellant at page 57 of the Record of appeal when he was recalled for cross examination. He therein said as follows, "*My father's illness did not affect his mental inability capabilities. I never had course to suspect his mental inability throughout his lifetime.*"

At page 61 of the Record of PW 1, DW Gloria Enang Offiong said under cross examination, "*Etubom Eyo Ita was well. He was O.K. psychologist. By 24/3/92, I was 20 years.*" That the testator Etubom Joseph Eyo Ita made the Will in the right frame of mind is a finding of the two lower courts. That is the impression one gets in reading through both judgments.

In Chief Oyelakin Balogun V. Alhaji Busari Amubikahun (1989) NWLR (PART 107) 18, this Court per Obaseki, JSC held that, "*where there are concurrent findings of facts in the Court below i.e. High*

*Court and the Court of Appeal the Supreme Court will only interfere with those findings if it can be shown on the record that those findings are not justified by the evidence and that the error in coming to those findings had led to a miscarriage of justice.*”See also Lokoyi V. Olojo (1983) 8 SC 61 at 68; Ibrahim V. Shagari (1983) 2 SCNLR 176; Ojomu V. Ajao (1983) 9 SC 22 at 53. I find no such shortcomings in the findings of the Court of Appeal. B

It is for these reasons and the fuller reasons contained in the lead judgment of my learned brother, Ngwuta, JSC which I had the privilege to read before now in draft and which I totally agree with, C that I also dismiss the appeal and abide by all order or orders contained in the lead judgment including order on costs.

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