

SUPREME COURT OF NIGERIA

FRIDAY 15TH MAY, 2015. SC. 296/2005

**CORAM:- M. U. PETER-ODILI, C. B. OGUNBIYI,
K. M. O. KEKERE-EKUN, J. I. OKORO, C. C. NWEZE, JJSC**

1. COMPAGNIE GENERALE DE
GEOPHYSIQUE (NIGERIA) LIMITED APPELLANTS
2. SAUVENET JEAN LOUIS
AND
JUMBO IDORENYIN RESPONDENT

PLEADINGS - Amendment - Lower courts rightly refused the amendment sought - As there was lack of good faith - With the result of overreaching respondent (H1)

JUDGMENTS - Mistake - Weight - It is not every error in judgment that results in appeal being allowed - As it is only substantial error that occasioned miscarriage of justice - That warrants interference on appeal (H2)

FACTS

Before the High Court of Rivers State Isiokpo, plaintiff/respondent instituted this suit against defendants/appellants. After the close of respondent's case, appellants brought an application, seeking for an amendment of their statement of defence. Specifically, appellants had sought to introduce facts relating to a "camp boss" with the objective that the person so designated at all material times to the suit, would be called as defence witness No. 1. Respondent objected to the motion for amendment. In his counter affidavit, respondent averred that there was no office of "Camp Boss" at the material time to the suit and that the person appellants seek to introduce into the proceedings as the holder of such office at the material time was a junior staff, newly recruited into 1st appellant's employment as a "Radio Assistant".

Appellants did not controvert the material averments in the counter-affidavit. In his ruling, the court was of the opinion that the amendment would overreach and work injustice on respondent, since the same had sought to introduce fresh facts which were not in exist-

ence at the commencement of the suit. The court refused the application for amendment. Being dissatisfied, appellants appealed to the Court of Appeal Port Harcourt Division. The court affirmed the decision of the trial court. Not yet satisfied, appellant appealed to Supreme Court.

ISSUE FOR DETERMINATION

Whether the Court below was correct in affirming the decision of the trial court refusing the amendment sought by the Appellants herein (as defendants) on the basis that the amendment sought was immaterial, sought to introduce fresh facts and was intended to over-reach.

HELD (Unanimously dismissing the appeal per **PETER-ODILI JSC**)

PLEADINGS - Amendment

1. It is true that it is within the power of the court to grant an amendment even if the amendment would add to the existing cause of action or substitute therefore a new cause of action provided that the additional or new cause of action arises out of the same or substantially the same facts as are contained in the pleadings. The key point to be considered is the interest of justice and a situation where the award of costs would not meet that interest of justice.

The facts of this case clearly evidence that the two Courts below were on the right path when they refused the amendment sought seeing a lack of good faith with the attendant result of overreaching the plaintiff which attitude of the Appellants cannot be condoned by this Court either. The point being made is that, the issue is not the stage of the amendment sought which in this instance was after the close of plaintiff's case but the fact of the capacity of the amendment being an ambush on the plaintiff/respondent which the law has not permitted.

In conclusion therefore, there is no basis for a contrary finding by this Court from what the two Courts below made and I have no difficulty in upholding those concurrent findings

and so I dismiss this appeal as lacking in merit. I affirm the judgment and orders of the Court of Appeal which upheld the decision of the trial High Court.

This case is accordingly remitted back to the trial Court for continuation without the amendment sought.

(pp. 1445 D/1447 E)

JUDGMENTS - Mistake - Weight

2. The error or mistake in that judgment of the Court below is noted, the question that follows therefore is whether that mistake is such as to change the course of events or occasion the setting aside the judgment of the Court of Appeal. In answering that question, it is to be noted that it is not every mistake or error in a judgment that will result in the appeal being allowed since it is only that error which is substantial in such a way that it has occasioned a miscarriage of justice that would warrant the appellate courts interference such as this court is being called upon to do. (p. 1446 H)

NOTABLE POINT OF INTEREST

PETER-ODILI JSC

1. Concurrent findings – conditions for interference

Having said that and getting back on track, what is being contested here and now are the concurrent findings of the court below which the Appellants are calling upon this court to disturb or interfere with. It is to be said that the position of the law with regard to the attitude of an appellate Court such as the Supreme Court to concurrent findings is now well settled or trite. That is to say that unless those findings are found to be perverse or not supported by evidence or were decisions reached from a wrong approach to the evidence or as a result of a wrong application of a principle of substantive or procedural law, then this court would not interfere with those findings even if wearing the shoes of the courts below, it would have come to a different conclusion. (p. 1445 F)

REPRESENTATION

Chief Richard Oma Ahonaruagho; for the Appellants

Henry E. Omu; for the Respondent

CASES REFERRED TO

- Ojah v. Ogboni (1976) 4 SC 69
U.B.N. Plc v. Sparkling Breweries Ltd (1997) NWLR (pt. 491) 29
B Ladejobi v. Ogintayo (2004) 18 NWLR (pt. 904) 149
Orji v. Zaria Ind. Ltd. (1992) 1 NWLR (pt. 216) 124
FBN Nig. Plc v. M. O. Kanu Sons & Co. (1999) 9 NWLR (pt. 619) 48
Ogoejiifo v. Ogoejiifo (2006) 3 NWLR (pt. 966) 205
C Abimbola v. Abatan (2001) 9 NWLR (pt. 717) 66
Mobil Oil v. Coker (1971) NMLR 56
Rotimi v. Macgregor (1974) 11 SC 133
Warner v. Sampson (1959) 1 QB 297
Ipadeola v. Oshowole (1987) 3 NWLR (pt. 59) 18
D Abimbola v. Abatan (2001) 9 NWLR (pt. 717) 66
Balogun v. Adejobi (1995) 2 NWLR (pt. 376) 131
Ojah v. Ogboni (1976) 4 SC 59
George v. Dominion Flour Mills Ltd. (1963) 1 All NLR 71

E **BOOK REFERRED TO**

Pleadings: Principles and Practice (Sweet & Maxwell)

LEAD JUDGMENT BY PETER-ODILI JSC

- F This is an appeal from the judgment of the Court of Appeal,
Port Harcourt Division, Coram: Oimage, Fabiyi and Dongban-Mensem
JJCA affirming the ruling of the trial High Court per Goodhead J.
sitting at Isiokpo High Court made on the 12th day of December,
1997 refusing defendants/appellants leave to further amend their
G Statement of Defence.

FACTS BRIEFLY STATED:

The background facts to this appeal would be captured here-
under and thus:-

- H The Appellants, as Defendants in the Trial Court, had sought a
further amendment of their statement of defence at a point in the
trial when plaintiff had closed its case and the amendments sought, in
the opinion of the learned trial judge would “overreach” and “work
injustice” on the plaintiff, since it had sought to introduce fresh facts
which in the opinion of the learned trial court and affirmed by the

Court below, were not in existence at the point in time when the suit was commenced. Specifically, the defendant had sought to introduce facts relating to a “camp boss” with the objective that the person so designated at all material times to the suit, would be called as defence witness No. 1. The plaintiff, (Respondent herein) objected to the motion for amendment by filing a counter affidavit and deposed that there was no office of “Camp Boss” at the material times to the suit and that the person defendant seeks to introduce into the proceedings as the holder of such office at the material time was a junior staff, newly recruited into the 1st defendant’s employment as a “Radio Assistant”. The learned trial Judge found that the material averments in the Counter-Affidavit were not controverted. He therefore accepted them and held as follows:-

“Now, the amendment sought in the instant case, is introducing for the first time the position of a Camp Boss and specifically mentioned the name of an Officer vide Mr. Tamunoemi Briggs as holding that office at the material time when the Plaintiff/Respondent has closed his case... These Paragraphs [for the counter-affidavit] with the exhibits attached thereto are uncontroverted and therefore the depositions therein stand as unchallenged evidence. Taken against this background, I am of the view that to allow the amendment sought at this stage will be tantamount to overreach the Plaintiff/Respondent and work injustice against the him [the plaintiff] which all the authorities cited by both sides are opposed to. In the circumstances the application is refused”.

Being dissatisfied with that decision, the defendant appealed to the Court of Appeal or Lower Court or Court Below for short. In its judgment dated 29th day of June, 2005, the Court of Appeal held inter alia:

“The amendment sought is intended to put the appellant in a better position to defeat the plaintiff’s action”, and further that “the real issue is if the position of a “Camp Boss” existed at the beginning of the proceedings, it was not included in the statement of defence... The attempt to introduce the issue of “Camp Boss” at the stage when the function now ascribed to Camp Boss was in their earlier statement of defence were attributed to Mr. Sauvanet Jean Louis, the 2nd defendant/appellant. In my view, it is a clear index to the intention of the defendants/appellants to introduce into the proceedings a

fresh issue, which did not exist at the commencement of the action. It is not an omission, a blunder or an error. It seeks to overreach. This should not be allowed. It is an attempt to alter the nature of the defence of the defendant/appellant's case and it should not be allowed..."

B Further dissatisfied, the Defendant/Appellant has appealed to this Court on a 5 ground Notice of Appeal.

C On the 23rd February, 2015 date of hearing, the learned counsel for the Respondent informed the Court of his intention to abandon the Notice of Preliminary Objection he filed dated 30th day of March, 2006. The arguments thereof were incorporated in the Respondent's Brief of Argument. The Objection and arguments thereof were accordingly struck out.

D Chief Richard Ahonaruogho of counsel for the Appellants adopted their Brief of argument settled by D.O. Ezaga and filed on 12/2/06 and a Reply Brief filed on 12/3/07. The Appellant raised a sole issue for determination of the appeal which is as follows:-

Whether the learned justices were right in rejecting the Appellants' right to amend their pleadings?

E Mr. Henry Omu of counsel for the Respondent adopted their Brief of Argument settled by Dejo Lamikanra Esq. and filed on 10/6/06. He identified a lone issue for determination crafted thus:-

F Whether the Court below was correct in affirming the decision of the trial court refusing the amendment sought by the Appellants herein (as defendants) on the basis that the amendment sought was immaterial, sought to introduce fresh facts and was intended to overreach.

G The question as raised by the Respondent seems more apt for use in the resolving of the nagging issues in this appeal and I shall make use of it.

H Learned counsel for the Appellants, canvassing their position, stated that the circumstances for granting an application for amendment are enunciated in a deluge of authorities flowing from Chief Ojah & Ors v. Chief Eyo Ogoni & Ors (1976) 4 SC 69 & U.B.N. Plc v. Sparkling Breweries Ltd (1997) NWLR (Pt. 491) 29.

That the bottom line has always been that an amendment of pleadings will be granted at any stage of the proceedings before judgment if it will lead to the justice of the case for the purpose of deter-

mining the real question in controversy between the parties, unless such an amendment will entail injustice or surprise or embarrassment to the other party; or the applicant is acting mala fide or by his blunder he has done some injury to the Respondent which cannot be compensated by costs or otherwise.

It was further contended for the Appellant that the Court of Appeal referred to a non-existent event when it stated in its judgment that the Defendant sought for the 3rd time, a motion to amend his Statement of Defence and that in the application for further amendment of the Statement of Defence, the Defendant sought to introduce into its defence the position and status of a Camp boss. That the Court below clearly believed there was a Statement of Claim which referred to the 1st defence witness i.e. T. Briggs as a radio assistant not camp boss which ought to have been denied by Appellants' subsequent Statement of Defence. That the Court of Appeal went along that same error to hold that having denied the above, the application was an after-thought which would place the Appellants in an advantageous position to the detriment of the Respondent.

For the Appellants, it was submitted that the Court below misconceived the relevant facts and issues and reached a conclusion based on non-existent events. He cited *Ladejobi v. Ogintayo* (2004) 18 NWLR (Pt. 904) 149 at 178.

Stated further for the Appellants is that the fact that an issue to be introduced did not exist at the commencement of the action is not a legal ground to reject the leave to amend the pleadings. That whether or not the issue of camp boss existed at the beginning of an action is a substantive question for proof which can only be done if the amendment is granted and hearing on the issue is taken. That to hold at an interlocutory stage that an issue for proof in the trial was non-existent amounts to prejudging the issue and is not allowed by law. Also that the fact that the issue of camp boss altered the nature of the defence is not a legal ground for refusing an amendment application. He referred to *Orji v. Zaria Ind. Ltd.* (1992) 1 NWLR (Pt. 216) 124; *FBN Nig. Plc v. M. O. Kanu Sons & Co.* (1999) 9 NWLR (Pt. 619) 48.

For the Respondent was contended that as a general rule, an amendment is hardly refused by the court unless having regard to the circumstances of the case, the court considers the proposed amendment fraudulent, intended to overreach, would cause avoidable de-

lay, take the plaintiff by surprise and or introduce new matters and generally work injustice against one of the parties to the case and as in this case where the amendment sought was intended to overreach the court of trial was right in rejecting the application. It was stated further that before the appellants herein can move this court to interfere with the concurrent decisions of the two Courts below, they must show special circumstances to justify such intervention. He cited *Ogoejiofo v. Ogoejiofo* (2006) 3 NWLR (Pt. 966) 205 at 226; *Abimbola v. Abatan* (2001) 9 NWLR (Pt. 717) 66 at 77.

Learned counsel for the Respondents submitted that since an amendment relates back to the date of the original pleading, a fact not in existence at the date of the original pleading as in this case is useless and immaterial and will not be allowed. He cited *Mobil Oil v. Coker* (1971) NMLR 56; *Rotimi v. Macgregor* (1974) 11 SC 133 at 152; *Warner v. Sampson & Anor* (1959) 1 QB 297 at 321.

It was observed by the Respondent's counsel that the person sought to be introduced as "Camp Boss" had participated in the proceedings as representative of the defendants.

In reply on points of law, learned counsel for the Appellants said Respondent had harped on speedy trial which should be discountenanced by the court as the quick dispensation of justice must be subject to the right of parties to fair trial, including the right to amend.

In a nutshell, the standpoint of the Appellants is that the Rules of the Rivers State High Court gives ample opportunity to Respondent to amend and recall any witness even after closing his case, the amendment ought to be allowed to enable Appellants prove whether or not there was indeed a camp boss through whom the 2nd Appellant acted. That the Respondent could be easily assuaged in cost.

The Respondent, countering that view of the Appellant contends that the amendment sought is immaterial and was correctly refused by the two Courts below as it was sought to introduce facts not in existence at the date of the original pleading and was going to be in-judicial and injudicious for the Court to do otherwise.

For a clear view of what amendment of Pleadings portend and the principles applying thereof, the authors of the book, *Pleadings: Principles and Practice* (Sweet & Maxwell) by Sir Jack Jacob, Qc and Ian S. Goldrein, Barrister at Chapter II of their treatise stated thus:-

“The wide and extensive powers of amendment vested in the Courts are designed to prevent failure of justice due to procedural errors, mistakes and defects and they are exercised to further and serve the aims of justice. The powers of amendment are intended to make more effective the function of the Courts to determine the true substantive merits of the case, to have more regard to substance than to form, and thus to free the parties and the court from technicalities or formalities of procedure and to correct errors and defects in the proceedings”.

As a general rule, an amendment is seldom refused by the Court, however, where taking into consideration the prevailing circumstances of a particular case, the court is of the view that the proposed amendment is fraudulent, intended to overreach or in bad faith, would cause avoidable delay, take the plaintiff by surprise or introduce new matters and generally work injustice against one of the parties in the case. In short, when the trial court comes to the conclusion that the application for amendment would occasion one of the negative consequences mentioned above as in the instant case where the trial court came to the conclusion that to allow the amendment sought at the stage it was applied for *“will be tantamount to overreach the Plaintiff/Respondent and work injustice against him which all the authorities cited by both sides are opposed to”.*

Coming to that conclusion, that Court of trial refused the application. That was the basis of the appeal to the court below per Omage JCA which held as follows:-

“...plaintiff has closed his case and defendant is to commence his defence should the Court below have allowed an amendment of the defendant’s defence which sought to introduce into the proceedings the evidence as to the existence of a camp boss allegedly occupied by T. Briggs who the plaintiff has referred to in his pleadings and deposed to his status as a radio assistant who was thereto engaged when the plaintiff was in the employment of the defendant.

The above fact encapsulates the real issue in controversy in the suit in the Court below. The real issue is if the position of a camp boss existed at the beginning of the proceedings it was not included in the statement of defence, when the plaintiff referred to the said T. Briggs as a radio assistant in his statement of claim.

It was not denied in the defence; and in the 1st and 2nd de-

defendants' statement of defence when they secured the 1st and 2nd amendments of the statement of defence. The attempt to introduce the issue of camp boss at the stage when the function now ascribe (sic) to the camp boss was in earlier statement of defence were attributed to Mr. Sauvanet Jean Louise, the 2nd defendant/appellant to introduce into the proceedings a fresh issue, which did not exist at the commencement of the action. It is not an omission, a blunder or an error. It seeks to overreach. This should not be allowed. The issue of camp boss is not an omission, an error a careless delict, it is an attempt to alter the nature of the defence of the defendant/appellant case and it should not be allowed - See Bello Adegoke Foko & Ors v. Oladekan Agboola Foko & Ors (1968) NMIL 441. See also Chief J.I.C. Anyia v. Governor in Council (1962) 2 All NLR 174. See George & Ors v. Dominion Flour Mills (1963) 1 All NLR at 71. It is sought mala fide.

In Professor Oyenugo v. Provincial Council of University of Ife (1965) NMLR, the apex Court, urged the Court to consider the materiality of an amendment so that it is not granted to create an unfair advantage to the party seeking it. This is what the present applicant seeks to do. It should be refused.

In my respectful view, the amendment sought by the defendant appellant is intended to place the defendant in a better position to defeat the plaintiff's claim, by introducing into the proceedings an issue which is an afterthought and which did not exist at the commencement of the facts in issue. It is refused. The appeal is dismissed. The case should be remitted to the trial court for continuation of hearing without the amendment sought."

The relevant paragraphs of the supporting affidavit of the defendants in seeking the amendment are paragraphs 3, 4 and 5 of the affidavit of Tamunoemi Briggs and they are thus:-

"3. That the Statement of Defence in this suit which was handed over to me by Appellant's counsel, D.O. Ezaga, Esq. have been properly scanned through by me on behalf of Applicants but surprisingly, found that most of the information given to the counsel were not reflected on the Statement of Defence.

4. That when I pointed this out to the counsel of recent, he agreed to do so since no evidence could be led on them and that it was his mistake but that this could only be done by leave of Court.

5. *That the purpose of this amendment is therefore to perfect all the instructions and briefings given to the Applicants' counsel in order to enable Applicants properly and effectually bring all the issues clearer in the interest of a good defence*".

The learned trial Judge reviewed the affidavit evidence of both sides and came to the following conclusion: B

"... Now the amendment sought in the instant case, is introducing for the first time the position of a Camp Boss and specifically mentioned the name of an officer vide Mr. Tamunoemi Briggs as holding that office at the material time when Plaintiff/Respondent has closed his case. Specific duties and roles have also been ascribed to the office of the Camp Boss by the amendment sought vide paragraphs 5a, 5b (iii), 8, 9 and 10 (i) of the proposed amended statement of defence." C

The trial Court after perusing and considering the Counter-affidavit of the Plaintiff/Respondent came to the conclusion that the amendment sought at the stage of the trial was tantamount to overreach the Plaintiff/Respondent and work injustice against him. D

It is true that it is within the power of the court to grant an amendment even if the amendment would add to the existing cause of action or substitute therefore a new cause of action provided that the additional or new cause of action arises out of the same or substantially the same facts as are contained in the pleadings. The key point to be considered is the interest of justice and a situation where the award of costs would not meet that interest of justice. See *Ipadeola v. Oshowole* (1987) 3 NWLR (Pt. 59) 18 at 33. E F

Having said that and getting back on track, what is being contested here and now are the concurrent findings of the court below which the Appellants are calling upon this court to disturb or interfere with. It is to be said that the position of the law with regard to the attitude of an appellate Court such as the Supreme Court to concurrent findings is now well settled or trite. That is to say that unless those findings are found to be perverse or not supported by evidence or were decisions reached from a wrong approach to the evidence or as a result of a wrong application of a principle of substantive or procedural law, then this court would not interfere with those findings even if wearing the shoes of the courts below, it would have come to a H

different conclusion. See Lasisi Adegbesan Abimbola v. Saka Abatan (2001) 9 NWLR (Pt. 717) 66; Ifeyinwa Ogoejeofe v. Daniel Chiejina Ogoejeofe (2006) 3 NWLR (Pt. 966) page 205 at 226.

In coming to the findings which tallied with those of the Court of trial, the Court of Appeal had identified that the issue at stake is that the Appellants were seeking to introduce into the proceedings the evidence as to the existence of a Camp Boss allegedly occupied by T. Briggs who the plaintiff had in his pleadings referred to as a radio assistant, the amendment sought at the stage when the plaintiff had closed his case and the defendant is to commence his defence. The court below felt as did the trial court that it was a fresh issue which did not exist at the commencement of the action and cannot be waived off as a mere omission, a blunder or an error. Taking those facts in view and alongside the fact that an amendment relates back to the date of the original pleading therefore this fact of a “Camp Boss” which was not in existence at the inception of the action is definitely a hard nut to crack. Therefore the stance of the appellant that the Court has the power to amend pleadings is not situated properly with the facts of the case in hand where the particular issue sought to be introduced was not in existence at the time of the initiation of the action and would clearly change not only the face of the pleadings and proceedings but would lift the carpet off the feet of the plaintiff unprepared. I refer to the cases of Mobil Oil v. Coker (1971) NMLR 56, Rotimi v. Macgregor (1974) 11 SC 133 at 153.

The Appellants had raised concerns that the Court of Appeal had fallen into the error of referring to a reply by Plaintiff/Respondent to a Second Amended Statement of Defence when there was no such second Amended Statement of Defence rather what existed was the Counter-Affidavit controverting the Motion on Notice to which the purported 2nd Amended Statement of Defence (i.e. proposed) was attached as annexure. The conclusion of the Appellants therefore is that having so utilised and referred to this non-existence Reply, the decision of the Court below qualifies for this court setting it aside and in effect disturb the findings that court made along the same findings as the Court of trial.

The error or mistake in that judgment of the Court below is noted, the question that follows therefore is whether that mistake is such as to change the course of events or oc-

casion the setting aside the judgment of the Court of Appeal. In answering that question, it is to be noted that it is not every mistake or error in a judgment that will result in the appeal being allowed since it is only that error which is substantial in such a way that it has occasioned a miscarriage of justice that would warrant the appellate courts interference such as this court is being called upon to do. I rely on *Abimbola v. Abatan* (2001) 9 NWLR (Pt. 717) 66 at 77. B

Another way of putting it is that even where some of the mistakes or errors are substantial, to push the hand of the appellate Court to interfere with that concurrent finding, that error must in one way or the other occasioned a miscarriage of justice. With that in mind and in the context of the case in hand, while admitting that reference to the reply of the 2nd Amended Statement of Defence was a reference to a document that was not in existence, it did not affect in the main, the flow of the findings of the Court nor did it occasion a miscarriage of justice, therefore no basis for this court up-setting those findings. See *Balogun v. Adejobi & Anor* (1995) 2 NWLR (Pt. 376) 131 at 157; *Pan Atlantic Shipping & Transport Agencies Ltd. v. Rhein Mass Und Sec Schiffants Kontor GMBH* (1997) 3 NWLR E (Pt. 493) 248 at 256. C D

The facts of this case clearly evidence that the two Courts below were on the right path when they refused the amendment sought seeing a lack of good faith with the attendant result of overreaching the plaintiff which attitude of the Appellants cannot be condoned by this Court either. The point being made is that, the issue is not the stage of the amendment sought which in this instance was after the close of plaintiff's case but the fact of the capacity of the amendment being an ambush on the plaintiff/respondent which the law has not permitted. See *Ojah & Ors v. Ogboni & Ors* (1976) 4 SC 59; *George & Ors. v. Dominion Flour Mills Ltd.* (1963) 1 All NLR 71. F G

In conclusion therefore, there is no basis for a contrary finding by this Court from what the two Courts below made and I have no difficulty in upholding those concurrent findings and so I dismiss this appeal as lacking in merit. I affirm the judgment and orders of the Court of Appeal which upheld the decision of the trial High Court. H

This case is accordingly remitted back to the trial Court for continuation without the amendment sought.

I award the sum of N250,000.00 costs to the Respondent to be paid by the Appellants.

B

OGUNBIYI JSC

I read in draft the lead judgment just delivered by my learned brother Peter-Odili, JSC and I agree that the appeal is devoid of any merit and should be dismissed.

C

The appellants as defendants, in their quest to amend their Statement of Defence sought to introduce new facts i.e. to say a fresh issue of Camp Boss which did not exist at the time the action was commenced.

D

The plaintiff (Respondent herein) objected to the motion for amendment by filing a counter affidavit and deposed that there was no office of “Camp Boss” at the material time to the suit and that the person defendant seeks to introduce into the proceedings as the holder of such office was a junior staff, newly recruited as a “Radio Assistant,” into the 1st defendant’s employment at the material time. The trial court having considered the facts deposed on the affidavits held and said:

E

“Now, the amendment sought in the instant case, is introducing for the first time the position of a Camp Boss and specifically mentioned the name of an Officer vide Mr. Tamunoemi Briggs as holding that office at the material time when the Plaintiff/Respondent has closed his case... These paragraphs (of the counter affidavit) with the exhibits attached thereto stand as uncontroverted and therefore the depositions therein stand as unchallenged evidence. Taken against this background, I am of the view that to allow the amendment sought at this stage will be tantamount to overreach the Plaintiff/Respondent and work injustice against him (the Plaintiff) which all the authorities cited by both sides are opposed to. In the circumstances the application is refused” (at pages 101 and 102).

F

G

H

On appeal before the lower court, it also held thus:-

“The amendment sought is intended to put the appellant in a better position to defeat the Plaintiff’s action” (see page 139), and further that “the real issue is if the position of a “Camp Boss” existed

at the beginning of the proceedings it was not included in the statement of defence... The attempt to introduce the issue of "Camp Boss" at the state when the function now ascribed to Camp Boss was in their earlier statement of defence was attributed to Mr. Sauvanet Jean Louis, the 2nd defendant/appellant. In my view, it is a clear index to the intention of the defendants/appellants to introduce into the proceedings a fresh issue, which did not exist at the commencement of the action. It is not an omission, a blunder or an error. It seeks to overreach. This should not be allowed. It is an attempt to alter the nature of the defence of the defendant/appellant's case and it should not be allowed..." at page 145 of the record of appeal. B C

The general principle of law is ancient and very well settled that an amendment in a pleading can be sought and made at any stage of a proceeding before judgment. See the old English decision of *Cropper v. Smith* (1884) 26 Ch. D 700 at 710-711 where Bowen D L. J. observed and said:

"...I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party..."

The purpose for allowing such privilege is to enable parties conduct their cases properly by placing before the court all relevant facts necessary for the just determination of disputes between them. The caveat however is that any application which seeks to either overreach the other party or alter the nature of the applicant's case will not be allowed. The idea and reason behind the refusal is of course logical, which is to avoid any form of injustice that might be caused to the other party. For instance an amendment which will necessitate the calling of fresh witnesses where both parties have closed their case will certainly not serve the course of justice because any further delay will certainly defeat the very purpose thereof. No amendment in any form should also be allowed if the outcome will entail surprise or cause embarrassment to the other party. This court has re-iterated the position in the case of *Adetutu v. Aderohunmu & Ors.* (1984) 15 NSCC, page 389 where it said:- E F G H

"Generally an amendment of pleading for purposes of determining the real question in controversy between parties ought to be allowed at any stage of the proceedings unless such amendment will entail injustice or surprise or embarrassment to the other party or the

applicant is acting mala fide or by his blunder the applicant has done some injury to the respondent which cannot be compensated by costs or otherwise. In other word, the discretion ought to be exercised so as to do what justice and fair play may require in the particular case. See Oguntimehin v. Gubere & Anor. (1964) 1 All NLR 176, Amadi v. Thomas Aplin Ltd. (1972) 1 All NLR, 409, Chief Ojah & Ors. v. Chief Ogboni & Ors. (1976) 4 S.C. 69, Chief Okafor v. Ikeanyi & Ors. (1976) 3 & 4 S.C. 99 and Ibanga & Ors. v. Chief Usanga (1982) 5 S.C. 103.” At page 396, per Bello, JSC (as he then was)

An amendment that gives an impression of an act in bad faith is not to be entertained and allowed. What is paramount in the mind of a court always is to ensure that justice is served to all parties who should not be allowed to take an undue advantage of the other. The court in checking against any such surreptitious motive will always consider the balance of the convenience between parties of the outcome of the application. For instance, in general, an amendment which will enhance the justice of a case will hardly be refused by any court except however, it occurs to the judge in his opinion that the intention is fraudulent and with a hidden agenda, which will generally work injustice against the opponent. The law in such a situation has therefore given the court wide discretionary powers to exercise in the determination of each case, which should be considered always on its own peculiar circumstance, bearing in mind that same sets of cases with similar facts may not necessarily yield the same outcome.

The application at hand is intended to serve the interest of the appellants to the detriment of the respondent. The two lower courts held concurrent views in refusing to oblige. The appellant before this court is also unable to dislodge the uphill task which is to overturn the lower court’s upholding the decision of the trial court. It is my view that the appellants in the circumstance, have not justify any reason why this court should interfere with the view taken by the lower court. The appeal lacks merit and in the same term held by my learned Lord Peter-Odili, JSC in her lead judgment, I also dismiss the appeal in its totality and abide by all orders made therein in the lead judgment inclusive of costs.

KEKERE-EKUN JSC

I have read in draft before now the judgment of my learned brother, MARY U. PETER-ODILI, JSC just delivered. I agree with the reasoning and conclusion that the appeal lacks merit and should be dismissed.

The lone issue for determination in this appeal, better expressed B
by learned counsel for the respondent, is:

*“Whether the court below was correct in affirming the decision of the trial court refusing the amendment sought by the appellants herein (as defendants) on the basis that the amendment sought was C
immaterial, sought to introduce fresh facts and was intended to overreach.”*

The salient facts giving rise to this appeal have been fully set out in the lead judgment. The general principle of law regarding the amendment of pleadings is that pleadings may be amended at any D
stage of the proceedings before judgment is delivered upon good and proper reasons shown. For instance, an amendment may be granted in order to bring the real issues in controversy between the parties before the court or in order to bring the pleadings in line with E
evidence already led at the trial. The power of the court to permit an amendment, which is discretionary, must be exercised judicially and judiciously having regard to all the circumstances of the case. An amendment will therefore not be granted where it will entail injustice to the adverse party; where the application is made mala fide or F
where, by his blunder, the applicant has done some injury to the respondent, which cannot be compensated by costs or otherwise. See: Ojah & Ors v. Ogboni & Ors (1976) 1 NMLR 95 @ 99; Cropper v. Smith (1884) 26 Ch. D 700 @ 710-711; Imonikhe & Anor. v. A-G Bendel State & Ors. (1992) 6 NWLR (Pt. 248) 396; Oguntimehin G
v. Gubere (1964) 1 ALL NLR 176 @ 179-180.

Amendments are more easily granted where the grant does not necessitate the calling of additional evidence or changing the character of the case on the ground that no prejudice would result from the amendment. See: Laguro v. Toku (1992) 2 NWLR (Pt. 223) 278 H
@ 291 H. While the various rules of court provide that an amendment can be made at any stage of the proceeding, different considerations apply depending on the stage at which the amendment is sought. It was held in Imonikhe v. A-G, Bendel State (supra) at 409

A-D per Nnaemeka-Agu, JSC:

“Although by the rules an amendment to the pleadings can be made at any stage of the proceedings different considerations apply depending on whether the amendment is being sought before or after the close of evidence by the parties. Before the close of evidence, such amendments are allowed to make such evidence as may be called admissible, as any evidence on an issue which was not pleaded or a claim not on record is strictly inadmissible: See on this - Aniameka Emeogokwue v. James Okadigbo (1973) 1 ALL NLR (Pt. 1) 379; Obijuru v. Ozims (1985) 2 NWLR (Pt. 6) 167. But once the calling of evidence has been concluded, any amendment of the pleading or claim can be justified or allowed only on the premises that evidence in support of it is already on record; so it is necessary and in the interest of justice to allow the amendment in order to make the pleading or the claim accord with the evidence already on record. The rationale of it is that such amendments would be allowed to enable the court to use the evidence already on record to settle the real issue in controversy between the parties.”

The court also emphasized that the purpose of an amendment is not to afford the applicant an opportunity to re-open his case. See generally: Civil Procedure in Nigeria, 2nd edition by Fidelis Nwadialo, SAN.

Applying the above principles to the facts of this case, I am in complete agreement with my learned brother, Peter-Odili, JSC that the attempt by the appellant to introduce the position of Camp Boss into the pleadings for the first time after the plaintiff/respondent had closed his case, was intended to overreach him and would change the character of the case as fought up to that stage. The lower court, in affirming the decision of the trial court, held at pages 145 and 146 of the record:

“The attempt to introduce the issue of camp boss at the stage when the function now ascribe to the camp boss was in earlier statement of defence were attributed to Mr. Sauvanet Jean Louis, the 2nd defendant/appellant. In my view, it is a clear index to the intention of the defendant/appellant to introduce into the proceedings a fresh issue, which did not exist at the commencement of the action. It is not an omission, a blunder or an error. It seeks to overreach. This should not be allowed. The issue of camp boss is not an omission, an

error a careless delict, it is an attempt to alter the nature of the defence of the defendant/appellant case and it should not be allowed.

In my respectful view, the amendment sought by the defendant/appellant is intended to place the defendant in a better position to defeat the plaintiff's claim, by introducing into the proceedings an issue which is an afterthought and which did not exist at the commencement of the facts in issue. It is refused. The appeal is dismissed. The case should be remitted to the trial court for continuation of hearing without the amendment sought".

The above finding is in full accord with the law on the issue. I find no reason to disturb it. For these and the more detailed reasons well adumbrated in the lead judgment, I also find no merit in this appeal. I hereby dismiss it and order that the case be remitted to the trial court for continuation of hearing without the amendment sought.

I abide by the order on costs.

OKORO JSC

I have had the advantage of reading in draft the judgment just delivered by my learned brother, Mary Ukaego Peter-Odili, JSC with which I agree that this appeal is devoid of merit and deserves to be dismissed. I shall make a few comments in support of the judgment.

The appellants herein as defendants at the trial court sought a further amendment of their statement of defence after the respondent (as plaintiff) had closed his case. The said second amendment was to introduce facts relating to a certain "camp boss" so that he would testify for the appellants. The respondent filed counter affidavit and objected to the said further amendment alleging that it would over-reach him. It was his contention that there was no office like "camp boss" or any person of that designation at the material time before the filing of the suit. This was upheld by the learned trial judge who held that the further amendment was in bad taste and was intended to overreach the respondent.

Not satisfied with the judgment of the learned trial judge, the appellants appealed to the Court of Appeal which dismissed the appeal holding that the amendment was an attempt to alter the nature of the defence of the defendant/appellant. The appellant has further appealed to this court. The lone issue nominated by the appellant for

the determination of this appeal states thus:

“Whether the learned justices were right in rejecting the appellants’ right to amend their pleadings.”

The learned counsel for the respondent has also distilled one issue which he has couched thus:

B *“whether the court below was correct in affirming the decision of the trial court refusing the amendment sought by the appellants herein (as defendants) on the basis that the amendment sought was immaterial, sought to introduce fresh facts and was intended to over-reach.”*

C I have carefully considered the arguments of both counsel which are well documented in the lead judgment. It is trite that parties are at liberty to amend their pleadings whenever it is appropriate to do so in order to bring into focus the real issues in controversy for determination by the court. In an old English case of *Cropper v. Smith* (1884) 26 Ch. D. 700 at 710-711, Bowen L.J. stated as follows:-

“...I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without prejudice to the other party”.

E The rationale behind allowance for amendment is that human memory is short and may at times remember issues after pleadings were filed and exchanged. There is always the need to make amendments to bring in the issues now remembered after pleadings had been filed. Sometimes mistakes are made and there is need to correct same.

Although by the rules of the various strata of courts, amendments to pleadings can be made at any stage of the proceedings, different considerations apply depending on whether the amendment is being sought before or after the close of evidence by the parties. It has been held in several cases by this court that before the close of evidence, such amendments are allowed to make such evidence as may be called admissible, as any evidence on an issue which was not pleaded or a claim not on record is clearly inadmissible. See H *Amenieka Emegokwe v. James Okadigbo* (1973) 1 ALL NLR (Pt. 1) 379 and *Obijuru v. Ozims* (1985) 2 NWLR (Pt. 6) 167. However, once the calling of evidence has been concluded, any amendment of the pleadings or claim can only be justified or allowed on the premises that evidence in support of it is already on record, so it is nec-

essary and in the interest of justice to allow the amendment in order to make the pleading or claim accord with the evidence already on record. The rationale of it is that such an amendment should be allowed to enable the court to use the evidence already on record to settle the real issue in controversy between the parties. See *Imonike v. Attorney-General, Bendel State* (1992) NWLR (Pt. 248) 396, *Asani Taiwo v. Adamo Akinwunmi* (1975) 4 SC 102, *Adekeye v. Akin-Olugbade* (1987) 6 SC 268. B

In the instant case, the learned trial judge considered the application for amendment and found that the new issue to be introduced i.e. the “camp boss” after the respondent has closed his case, was such that would put the plaintiff’s case completely out of gear. C
The Court of Appeal found that the amendment was meant to overreach the respondent. I am of the view that the two courts below reasoned and concluded in line with the position of the law. Had the amendment been granted, it would have set up a new line of defence not contemplated when the case started. It would have had the effect of waiting for the plaintiff to conclude his case and then the defendant would “manufacture” a defence hard for the plaintiff to comprehend. Such amendment should not be allowed at all. It is prejudicial to the plaintiff and as was held by the court below, it was clearly intended to overreach. D E

In conclusion, I find it very easy and comfortable to agree with the court below that the amendment sought by the appellants was in bad taste and intended to overreach. Accordingly, I agree that it was rightly refused by the learned trial judge. This appeal, in the circumstance, lacks merit. It is also dismissed by me. I abide by the consequential orders made in the lead judgment, that relating to costs, inclusive. F G

NWEZE JSC

I had the advantage of reading the draft of the leading judgment which my Lord, Peter-Odili, JSC, just delivered now. I endorse H
the conclusion that this appeal is, wholly, unmeritorious.

Long after the respondent in this appeal [as plaintiff] had closed his case, the appellants herein [as defendants] beseeched the trial court with an application for the amendment of their Statement of

Defence, as per paragraphs 5 (a); 5 (b) (iii); 8; 9; and 10 (1) of the Proposed Amended Statement of Defence. In the said paragraphs, the appellants, disingenuously, sought to wangle new facts into their pleadings: new facts which, no doubt, would have bolstered their defence, albeit, to the discomfiture and embarrassment of the respondent in this appeal [as plaintiff]. Indeed, that was a booby trap, craftily set up to take the wind off the sail of the case which the plaintiff had put forward on the settled pleadings.

The eagle-eyed counsel for the plaintiff, successfully, staved off that move as the trial court, persuaded by his eloquent submissions, discountenanced the application. The appellants [defendants/applicants'] appeal to the Court of Appeal [lower court] was dismissed as that court saw through the chicanery that underpinned the application. According to the court:

...The attempt to introduce the issue of Camp Boss at the stage... [was an attempt by] the second defendant/appellant to introduce into the proceedings a fresh issue which did not exist at the commencement of the action... It seeks to overreach... it is an attempt to alter the nature of the defence of the defendant/appellant's case and it should not be allowed...

In their further appeal to this court, the appellants inveighed at the lower court's findings and conclusion, citing a host of authorities.

True, indeed, both judicial and scholastic authorities support the view that "*the powers of amendment are intended to make more effective the function of the courts to determine the true substantive merits of the case...*" *Cropper v. Smith* (1884) 26 Ch. D 700, 710; *Shoe Machinery Co. v. Cutlam* (1896) 1 Ch. 108, 112; *Okeowo v. Migliore* [1979] 11 SC 138; *Ojah and Ors. v. Ogboni and Ors.* (1976) 1 NMLR 95; *Amadi v. Thomas Alpin and Co. Ltd* (1972) 1 All NLR 409; *Owena Bank v. Olatunji* [2002] 13 NWLR (Pt. 781) 259; *Gowon v. Ike-Okongwu* [2003] 6 NWLR (Pt. 815) 38; *Odgers, Principles of Pleadings and Practice* (20th Edition) passim; *Bullen and Leak and Jacob's Precedents of Pleadings* (12 Edition) 658 et passim; *F. Nwadialo, Civil Procedure in Nigeria* (Second Edition) (Lagos: University of Lagos Press, 2000) 459; *J. Amadi, Modern Civil Procedure Law and Practice in Nigeria* (Vol. 1) (Port Harcourt: Pearl Publishers, 2014) 891.

However, such extensive powers would, by no means, trans-

late to a carte blanche for effecting amendments which not only seek to overreach the adversary by attempting to alter the nature of the defence, *George and Ors. v. Dominion Flour Mills* (1963) 1 All NLR 174; *Okafor v. Ikeanyi* [1979] 3-4 SC 99, 106; *Ojah and Ors v. Ogboni and Ors* (supra); also, [1976] 4 SC 69; *Jessica v. Bendel Insurance Co.* [1993] 1 SCNJ 240, 244; *Okolo v. UBN* [1999] 6 B SCNJ 193, 203 or for unfairly prejudicing the plaintiff, *Adetutu v. Aderohunmu and Ors* [1984] 6 SC 92; or which, if granted, would entail further evidence to be led on both sides, although one of them had already closed his case [as happened in the instant case], *Bamishebi v. Ote* [1995] 9 SCNJ 220, 228. C

Simply put, an amendment will be refused where, if allowed, it will entail injustice or surprise or embarrassment to the other party or where the applicant is acting mala fide, or where the respondent cannot be compensated with costs or otherwise, *Akaninwo and Ors D v. Nsirim and Ors* (2008) LPELR-321 (SC); *Ikyernum v. Iorkumbur* [2002] 11 NWLR (Pt. 777) 52; *Fagbule v. Rodrigues* [2002] 7 NWLR (Pt. 765) 188. In one word, where such an amendment would prejudice the case of the other party to the extent that injustice will occur, the court will refuse the application for the amendment of pleadings, E *Okafor v. Ikeanyi* (1979) 3-4 SC 99, 106; *Adetutu v. Aderohunmu* (supra); also, [1984] 1 SCNLR 515.

In the instant case, the trial court found that the amendment sought was a clever ploy to introduce a new issue after the plaintiff [respondent herein] had closed his case. On its part, the lower court F reasoned that the said amendment was designed to overreach the plaintiff [respondent in this appeal]. The appellants in this appeal have not donated sufficient materials to warrant this court's interference with these findings. Like the leading judgment, therefore, I shall decline the appellants' invitation to wreak havoc on the plaintiff G [respondent's] case.

For these, and the more detailed, reasons in the leading judgment, I, too, shall dismiss this appeal as being unmeritorious. I abide H by the consequential orders in the said leading judgment.