**MUSILIU TEWOGBADE**

**v.**

**SALIU AGBABIAKA**

COURT OF APPEAL, LAGOS JUDICIAL DIVISION

30TH OCTOBER, 2000

CA/L/198/94

2PLR/2000/184 (CA)

OTHER CITATIONS

24 WRN 12

**BEFORE THEIR LORDSHIPS**

GEORGE ADESOLA OGUNTADE, JCA

SULEIMAN GALADIMA , JCA

PIUS OLAYIWOLA ADEREMI, JCA

**BETWEEN**

MUSILIU TEWOGBADE

AND

1. SALIU AGBABIAKA

2. MODINATU AGBABIAKA

3. NIMOTA AGBABIAKA (Substituted for Tijani Agbabiaka Faniyi Aluko (deceased) the original plaintiff and suing by SINOTU AGBABIAKA – their mother and next friend)

**ORIGINATING COURTS**

LAGOS STATE HIGH COURT, IKEJA JUDICIAL DIVISION (Martins J., Presiding)

**REPRESENTATION**

OLUMIDE SOFOWORA with him S.Y. KOLAWOLE – for the Appellant

L.V. DAVIS - for the Respondent

**ISSUES FROM THE CAUSE(S) OF ACTION**

CHILDREN AND LAW – JUSTICE ADMINISTRATION:-Enforcement/defence of right of minor(s) in estate co-owned with others who are not minors – Death of representative of estate in an ongoing legal proceeding – Where minor seeks to advance interest direct by being substituted into the position of the deceased party – How application may be brought - Legal effects

CONSTITUTIONAL LAW – FAIR HEARING AND CROSS-EXAMINATION RIGHTS:- Denial of a party the right to cross-examine an opposing witness – Whether amounts to a denial of the right to fair hearing guaranteed by Section 33 (1) of the Constitution

CONSTITUTIONAL LAW – FAIR HEARING AND CROSS-EXAMINATION RIGHTS: - Right to cross-examine opposing witnesses – Constitutional basis of - Legal effect of denial thereto - Whether results in the nullification of the entire proceedings

ESTATE ADMINISTRATION AND PLANNING LAW- FAMILY PROPERTY:- Death of a person representing a the interest of a family in a suit - If a person(s) who ought to step in and protect the interest of the family estate refuses to do so – Right of other members of the family to do so - Whether the category of competent parties who can apply to the court to proceed with the prosecution of the case or its defence extends to minors

REAL ESTATE AND PROPERTY LAW – LAND:- Proceedings relating to ownership of title in land - Admission in evidence of a survey plan not pleaded in the statement of claim in proceedings before a superior court where pleadings are always ordered – Whether the rule that evidence is admitted in the course of trial on facts not pleaded goes to no issue in the absence of an amendment of the pleadings – Where such piece of evidence not rooted in the pleadings is elicited under cross-examination – Whether an exception thereto

**PRACTICE AND PROCEDURE ISSUES**

ACTION – SUBSTITUTION OF A DECEASED PLAINTIFF:- Basis of the practice to allow for substitution of a deceased plaintiff – Whether children who are minors can be substituted to continue an action on behalf of an accused plaintiff

ACTION – SUBSTITUTION OF DECEASED PARTY BY MINORS:- How application may be brought - Principle that the law would permit them to sue through their next of friend or guardian ad litem – Whether a guardian ad litem or next of friend is not a party to the case

EVIDENCE – DISCOVERY PROCEEDING:- Discovering or producing or allowing the other side to inspect documents pleaded – Purpose of as methods fashioned out to ensure transparency in the conduct of cases, preventing one side from over-reaching the other and enabling the court to decide the case on the full facts that are possibly available – Extent of – Whether goes beyond giving the plaintiff a knowledge of what he does not already know as to include the getting of an admission of anything which he has to prove on any issue which is raised between him and the defendant

EVIDENCE – EVIDENCE ON OATH – RIGHT OF CROSS-EXAMINATION:- Right of a defendant to cross-examine plaintiff’s witness – Whether depends on the filing of a statement of defence or if the one filed has been struck out

EVIDENCE – EVIDENCE ON OATH:- Plaintiff/witness who swore on oath before testifying – Effect of Section 192 of the Evidence Act Cap. 112 Laws of the Federation 1990 – Distinction from a witness called merely to produce a document under a subpoena duces tecum

EVIDENCE – EVIDENCE ON OATH:- Where either the plaintiff or defendant or any of the witnesses called by either of them to testify has been sworn before giving evidence - Whether the opposite party has a right to cross-examine such sworn party or witness (even if in practice the examination-in-Chief is waived, or if the counsel changes his mind and asks no questions, or when the examination-in-chief is closed)

EVIDENCE – INTERROGATORIES:- Principle that interrogatories are not, like pleadings, confined to the material facts on which the parties intend to rely but generally are directed to the evidence by which the party interrogating desires to establish such facts – Legal effect – Whether either party may be allowed to interrogate as to any link in the chain of evidence necessary to substantiate his own case – Basis of in provisions in powers conferred by the High Court of Lagos State (Civil Procedure) Rules

JUDGMENT AND ORDER – STRUCK OUT ORDER:- Statement of defence - When deemed to have been given a new lease of legal life after being struck out – A subsequent order directing that the suit be re-listed and should now proceed to trial on merit – Effect of – Whether deemed to have set-aside the entire orders of striking out

JUDGMENT AND ORDERS:- Order to supply further and better particulars of some documents pleaded , a list of some documents, inspection of the documents and the administering of interrogatories - Basis and scope of

PLEADINGS –AMENDMENT OF:- Refusal of trial judge to grant an application for the amendment of the statement of defence – Amendment that, if granted, would make the need to answer interrogatories no longer necessary – Principle that it is the duty of courts to decide the rights of parties and not to foist punishment on them for the mistakes made in the course of preparing or conducting their case by deciding otherwise than in accordance with their rights - Where no injustice would result to the other side if the amendment sought was allowed – Whether court has no discretion to refuse same

ORIGINATING FACTS AND CLAIMS

The proceedings was commenced by a plaintiff (who during the course of the action became deceased) claiming, inter alia, for damages for trespass and injunction restraining the defendant and his privies from interference the plaintiff’s asserted rights in the parcel of land under dispute. In the course of what was a protracted action, the Court had course to strike out the statement of defence consequent upon the failure of the defendant to comply with an earlier order of court directing that the plaintiff be allowed to to administer interrogatories after the inspection of the documents. All the orders were granted by the trial judge on 4th March 1985. For a couple of occasions, the case was adjourned to explore possibility of settlement out of court which failed.

The plaintiff thereafter, again through his counsel, brought an application praying the court for an order striking out the statement of defence and entering judgment in default against the defendant. That application was granted by the court below on 2nd December, 1985 and consequently the statement of defence was struck out and judgment was entered in favour of the plaintiff. However, by an application filed on 10th December 1985 through another counsel the defendant prayed the court to set aside the judgment in default entered in favour of the plaintiff on 2/12/85. After taking arguments of counsel on both sides on this application, the court below granted the prayer by setting aside the judgment earlier entered in favour of the plaintiff on 2/12/85; it further ordered that the case should proceed to trial on the merit and the defendant should supply the plaintiff with further and better particulars of some documents pleaded in some paragraphs of the statement of defence. Counsel for the defendant, immediately thereafter brought another application for further directions praying for an order to amend the statement of defence filed on behalf of the defendant by his former counsel and also to regularise the appearance of the new counsel. This application was argued but was refused by the court on the ground that the order earlier made by the court on 4th March 1985 was not complied with. That part of the application praying for change of counsel was however granted.

The new counsel brought a motion to enable him comply with the said order of court, and thereupon again applied to amend the statement of claim on ground that that the amended statement of defence would make the need to answer interrogatories unnecessary and further in order to avoid a waste of time of the court. The application went unheeded but the hearing commenced with his consent.

Thereupon, the plaintiff was called to testify after which Counsel to the defendant moved to cross-examine. However, the bid to cross-examine was objected to by the plaintiff’s counsel on the grounds that (1) the statement of defence is non-existent in law as it was struck-out on 2/12/88 and (2) the order of court made before the statement of defence was struck out had not been complied with. In reply, the learned counsel for the defendant argued that the order setting aside the judgment had reversed the ground upon which the judgment was based. He further reasoned that even if there was no statement of defence in the file the plaintiff still had the duty to prove his case and he defendant reserved the right to cross-examine the plaintiff. The learned trial judge up-held the objection and thus refused the defendant the right to cross-examine the plaintiff.

JUDGMENT APPEALED AGAINST

Being dissatisfied with the said ruling, the defendant entered an appeal against it. The case suffered some series of adjournments during which period the plaintiff died. An application was brought to substitute the deceased with another person but that person who was ordered to prosecute the case in a representative capacity filed a Notice of Discontinuance of the case. Thereupon, a second application was consequently brought to substitute the present respondents for the deceased plaintiff. More applications were brought seeking, among others, the amendment of the statement of claim which the Court rejected and entered judgment against the defendant from which the appeal arose.

ISSUES FOR DETERMINATION

BY APPELLANT

(1) whether the learned trial judge was right to have held that the defendant/appellant had no defence to the plaintiff’s claim and therefore denied him his constitution alright to be heard in the matter when by his ruling on the defendant/appellant’s application delivered on 16th December,1985 he set aside his order of 2nd December 1985 wherein the statement of defence was struck out.

(2) whether the learned trial judge was right to have denied the defendant the opportunity to cross – examine the plaintiff and his witnesses based on the erroneous fact that the defendant/appellant’s statement defence had been struck out for failure to comply with procedural rules.

(3) whether the learned trial judge was right to have prevented the defendant/appellant from amending his statement of defence which amendment would have made the need to answer interrogatories unnecessary;

(4) whether the learned trial judge came to a right decision when he relied on a survey plan different from the one pleaded in the statement of claim in the determination of the case;

(5) whether in the absence of concrete evidence in support of the destruction of cash crops and farm products and strict proof of special and general damages, the learned trial judge was right to have awarded the sum or N10,000.00 as special and general damages.

(6) whether children who are minors can be substituted to continue an action on behalf of the estate of a deceased plaintiff when the deceased plaintiff has children who are seri juris and within reach.

BY RESPONDENT

(1) whether the learned trial judge was right in insisting that the defendant should first comply fully with the orders made by him in the proceedings on the 4th of March 1985 before he could properly entertain such applications which, prima facie, ran counter to those orders, and which if granted would make those orders ineffective and useless.

(2) whether in the circumstances of this case, the learned trial judge had exercised his discretion judicially and judiciously.

(3) whether there was sufficient credible and convincing evidence (documentary or otherwise), to enable it determine who was responsible for the failure to comply with the orders of the 4th of March 1985 and whether or not the defendant had acquiesced in any way in the said failure.

(4) whether the learned trial judge was in error in admitting the two survey plans in evidence when only one was pleaded and if he was whether that error was so fundamental that it resulted in a miscarriage or justice.

(5) whether the learned trial judge was in error in making the order substituting the three minor children of the original plaintiff who had died intestate, and authorising their mother as their next friend to prosecute the action on their behalf.

(6) whether the evidence before the court justifies the award of N5,000.00 as damages.

(7) whether at the time of judgment (28/3/91) there was a statement of defence which the learned trial judge should have looked and considered the averments therein before making up his mind one way or the other.

AS ADOPTED BY COURT

[Court adopted the six issues for determination raised by the Appellants]

DECISION BY COURT

1. Discovering or producing or allowing the other side to inspect documents pleaded are some of the methods fashioned out to ensure transparency in the conduct of cases, preventing one side from over-reaching the other and enabling the court to decide the case on the full facts that are possibly available. Discovery is not limited to giving the plaintiff a knowledge of what he does not already know, but it includes the getting of an admission of anything which he has to prove on any issue which is raised between him and the defendant. But interrogatories are not, like pleadings, confined to the material facts on which the parties intend to rely, they generally are directed to the evidence by which the party interrogating desires to establish such facts at the trial. Either party may be allowed to interrogate as to any link in the chain of evidence necessary to substantiate his own case.

2. Provisions are made for the exercise of these powers by the court in the High Court of Lagos State (Civil Procedure) Rules applicable at the time the orders were granted.

3. Where a statement of defence is struck out by the Court but by a later order of the Court, the same defendant is ordered to in the same proceeding to comply with an order preceding the striking out order (and which precipitated the striking out order), the legal effect is the restoration of the statement of defence which was struck out, giving it a new lease of legal life.

4. By directing that the case should now proceed to trial on merit, the trial judge was saying no more than that the statement of claim and the statement of defence were validly filed. Since that order was not appealed against and neither has it been set aside, it is binding on parties and the Court.

5. By virtue of Section 192 of the Evidence Act Cap. 112 Laws of the Federation 1990 a witness called merely to produce a document under a subpoena duces tecum need not be sworn if the document either requires no proof or is to be proved by other means and if not sworn he cannot be cross examined.

6. Where either the plaintiff or defendant or any of the witnesses called by either of them to testify has been sworn before giving evidence, the opposite party has a right, even if in practice the examination-in-Chief is waived, or if the counsel changes his mind and asks no questions, or when the examination-in-chief is closed, to cross-examine such sworn party or witness. It does not matter that the opposite party has not filed a statement of defence or he does not have one which is validly before the court.

7. To deny such a party the right to cross-examine is to deny him the right to fair hearing guaranteed by Section 33 (1) of the Constitution. After all a hearing can only be said to be fair when all the parties to a dispute are given a hearing or an opportunity of a hearing. If one party is refused or denied a hearing or an opportunity to be heard such hearing cannot qualify as a fair hearing which is a fundamental constitutional right guaranteed by Section 33 (1) of the Constitution – the breach of which usually results in the nullification of the entire proceedings.

8. The Court to have granted the amendment ought as the object of courts is to decide the rights of parties and not to foist punishment on them for the mistakes made in the course of preparing or conducting their case by deciding otherwise than in accordance with their rights, or intended to overreach. The proceedings before the court made it clear to the court that the way in which the defendant had set out his defence would not lead to the decision of the real matter in dispute and that no injustice would result to the respondent if the amendment was allowed. What the appellant said the amendment was aimed at was what the respondent had desired.

9. The Court was wrong to have admitted in evidence a survey plan not pleaded in the statement of claim. In superior courts of records where pleadings are always ordered, evidence admitted in the course of trial on facts not pleaded goes to no issue in the absence of an amendment of the pleadings. The court has a duty to ignore it. Even if such piece of evidence, not rooted in the pleadings, is elicited under cross-examination, it still goes to no issue.

10. There is no scintilla of evidence in proof of any special damage and indeed, no specific special damage was claimed. All that was claimed was N50,000.00 being general and special damages. No particulars of the special damages were given and of course no evidence led.

11. Children who are minors can be substituted to continue an action on behalf of an accused plaintiff when the deceased sui juris and within reach. It is the demand of law that all parties to a case must be seen to be made parties to a case before the court to enable the court effectually determine all the issues in the case. But an un-willing person cannot be made or requested to institute an action as plaintiff nor a person forced on the plaintiff as a defendant against whom he does not claim any relief. If a person who ought to protect the interest of an estate refuses to do so, such other members of the family the category of which includes the minors can apply to the court to continue to proceed with the prosecution of the case or its defence. And where such other members are minors at the time they were made to step into the shoes of the deceased in prosecuting the case, the law would permit them to sue through their next of friend or guardian ad litem.

12. A guardian ad litem or next of friend is not a party to the case.

**MAIN JUDGEMENT**

PIUS OLAYIWOLA ADEREMI, J.C.A. (DELIVERING THE LEADING JUDGMENT)

(a) N50, 000.00 general and special damages for trespass committed, which trespass is still continuing by the defendant, his servants, agents and for workmen since April, 1981 on the plaintiff’s piece or parcel of land covering approximately1 plot situate, lying and being at Ago Road, Isolo, Mushin within the jurisdiction of this court.

(b) perpetual injunction restraining the defendant, his servants, agents and/or workmen from alienating dealing with buildings, completing building already unlawfully commenced, taking possession of, or committing further trespass in any manner as the piece or parcel of land aforesaid.

Briefly the facts of the case are as follows:-

Pleadings filed and exchanged by the parties are the statement of claim and the statement of defence dated 5th March, 1984 but filed on 6th March, 1984. The plaintiff, through his solicitor, filed summons for Directions praying the court to order the defendant to supply further and better particulars of some documents, a list of some documents and an inspection of same all of which were pleaded by the defendant in his statement of defence. The plaintiff also prayed for an order to administer interrogatories after the inspection of the documents. All the orders were granted by the trial judge on 4th March 1985. For a couple of occasions, the case was adjourned to explore possibility of settlement out of court. This was not to be. The plaintiff thereafter, again through his counsel, brought an application praying the court for an order striking out the statement of defence and entering judgment in default against the defendant. That application was granted by the court below on 2nd December, 1985 and consequently the statement of defence was struck out and judgment was entered in favour of the plaintiff.

By an application filed on 10th December 1985 through another counsel the defendant prayed the court to set aside the judgment in default entered in favour of the plaintiff on 2/12/85. After taking arguments of counsel on both sides on this application, the court below granted the prayer by setting aside the judgment earlier entered in favour of the plaintiff on 2/12/85; it further ordered that the case should proceed to trial on the merit and the defendant should supply the plaintiff with further and better particulars of some documents pleaded in some paragraphs of the statement of defence. Counsel for the defendant, immediately thereafter brought another application for further directions praying for an order to amend the statement of defence filed on behalf. of the defendant by his former counsel and also to regularise the appearance of the new counsel; that is himself. This application dated 29th January 1986 was argued on 7th April, 1986 and in a reserved ruling, was refused by the court below on the 5th of May, 1986, on the ground that the order earlier made by the court on 4th March 1985 was not complied with. That part of the application praying for change of counsel was however granted.

Suffice it to say that the proposed amendment to the statement of defence was attached to the application dated 29th January, 1986. On 12th June, 1986, the new counsel to the defendant in his quest to comply with the order of court made on 4th March 1985 filed further and: better particulars and again went ahead to file another application on 27th June 1986 for further directions praying the court for leave to amend the statement of defence in the manner proposed in the attached proposed further amended statement of defence. This application was argued on 6th October 1986 and in a considered ruling handed down by the court below on the 18th of November, 1986 it was again refused for reason of non – compliance with the order of 4th March 1985 directing the defendant to furnish further and better particulars of some documents inspection of same and the plaintiff to deliver interrogatories, to the defendant. On 25th February, 1987 when the matter came up for hearing the new counsel for the defendant prayed the court for an order to amend the statement of defence and reasoned that the amended statement of defence would make the need to answer interrogatories unnecessary and further in order to avoid a waste of time of the court, he prayed that the trial of the case should commence. Hearing of the case thereafter commenced.

The plaintiff was called to testify. Sequel to the completion of the evidence of the plaintiff under examination–in–chief an attempt by Mr. Adesina, the new counsel to the defendant, to cross–examine the plaintiff was not without objection by the plaintiff’s counsel (Mr. Sasegbon) on the grounds that (1) the statement of defence is non-existent in law as it was struck-out on 2/12/88 and (2) the order of court made before the statement of defence was struck out had not been complied with. In reply, the learned counsel for the defendant argued that the order setting aside the judgment had reversed the ground upon which the judgment was based. He further reasoned that even if there was no statement of defence in the file the plaintiff still had the duty to prove his case and he defendant reserved the right to cross-examine the plaintiff, his witnesses as to his veracity, consistency and accuracy, in a reserved ruling delivered on 25th March 1987, the learned trial judge up-held the objection and thus denied the defendant the right to cross-examine the plaintiff.

Being dissatisfied with the said ruling, the defendant entered an appeal against it on 3/4/87. The case suffered some series of adjournments during which period the plaintiff died and a second application was consequently brought to substitute the present respondents for the deceased plaintiff. Perhaps I should here add that an earlier application had been brought to substitute and the person who was ordered to prosecute the case in a representative capacity later filed a Notice of Discontinuance of the case. This led to the bringing of another application to substitute the present respondents to prosecute the case in a representative capacity. An earlier application brought praying for stay of further proceedings at the lower court was refused. On the 25th October, 1990, the 2nd and 3rd plaintiffs’ witnesses testified with Mr. Adesina counsel for the defendant been (sic) present but did not cross-examine them. On 3rd January, 1991, plaintiff’s counsel addressed the court. On the 5th March 1991, the present counsel representing the defendant/appellant (Mr. Sofowora) filed another further and better particulars on behalf of the defendant accompanied by an application for further directions for an order to change counsel since Mr. Adesina had announced his desire to withdraw from further appearing in the case, he also prayed for an order extending the time within which to comply with the order of 4th May, 1985 and also an order to amend the statement of defence. This application was refused in its entirety by the court below on 28th March, 1991 and immediately delivered by judgment appealed against. The Notice of Appeal filed on 3/5/91 against the judgment delivered on 28th March, 1991 carries six original grounds of appeal. Distilled from the six grounds of appeal are six issues which, as incorporated in the appellant’s brief are in the following terms:

(1) whether the learned trial judge was right to have held that the defendant/appellant had no defence to the plaintiff’s claim and therefore denied him his constitution alright to be heard in the matter when by his ruling on the defendant/appellant’s application delivered on 16th December,1985 he set aside his order of 2nd December 1985 wherein the statement of defence was struck out.

(2) whether the learned trial judge was right to have denied the defendant the opportunity to cross – examine the plaintiff and his witnesses based on the erroneous fact that the defendant/appellant’s statement defence had been struck out for failure to comply with procedural rules.

(3) whether the learned trial judge was right to have prevented the defendant/appellant from amending his statement of defence which amendment would have made the need to answer interrogatories unnecessary;

(4) whether the learned trial judge came to a right decision when he relied on a survey plan different from the one pleaded in the statement of claim in the determination of the case;

(5) whether in the absence of concrete evidence in support of the destruction of cash crops and farm products and strict proof of special and general damages, the learned trial judge was right to have awarded the sum or N10,000.00 as special and general damages.

(6) whether children who are minors can be substituted to continue an action on behalf of the estate of a deceased plaintiff when the deceased plaintiff has children who are seri juris and within reach.

For their part, the plaintiffs/respondents through their brief of argument identified seven issues for determination and I they are as follows:-

(1) whether the learned trial judge was right in insisting that the defendant should first comply fully with the orders made by him in the proceedings on the 4th of March 1985 before he could properly entertain such applications which, prima facie, ran counter to those orders, and which if granted would make those orders ineffective and useless.

(2) whether in the circumstances of this case, the learned trial judge had exercised his discretion judicially and judiciously.

(3) whether there was sufficient credible and convincing evidence (documentary or otherwise), to enable it determine who was responsible for the failure to comply with the orders of the 4th of March 1985 and whether or not the defendant had acquiesced in any way in the said failure.

(4) whether the learned trial judge was in error in admitting the two survey plans in evidence when only one was pleaded and if he was whether that error was so fundamental that it resulted in a miscarriage or justice.

(5) whether the learned trial judge was in error in making the order substituting the three minor children of the original plaintiff who had died intestate, and authorising their mother as their next friend to prosecute the action on their behalf.

(6) whether the evidence before the court justifies the award of N5,000.00 as damages.

(7) whether at the time of judgment (28/3/91) there was a statement of defence which the learned trial judge should have looked and considered the averments therein before making up his mind one way or the other.

When this appeal came before us on 25/9/2000 for argument, Mr. Sofawora, learned counsel for the appellant adopted the appellant’s brief filed on 29/10/96 and urged that the appeal be allowed. Mr. Davis, learned counsel for the respondent for his part, adopted the respondent’s brief filed on 9/2/2000 and urged that the appeal be dismissed.

I shall start the consideration of this appeal with the issues raised for determination by both sides. While the appellant formulated six grounds of appeal in the Notice of Appeal and distilled six issues there from, the respondents raised seven issues. It has long been decided that issues raised for determination should not be more than the grounds of appeal formulated. And issues for determination should not be formed in the abstract but rather on concrete terms flowing from and related to the grounds of appeal files see Abisi v. Ekwealor (1993)6 NWLR (Pt..302) 643. I have cast a second look at the issues raised by the respondents, I am of the view that issues 1 and 2 can be conveniently merged into one for the purpose of this appeal I wish to be guided by the six issues distilled by the appellant in his brief. They are more elegantly crafted than those of the respondents and they even cover the field.

The orders made by the court below on 4th March 1985 sequel to the summons for Directions filed by the plaintiffs/respondents were that the defendant/appellant was to supply further and better particulars of some documents pleaded by him, a list of some documents, inspection of these documents and administering interrogatories by the plaintiffs/respondents after the inspection. Discovering or producing or allowing the other side to inspect documents pleaded are some of the methods fashioned out to ensure transparency in the conduct of cases, preventing one side from over-reaching the other and enabling the court to decide the case on the full facts that are possibly available. Discovery is not limited to giving the plaintiff a knowledge of what he does not already know, but it includes the getting of an admission of anything which he has to prove on any issue which is raised between him and the defendant. But interrogatories are not, like pleadings, confined to the material facts on which the parties intend to rely, they generally are directed to the evidence by which the party interrogating desires to establish such facts at the trial see Jones v. Richards (1885) 15 Q.B.D. 439. Perhaps, I should add that either party may be allowed to interrogate as to any link in the chain of evidence necessary to substantiate his own case. Provisions are made for the exercise of these powers by the court in the High Court of Lagos State (Civil Procedure) Rules applicable at the time the orders were granted i.e. 4th March 1985.

I pause to say that orders made by a competent court of law are there commanding obedience by those affected. Flagrant disobedience of court’s orders is a sure way to anarchy. I shall start the consideration of this appeal by first considering issue I formulated by the defendant/appellant. It is the foundation on which the whole appeal rests. As I have pointed out above when the order of 4th March 1985 was not complied with sequel to an application brought by the plaintiffs/respondents and in line with accepted practice, the court below struck out the statement of defence and entered judgment in favour of the plaintiff on 2nd December 1985. Thereafter, the defendant brought an application to set aside the judgment entered in favour of the plaintiffs. Ruling on the application, the trial judge on 16th December 1985 said inter alia:

"I have also considered the affidavit in this application and the affidavit in support; I am also not happy about the amount awarded for the general damage and in the interest of justice I think my order should be set aside.

Accordingly, order of this court made in favour of the plaintiff against the defendant/applicant is hereby set aside. The case should now proceed to trial on merit. The defendant is to supply the plaintiff with this Honourable Court Order on the Summons Directions with particular reference to paragraphs 7, 11, 12 and 13 within 21 days of this order that is with effect from today .............................................."

By this latest order the defendant was directed to comply with the orders made on 4th March, 1985 which, inter alia are the supply of further and better particulars of comments pleaded in paragraphs 7, 11, 12 and 13 of the statement of defence. Defendant could not comply with the order of 16th December, 1985 the statement of defence was not, in law, seen to be properly before the court. The order of 16th December 1985 undoubtedly has given a new lease of legal life to the statement of defence earlier struck out by the order made on 2nd December 1985. By directing that the case should now proceed to trial on merit, the trial judge, in my view, was saying no more than that the statement of claim and the statement of defence were validly filed; they were and still on firma terra. The order of 16th December, 1985 was not appealed against and neither has it been set aside. Issue 1 on the appellant’s brief must therefore be resolved in the appellant’s favour and I so resolve it.

I shall preface the treatment of issue 2 with some salient facts; when this matter came before the court below for hearing on 25th February, 1987 hearing opened with the evidence of the plaintiff/witness. Upon the completion of the evidence of the plaintiff/witness, counsel for the defendant moved to cross-examine by counsel for the plaintiff. After taking arguments from both sides the trial judge ruled inter alia:

"The order dated 2nd December 1985 cannot reversed (sic) the order by 4th March 1985 because the learned counsel for the defendant did not make any application to set-aside the order of 4th March 1985. In my view that order is still subsisting the defendant cannot be granted any further indulgence having failed to comply within 14 days as specified in the order of 4th March 1985 and on the Summons for Directions.

....................................................

I am of the settled view that the defendant cannot be heard again and in the circumstances the learned counsel for the defendant cannot cross-examination (sic) on the evidence adduced by the plaintiff/ witness. He has no statement of defence having strike (sic) out by order of 16th December, 1985 before my granting final judgment to the plaintiff"

With due respect to the learned trial judge, he fell into serious error when he, held that the defendant no longer had a statement of defence standing same having been struck-out by the order he made on the 16th of December 1985. It was the order made by the learned trial judge on 2nd December 1985 that he employed in striking out the statement of defence and not that made on the 16th December, 1985. Indeed, by the ruling of 16th December, 1985, the learned trial judge set-aside the entire orders made by him on 2nd December 1985. And by the enrolment of the order drawn up by the Higher Registrar of the court, it was further ordered that the suit be relisted for hearing. I pause here to restate that the plaintiff/witness swore on oath before testifying. By virtue of Section 192 of the Evidence Act Cap. 112 Laws of the Federation 1990 a witness called merely to produce a document under a subpoena duces tecum need not be sworn if the document either requires no proof or is to be proved by other means and if not sworn, he cannot be cross examined. But where either the plaintiff or defendant or any of the witnesses called by either of them to testify has been sworn before giving evidence, the opposite party has a right, even if in practice the examination-in-Chief is waived, or if the counsel changes his mind and asks no questions, or when the examination-in-chief is closed, to cross-examine such sworn party or witness see Phipson on Evidence 13th Edition page 801. It does not matter that the opposite party, a defendant, has not filed a statement, of defence or he does not have one which is validly before the court. To deny such a party the right to cross-examine is to deny him the right to fair hearing guaranteed by Section 33 (1) of the Constitution. After all a hearing can only be said to be fair when all the parties to a dispute are given a hearing or an opportunity of a hearing. If one party is refused or denied a hearing or an opportunity to be heard such hearing cannot qualify as a fair hearing which is a fundamental constitutional right guaranteed by Section 33 (1) of the Constitution – the breach of which usually results in the nullification of the entire proceedings see (1) Adigun v. A-g. Oyo State (1987)1 NWLR (Pt. 53) 678 and (2) Oluwesan v. Ogundepo (1996) 2 NWLR (Pt. 33) 628. Issue 2 must be resolved in favour of the appellant and I hereby resolve it in his favour.

Issue 3 deals with the refusal of the trial judge to grant an application for the amendment of the statement of defence. According to the appellant, the amendment, if granted, would make the need to answer interrogatories no longer necessary. Judicial decisions are at one that the object of courts is to decide the rights of parties and not to foist punishment on them for the mistakes made in the course of preparing or conducting their case by deciding otherwise than in accordance with their rights. or intended to overreach. And the proceedings before the court, in my view, made it clear to the court that the way in which the defendant had set out his defence would not lead to the decision of the real matter in dispute. Indeed no injustice would result to the respondent if the amendment was allowed. What the appellant said the amendment was aimed at was what the respondent had desired. The amendment ought to have been granted see Oguntimehin v. Gubere (1964) 1 ALL N.L.R. 176. This issue is also resolved in favour of the appellant.

Issue 4 dwells on the admission in evidence of a survey plan not pleaded in the statement of claim. The respondents in their brief contended that the survey plan admitted at trial by the learned trial judge though not pleaded, its admission in evidence was informed by the fact that it showed the land indispute. In superior courts of records where pleadings are always ordered; where evidence is admitted in the course of trial on facts not pleaded such evidence goes to no issue in the absence of an amendment of the pleadings and it should be ignored. Even if such piece of evidence, not rooted in the pleadings, is elicited under cross-examination, it still goes to no issue see Usenfowokan v. Idowu(1969) 1 NMLR 7.7. Issue 4 must also be resolved in favour of the appellant and I so resolve it.

Also issue 5 must be resolved in favour of the appellant for there is no scintilla of evidence in proof of any special damage and I must even say that no specific special damage was claimed. All that was claimed was N50,000.00 being general and special damages. No particulars of the special damages were given and of course no evidence led. Issue 5 is hereby resolved in favour of the appellant.

I have read the submissions of the appellant on issue 6 as contained in his brief of argument and I wish to say that they are far in excess of the cardinal issue raised which is whether children who are minors can be substituted to continue an action on behalf of an accused plaintiff when the deceased sui juris and within reach. I will again say that it is the demand of law that all parties to a case must be seen to be made parties to a case before the court to enable the court effectually determine all the issues in the case. But it must be remembered that an un-willing person cannot be made or requested to institute an action as plaintiff nor a person forced on the plaintiff as a defendant against whom he does not claim any relief. It is not the case of the appellant that the other children of the deceased whom he contended were sui juris and within reach during the pendency of the case were prevented from getting their names substituted for that of their deceased father neither is it their contention that the case was conducted in secrecy such that they did not know of the existence of the case. If a person who ought to protect the interest of an estate refuses to do so such other members of the family the category of which includes the minors can apply to the court to continue to proceed with the prosecution of the case or its defence. But since Saliu Agbabiaka, Modinatu Agbabiaka and Nimota Agbabiaka were said to be minors at the time they were made to step into the shoes of their father in prosecuting the case, the law would permit them to sue through their next of friend or guardian ad litem; who in this case is Alhaja Sinotu Agbabiaka. It must however be said that a guardian ad litem or next of friend is not a party to the case see Akpamaku v. Igbifoy & Ors (1970) 1 ALL N.L.R. 211. This issue therefore does not avail the appellant and it is thus resolved against him. This last issue which is in consequential does not detract from the fact that the appeal is meritorious, in substance.

In conclusion, this appeal is allowed, the judgment of the court below entered on 28/3/91 is hereby set aside and in its place is an order remitting the case back to the Chief Judge of Lagos State for re-assignment to another judge for re-trial. The appellant is entitled to the cost of this appeal which I assess at N5,000.00 in his favour.

**G.A. OGUNTADE, J.C.A.**

I have had the advantage of reading in draft a copy of the lead judgment by my learned brother Aderemi J.C.A. As to agree with his reasoning and conclusion, I would also allow the appeal. I make the same orders as in the lead judgment.

**SULEIMAN GALADIMA, JCA.**

I have had a preview of the judgment of my learned brother Aderemi, J.C.A. just delivered, I agree with his reasoning and conclusion for allowing this appeal I abide with the consequential orders made in this lead judgment**.**

**Cases referred to in the judgment**

Abisi v. Ekwealor (1993)6 NWLR (Pt..302) 643.

Adigun v. A-G. Oyo State (1987)1 NWLR (Pt. 53) 678.

Akpamaku v. Igbifoy & Ors (1970) 1 ALL N.L.R. 211.

Jones v. Richards (1885) 15 Q.B.D. 439.

Oguntimehin v. Gubere (1964) 1 ALL N.L.R. 176.

Oluwesan v. Ogundepo (1996) 2 NWLR (Pt. 33) 628.

Usenfowokan v. Idowu(1969) 1 NMLR 7.7.