**MRS. FOLASADE OYEWOLE**

**V.**

**MRS. VICTORIA LASISI**

IN THE COURT OF APPEAL, IBADAN JUDICIAL DIVISION

9TH MARCH 2000

CA/I/132/93

**LEX (2000) - CA/I/132/93**

OTHER CITATIONS

3PLR/2000/181 (CA)

**BEFORE THEIR LORDSHIPS**

ALOMA MARIAM MUKHTAR, JCA

MORONKEJI ONALAJA, JCA

DALHATU ADAMU, JCA

**BETWEEN**

MRS. FOLASADE OYEWOLE

MRS. LATUNDUN ALESIN

AND

MRS. VICTORIA LASISI

**REPRESENTATION**

PETER ADE OGUNLEYE – for appellants

SOJI OYEBADEJO – for respondent

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

REAL ESTATE/LAND LAW - Capacity to sue over family property – Where action brought in individual capacity – Implication for locus standi of plaintiff and competence of suit

AGRICULTURE AND FOOD LAW – FARM LAND:- Claim for declaration as to ownership of cocoa farm – Applicable principles of land law – How treated

ETHICS – LEGAL PRACTITIONER:- Competence of counsel – Mistake of counsel in the institution of a case – Where it affects locus standi of client - Attitude of court thereto - Effect

ETHICS – LEGAL PRACTITIONER:- Incompetence of counsel – When would be binding on client – Justification – Whether undermines Constitutionally guaranteed freedom to elect counsel of choice

ETHICS – LEGAL PRACTITIONER:- Duty of counsel - Dominant and general instruction to conduct the litigation in court to finality – Nature of role as counsel in carrying out that function – Whether deemed to be that of an independent contractor who exercise his skill and judgment and is free to act as he considers fit within the instruction in the interest of his client – Duty of counsel to act within the scope of his authority express or implied – When failure of counsel to properly conduct brief is binding on client

CHILDREN AND WOMEN LAW: *Women/Children and Property/Justice Administration* – Protection of interest in family land - Whether proper to sue in individual capacity instead of representative of family – How treated

**PRACTICE AND PROCEDURE ISSUES**

ACTION:- Inadvertence of counsel – Rule that its effect is usually not visited on the client – Justification – When will not apply

EVIDENCE:- Averments and particulars in statement of claim when filed - Whether supersedes the particulars of claim endorsed in the writ of summons - Where a claim is endorsed in the writ of summons but not reflected in the statement of claim is deemed to be abandoned – Whether deemed abandoned and thus unpleaded - Effect of

JUDGMENT AND ORDER:- Proper order where party lacks locus standi – Whether dismissal of suit or striking out – Duty of appellate court where lower court ordered dismissal

PLEADINGS - AMENDMENTS:- Rule that parties are bound by their pleadings – When pleadings are amended – Effect

**MAIN JUDGMENT**

**M.O. ONALAJA, JCA, (Delivering the leading judgment)**

The plaintiff (1) MRS. FOLASADE OYEWOLE (Nee AKINYOMBO DADA) (2) MRS. LATUNDUN ALESIN (for themselves and on behalf of the entire children of JOHNSON AKINYOMBO DADA) issued writ against MRS. VICTORIA LASISI (Nee ANIBI) as defendant which writ was duly endorsed. After service of the writ on defendant pleadings were filed, delivered, exchanged and amended.

By their amended statement of claims at page 14 of the record of appeal its states the undermentioned paragraphs as follows:-

SUIT NO. HIF/71/90

BETWEEN

(1) MRS. FOLASADE OYEWOLE nee (AKINYO-MBO)

(2) MRS. LATUNDUN ALESHIN) Plaintiffs

AND

MRS. VICTORIA LASISI

OGUNMAKINDE (Nee (ANIBI)) Defendant

AMENDED STATEMENT OF CLAIM

(1) The plaintiffs are petty traders. The 1st plaintiff is resident in 26B OMPETU STREET, ILE-IFE and the 2nd resident in 21 IGBO ITAPA STREET, ILE-IFE.

(2) The DEFENDANT is a businesswoman and her marital home is OMITOTO LINE 2, ILE-IFE.

(3) The plaintiffs’ father is late Johnson Dada Akinyombo who died sometime in 1960.

(4) The said plaintiffs’ father Johnson, Dada Akinyombo and defendant’s mother, Late Comfort Layemi were born of the same parents.

(5) The plaintiffs’ deceased father acquired three separate parcels of virgin land in Idu about a decade before his death and these were developed before his death and these were developed into cocoa farms by the said Johnson Dada Akinyombo.

(6) The boundaries of the farms which the defendant knows very well are as follows:-

FARM (A)

1st Side Mulekanles’ farm

2nd Side Idu Village

3rd Side Titi’s Farm

4th Side Ojo Arobieku’s Farm

FARM (B)

1st Side Aguro’s Cocoa Farm

2nd Side Moses Adewole’s Farm

3rd Side Titus Akindun’s Farm

4th Side Ayo Ogunmokun’s Farm

FARM (C)

1st Side Ayo Ogunmokun’s Farm

2nd Side Joseph Oke’s Farm

3rd Side Ayo Ogunmokun’s Farm

4th Side Ponbo’s Farm.

47 WHEREOF the plaintiffs’ claim against the defendant as per writ of summons viz:

(1) Declaration that the plaintiffs are the rightful owners of the three parcels of cocoa farm situate lying and being at IDU VILLAGE, Ondo Road, Ile-Ife the farm having developed (sic devolved) on them on the death of their father in accordance with native law and custom.

(2) An order for perpetual injunction restraining the defendant, her agents and privies, from (sic from) further entry into the said plaintiffs’ farm".

Similarly, defendant filed an amended statement of defence of 29 paragraphs at pages 19 to 21 of the record of appeal and concluded thus:

"29 WHEREOF the plaintiffs’ claim should be dismissed as being frivolous".

It is pertinent to state that plaintiffs did not file a reply to the amended statement of defence. It was this stage of the pleadings that the case proceeded to trial.

Plaintiffs called in all 4 witnesses inclusive of the senior brother of the plaintiffs who is ordinarily resident in LONDON who testified as 3rd PW whilst 1st plaintiff testified as 4th PW her evidence in chief was short and it reads partly as follows:

"I know the farm in dispute. My father Johnson Dada was the owner of the farm. My father has since died. I come to the court to request it to take my farm and hand it over to me from the defendant.

My father died 32 years ago. After the death of my father Waasin took over the farm. Waasin had also died. He died about 5years ago. I did not bring this action on time because my senior brother is overseas and we were waiting for him to direct us in taking necessary action".

The 4 plaintiffs’ witnesses were thoroughly cross-examined. The defendant called 4 witnesses which included the defendant and 2nd DW who was half brother to the plaintiffs. At page 33 of the record of appeal 2nd DW stated in his evidence in chief –

"I don’t know the land in dispute but I have heard about it before. The land is at IDU."

Each defence witness was cross-examined after the evidence in chief. The counsel to the parties addressed the court after conclusion of trial. Eventually, in a considered judgement delivered on 14th day of October, 1992 OLUBORODE J. after review of the evidence and evaluation of the evidence concluded his judgement at pages 49 and 50 of the record of appeal by the following observations:-

"The evidence of the 1st PW under cross examination as stated above is in conflict with the above averments and also contradicts the evidence of 2nd PW while the 3rd PW in effect admitted not knowing the boundaries. The 1st plaintiff i.e. the 4th PW was in fact unable to give the identity of the land. This situation had clearly demonstrated the little knowledge they had on the land they now seek both declaration and perpetual injunction which in view of the principle enumerated and the court’s findings above are bound to fail.

Again going by the evidence of the plaintiffs the question is whether they are competent to sue as the rightful owners over the land in which evidence was adduced belonged to Johnson Dada family consisting of plaintiffs, their brother Dimeji and also their half brother Gbenga the 5th DW (sic 2nd DW). I think I agree with the submission of the learned counsel for the defendant that in view of the pleadings and evidence above the plaintiffs cannot properly sue in their personal capacity as the rightful owners of the family property. I do not share the sentiment of the learned counsel for the plaintiffs Mr. Adesanmi that the mistake in instituting the action in such manner was that of counsel and not the litigant and therefore it should be overlooked. It is a fundamental mistake which renders the action incompetent.

*“On the whole and in view of the above findings I cannot but hold that the claims of the plaintiff had failed and it is accordingly dismissed in its entirety"*

(Italics mine).

The plaintiffs being dissatisfied with the above judgment at page 52 of the record of appeal filed the notice of appeal and in paragraph 3 raised two grounds of appeal and furnished the particulars. Plaintiffs are henceforth referred to in this judgement as the APPELLANTS.

The grounds of appeal are set down as follows:-

"3 GROUNDS OF APPEAL

(1) The Judgment is against the weight of evidence.

(2) The learned Trial Judge erred in law in, dismissing the plaintiff/appellants’ case in toto despite in finding of the Court that the disputed land was communal to both parties. The dismissal has occasioned miscarriage of Justice.

PARTICULARS OF ERROR

(1) The Plaintiffs/Appellants’ case is not like Kodinlinye case, in which the claimants have failed to prove any title at all to any of the disputed land.

(2) Injustice will be done to the Plaintiffs/Appellants’ family and its members by the estoppel per rem judicatam to which they would be subjected to as a result of the dismissal of the action".

With the leave of this court APPELLANTS filed two additional grounds of appeal 3 and 4 and furnished the particulars. From the four grounds of appeal in accordance with the rules of this court appellants filed appellants’ brief of arguments on 2nd July 1996.

In accordance with the rules and practice of this court in brief writing that issues raised both in appellants’ brief and also respondents’ brief must be based and correlate with the grounds of appeal, appellants at page 4 of their appellants’ brief of argument in paragraph 3 of their brief raised the issues for determination as under:-

"3 ISSUES FOR DETERMINATION

(1) Was the learned trial judge right in dismissing the plaintiffs’ claim in its entirety in view of his findings on record" or was the Court right in dismissing the plaintiffs’ claim in toto in view of the findings of the court on record".

(2) Whether the findings of the learned trial Judge is justified in view of the evidence on record i.e. Did the learned trial Judge make proper evaluation of the evidence adduced by the plaintiff/ appellants in this case? Whether the learned trial Judge was right in dismissing the plaintiffs/appellants’ claim despite the fact that their counsel admitted his inadvertence in not heading the amended statement of claim that the action was brought in a representative capacity?

The Appellants served their brief of argument on the Defendant whom they have previously served their notice of appeal and application to file additional grounds of appeal. Henceforth in this judgment the Defendant is referred to as RESPONDENT. She filed respondents’ brief of argument in accordance with the rules and practice of this court to appellants’ brief with leave of this court on 12th October 1999 she raised an issue for determination in her unpaged respondents’ brief in this inelegant respondent’s brief as follows:-

"It is respectfully submitted that the main issue that calls for determination is Whether from findings of the trial Judge The appellant is entitled to a non suit?

In the additional grounds of appeal there was the issue of non suit raised in ground 3 whilst ground 4 complained that the trial judge erred in law and in fact in dismissing the plaintiffs’ claim on the ground that the plaintiff/appellants instituted the suit in their personal capacity, ground 4 as couched is an incompetent ground of appeal based on line of authorities of both the Supreme Court and this court in interpreting Order 3 rule 2 sub 2 Court of Appeal Rules that a ground of appeal cannot be based on error of law and misdirection Madike v. Ibekwe (1987) 4 NWLR (Pt. 67) page 718 SC, Emecheta v. Ogueri (1998) 12 NWLR (Pt. 547) pg. 546; Godwin Loke v. Inspector General of Police (1997) 11 NWLR (Pt. 527) page 57 CA, Free Enterprises (Nig.) Ltd. v. Gtosa (1998) 1 NWLR (Pt. 332) page 1 CA. It is not surprising that the only sustainable respondents’ issue is the singular issue of non-suit.

Upon the matter coming up for argument learned counsel to appellants and respondent relied and adopted their respective briefs of argument.

The capacity of the appellants was put in issue, and this indirectly puts the locus standi of the appellants into focus. Once the locus standi of a party has been raised it has to be considered first. In the consideration it is the writ of summons and statement of claim that is considered. It is for this reason that the writ of summons and the amended statement of claim were purposely and advisedly set up above.

The writ of summons described the appellants as suing for themselves and on behalf of the entire children of Johnson Akinyombo Dada. In the amended statement of the representative capacity of Appellants was not reflected in naming the appellants. In paragraph 1 supra of the amended statement of claim the appellants were named in their personal names in their individual capacities. Under High Court Civil Procedure Rules of Oyo State applicable in Osun State leave is not required to sue in a representative capacity. On procedure in a representative action the comments in Commentaries From The Bench Part II by ONALAJA JCA at page 135 on the topic Parties To Civil Action is apposite as follows:

"Where a plaintiff or plaintiffs institute action in a representative capacity there is the school of thought that the leave of the court is required. With respect I consider the leave as superfluous, the duty of such plaintiff is to describe his capacity in the writ and to plead that capacity as a material fact in the statement of claim".

It is trite law that averments and particulars in the statement of claim supercede the particulars of claim endorsed in the writ of summons. Where a claim is endorsed in the writ of summons but not reflected in the statement of claim is deemed to be abandoned Chief J O Lahan v. Chief Lajoyetan (1972) 6 SC 190, University of Calabar v. Essien (1996) 10 NWLR (Pt. 477) page 225 SC ; Nzeribe v. A.g. Imo State (1996) 10 NWLR (Pt. 478); Onyero v. Nwadike (1996) 9 NWLR (Pt. 471 page 231 wherein the Court of Appeal held as follows:

"(4) It is well settled that a statement of claim when filed supercedes the writ of summons and must itself disclose a good cause of action. Accordingly, where a special relief is claimed in the writ of summons which is not claimed in the statement of claim it will be deemed that the appeal relief has been abandoned. Also where in a statement of claim a consequential relief is added to the claim in the writ of summons such additional claim will be deemed as claimed before the court (Udechukiwu v. Okwuka (1956) SCNLR 189; Lahan v. Lajoyetan (1972) 6 SC 190 referred to).

(4) In all action in the superior courts of record where pleadings set out the facts relied upon by each party, a writ must first be taken out of the court registry. But once pleadings are filed and exchanged, the statement of claim thenceforth supersedes the writ. It is the law that the writ itself must disclose reasonable cause of action. In many cases the statement of claim more than a writ amplifies through facts averred the real action a party pursues Enigbokan v. American International Insurance Co. Ltd. (1994) 4 NWLR (Pt. 348) page I at 19, NTA v. Anigbo (1972) 5 SC 156, Udechukwu v. Okwuka (1956) SCNLR 189 referred to"

From the above authorities the appellants by their amended statement of claim as reflected in paragraph I of the amended statement of claim (supra) and the heading of the parties named appellants individually and the claims or reliefs sought were not for themselves and on behalf of the entire children of Johnson Akinyombo Dada. In so holding apart from the supersession of the statement of claim over the writ of summons.

It is a fundamental rule of our civil jurisprudence and process that both the courts and the parties are bound by their pleadings as unpleaded facts go to no issue Abimbola George & Ors v. Dominion Flour Mills Ltd. (1963) All NLR 70 SC, Ferdinand George & Anor v. United Bank For Africa Ltd. (1972) 8/9 SC 264 (1972) 1 ALL NLR (Pt. 2) page 347, UBN PIc v. Scpok Nig. Ltd. (1998) 12 NWLR (Pt. 578) page 439 CA, Universal Insurance Co. Ltd v. TA. Hammond (Nig.) Ltd. (1998) 9 NWLR (Pt. 569) page 340 CA.

As the learned trial Judge pointed out the lacuna in the capacity of the appellants in the pleading that was a sufficient notice for learned counsel to have applied for an amendment of the pleadings. The address stage was not too late to apply for amendment since the High Court Civil Procedure Rules allow application to be made at any stage before judgment Olawole Ajao & Ors v. Salimotu Ajao Awososun unreported lbadan Civil Suit 1/90/63 the plaintiffs at address stage sought leave to amend the pleadings after he had closed his case and defendant had called eight witnesses, in granting the prayer the learned trial Judge stated that the defendant could be compensated in costs. The Supreme Court in James Oguntimehin v. Kpakpe Gubere & Ors. (1964) NMLR 55 (SC) 1964 1 All NLR 176 stated that an amendment could be granted even during final address by counsel so as to amend the pleadings to be in line with the evidence already led, see also Chief Okafor v. Ikeanyi & 3 Ors. (1979) 3/4 SC 99 at 106; Chief Ojah v. Chief Eyo Ogboni (1976) 4 SC 69. Amendment is granted or refused by the peculiar circumstances of each case. Where there is no materiality between the case and amendment sought the amendment shall be refused Wood v. Earl of Durham (1888) 21 QBD 50 1, Sinclair v. James (1894) CHD 554; Oyenuga v. Provisional Council of University of Ife (1965) NMLR page 9; Mobil Oil Nigeria Ltd v. Abolade Coker (1971) 1 NMLR 56.

The Court is not a court of sentiments, the learned trial Judge was right to have rejected the inadvertence of counsel is usually not visited on the client Bowaje v. Adediwura 1976 6 SC 143. In Chief Boniface Amadi Ogbuehi & 3 Ors v. The Governor of Imo State & 3 Ors. (1995) NWLR (Pt. 417) page 53 at 95 the Court of Appeal stated that:

"There is the usual dominant and general instruction to conduct the litigation in court to finality. In carrying out this instruction counsel functions as an independent contractor who exercise his skill and judgment and is free to act as he considers fit within the instruction in the interest of his client. However, counsel acting within the scope of his authority express or implied can bind the client. In the instant case the failure of the learned counsel for the appellant to invoke section 192 of the Evidence Act to buttress his application for the call of a witness binds the appellant as counsel had full control of the litigation. Edozien v. Edozien (1993) 1 NWLR (Pt, 272) page 678 at 702 referred to)".

In the instant appeal if incompetence of counsel is allowed where counsel failed to file proper statement of claim it will open a floodgate and defeat the course of justice notwithstanding that under the 1999 Constitution of the Federal Republic of Nigeria that every citizen has a fundamental right of choice of counsel the citizen should ensure she employs competent counsel as she relies on counsel’s skill. The facts of this case does not justify the kind of inadvertence envisaged in Bowaje v. Adediwura’s case (supra). Therefore the plea of inadvertence by learned counsel for not settling the pleadings properly lacks substance and is rejected.

Be that as it may the lower court held that appellants lacked capacity to claim the disputed land personally as the rightful owners being family properties are not before the court. So the court lacked jurisdiction as proper [parties] are not before the court therefore the Appellants lacked locus standi Madukolu v. Nkemdilim (1962) 2 SCNLR 34 1, therefore as proper parties are not before the court since the evidence was at variance with the pleading the lower court was right in refusing the claims of the appellants, it is trite law that where a party lacks capacity to maintain an action, like failure of locus standi the proper order for lack of jurisdiction is to strike out the case and not a dismissal.

So invoking Section 16 Court of Appeal Act this appeal fails in that the prayers and reliefs sought by the appellants were rightly refused but instead of dismissal of the action an order of striking out the action is entered.

In the peculiar circumstances of the case the judgment of Oluborode J of 14th October, 1992 is confirmed but on a different ground and that the order of dismissal of the action in its entirety is substituted with an order striking out the action. All the other issues had been subsumed on the issue of jurisdiction.

There shall be no order of costs each party should bear theirs or her cost.

**ALOMA MARIAM MUKHTAR J.C.A.:**

As has been rightly pointed out in the lead judgment written by my learned brother Onalaja J.C.A., the Writ of Summons in this case bore the correct title. Being a suit meant to be taken in a representative capacity, the Plaintiffs’ Counsel was awoken to his responsibility at that initial stage of the proceedings, when he correctly described the Plaintiffs, who are now the Appellants thus:

1. Mrs. Folasade Oyewole (Nee Akinyombo Dada)

2. Mrs. Latundun Alesin (For themselves and on behalf of the entire children of Johnson Akinyombo Dada) Plaintiffs.

Quite clearly the above reflected an action taken in a representative capacity, but somewhere along the line learned Counsel lost sight of this very fundamental aspect of the case, and continued to refer to the two persons above as Plaintiffs simpliciter. The Statement of Claim initially filed and even the amended one thereafter did not fare any better. This mistake or oversight therefore brought into focus the fundamental issue of locus standi, an issue which may result in proceeding being nullified. See Akinbinu v. Oseni (1992) 1 NWLR (Pt. 215) page 97; Nwankwo v. Nwankwo (1992) 1 NWLR (Pt. 238) page 693.

I have had a preview of the lead judgment and I am in full agreement with the reasoning and conclusion reached therein that the appellants lack capacity to maintain the action they have instituted. Their appeal fail and it is dismissed. I abide by the orders made.

**DALHATU ADAMU J.C.A.:**

I was privileged to have read in advance the leading judgment of my learned brother Onalaja J.C.A. in this appeal. I am in complete agreement with the reasons given and the conclusion reached in the said leading judgment which I hereby adopt. I also hereby dismiss the appeal, affirm the decision of the lower court and abide by the other consequential orders as made in the leading judgment.

CASES REFERRED TO IN THE JUDGMENT

Abimbola George & Ors. v. Dominion Flour Mills Ltd. (1963) All NLR 70 SC

Akinbinu v. Oseni (1992) 1 NWLR (Pt. 215) 97

Bowaje v. Adediwura (1976) 6 SC 143

Chief J 0. Lahan v. Chief Latoyetan (1972) 6 SC 190

Chief Ogbuehi & 3 Ors v. The Governor & 3 Ors (1995) 9 NWLR (Pt. 417) 53

Chief Ojah v. Chief Eyo Ogboni (1976) 4 SC 69

Chief Okafor v. Ikeanyi & 3 Ors (1979) 3 – 4 SC 99

Edojieu v. Edojieu (1993) 1 NWLR (Pt. 272) 678

Emecheta v. Ogueri (1998) 12 NWLR (Pt. 579) 502

Enigbokan v. American International Insurance Co. Ltd. (1994) 44 (Pt. 348) 1

Ferdinand George & Anor v. United Bank for Africa Ltd. (1972) 819 SC 264,1972 1 All NLR (Pt. 2) 347

Free Enterprise (Nig.) Ltd v. GTOSA (1998)1 NWLR (Pt. 532) 1

Godwin Loke v. Inspector General of Police (1997) 11 NWLR (Pt. 527) 57

James Oguntimehin v. Kpekpe Gubere & Ors (1964) NWLR 55 SC (1964) 1 All NLR 176

Madukolu v. Nkedilim (1962) 2 SCNLR 341

Mobil Oil (Nigeria) Ltd. v. Abolade Coker (1971) 1 NMLR 56

NTA v. Anigbo (1972) 5 SC 156.

Nwadike v. Ibekwe (1987) 4 NWLR (Pt. 67) 718

Nwankwo v. Nwankwo (1992) 1 NWLR (Pt. 238) 693

Nzeribe v. A.G. Into State (1996) 10 NWLR (Pt. 478)

Olawole Ajao & Ors v. Salimotu Ajao Awososun Unreported Ibadan Civil suit. I/90/63

Onyero v. Nwadike (1996) 9 NWLR (Pt. 471) 231

0yenuga v. Provisional Council of University of Ife (1965)

Sinclair v. James (1894) 3 CHD 5 54

UBN Plc v. SCPOK (Nig.) Ltd. (1998) 12 NWLR (Pt. 578) 439

Udechukwu v. Okwuka (1956) 5 SCNLR 189

United Agro Ventures Ltd v. FCMB (1998) 4 NWLR (Pt. 547) 546

Universal Insurance Co. Ltd. v. TA. Hammoud (Nig.) Ltd. (1998) 9 NWLR (Pt. 565) 340

University of Calabar v. Essien (1996) 10 NWLR (Pt, 477) 225

Wool v. Earl of Durham (1888) 21 QBD 501

STATUTES REFERRED TO IN THE JUDGMENT:

Constitution of the Federal Republic of Nigeria 1999.

Court of Appeal Act – S. 16