**ENA RAYMOND EZE**

**V**

**BETRAM ENE AND ANOTHER**

SUPREME COURT OF NIGERIA

10TH DAY OF MARCH 2017

SC. 295/2006

**LEX (2017) - SC. 295/2006**

OTHER CITATIONS

2PLR/2017/119 (SC)

**BEFORE THEIR LORDSHIP**

OLABODE RHODES-VIVOUR, JSC (Presided and Read the Lead Judgment)

MUSA DATTIJO MUHAMMAD, JSC

CLARA BATA OGUNBIYI, JSC

CHIMA CENTUS NWEZE, JSC

AMIRU SANUSI, JSC

**BETWEEN**

ENA RAYMOND EZE (For himself and on behalf of Umuonugbo Eze family of Idedu Amokwe in Udi Local Government Area)

AND

1. BETRAM ENE

2. SIMON ENE – Respondents

(For themselves and on behalf of the members of Umuenovoali family of Idedu Amokwe in Udi Local Government Area)

**ORIGINATING COURT**

1. COURT OF APPEAL, ENUGU DIVISION

2. OGUN STATE HIGH COURT (S.A. Olugbemi J., Presiding)

**REPRESENTATION/LAWYERS**

T. MADUKA with E. EHIANE - for the Appellant.

ALEX EJESIEME - for the Respondents.

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

REAL ESTATE AND PROPERTY LAW – LAND:- Claim for declaration of title to the customary right of occupancy to the land in dispute, damages for trespass and perpetual injunction – Application for amendment of statement of defence after the last witness had finished with their testimony – How treated

**PRACTICE AND PROCEDURE ISSUES**

APPEAL - FINDINGS OF FACT OF TRIAL COURT AND COURT OF APPEAL:- Where concurrent - Attitude of Supreme Court thereto.

APPEAL - FINDINGS OF TWO LOWER COURTS:- Where concurrent - Appellant who challenges - Duty on.

EVIDENCE - PREVIOUS PROCEEDINGS: - Evidence of – Relevance of in a subsequent trial.

EVIDENCE - PREVIOUS TESTIMONY IN SUBSEQUENT OR SAME PROCEEDINGS:- Admission of - Conditions warranting - Rationale therefor - Section 46 of the Evidence Act, 2011 considered.

PLEADINGS - AMENDMENT OF - Application for - Grant or refusal of - Conditions determining - Duty on court in respect of - Right to amend - Restriction thereto.

PLEADINGS:- Purport of – Duty of parties and court thereto

WORD AND PHRASES – LATIN MAXIM - RES INTER ALIOS ACTA ALTERI NOCERE NON DEBET:– Meaning of.

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

The appellant as plaintiff instituted an action at the Anambra State High court were they claimed declaration of title to the customary right of occupancy to the land in disputed, the sum of one thousand naira damages for trespass and perpetual injunction.

At trial, the appellant called three (3) witnesses in proof of his case. The respondents called four (4) witnesses and relied on their statement of defence. However, after the last witness concluded evidence, the respondents filed an application to amend their statement of defence. The appellant opposed the application. The trial judge heard parties on the application and in its ruling granted the application/amendment as prayed.

Dissatisfied, the appellant appealed the court’s ruling. The Court of Appeal upheld the court’s decision.

Dissatisfied still, the appellant appealed to the Supreme Court. He challenged the propriety of amending the statement of defence after close of parties’ case, as it occasioned a breach of his right to a fair hearing.

**DECISION(S) APPEALED AGAINST**

The Court of Appeal entered judgment, affirming the decision of the trial court. The trial Court had entered judgment dismissing the suit of the Appellant. Dissatisfied, the Appellant appealed to the Supreme Court.

**ISSUE(S) FOR DETERMINATION ON APPEAL**

*BY APPELLANT:*

Issue 1

Whether the learned justices’ of the Court of Appeal were right in law in upholding the decision of the High Court granting a fundamental amendment to the statement of defence after the close of the cases for the parties; and whether same resulted in a denial of fair hearing to the appellant.

Issue 2

Whether the learned justices’ of the Court of Appeal were right in law in affirming the trial judge’s rejection of exhibit 1.

*BY RESPONDENTS:*

Issue 1

Whether the court below was right in affirming the decision of the trial court which allowed the amendment sought by the respondents.

Issue 2

Whether the court below was right in affirming the decision of the trial court in the rejection of exhibit 1.

*AS ADOPTED BY COURT:*

[The Court adopted the issues formulated by the Appellant].

**MAIN JUDGMENT**

RHODES-VIVOUR JSC (DELIVERING THE LEAD JUDGMENT):

The appellant as plaintiff sued the respondents as defendants on a writ of summons accompanied by statement of claim.

Paragraph 13 of the statement of claim states the plaintiff’s claim. It reads:

13. Whereof the plaintiff claims against the defendants jointly and severally as follows:-

(a) Declaration that the plaintiff is entitled to the customary right of occupancy to the land in dispute.

(b) N1,000.00 (one thousand naira) damages for trespass.

(c) Perpetual injunction restraining the defendants’, their servants, agents and privies from further entering the land without the consent of the plaintiff.

The plaintiff relied on their statement of claim filed on 30 May 1983.

Trial commenced at, one time or the other before the judges who were unable to hear the case to the end. Finally trial commenced on 4 February 1991 before the Hon. Justice P. K. Nwokedi (CJ Anambra State as he then was). Three witnesses were called by the plaintiff in proof of their case.

On 15 February 1991, the defendants opened their defence, relying on their statement of defence, filed on 9 September 1983.

The defendants called four witnesses and on 18 February 1991 after DW4 concluded his evidence, filed an application to amend their statement of defence. This application was opposed by the plaintiff. The learned Chief Judge heard arguments and ruled as follows: Court: Objection is overruled. I shall give reasons in my judgment. Amendments are hereby granted as prayed.”

Four documents were admitted in evidence as exhibits.

They are:

1. Exhibit 1 - Certified copy of records of proceedings in suit No. E/113/77.

2. Exhibit 2 - Plan No. MEC/12/18/78.

3. Exhibit 3 - Judgment in criminal case.

4. Exhibit 4 - Plan No. MLS/2311/83.

The learned Chief Judge delivered judgment on 21 March 1991 dismissing the plaintiff’s claims. The plaintiff filed an appeal. It was heard by the Enugu Division of the Court of Appeal, that court dismissed the appeal. On a further and final appeal to this court and in accordance with rules of court, both sides filed briefs of argument. The appellant’s brief was filed on 17 May 2012, but was deemed duly filed and served on 1 November 2016. The respondents’ brief was filed on 3 November 2016.

Learned counsel for the appellant Mr. T. Maduka formulated two issues from his amended notice of appeal. They are.

Issue 1

Whether the learned justices’ of the Court of Appeal were right in law in upholding the decision of the High Court granting a fundamental amendment to the statement of defence after the close of the cases for the parties; and whether same resulted in a denial of fair hearing to the appellant.

Issue 2

Whether the learned justices’ of the Court of Appeal were right in law in affirming the trial judge’s rejection of exhibit 1.

Learned counsel for the respondents, Mr. A. Ejesieme also formulated two issues for determination of this appeal. They read:

Issue 1

Whether the court below was right in affirming the decision of the trial court which allowed the amendment sought by the respondents.

Issue 2

Whether the court below was right in affirming the decision of the trial court in the rejection of exhibit 1.

Both sets of issues ask the same question, so the issues formulated by the appellant would be considered in resolving this appeal.

At the hearing of the appeal on 13 December, both sides adopted their briefs. Learned counsel for the appellant urged us to allow the appeal, while learned counsel for the respondents urged the opposite.

Issue 1.

Whether the learned justices’ of the Court of Appeal were right in law in upholding the decision of the High Court granting a fundamental amendment to the statement of defence after the close of the cases for the parties; and whether same resulted in a denial of fair hearing to the appellant?

Learned counsel for the appellant observed that the respondents’ case had always been that their land, “Ishi Owelle Umunevoali” is situate within a larger piece of land called “Okoto” but by the amendment, their case changed in that “Ishi Owelle Umunevoali” now borders the Idedu Amokwe section of “okoto” land. He further observed that by the said amendment, the respondents substituted their original survey plan No. NLS/AN/234/83 with a new survey No. NLS/AN/2311/83, thereby denying the appellant the right to cross-examine the respondents since they had close their case. Reliance was placed on Imonikhe v. Attorney-General, Bendel State (1992) 7 SCNJ 197.

He submitted that granting the amendment at such a belated stage of the proceeding amounted to a denial of fair hearing.

Reference was made to C.I. Adetutu v. W.O. Aderohunmu & Ors. (1984) 6 SC 92.

He urged this court to resolve this issue in favour of the appellant.

Learned counsel for the respondents’ observed that the amendment was granted solely to bring the evidence before the court in line with the pleadings. He further observed that he closed the respondents’ case with the grant of the amendment as no further evidence was called. He argued that if the appellant felt that he was denied a fair hearing he could have made application to effect consequential amendments to his pleadings and ask for an adjournment to recall the witness for further cross-examination. Reliance was placed on Emegokwue v. Okadigbo (1973) 1 All NLR (Pt. 1) 379; Obijuau v. Ozims (1985) 2 NWLR (Pt. 6) 167.

He submitted that the appellant was not denied fair hearing.

He urged this court to resolve the issue against the appellant and in favour of the respondents.

Order 8, rule 1 of the High Court (Civil Procedure) Rules of Anambra State provides for amendment of pleadings for the purpose of determining the real question(s) in controversy between the parties.

A party’s case is in his pleadings and his case is proved by evidence. A party is thus bound by his pleadings, and so evidence which is contrary to his pleadings go to no issue. See Emegokwue v. Okadigbo (1973) 4 SC 113.

The statement of claim and statement of defence are thus very important processes in all proceedings.

Usually, there are two stages in proceedings when a party can apply to amend his pleadings, and in each of the stages different considerations apply.

Before trial, an application to amend or add to particulars would be granted if made a reasonable time before trial but would not be allowed if the amendment would introduce a new cause of action. Before the close of evidence and after the close of evidence, amendments would be allowed if evidence on it is already on record. An amendment would be allowed to make pleadings fall in line with evidence already on record. The reasoning being that the amendment should be allowed so that the court would be at liberty to use evidence already on record to resolved the real issue in dispute.

Applications for amendment of pleadings would not be allowed where if granted it would entail injustice to the other party, where the applicant is acting in bad faith or where the applicant has done some injury by his blunder which cannot be compensated by costs. See Ojah & Ors. v. Ogboni & Ors. (1976) 10 NSCC 244.

In view of all that I have been saying, the courts would readily allow an applicant to amend a defect in his pleadings rather than give judgment in ignorance of facts which ought to be known before rights are finally decided.

At the close of re-examination of the defendants’ final witness, DW4 on 18 February 1991, learned counsel for thedefendants informed the court that he had a motion to amend the statement of defence. Hearing of the application was fixed for 20 February 1991. The learned Chief Judge heard arguments, overrule the objection and said that reasons would be given in the judgment.

Now, what were the amendments?

Amendments were made to paragraphs 4, 5 and 7 of the statement of defence.

In the original statement of defence, paragraphs 4, 5 and 7 runs as follows:

“4. The defendants deny paragraph 6 of the statement of claim. The land in dispute is situate within a larger piece of land called “Okoto” which has boundary with Udi Obinagu and Umuabi. This Okoto land is “Agu” land (that is farm land in the out-skirt of the town) and each of the three towns referred to in this paragraph has its own Okoto. The land in dispute is situate in Idedu Amokwe section of Okoto land.

5. The defendants deny paragraph 7 of the statement of claim. The land in dispute with its boundaries and features are as shown in Plan No. NLS/AN/234/83 filed with this defence.

7. Standing on the Enugu/Onitsha road and facing the wall, all the land on the right including the land in dispute belong to the defendants while the land on the left hand side belong to the plaintiff. The defendants call their land at Okoto Ishi Owele Umuneou Ali of which the land in dispute is a part.

Paragraph 8 of the statement of claim is denied.”

With the amendments to the statement of defence granted, paragraphs 4, 5 and 7 of the statement of defence now reads:

4. The defendants deny paragraph 6 of the statement of claim. The land in dispute borders a larger piece of land called “Okoto” which has boundary with Udi Obinagu and Umuabi. This Okoto land is “Agu” land (that is farm land in the out-skirt of the town) and each of the three towns referred to in this paragraph has its own Okoto. The land in dispute borders Idedu Amokwe section of Okoto land.

5. The defendants deny paragraph 7 of the statement of claim. The land in dispute with its boundaries and features are as shown in Plan No. NLS/AN/234/83 filed with this defence.

7. Standing on the Enugu/Onitsha road and facing the wall, all the land on the right including the land in dispute belong to the defendants while the land on the left hand side belong to the plaintiff. The defendants call their land “Ishi Owele Umunevo Ali” of which the land in dispute is a part. Paragraph 8 of the statement of claim is denied.”

What did the Court of Appeal have to say on these amendments. The court said:

“... The amendment granted by the trial court did not require further evidence or recall of witnesses. It was merely to bring the evidence already given in line with the pleadings.”

Was the Court of Appeal correct?

After the defendants’ witnesses led evidence on the correct identity of the land, their counsel applied to amend paragraph 7 of the statement of defence so that Plan NLS/AN2311/83 is admitted in evidence as an exhibit. It was admitted as exhibit 4.

Thereafter, learned counsel for the plaintiffs/appellants, Mr. Kalu cross-examined the defence witness. (See page 46 of the record of appeal).

Question - Was there a boundary wall between Umuanagu and the defendants?

Answer - No

Question - What was the land called?

Answer - Ishi Owelle Umuenovoali - part of which is in dispute.

Question - Were there house in the area in dispute at time of survey?

Answer - No.

Question - Were you shown the land of Eze Nwachiwe?

Answer - No.

Question - And Ene Nwene

Answer - No

Question - Did you see the plaintiff’s plan before you made your own?

Answer - No.

Re-examination - Nil.

Court to witness - The area in dispute in exhibit 1 is not the same as the area in exhibit 4 would that be correct.

Answer - It is so my lord.

The amendments to the defendants’ pleadings in paragraphs 4, 5 and 7 became necessary after the defendants’ witnesses particularly DW3 (the surveyor) by their testimony gave a clearer picture of the land in dispute. The defendants’ plan, exhibit 4, shows that the land in dispute is called “Ishi Owelle Umuenovo Ali” by the defendant and Okoto land is also separately owned.

The amendment was to bring the pleadings in line with the evidence already given and so would be of tremendous assistance for the purpose of resolving the real dispute between the parties.

Furthermore, the appellants’ cannot complain of being denied fair hearing since their learned counsel was never denied the right to cross-examine the defendants’ witnesses, and he did cross-examine them. He cross-examined DW3 on these amendments (see page 46 of the record of appeal).

Finally, the learned CJ after hearing arguments for and against the application to amend the defendants’ pleadings said:

“Objection overruled”.

That means that the application to amend the defendant’s pleadings is granted. If learned counsel for the plaintiff felt that by the amendment he was denied fair hearing, he ought to have made an application to effect consequential amendments to his pleadings and ask for a date to recall witness(es) for cross examination on the amendment granted.

The amendments granted by the learned Chief Judge of Anambra State did not require further evidence or recall of witnesses. Once again, the amendments were granted to bring evidence already given in line with pleadings. The Court of Appeal was correct.

Issue 2

Whether the learned justices of the Court of Appeal were right in law in affirming the trial judge’s rejection of exhibit 1.

Exhibit 1 is a certified true copy of records of proceedings in suit No. E/113/77. On 5 February 1991, learned counsel for the plaintiff relying on section 34(1) of the Evidence Act, now section 45(1) of the Evidence Act, 2011, applied to tender a certified copy of records of proceedings in suit No. E/113/77.

Suit No. E/113/77 and this suit are the same. Suit No. E/113/77 was never concluded. It was learned counsel for the plaintiffs’ desire to rely on the witness testimony in suit No. E/113/77 in this suit since according to him, he no longer could trace the witnesses.

The learned Chief Judge (trial judge) admitted certified true copy of proceedings in suit No. E/113/77 as exhibit 1.

However in his lordship’s judgment, he rejected exhibit 1. The Court of Appeal agreed with the trial High Court.

Learned counsel for the appellant observed that witnesses to wit; Mrs. Nwadiuko Aneke, Mr. John Onyia, Mr. Okoli Ezeonyia who gave evidence in suit No. E/113/77 were either dead or could not be traced, contending that their testimonies in suit No. E/113/77 ought to have been admitted in this suit.

Reliance was placed on C.A. Akunne v. M. Ekwuno & Ors. (1952) 14 WACA 59; A. Alade v. S. Olukade (1976) 6 SC 183.

Concluding he submitted that the Court of Appeal was in error affirming the rejection of exhibit 1 by the trial court.

Opposing, learned counsel for the respondents observed that after PW1 gave evidence, it was clear that Emmanuel Eze, Okoli Ezeonyia, and John Onyia were available to give evidence as where they reside was known. He further observed that PW1 who tendered exhibit 1 is a total stranger and had no nexus with exhibit 1.

Concluding, he submitted that the learned Chief Judge was right not to ascribe any probative value to exhibit 1 and the Court of Appeal was right to affirm the trial court’s decision.

Section 34(1) of the Evidence Act, Cap. E14 Laws of the Federation of Nigeria, 2004 (now repealed) is now section 46(1) of the Evidence Act, 2011. The section lays down the condition under which secondary evidence of the testimony of a witness given in a former proceeding, be it civil or criminal is admissible in a subsequent proceedings, or in a later stage of the same proceedings. This is premised on the position of the law that the best evidence available must always be produced and used by the courts so that the rights of litigants are correctly decided.

The power under section 46(1) must at all times be exercised with great caution. For instance, death or incapability to give evidence must be proved strictly, and the onus of proving that a witness is dead or cannot be found is on the party who wishes to rely on the evidence.

The following conditions must be fulfilled before a previous testimony can be admitted in evidence. Once any of them is absent, the evidence to be relied on would be inadmissible.

1. The evidence must have been given in a judicial proceeding.

2. The first proceeding must be between the same parties as the second proceeding, and the identity of the parties in the two proceedings must be substantial and not nominal.

3. The party against whom the testimony is tendered must have had the opportunity of cross-examining the witness when his testimony was taken;

4. The issues in both proceedings must be the same or substantially the same.

5. The witness must be incapable of coming to court in the subsequent proceeding on account of death, or incapability of giving evidence, or prevented from coming to court by the adverse party, or bringing him to court would entail huge expense or unreasonable amount of delay. See Ikenye & Anor. v. Ofune & Ors. (1985) 16 NSCC (Pt. 1) 379.

Agreeing with the trial court that the Court of Appeal was right in affirming the decision rejecting exhibit 1, the Court of Appeal said:

“When exhibit 1 was tendered by the appellant with the consent of the respondent, no attempt whatsoever was made to fulfil the conditions prescribed by this section of the Evidence Act as a foundation for its admissibility.

The trial Chief Judge was right in holding that the document was inadmissible. To do that, he did not require to recall the parties to address him as this was purely a matter of law which he was competent to pronounce on. The learned Chief Judge out of abundant caution took a look at exhibit 1, evaluated it and came to the conclusion that it did not assist the appellant prove his claim ...”

In a bid to find out if the witnesses that gave evidence in suit No. E/113/77 - exhibit 1 were available and able to attend court to give evidence, PW1 was recalled. His cross-examination is on page 38 of the record of appeal. It runs as follows:

Question - Do you know where Emmanuel Eze lives?

Answer - Yes

Question - Okoli Ezeonyia is a wine tapper?

Answer - He is an artist. He does tap palm wine.

He is wood carver and makes hoes.

Question - He is still carrying on with the above activities?

Answer - Yes as much as he can

Question - If you get him a vehicle he can travel to Enugu

Answer - Yes

Question - Did you know John Onyia left for the North?

Answer - No

Question - He came home last Christmas

Answer - Yes I saw him

Question - His relations know where he is in the North.

Answer - Yes.

PW1 gave evidence to justify admitting the evidence of witnesses in exhibit 1 in this proceeding. He made a poor attempt.

John Onyia according to him travelled to the North of the country and came home for Christmas. His relations and friends know where he is. Under cross-examination it is clear that no attempt was made to get him to come to court.

Emmanuel Eze was absent from court. The witness said he knows where he lives.

The third witness is Okoli Ezeonyia who is alleged to be advanced in age and so could not attend court but is still able to carry on his trade as a palm wine tapper and wood carver. He admitted that if a car is provided he would be brought to court.

The death of Nwachuke Aneke was not strictly proved.

I am satisfied that the first to third witnesses are able to come to court and so do not come under section 46(1) of the Evidence Act, neither was sufficient evidence laid for the admissibility of their evidence. Despite the fact that the trial judge rejected exhibit 1, his lordship still relied on it and found it worthless.

Once again, both courts were correct in rejecting exhibit 1.

Finally, I must observed that this court is slow to upset concurrent findings of fact of the trial court and the Court of Appeal but would be quick to upset such findings if found to be perverse, or cannot be supported from the evidence led, and accepted by the court, or if there was a miscarriage of justice or violation of some principles of law or procedure. See Ilodigwe v. State (2012) 5-7 SC (Pt. II) 143.

The finding of fact by the trial court is that the defendant is entitled to the customary right of occupancy of the land in dispute. A fact affirmed by the Court of Appeal. By no stretch of imagination has learned counsel for the appellant been able to show that the finding is perverse, or cannot be supported from the evidence led or that there was a miscarriage of justice or violation of some principle or law or procedure. Concurrent findings of fact are in the circumstances correct.

In the end, there is no merit in this appeal.

Appeal dismissed.

**MUHAMMAD JSC:**

Having read in draft, the lead judgment of my learned brother, Rhodes-Vivour JSC, I entirely agree with his lordship’s reasoning and conclusion, which I hereby adopt as mine, that the appeal lacks merit. I dismiss the appeal and abide by the consequential orders made in the lead judgment.

**OGUNBIYI JSC:** My learned brother, Hon. Justice RhodesVivour JSC has done adequate justice to the two issues raised in this appeal. I have had the privilege of reading his draft judgment, I agree with him that the appeal is devoid of any merit and should be dismissed. I therefore adopt his judgment as mine.

However, for purpose of emphasis, I will deem it pertinent to put in my few words.

Relevant to this appeal is to determine the nature of the amendment sought for. This I say, because the duty of a court as an arbiter is to act for the benefit of all parties. It follows therefore that an amendment which will serve the interest of the justice of the case is beneficial to all parties and should be allowed and granted.

The caveat however is also true that if an amendment is sought either in bad faith, for purpose of undermining the case of the opponent or is simply done with the intention of giving the party seeking same to have a second bite at the cherry, then such should not be allowed.

The general principle of law is well settled that an amendment of pleadings can be made at any time, before judgment. However, and notwithstanding the wide latitude, the intention is not to leave the consideration open-ended and without proper control so as to create a flood gate of an abuse of discretion. The case of Imonikhe v. Attorney-General, Bendel State (1992) 7 SCNJ 197 at 207 - 208 per Nnaemeka-Agu JSC is relevant wherein this court said:-

“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 the evidence by the parties. Before the close of evidence, such amendments are allowed to make such evidence as may be called admissible, as evidence on an issue which was not pleaded or a claim not on the record is strictly inadmissible. But once the calling of evidence has been concluded, any amendment of the pleadings or claim can be justified or allowed only on the premise that evidence in support of it is already on record, so that it is necessary and in the interest of justice to allow the amendment in order to make the pleadings or the claim accord with evidence already on record. The rationale of it is that such 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.”

Parties are enjoined and must be aware that instituting an action must first require great consideration and caution. This should give a cause for careful and proper planning.

It is pertinent to say that by the very nature of the amendment sought for, same did not require calling for further evidence. It was merely to bring the evidence already given before the court and on record, to proper perspective. The intention is to lay before the court the entire facts for purpose of doing justice to the case in question and eventually to all the parties involved.

It is the submission of the appellant’s counsel that the situation created by the order of court allowing the amendment at such a belated stage of the proceedings amounted to a denial of a fair hearing to the appellant in the conduct of the proceeding.

This, learned counsel submits have unfairly prejudiced his case.

Counsel cites in support, the case of George & Ors. v. Dominion Flour Mills Ltd.

The issue at hand is whether the court below was right in affirming the decision of the trial court which allowed the amendments sought by the respondents.

The learned trial judge on 20 February 1991, granted the amendment sought by the respondents and reserved his reasons until the judgment which was eventually given on 21 March 1991.

On the said date 20 February 1991 when the trial court granted the amendment sought by the respondents, the appellant’s counsel was in court. The counsel did not deem it necessary to seek for consequential amendments to his pleadings if any, following the order of the court. He did not also seek for an adjournment to enable him recall any of the witnesses for purpose of being cross-examined, based on the amendment granted.

The presumption I hold, was because the appellant knew that the amendment granted was solely to bring the evidence before the court in line with the pleadings. It is also for this court to effectually and effectively determine the real issues in dispute between the parties. There was no further need adducing of witness by the respondent after the amendment was granted. The appellant, as rightly submitted by the respondent, did not produce any evidence considered as either injurious or a denial of fair hearing to the appellant, who had also closed his case.

In the case of Ojah v. Ogboni (1976) 1 NMLR 95 at 99, it was held that an amendment of pleadings should be allowed unless:-

(a) It will entail injustice to the respondent;

(b) The applicant is acting malafide; and,

(c) By his blunder, the applicant has done some injury to the respondent which cannot be compensated by costs or otherwise.

The respondent herein was not shown to have come within the three criteria, a - c above. The appellant’s complaint is not shown as firmly established. This is especially where the respondent did not adduce any additional evidence to the detriment of the appellant’s case.

There was also no request made by the appellant which was refused.

The decision at hand is concurrent by the two lower courts.

The appellant has the duty to show that the concurrent findings of the two lower courts are perverse in the sense that they either did not draw from the evidence on record or that they are consequent upon wrong application of some principles of law or that the findings have occasioned a miscarriage of justice. See M. O. Muhammad JSC in Ude v. State (2016) All FWLR (Pt. 853) 1785, (2016) 14 NWLR (Pt.1531) at page 134. See also Mohammed v. Hussein (1998) 14 NWLR (Pt. 584) 108.

In the absence of the appellant showing such evidence of perversity therefore, I see no reason why the judgment of the lower court should be disturbed.

My learned brother has dealt adequately with the justice of this case and I hereby endorse his judgment as mine. In the same tone therefore, I also find the appeal devoid of any merit and dismiss same and abide by all orders made in the lead judgment.

**NWEZE JSC:**

My lord, Rhodes-Vivour JSC, obliged me with the draft of the leading judgement just delivered. I agree that, being unmeritorious, this appeal ought to be dismissed. My contribution shall, therefore, be circumscribed to a few comments on the submissions relating to the admissibility of the proceedings in suit No. E/113/77 in the instant proceedings.

The second issue was woven around the question:

“Whether the learned justices of the Court of Appeal were right in law in affirming the trial judge’s rejection of exhibit 1?”

As shown in the leading judgement, exhibit 1 is a certified true copy of the record of proceedings in suit No. E/113/77. At the trial court, learned counsel for the plaintiff, anchoring his submissions on section 34(1) of the Evidence Act (then applicable) applied to tender a certified true copy of the record of proceedings in the said suit, that is, E/113/77, which was inconclusive, in the proceedings of the present case. He sought to rely on the testimony of a witness in the said previous proceedings, namely, E/113/77 in the proceedings in the instant case at the trial court.

Although, the trial court admitted the said proceedings, as urged, it, nonetheless, rejected it in the actual judgement. The lower court endorsed the rejection of the said exhibit. Expectedly, counsel for the appellant impugned the lower court’s approach.

Contrariwise, it was contended on behalf of the respondents herein that Emmanuel Eze, Okoli Ezeonyia and John Onyia, whose residences were well-known, were available and so should have been summoned to testify. In his submission, therefore, the lower court, rightly, affirmed the trial court’s non-ascription of any probative value to the said exhibit 1.

Like the leading judgement, I, entirely, endorse the approach of the lower court. It cannot be otherwise. The general law is that evidence of a witness taken in earlier proceedings is not relevant in a later trial except for the purpose of discrediting such witness on cross-examination, and for that purpose only. In effect, it is wrong to treat evidence in previous proceeding of an absent witness in later proceedings as one of truth, Alade v. Aborishade (1960) SCNLR 398, (1960) 5 FSC 167, 171; Asuiquo Udo Enang & Anor v. Edem Udo Ekanem & Ors. (1962) 1 All NLR 530; Ariku v. Ajiwogbo (1962) 2 SCNLR 369, (1962) 1 All NLR 629, 631 - 632. Let me elaborate.

The Evidence Act, only, permits the admissibility of testimonies in previous suits or proceedings in subsequent judicial proceedings under three circumstances. Under the said Act (relevant to the proceedings at the trial court), they were categorized under section 34(1); admissions in a previous judicial proceeding under sections 19 to 26 inclusive of the Evidence Act, Iga & Ors. v. Amakiri (1976) 11 SC 1, 12; Ojiegbe & Ors. v. Okwaranyia & Ors. (1961) 1 All NLR (pt. 4) 605, 610. In passing, it must be noted that if an admission is relied on as an estoppel, then it must be pleaded; K. Chellaram and Sons v. G. B. Olivant Ltd (1944) 10 WACA 77; Ajayi v. Briscoe (Nig.) Ltd (1964) 3 All ER 556, 559 - 560; Chukwura v. Ofochebe (1972) 1 All NLR (Pt. 2) 514.

The last category was under sections 199 (208 and 209) of the Evidence Act. Under these sections, cross-examination as to previous statements in writing was permissible in a subsequent judicial proceeding to discredit the witness provided the conditions prescribed by the section were satisfied, Madumere & Ors. v. Okafor & Ors. (1996) LPELR -1810 (SC) 18; Nahman v. Odutola (1953) 14 WACA 381, 384; Alade v. Aborishade; Ajadi v. Kelani (1985) LPELR -302 (SC) 16-17, paragraphs B -C.

As shown above, under this last category, such evidence is only relevant for the purpose of discrediting such witness on cross-examination, and for that purpose only. It does not, therefore, prove the truth thereof, Madumere & Ors. v. Okafor & Ors.; Alade v. Aborishade (1960) SCNLR 398, (1960) 5 FSC 167, 171; Asuiquo Udo Enang & Anor v. Edem Udo Ekanem & Ors. (1962) 1 All NLR 530; Ariku v. Ajiwogbo (1962) 2 SCNLR 369, (1962) 1 All NLR 629, 631 - 632.

On the other hand, under section 34 of the said Evidence Act, (the Act which was applicable at the time), evidence given by a witness in a previous judicial proceeding, whether the witness was a party or not to the previous proceeding, was admissible in a subsequent judicial proceeding to prove the truth of the facts it stated when the conditions specified by the section had been satisfied.

The said section codified the Latin maxim, res inter alios acta alteri nocere non debet, meaning, a man ought not to be prejudiced by what has taken place between others; Akaninwo & Ors. v. Nsirim & Ors. (2008) All FWLR (Pt. 410) 610, (2008) LPELR -321 (SC) 39 - 40, paragraphs B - A; Yusuf v. Degoke (2007) All FWLR (Pt. 385) 384, (2007) 11 NWLR (Pt. 1045) 332; Nahman v. Odutola; Alade v. Aborishade; Sanyaolu v. Coker (1983) 3 SC 124, 155; Lawal v. Dawodu (1972) LPELR -1761 (SC) 17 -18, paragraphs F - D; Eghobamien v. Federal Mortgage Bank of Nigeria (2002) FWLR (Pt. 121) 1858, (2002) LPELR -1045 (SC) 9 - 11, paragraphs G - A; Dada v. Bankole (2008) All FWLR (Pt. 403) 1209, (2008) LPELR -907 (SC) 11- 12, paragraph E; Sanyaolu v. Coker (1983) All NLR 157; Okonji v. Njokanma (1999) 14 NWLR (Pt. 638) 250; Onu v. Idu (2006) All FWLR (Pt. 328) 691, (2006) 12 NWLR (Pt. 995) 657.

The section was worded thus:

34(1) Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or when his presence cannot be obtained without an amount of delay or expense which, in the circumstances of the case, the court considers unreasonable:

Provided:

(a) that the proceeding was between the same parties or their representatives in interest;

(b) that the adverse party in the first proceeding had the right and opportunity to cross-examine; and,

(c) that the questions in issue were substantially the same in the first as in the second proceeding.

The above mandatory provisions were adjudged unwaivable, Eghobamien v. Federal Mortgage Bank of Nigeria (2002) FWLR (Pt. 121) 1858, (2002) LPELR - 1045 (SC) 9- 11, paragraphs G - A; Menakaya v. Menakaya (2001) FWLR (Pt. 76) 742, (2001) 16 NWLR (Pt. 738) 203, 236 and 263. That was held to be so for the section postulated the reception in evidence of a transcript of the evidence of a witness in previous judicial proceedings between the same parties where the conditions prescribed under the proviso were complied with, Lawal v. Dawodu & Anor. (1972) LPELR -1761 (SC) 17 -18, paragraphs F - D; Dada & Ors. v. Bankole & Ors. (2008) All FWLR (Pt. 403) 1209, (2008) LPELR - 907 (SC) 11- 12, paragraph E; Obawole & Anor. v. Coker (1994) LPELR -2157 (SC) 30 - 31, paragraphs G - B; Alade v. Aborishade; Enang & Anor. v. Ukanem & Ors. (1962) 1 All NLR 530; Ariku v. Ajiwogbo (1962) 2 SCNLR 369.

As this court explained in Akaninwo & Ors. v. Nsirim & Ors. (2008) All FWLR (Pt. 410) 610, (2008) LPELR -321 (SC) 39 - 40, paragraphs B - A: the reasons for rejecting such piece of evidence are not far-fetched. Similar facts - though often cogent, moral and weighty, that is, logically relevant - are rejected as legal evidence on the grounds of policy and fairness; since they tend to waste time, embarrass the enquiry with collateral issues, prejudice the parties and even the court and, equally, encourages attacks without notice.

It is for these, and the more detailed, reasons in the leading judgement that I, too, shall enter an order dismissing this appeal.

Appeal dismissed.

**SANUSI JSC:**

I had the advantage of reading the judgment just delivered by my learned brother, Rhodes-Vivour JSC. His lordship has adequately and painstakingly dealt with all the salient issues raised in this appeal. I am at one with his reasoning and conclusion that this appeal is unmeritorious and must be dismissed. I accordingly dismiss it and have nothing useful to add. Appeal dismissed.

Appeal dismissed