introduction:

this appeal centers on civil procedure.

facts:

this appeal is against the judgment of the high court of lagos. early in 1959, when trading as "laibru", mr ibru sold goods to the defendants, for which they did not pay. in june, 1959, he and others formed the company known as laibru ltd., which took over his assets and liabilities, but he did not give the defendants notice of the assignment of his claim to the company. the suit was brought in the company's name. when mr ibru was testifying as a witness for the company, the learned judge observed that the company had no title if no notice of assignment had been given. counsel for the company at first asked that mr ibru be added as co-plaintiff, and later that he be substituted as the plaintiff, and referred to order 16 rule 2, of the english supreme court rules, and to section 12 of the lagos high court ordinance in support of using that rule. counsel for the defence objected that the local order on parties could not be supplemented from the english rules. the learned judge left it over to decide later; he went on with the trial, and eventually dismissed the claim only because he held that he could not substitute mr ibru as the plaintiff. dissatisfied with the decision, the appellant appealed to the federal supreme court.

issues:

the court considered whether the learned trial judge erred in dismissing the appellant's claim on the ground that he has no power to substitute michael ibru for the company as plaintiff.

decision/held:

in the final analysis, the appeal was allowed, the judgment of the high court of lagos was set aside; and it was ordered that michael ibru be added as co-plaintiff in the suit, and that judgment be entered for the plaintiff company and the co-plaintiff against the defendants.

vahe robert bairamian, f.j.: **(delivering the leading judgment)**: the appellant company complains that the learned judge (onyeama, j., on the 28th october, 1960, in the high court of lagos suit 60 of 1960), having found in favour of the claim on the merits, erred in dismissing it on the ground that there was no power to substitute michael ibru for the company as plaintiff.

early in 1959, when trading as "laibru", mr ibru sold goods to the defendants, for which they did not pay. in june, 1959, he and others formed the company known as laibru ltd., which took

over his assets and liabilities, but he did not give the defendants notice of the assignment of his claim to the company. thus the company had an equitable assignment of a legal chose in action. in such case, according to ***halsbury's laws of england, 3rd edition, vol. 4, page 511***- the assignor ..must be a party to the action either as plaintiff or defendant ..... if the assignor does not bring the action himself, the assignee is entitled to do so in the name of the assignor, on giving him a proper indemnity against all costs and charges consequent

on the use of his name; or, on proving his failure or refusal to sue or to allow the use of his name, may make him a defendant, leave to amend being granted, if necessary.

the suit was brought in the company's name. when mr ibru was testifying as a witness for the company, the learned judge observed that the company had no title if no notice of assignment had been given. counsel for the company at first asked that mr ibru be added as co-plaintiff, and later that he be substituted as the plaintiff, and referred to ***order 16, rule 2, of the english supreme court rules***, and to ***section 12 of the lagos high court ordinance*** in support of using that rule. counsel for the defence objected that the local order on parties could not be supplemented from the english rules. the learned judge left it over to decide later; he went on with the trial, and eventually dismissed the claim only because he held that he could not substitute mr ibru as the plaintiff.

in the notice of appeal the company complains that he erred in so holding, and asks that the substitution be allowed, and that judgment be entered for the amount; and there is a paragraph (3) which prays for -

any further order or other orders as the court may deem fit to make in the circumstances.-

the defendants did not give notice that they would support the judgment on any other ground.

their learned counsel concedes that if there is no provision to meet a situation, the english rules will apply. ***section 12 of the lagos high court ordinance*** provides that-

the jurisdiction vested in the high court shall, so far as practice and procedure are concerned, be exercised in the manner provided by this or any other ordinance, or by such rules and orders of court as may be made pursuant to this or any other ordinance, and in the absence of any such provisions in substantial conformity with the practice and procedure for the time being of her majesty's high court of justice in england.

the second clause ekes out the deficiencies of the old supreme court (civil procedure) rules, which are still in force; and the deficiencies are twofold :-

(a) those rules are not as full as they should be on the subjects with which the orders deal;

(b) they contain no orders on some other subjects.

there is nothing in the wording of the clause to restrict its application to the second class of deficiency; the clause is

wide enough to include both classes of deficiency; therefore the interpretation which makes the clause more helpful should be preferred.

order 16, rule 2 of the english rules provides that- where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff, the court or a judge may, if satisfied that it has been so commenced through a *bona fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as may be just.

that rule is read with ***rule 11 of order 16***, in which there is an express requirement that no person shall be made a plaintiff without his own consent in writing thereto. it is argued for the defendants that there is no such consent from mr ibru. in the case of **tryon v. the national provident institution**, (1886), 16 q.b.d., 678, in refusing to add a person as plaintiff who would not give his consent, the learned judges made it clear that if that express requirement had not existed in ***rule 11***, the court would have been able to add or substitute

under ***rule 2 of the order*** without such consent. that express requirement in the ***english rule 11***does not exist in the corresponding local ***rule 5 of order 4***, and consent is not indispensable.

in regard to substitution, it is argued for the defendants that it cannot be made except in the case of a misnomer, and **in re : nos. 55 and 57 holmes road, kentish town: beardmore motors ltd. v. birch bros. (properties) ltd.**, (1959) ch. 298, is cited in support. it is true that the applicants there argued, in part, that it was a case of mere misnomer; the learned judge thought not; his reason for declining to amend was that it would divest the respondents of a right in favour of which time had run. misnomer is one instance; there are others; the rule,

namely ***rule 2 in order 16 of the english rules*** is not confined to misnomers. what is more, if a case comes within the rule, there is no difference in principle between adding and substituting a plaintiff, for it mentions both.

in regard to addition, it is objected that it is not asked for in the notice of appeal; also that it is not known whether laibru's assets and liabilities had been properly transferred to the

company. the transfer was proved by mr ibru in his evidence. the notice of appeal could be amended, but addition can be made under paragraph 3 of the notice, which prays for further or other orders which the court may deem fit. adding ibru does no harm: the only legitimate interest of the defendants is to ensure that they shall not be asked to pay twice.

but for their objection to ibru being substituted, he would presumably have been substituted as the plaintiff in the course of his evidence, and consequential orders on pleadings could then have been made with ease, which impels me to observe that applications to change the parties should be decided forthwith. now it is rather late for amending the pleadings, if amendment should be necessary. whether it is, and what is should be, has not been discussed.

on the other hand, the addition of michael ibru as a co-plaintiff does not involve any amendment of pleadings, but only that he should have an opportunity of saying whether he would like to have an indemnity against costs from the company, and anything else he might wish to say. he should have been given notice of the appeal, as the coming was