IN THE COURT OF APPEAL
HOLDEN AT LAGOS
ON 12th THE THURSDAY DAY OF JUNE, 2003
BEFORE THEIR LORDSHIPS:

JAMES OGENYI OGEBE	**JUSTICE COURT OF APPEAL**
PIUS OLAYIWOLA ADEREMI	**JUSTICE COURT OF APPEAL**
MUSA DATTIJO MUHAMMAD	**JUSTICE, COURT OF APPEAL**

CA/L/395/99

BETWEEN;
COMRADE PASCHAL BAFYAU … APPELLANT
A N D
MRS FUNKE ADEKOYA … RESPONDENT

JUDGEMENT
(DELIVERED BY MUSA DATTIJO MUHAMMAD, JCA)

The Respondent being the plaintiff at the lower court, by a writ dated 1st July 1994, claimed against the Appellant who was one of the Defendants thereat as follows:

"(1) The Plaintiff is entitled to possession of the detached storey building with appurtenances and 2 rooms guest chalet and Boys quarters situate at house 18, 21 Road, B Close 2nd Avenue Festac Town Lagos which is held of the said Plaintiff by the Defendants under a tenancy at will which expired on the 13th May 1994, and on the 18th May 1994, the Plaintiff did serve on the 2nd Defendant a notice in writing of her intention to apply to court to recover possession of the detached storey building and not withstanding the said notice, the Defendant have refused and/or neglected to deliver up possession of the premises and still detain the same.

(2) The Plaintiff claims jointly and severally against the Defendants Possession and mesns profits from 1st January 1994, until the

Defendants give up possession at the rate of N30, 000.00 per month annual rent being three hundred and sixty thousand naira."

It is important to note that at the time of issuance of the writ of summons, the Federal Housing Authority was the 1st defendant while the Appellant was the 2nd Defendant. The claim against 1st Defendant was withdrawn by the respondent on 27th February, 1997.

The brief facts upon which this appeal hinges are hereunder stated.

Pleadings having been ordered, filed, and exchanged, on 9th October 1996, the Respondent opened her case. She testified as the first witness in proof of her case. She was being cross-examined when she applied for leave to amend the writ of summons she had taken out. She sought to add an alternative claim of "loss of use and occupation" of the very property in respect of which the initial claim against the appellant was made. The Appellant opposed Respondent's application for amendment. The lower court heard arguments in respect of the application. In its ruling of 27th February 1997, the court granted Respondent leave to amend her writ of summons. Appellant being dissatisfied by the lower court's decision has brought the instant appeal on three grounds.

Briefs have been filed and exchanged in prosecution of this appeal. At hearing, parties have adopted these briefs. The Appellant has formulated a lone issue for the determination of the appeal in his brief. Respondent has adopted this lone issue as formulated.

It reads:

"Whether the trial court was right in granting the respondent leave to amend its writ of summons by adding an alternative claim for damages for use and occupation to the existing claim of mesne profits".

Appellant argues that although by the decision in African Petroleum Ltd v Owudunmi (1991)8 NWLR (Pt 210)391, it must be conceded that Respondent is free to set up the alternative claims of either "mesne profit" or for "damages for use and occupation" either claim would only arise where tenancy or quasi-tenancy exists between the parties. The lower court could only have been right if the evidence before it, at the time respondent's application for amendment was made, had shown appellant to be a tenant and that the tenancy had in fact been determined by a notice to quit. It is argued that appellant was not such a tenant against whom either claim would start running from the date of determination of the tenancy and the commencement of the holding over period. In essence, Appellant contends that the leave granted to Respondent would facilitate the making of a totally different case from the one before the lower court. It is argued that this is

contrary to the principles upon which amendments are granted as enunciated in decisions such as Bamishebi v Ote (1995) NWLR (Pt 411)1 and Jessuca Trading Company Ltd v Bendel Insurance Co. Ltd (1993) NWLR (Pt 271)538.

Lastly, Appellant also contends that since both the claims of the Respondent were not maintainable in law, it was wrong for the court to have allowed the amendment.

Appellant has asked us to allow the appeal, vacate the order of amendment date 27th February 1997, and substitute same by the order for the dismissal of the motion on notice dated 18th November 1996.

On Respondent's part, it is argued that the facts before the trial court justified the leave granted to her to amend her writ. The Federal Housing Authority had sold house No.18, 21 Road, B Close Festac Town Lagos, the subject matter of the litigation between the parties in the instant suit, to the Respondent. Before the sale, Appellant was the authority's tenant in respect of the same property. This fact is deducible from the pleadings of both Appellant and Respondent. It was equally testified to by the Respondent. Exhibit p1 also evidences the sale of the very house to the Respondent for a consideration of N1.7 million naira effective from January 1994. By the sale, Respondent has become vested with title over the sold property. Appellant was a quasi tenant against whom after the determination of the tenancy between him and the former owner of the property a claim for damages for "loss of use and occupation" could be pursued. The statement of claim and the testimony of the respondent contained all the material facts to sustain the alternative claim appellant was granted leave to prosecute. By virtue of order 26 rule 1 of the Lagos State High Court (Civil Procedure) rules, and the Judicial authorities as to amendments, Respondent contends, the leave granted was lawful. Respondent's counsel has cited and relied in support of their contention, amongst others: Equity Bank (Nig) Ltd v Daura (1999)10 NWLR (Pt 621)147 at 154; Metal Construction (W.A.) Ltd v Aboderin (1998)8 NWLR (Pt 563)538 at 547, Alstitom S, A. Saraki (200) 10-11 SC at 64 and Ogidi v Egba (1999)10 NWLR (Pt 621)42.

Respondent has urged that the appeal is without merit and same should be dismissed after the affirmation of the lower court's decision.

It now must be asked if the lower court had the power to grant the relief obtained by the Respondent and, if it had, whether all the relevant considerations had been taken before the grant of the said relief.

One readily agrees with Respondent's counsel that a most convenient take-off point is order 26 rule 1 & 2 of the Lagos State High Court Civil Procedure rules.

The order provides:
Rule (1) "The court or Judge in chambers may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings, in such manner and on such term as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.
Rule (2) Application for leave to amend may be made by either party to a Judge in Chambers or to the Judge at trial of the action, and such amendment may be allowed upon such terms as to losts or otherwise as may be just."

The foregoing adjectival provisions are plain. They must be interpreted by ascribing to the words which constitute them their natural and ordinary meanings. In so doing, it would down on us that:

(1) Either party to a suit is free to seek leave of the trial Judge in Chambers or at the trial of the action for the purpose of amending:-

    (a) The party's indorsement or
    (b) pleadings.

(2) The court or Judge in the foregoing situations may, at any stage of the proceedings, allow a party who has asked, to amend his indorsement or pleadings:

    (a) In a manner and on terms that are just and
    (b) for the overriding purpose of facilitating the determination of the real questions in controversy between the parties

Looking at the provisions of order 26 rules 1 and 2, which rules govern the trial court, the powers of amendment granted the court are clearly discretionary. It is now our burden to say whether or not the lower court in the exercise of such powers had acted judiciously and judicially.

A plethora of judicial authorities abound enunciating what courts should consider in the grant of leave to parties who seek to amend their indorsements or pleadings. Some of these decisions have been appropriately

alluded to by both parties to the instant appeal. The principles which courts are urged to consider in granting applications for leave to amend the writ of summons and/or pleadings are:

(a) Leave in respect of amendments that are not material, relevant and consistent to the subject matter of the suit but rather useless should not be granted.

(b) Amendments that would enable the court to decide the real matter in controversy and without injustice are to be granted.

(c) Amendments in respect of misnormers are granted as a matter of course.

(d) An amendment which seeks to create a suit where none existed must refused.

(e) An amendment that does not cure a defect in the courts proceedings is not granted.

(f) Amendments which will change the nature of the claim before the court are not granted.

(g) An amendment which if allowed will prevent injustice would be allowed. Such amendment which conversely facilitates injustice or the breach of the rule of fair hearing will not be allowed, Thus where an amendment is introduced at a stage when the otherside is precluded from adducing its own answer to the issue introduced by the amendment allowed.

(h) On appeal, amendments which would be inconsistent with testimonies of witnesses on which both parties fought their case at trial are not granted.

(i) Amendments will not be allowed on appeal if it would required adducing additional evidence or make a new trial a necessity.

See: Amadi v Thomas Apphu & Co Ltd (1972)1 All NLR 409; Oyenuga v Provisional Council of the University of Ife (1965) NMLR 9; Chief Ojah v Chief Eyo Ogbom & Ors (1976)1 A WLR 277 at 218; Metal Construction (W.A) Ltd.v Migliove (1976)6-9 SC 163.

In the case under consideration, Appellant is of the view that the amendment allowed by the lower court from the pleadings of parties and the evidence led so far could not be sustained. Furthermore, the amendment was not material.

It must be conceded to the Appellant that in its exercise of discretion whether or not to allow an amendment, the court must consider the

materiality of the amendment that was sought. We have already noted that amendments that are useless and of no consequence to the overall outcome of the litigation must be avoided. In the instant case, the amendment allowed by the trial court proceeded on the basis that Respondent was adding an alternative claim to the one indorsed on the writ. If it were, the leave granted to facilitate the amendment would be a proper one. This is so because it is the law that, in a proper case, either party to a suit would be allowed to include either in his indorsement and or pleading, as the case may be, alternative claims and/or inconsistent allegations of material facts provided he does so separately and distinctly. The Respondent, if that is what he sought to do, was perfectly entitled to plead two or more sets of material facts, even inconsistent ones at that, and claim reliefs in the alternative by virtue of the separate and distinct set of facts. As long as Respondent had clearly demarcated the different sets of material facts upon which each of the alternative claims indorsed on the writ or for which the alternative claim facilitated by the amendment rests, the amendment would be fair and beyond reproach. See Metal Construction (W.A) Ltd v Aboderin (1998) NWLR (Pt 563) 538 at 547. But is that what avail in the instant case? One thinks not.

In the case at hand, the writ of summons as taken out by the Respondent against the Appellant, is a claim for possession of the property the subject matter of the suit and "mesne profit" from 1st January 1994 until the defendants had given up possession.

The application for leave to amend the indorsements on the writ of summons issued against the Appellant was to allow the Respondent to add or claim in the alternative the sum of N30,000.00 per month from 1st day of January 1994 until possession is given up "as damages for use and occupation" of the property in question.

The question to ask here is: How does a claim for "mesne profit" differ from a claim for "damages for use and occupation" of the same property being litigated upon?

I agree with Appellant's counsel that a claim for "mesne profit" is always set up by an owner of a landed property gone into lawfully by another but in respect of which the contractual relationships of landlord and tenant had been determined and the tenant had continued, inspite of such determination, to hold over the property. "Mesne profit" is thus a claim for the "use and occupation" of the property at one time covered by a tenancy agreement between the two. The sum is being specifically so called because the consensus that had governed the determined tenancy had ceased to be the feature of the claim. See: African Petroleum Ltd v Owodunmi Supra, Metal

Construction (W.A.) Ltd v Aboderin Supra, and Peenok Investments Ltd v Hotel Presidential (1982)12 SC 1.
"Mesne profit" is not any different from the claim for "damages for use and occupation" which the Appellant in view of the amendment allowed is again asking for in respect of the same property. The affidavit in support of Respondent's application for leave to amend does not contain separate set of material facts to ground the seeming alternative claim. The statement of claim filed by Respondent and indeed the evidence that had been led so far all point towards one and an only claim. In the circumstance, it would be right to adjudge the leave granted by the lower court as improper. The amendment sought for which leave of the lower court was obtained was not material given the foregoing firm position.

It must however be pointed out that not all slips in a trial court's proceedings would attract reversal of its decision on appeal. See Salako v Dosunmu (1997)8 NWLR (Pt 517)371.

What injustice has the Appellant in the instant case suffered or is likely to suffer as a result of improper exercise by the lower court of its discretionary powers? The ruling of the lower court at page 32-33 of the record rightly holds that Appellant has not been prejudiced. That truly is the case.

The error complained of in the judgment of the lower court is insufficient to vitiate the decision. Though the issue the Appellant has raised is hereby resolved in his favour, this not being a proper case to set aside the decision appealed against, it is affirmed inspite of the slip it is held to have manifested.

Appeal is dismissed. Parties are ordered to bear their costs.

M. D. MUHAMMAD
JUSTICE, COURT OF APPEAL.

APPEARANCES

I. N. OKOLI with Lloyd Okereafor for the Appellant.
Orewale O.A. for the Respondent.