

PLEADINGS IN THE HIGH COURTS

OF NIGERIA:

HARMONISING THE RULES

BY

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requirement for the degree of Master
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DECEMBER, 1986.

DEDICATION

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With gratitude to God Almighty,
it is with a heavy heart that I dedicate
this Thesis to my beloved father, late
Joel Igoniwari who died in 1961 and who
in his life time devoted all his life
and earnings to the training of his
children and to the service of God.

I remember you now and always.

May the Almighty God grant you
eternal rest.

E. J. IGONIWARI,
BARRISTER & SOLICITOR.

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PREFACE

In Nigeria, there are, broadly speaking, four different High Court Rules governing civil procedure. These are the Rules of Procedure of the former Northern, Western, Eastern Nigeria and Lagos. This situation arose from the adoption in Nigeria of a federal system of government which divided the country into three Regions, namely Eastern, Western, Northern Nigeria and the Federal territory of Lagos. Each of the Regions was empowered by law to draw up its own High Court Civil Procedure Rules. For the North, East and West, the civil procedure rules which emerged were mainly a modification of the rules of the old Supreme Court Rules (Nigeria) of 1945. These rules now apply, *mutatis mutandis*, in all the States that have been created out of the former Regions. However, in September, 1973, Lagos State enacted a completely new set of Rules which are not only far in advance of the Rules applicable in other States of the Federation but would appear to be an introduction in Nigeria of the Rules of the Supreme Court (England) enacted under the Judicature Act of 1925 and extensively modified in 1965.

The conferment of powers on the former Regions to make Rules of civil procedure sowed the seed for the Rules of civil procedure to grow in diverse directions. Over the years, the Rules have grown in diverse directions and there is no central body to co-ordinate the growth of these Rules.

With the creation of 19 States and the new Federal Capital territory of Abuja, Nigerians are now faced with the possibility of having twenty different Rules of civil procedure. This is not a healthy situation and the need for some form of harmonisation is now obvious.

Recently, the Federal Government set up a commission to study and recommend ways and means of harmonising the Rules but these recommendations have not been implemented. This thesis is, therefore, an attempt to draw attention to the conflict and diversity inherent in these numerous Rules and to suggest areas of harmonisation.

It is curious to observe that although the various Rules have over the years been growing, the growth has not been a healthy one. This is because the entire growth has been patterned along the growth of the Rules of civil procedure in England (the Rules of the supreme Court). This trend savours on colonialism. It is now time for us to adopt an approach that is indigenous and more beneficial to Nigerians. In this thesis suggestions have been made for the adoption of this indigenous approach.

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A.C.	Appeal Cases
ALL N.L.R.	All Nigeria Law Reports
ALL E.R.	All England Reports.
C.C.H.C.J.	Certified Copies of the High Court Judgments
Ch. D.	Chancery Division.
E.C.S.L.R.	East Central State Law Reports
F.S.C.	Federal Supreme Court Reports
K.B.	King' Bench
L.L.R.	Lagos Law Reports
N.M.L.R.	Nigerian Monthly Law Reports
N.L.R.	Nigerian Law Reports
N.N.L.R.	Northern Nigeria Law Reports
N.W.L.R.	Nigerian Weekly Law Reports
PHC	Port Harcourt High Court
Q.B.	Queen's Bench
R.S.C.	Rules of the Supreme Court (England)
R.S.L.R.	Rivers State Law Reports
S.C.	Supreme Court Reports
W.A.C.A.	West African Court of Appeal
W.L.R.	Weekly Law Reports
W.N.	Weekly Notes
W.R.N.L.R.	Western Region of Nigeria Law Reports

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CHAPTER ONE

INTRODUCTION

DEFINITION OF PLEADINGS:

The need for a definition in a thesis on this subject is imperative. This is because such a definition will, to a large extent, determine the scope of one's investigation.

There have been several definitions of the word "pleadings" by various writers and statutes. Most of the definitions show remarkable similarity both in wordings and contents while in one case - the Indian Code of Civil Procedure - the definition exhibits a considerable difference. The Indian Code of Civil Procedure defines "pleadings" as "plaint or written statement."¹ It goes further to amplify this definition by stating as follows:

"Pleadings are statements in writing delivered by each party alternately to his opponent, stating what his contentions will be at the trial, and giving all such details as his opponent needs to know in order to prepare his case in answer."

The author² then explains the definition by saying that there are now not more than two pleadings in any suit:

- (a) a plaint, in which the plaintiff sets out his cause of action with all necessary particulars as to his injuries and losses and
- (b) a written statement, in which the defendant deals with every material fact alleged by the plaintiff in his plaint, and also states any new facts which tell in his own favour.

From this definition it is evident that further definitions are required before the reader can understand the definition. What, for example, is the meaning of "plaint?" The Short Oxford English Dictionary defines a "plaint" as a "statement or representation of wrong, injury or injustice, a complaint. An oral or written grievance made to a court of law, for the purpose of obtaining redress, an accusation, charge, complaint."

One way of looking at the definition of pleadings under the Indian Code is to equate it with a statement of claim and a statement of defence. A better way of looking at the definition, however, is to see it as incorporating a writ of summons and its indorsement, where specially indorsed and there lies the falsity of the definition. According to Dr. Akinola Aguda³ a generally indorsed writ of summons cannot be regarded as a pleading. A specially indorsed writ, however, is a part of pleadings.

"Pleadings" have been defined by Jowitt's Dictionary of English Law as "written statement, delivered alternately by the parties to one another until the questions of facts and law to be decided in the action have been ascertained."

The definition appears to be concise because it covers all the grounds or functions that pleadings cover and perform. The only problem is that it assumes a good knowledge on the part of the reader as to what goes on in practice and it is therefore difficult in the definition to know when

Pleadings commence and end. It is because of the concise nature of this definition that a learned Ghanaian author has to supplement the definition of Jowitt by saying that the definition includes statement of claim, defence, counter-claim, reply, reply to counter-claim, rejoinder, surrejoinder, rebutter, surrebutter and further and better particulars of any of the foregoing.⁴ It is only after this amplification that it becomes easy to comprehend the true purport of Jowitt's definition.

By far, a more comprehensive definition of Pleadings is that given in Halsbury's Laws of England⁵ which defines Pleadings as follows:

The term "pleadings" is used in civil cases to denote a document

- (a) in which a party to a proceeding in a court of first instance is required by law to formulate in writing his case or part of his case in preparation for the hearing. A pleading, in legislation concerning procedure of the Supreme Court, includes any petition or summons,
- (b) and also includes the statements in writing of the claim or demand of any Plaintiff, and of the defence of any defendant thereto,
- (c) and of the reply of the Plaintiff to any counter-claim of a defendant.

Apart from the definition of Dr. Nand Lal which fails to make a distinction between a generally and a specially endorsed writ, a pleading commences from a specially indorsed writ and ends with a reply either to a statement of defence or counter-claim and even summons for directions. According to Halsbury's Laws of England⁶ "when a pleading subsequent to a reply has not been ordered, the

pleadings are deemed to be closed at the expiration of seven days from the delivery of the defence or reply, if any. Where a pleading subsequent to a reply has been ordered and there has been a failure to deliver it within the period limited for the purpose, the pleadings are deemed to be closed at the expiration of that period."⁷

From the totality of the foregoing discussions, pleadings include a specially indorsed writ, statement of claim, defence, a counter-claim, a set-off, reply to statement of defence, defence to counter-claim and by leave of the court, a rejoinder, surrejoinder, rebutter and surrebutter. Amendments and petitions also come within the definition of pleadings, as, for example, a matrimonial case or an election petition. The scope of the thesis will, therefore, cover all these areas.

HISTORY OF PLEADINGS IN NIGERIA

The history of pleadings in Nigeria dates as far back as 1914, when the entities under British colonial rule known as Northern and Southern Protectorates were brought under one administrative umbrella and called Nigeria. This merger (usually referred to as "the Amalgamation" in our legal and political history) was carried out by Lord Lugard who was then the Governor of all the territories brought together. The entire entity was then called the Colony and Protectorate of Nigeria. The colonial government at once made a law for the administration of justice and constituted the Supreme Court of Nigeria by Ordinance.⁸ Section 3 of the said ordinance created the Supreme Court in the following terms:

There shall be a court which shall be called the Supreme Court of Nigeria

and shall, subject to the terms of this Ordinance, constitute the Supreme Court of judicature for colony and protectorate.

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The Ordinance also provided in S. 15 for the practice and procedure to be used in the Supreme Court as follows:

The jurisdiction by this Ordinance vested in the Supreme Court shall be exercised (so far as regards procedure and practice) in the manner provided by this Ordinance, or by such rules and orders of court as may be made pursuant to this Ordinance.¹⁰

Accordingly, the practice and procedure of the Supreme Court, 1914, was drawn up and made the second schedule to the Ordinance, and Order 25 dealt specifically with pleadings. It is curious to observe that the court adjudicated generally without pleadings and pleadings were to be ordered only if the court deemed it necessary. Order 25 Rule 1 provided as follows:

Suits shall ordinarily be heard and determined in a summary manner without pleadings, but when it appears to the court that the nature and circumstances of any case render it expedient in the interest of justice to do so, the court may order the plaintiff to file a written statement of his claim, and may likewise order the defendant to file a written statement of his defence. The filing of a statement of claim shall not necessarily, involve, unless the court so directs, that a defence shall also be filed. The order may be at any stage of a suit, either before or at the hearing.

Rule 25(2) stated that "in making any such order, the court shall have regard to the conditions of the parties, and shall not require any party to file a written statement who, from want of education, is

incapable of preparing or understanding the same. If in any case the court considers it necessary, in the interest of justice, that any statement of such party should be reduced into writing previous to the hearing, the court may direct that the same be taken down in writing by the Registrar or other fit officer of the court, and after verifying the statement so prepared by oral examination of the party where necessary, may direct, if it thinks fit, that such statement be filed as a pleading."¹¹

The Supreme Court was a Court of Record having regard to its provisions in S.12 which provided that "the jurisdiction by this Ordinance vested in the Supreme Court shall include all His Majesty's Civil Jurisdiction, which at the commencement of this Ordinance was, or at any time afterwards may be exercisable in Nigeria. It was, therefore, obvious that the Supreme Court had considerable difficulties in keeping good records particularly keeping of records as regards the issues actually in controversy between the parties in any particular suit. More problems were even experienced when the matter was to go on appeal to the West African Court of Appeal and the West African Court of Appeal did not hide its feelings by deprecating, in serious terms, the practice of litigation without pleadings. In the case of LARYEA V. QUAO¹² the West African Court Appeal condemned the practice as follows:

"This is another of those all-too-numerous cases unfortunately tried without pleadings with resultant waste of time both in the court below and in this court."

To the present-day lawyer, the practice of law in the High Court without pleadings may sound absurd or that the practice was introduced in 1914 only because of our level of literacy. Even in England today there are still vestiges of attempts to carry on trials in the Supreme Court without pleadings. There are actions commencing with the originating summons under Order 19 Rule 14^B (R.S.C.) which makes provision for notice to proceed to trial without pleadings. It all started in 1880, when a committee on procedure was set up presided over by Lord Coleridge, C.J., and this committee was expected to recommend the abolition of pleadings.¹³

It did recommend that no pleadings shall be delivered in any action except with leave of the court. This recommendation was accepted and embodied in a rule made in 1897; but in practice the court granted leave just for the asking and the rule fell into disuse and was subsequently abolished in 1933.

There was also the Evershed Committee on the Supreme Court Practice and Procedure relating to pleadings in 1953.¹⁴ The first report of that committee recommended that parties should be encouraged in appropriate cases to dispense with pleadings and should go on to trial without pleadings. The underlying idea was that the issues between the parties could be ascertained or stated clearly without pleadings and this being the object of pleadings, the role of pleadings could be dispensed with. This was the recommendation that led to the making of the new Order 14^B of 1955. This Order enabled a plaintiff to endorse the writ of summons with

a notice that he intended to apply for trial without pleadings. Such an application was usually supported by an affidavit, made by the plaintiff, or by any person who could swear positively to the facts

- (a) summarising the question believed to be at issue between the parties, and
- (b) indicating so far as necessary, the grounds for the contention that the case is suitable to be tried without further pleadings.

The second Evershed Committee's report was the recommendation of the extended use of the originating summons so as to dispense with pleadings. It was probable that these ideas going on in Britain also influenced the insertion of Order 25 Rule 1 of the Rules of procedure (pleadings) in the 1914 Act. In any case, this state of affairs continued until 1945 when a Supreme Court of Nigeria was created by Ordinance.¹⁵ By its S.50 the then Chief Justice of Nigeria was empowered to draw up Rules of practice and procedure for the Court. The Supreme Court (Civil Procedure) Rules were accordingly drawn up by the Chief Justice with effect from September 19, 1945.

In 1954, Nigeria became a Federation under a Constitution and the country was divided into three Regions - the Northern, Eastern and Western Regions and the Federal Territory of Lagos. As a result, High Courts, were set up in all the regions under laws that empowered the Regional High Courts to draw up their own civil procedure rules.

Meanwhile, the former rules of the Supreme Court became applicable in the High Courts in the Regions. Perhaps, if civil procedure rules (at least for the High Courts) were made an exclusive matter for the Federal Government to legislate on, the unnecessary divergence and multiplicity in our present-day rules might have been avoided. Unfortunately, this was not done, and in consequence, all the Regions started drawing up their own civil procedure rules. The Eastern Region drew up its own rules in 1956 and these rules are now applicable in all the States that have eventually been created out of the former Eastern Region namely, Anambra, Cross River, Imo and Rivers States. The Western Region also drew up its own rules in 1958 and these rules are now applicable, with minor differences, in all the States that have been created out of the former Western Region namely, Bendel, Ogun, Ondo and Oyo States. In the North, the Rules of the Supreme Court (Nigeria) drawn in 1945 continued to apply until 1976 when the North extensively modified these rules and made them applicable in all the ten Northern States with minor variations from State to State. Lagos State also continued to apply the old rules of the Supreme Court (Nigeria) until September, 1973. In that year the Lagos State completely adopted a new set of Rules which were far in advance of the other States. The Lagos Rules appear to have incorporated to a large extent the Rules applicable in England - the Rules of the Supreme Court made under S.99 of the Judicature Act of 1925 which were extensively revised in 1965. The English decisions based on these Rules will, therefore, be of persuasive authority, especially those of the Court of Appeal and the House of Lords.

At the present, all the Rules on pleadings in Nigeria provide, some mandatorily, that written pleadings must be filed in all suits except the court considers it necessary to order otherwise having regard to the condition of the parties. This is a clear reversal of the 1914 position in which pleadings were not filed except the court saw it fit to order the filing of pleadings in any particular suit.

The provision of the law in the former Eastern Nigeria, for example, is emphatic. Order 33 Rule 1 states as follows:

"In all suits written pleadings shall be ordered by the court unless the court considers in any particular suit that written pleadings are unnecessary."

NEED FOR HARMONISATION

As a result of the numerous Rules of procedure a counsel who is based in an area where one set of Rules is applicable, may not be able to practise easily in another area with another set of Rules, especially Lagos. This unfortunate situation is brought about by the wide disparity in the procedures between the Rules.

Since the purpose of the Rules is to enable the courts do justice while at the same time ensuring speedy disposal of cases, it will be emphasized in the thesis which of these sets of Rules has this advantage. There is, it seems, an urgent need to harmonise the Rules of procedure applicable in the whole country,

especially those relating to pleadings because it is often in the area of pleadings that the Rules appear to be noticeably divergent.

Consequently, there is no doubt that a noticeable difference exists in the Rules that are in use in the High Courts in Nigeria. An example of the difference or conflict in the various rules applicable in the country is the rule of pleadings that only material facts should be pleaded and not the evidence by which the facts are to be proved. In practice, the rule is strict that pleadings must not contain conclusions of law. These are general rules of pleadings which are applicable in Lagos, the Eastern States and the Western States, including Bendel. The provision in the Northern States may, however, be noted. The heading States "points of law" may be raised by pleading (Order 10 Rule 21) and states thus:

"A party may by his pleading raise any point of law."¹⁶

A lot more of these disparities will be highlighted below under the "scope" of the thesis.

There is, however, a need to harmonise or even create a uniformity of the Rules applicable in the country. The divergence of these rules has created a lot of problems, some of which may be noted.

1. There is confusion in the application of these rules both in Lagos and in other parts of the country as Judges

have tended to use as authorities cases decided in one jurisdiction according to the rules applicable in that jurisdiction in deciding cases in other jurisdictions with different set of rules. On some other occasions, the rules have been said not to cover a given set of facts and a resort is then quickly made to the received English rules, in some cases, without ensuring that those rules are applicable to that jurisdiction. All these are confusions that have their roots in the lack of uniformity of the local rules.

2. It is difficult for a legal practitioner in one part of the country and accepting a brief from another part to adapt himself to the rules applicable in that part of the country without some serious efforts.
3. Nearly the entire body of the Rules applicable both in Lagos and other parts of the country are imported rules, the rules of Lagos being based largely on the rules of the Supreme Court of England, 1965, and those of the rest of the country basically on the English Rules of 1883. Avenues of drawing up indigenous rules have to be sought.

4. There are now serious doubts as to whether the type of advanced rules adopted in Lagos are better than those generally applicable in the other States, having regard to their speed and efficacy in the dispensation of justice. Some Legal Practitioners and text book writers, including Dr. Aguda¹⁷ have described the Lagos Rules as cumbersome. There is, therefore, a need for an analytical and comparative study of the rules relating to pleadings in Nigeria with a view to harmonising them.
5. Generally, the law on pleadings in Nigeria requires up-dating, particularly having regard to recent decisions of the Supreme Court on amendments and applications for extension of time. These are discussed further in chapters four and five of this thesis.

METHOD OF APPROACH

This thesis will concern itself with the general review and detailed comparative study of the rules of pleadings applicable in all the High Courts in Nigeria. The conclusions will involve suggestions on areas of harmonisation so as to bring about a uniformity in the rules. This thesis will therefore, centre mainly on the rules of pleadings in the High Courts within the country. In the course of this research, however, comparison will be made with the rules on pleadings in other jurisdictions

outside Nigeria and three countries have been selected for this exercise, namely, England, India and Ghana.

The choice of these countries is deliberate. India, Ghana and Nigeria were at one time or the other colonies of Britain and the rules of pleadings applicable in these countries were either basically made for them by British Judicial Officers or the Rules were directly influenced by the Rules applicable in England. They all had rules of pleadings during their colonial eras and these rules have been developed after the attainment of independence. It will be seen whether the rules in these countries show a common pattern in not wanting to deviate from the English Rules. These are matters worthy of examination. The Rules will be grouped into four for purposes of convenience in the treatment of the subject, namely, East, West, North and Lagos. The analysis will be based on Rules applicable in Lagos and where the rules applicable in other jurisdictions are the same in wording as those applicable in Lagos State, the other rules will not be reproduced but mention will be made to the effect that the rules are the same. Where, however, the rules are different, then the differing rules will be reproduced for comparative purposes. The Rules applicable in individual States only will be specifically referred to where there is a striking difference in the provisions of those individual States to the Rules generally provided.

SCOPE OF THE THESIS

The aim of this comparative study will be the eventual suggestions of ways of

harmonising the rules in Nigeria. Before one can be in a position to recommend a way of unifying the rules, however, a thorough examination of the rules and their application to practice in the law courts will be undertaken. It is probably in this way that the difficulties, inconsistencies and the relative advantages of the various rules will be highlighted.

To state that many of the rules in Nigeria **vary** tremendously between the North, East, West and Lagos is to state the obvious but the depth of it will not be realised unless some examples are given in general or specific terms.

In the Eastern and Northern States, the parties to a civil suit cannot file a statement of claim or defence unless there is an order of the court to that effect. That is probably why Order 33 Rule 1 of the Eastern Nigeria Rules appropriately states that "written pleadings shall be ordered". Usually, the parties to the suit, on the return date of the summons, appear in court and if the defendant pleads not liable to the claim, the court then orders statements of claim and defence to be filed respectively and within stated periods. Perhaps, also the mode of service, either service is by counsel on counsel on behalf of the parties or directly on the parties themselves as shown in the writ of summons. The court can order pleadings even in the absence of one of the parties, usually the defendant,

provided there is proof of service of the writ of summons.

Whereas this is the position in the East and the North, in Lagos a lot of the appearances in court have been dispensed with and replaced by statutory periods within which to file statements of claim and defence. Order 17 states that except where a Judge orders otherwise or where there is no appearance by a defendant, a plaintiff has to file his statement of claim within ten days after appearance by the defendant. The parties may by consent in writing enlarge upon this time. In the East and the North no such enlargement of time is permissible by a party with the consent of the other party without an order of the court. Order 11 Rule 2 (East), infact, specifically prohibits the parties to a suit from acting without the leave of the court. The Rule states that "the parties may not by consent enlarge or abridge any of the times fixed by these rules for taking any step, or filing any document, or giving any notice." Order 11 Rule 3 (East) also states as follows:

"The court may, as often as it thinks fit, and either before or after the expiration of the time appointed by these rules, or by any judgment, order, or rule of the court, extend or adjourn the time for doing any act or taking any proceeding."

This is generally also the position in the North. The application for extension of time must be made to the court by motion supported by an affidavit sworn to by the applicant

stating the reason for failing to carry out the order of the court within the stipulated period. The court usually grants the extension of time. There is, therefore, a world of difference in the two procedures. In the course of the thesis it will be shown which of the procedures has a relative advantage. Suffice it to mention here that the main aim of Order 17 Rule 1 (Lagos) may be an attempt to save time and costs by reducing the number of appearances in court.

The position is nearly the same in the case of filing a statement of defence. Order 18 Rule 6 (Lagos) which deals with time for filing a defence clearly states that "where a defendant has entered an appearance he shall file his defence within fourteen days from the time limited for appearance or from the date of service of the statement of claim, whichever shall be the later, unless such time is extended by consent in writing, or by the court or a Judge in Chambers x x x x."

Again there is no provision for specially indorsed writs in the East and North and in these two jurisdictions where an action is commenced by a writ of summons, a court order is required before a statement of claim or defence can be filed. A statement of claim or defence filed without an order of the court or Judge in Chambers is null and void.

Demurrers were abolished under the English Rules in 1883¹⁸ and this position seems to have been incorporated in our law as no Rule of pleading provides specially for a demurrer. Infact, Order 22(1) (Lagos) specifically states that "no demurrer shall be allowed." The rules however allow objections to be taken against a statement of claim on grounds of law. The procedure adopted in the North, East and Lagos are radically different. Order 29 Rule 1 (East) states that "where a defendant conceives that he has a good legal or equitable defence to the suit, so that even if the allegations of the Plaintiff were admitted or established, yet the Plaintiff would not be entitled to any decree against the defendant, he may raise this by a motion that the suit be dismissed without any answer upon questions of fact being required from him." The provision means that a separate application by motion supported by an affidavit must be filed attacking the claim of the plaintiff. Whereas this is the position in the East and North, Order 22 Rule 2 (Lagos) states that "any party shall be entitled to raise by his pleadings any point of law and, unless the court or a Judge in Chambers otherwise orders, any point so raised shall be disposed of by the Judge who tries the cause at or after the trial." This means that the defendant must include the objection in his statement of defence to enable the trial Judge to decide when to take up the point of objection.

R E P L Y

Finally, on these examples of the disparities or divergence between the rules applicable in Nigeria, mention may be made of a Reply. Reply means an answer to new issues raised by the statement of defence. There is a statutory period set by Order 20 Rule 1 (Lagos) that a Reply must be made within seven days from the service of defence. This is not so in the East and North. In those jurisdictions replies must be by leave of the court.

In this chapter an attempt has been made to highlight some of the problems beleaguering our rules on pleadings as one goes from one State High Court to another. In the subsequent chapters these problems will be discussed in greater detail, beginning with the general rules of pleadings in the next chapter.

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15. Ordinance No. 23 of 1945 which came into effect from 1945.
16. See specifically Order 10 Rule 21(1) Plateau State Rules which states that "A party may by his pleadings raise any point of law."
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CHAPTER TWO

GENERAL RULES ON PLEADINGS

The main purpose of pleadings is to put in written form all the issues in controversy and to deliver same to the opposite party to avoid surprise at the hearing. This enables the opposite party to prepare his case towards only those issues in controversy and thus save spending money and time in procuring witnesses that are irrelevant to the facts in issue. As was stated in Chapter One, there have been moves on various occasions to dispense either completely or partially with pleadings in the interest of speedy hearing and reduction of costs. Even now it is still doubted by many whether pleadings should be given so much prominence as is being given to it. It is always a matter of surprise to the non-lawyer that sometimes there are so many objections taken during the hearing of a case by counsel on the opposite sides that a matter is not pleaded and therefore that evidence should not be given. This is more so when it is realised that what is being said by the party himself in the witness box is what, to his knowledge, happened. At some other times judgments are delivered purely on technical grounds of pleadings without regard to the evidence of the parties. It would therefore appear that the courts are giving too much prominence to form rather than substance. A few example will be necessary to illustrate this preference for form rather than substance.

In LEAF V. INTERNATIONAL GALLERIES LTD.¹ the failure to use the word "warranty" in

the statement of claim earned the plaintiff a dismissal of the suit. In ENGLAND V. PALMER² the West African Court of Appeal saved the plaintiff's case only when the court amended the statement of claim by adding "in possession" to the word "owner". Also, in the case of ESSO PETROLEUM CO. LTD. V. SOUTHPORT CORPORATION³ the plaintiffs lost their case because they could not prove the only negligence they pleaded. The matters that were proved were not pleaded and therefore went to no issues. Apparently, the plaintiffs pleaded too narrowly. According to I. H. JACOBS,⁴ instead of the plaintiffs pleading that the warehousemen to whom goods were entrusted for storage returned them in a damaged condition, and therefore placing the burden on them to show that the goods were damaged without their fault, or that their fault was excused by an exempting clause, the bailors pleaded positive allegations of negligence in storage. This enabled the warehousemen to rely upon an exemption clause excluding liability for precisely such negligence, although they stoutly maintained that they were not negligent at all. One is, therefore constrained to question the present day role and function of pleadings.

IMPORTANCE OF PLEADINGS

I. H. Jacobs gave the answer to this question humorously. He said "In the adversary system of litigation, therefore, it is the parties themselves who set the agenda for the trial by their pleadings,

and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "any other business," in the sense that points other than those specified may be raised without notice. The above-quoted statement puts in a very succinct form the role of pleadings. The Judge is a kind of umpire who acts on the matters placed before the court to adjudicate. He is not to take part or suggest what a party's case should be. He does not know the facts other than those placed before him. This brings into focus the problem of the talkative Judge who looks always beyond the matters stated in the pleadings. The power of the court to amend suo motu or to suggest such amendment has been held to be very restricted.⁵ The court must ascertain from the parties themselves what are the matters in dispute between them. It is the function of pleadings to inform the court of these matters, and to define the issues in dispute between the parties. Without pleadings the parties will be left to guess what the issues are. In civil litigation, therefore, pleadings are very important because they define or delimit in precise or concise form the issues for adjudication and decision.

It must be realised that the parties in dispute are adversaries and it is left for the parties to put their case in the way most appropriate that will bring out the particular party's case,

subject to the basic rules of pleading that in putting across his case a party must state only material facts and the defence of the opposite party must not be evasive on the points raised but answer the specific points raised by the plaintiff.

The importance of pleadings is not confined to raising the issues in controversy between the parties. From the filing of pleadings, such pleadings seem to take control or influence all subsequent proceedings in the case. For example, it is from the pleadings that better and further particulars can be ordered and this helps to further narrow the issues in dispute between the parties. It is also from the pleadings that it becomes known whether the statement of claim does not disclose a cause of action or whether the statement of defence discloses a defence to plaintiff's case. So pleadings run through the entire proceedings.

The effect of what has been said above is the emergence of the principle that the parties are bound by their pleadings. That is, in the conduct of their case in court, the parties are not allowed to depart from the issues as put forward by them in the pleadings. To permit a departure will be to take the other party by surprise. In OMEGOKWE V. OKADIGBO⁶ the Supreme Court emphasized that the parties must adhere strictly to their pleadings. Also, in NORTH BREWERY LTD. V. MOHAMMED⁷ the statement of claim merely averred that the

defendant was indebted to the plaintiffs in the sum stated in the statement of account attached to the statement of claim and all that was mentioned in the Statement of Account in respect of the claim for money lent was "Motor-car/Personal advance £1,000.00 (#2,000.00)."

At the hearing it emerged that it was the plaintiff's case that the parties had executed an agreement governing this loan. The agreement was produced in evidence and contained detailed provisions regarding repayment of the loan and for preserving the car for the benefit of the plaintiffs as security for the loan. It was held that the plaintiffs should be non-suited in respect of their claim for money lent in respect of the motor car because they could not recover upon a written agreement containing terms governing the defendant's liability to repay the money under the cloak of a claim for a debt simpliciter as the court would not adjudicate on issues not raised by the pleadings. Wheeler Ag. S. P. J. stated the matter as follows:

"It is well established that where an oral agreement is relied on by a plaintiff, it should be alleged as a fact that such agreement was entered into, and, that, equally, where a written agreement is relied on it must be referred to and identified in the statement of claim. The consequence of this, of course, is that the agreement, Exhibit 7 should not have been admitted in evidence as it did not relate to matters which were pleaded and it strictly went to no issue at the trial.

It follows too that I am in effect being asked by the plaintiffs to adjudicate on issues which are not raised by their pleadings, which of course I am not entitled to do."⁸

It used to be the practice that facts not pleaded but allowed to be led in evidence by the opposite party are admissible and cannot be disturbed on appeal;⁹ and also that an amendment can be effected to take in the new evidence.

This practice has now been reversed. Facts not pleaded but upon which evidence has been led are now ignored or expunged during the judgment.¹⁰

Recently, however, the Supreme Court has made a fine distinction and has decided that facts not pleaded but upon which evidence has been led without objection will not in certain circumstances be capable of being excluded.

The court stated that "in an appropriate case - where the evidence complained of is admissible under certain conditions (as in the case presently on appeal), this court will not entertain any complaint on the admissibility of such evidence without objection or by consent of the parties. The same view was expressed in the case of ALADE V. OLUKADE"¹²

where the Supreme Court made the same distinction as follows:

"In a trial by a Judge alone, as in the case in hand, a distinction must be drawn between those cases where the evidence complained of is in no circumstances

admissible in law and where the evidence complained of is admissible under certain condition. In the former class of cases the evidence cannot be acted upon even if parties admitted it by consent and the Court of Appeal will entertain a complaint on the admissibility of such evidence by the lower court (although, the evidence was admitted in the lower court without objection); in the latter class of cases if the evidence was admitted in the lower court without objection or by consent of the parties or was used by the opposite party (e.g. for the purpose of cross-examination) then it would be within the competence of the trial court to act on it and the Court of Appeal will not entertain any complaint on the admissibility of such evidence."

It is worthy of note that to reduce the possible hardship that can arise from the rule that parties are bound by their pleadings, parties are allowed, in most cases, to amend their pleadings. The subject of amendment has been discussed in a later chapter.

CONTENTS OF GOOD PLEADINGS

The contents of pleadings are divisible into two parts. The first refers to the form in which a pleading should take, and essentially makes for elegance and clarity of the pleadings while the second type of contents refer to those rules designed statutorily to meet what may be regarded as a good pleading.

FORM OF PLEADINGS

Form of pleadings has to do with the structure or layout in which pleadings should be written. It is the format of pleadings. It has to do with heading, paragraphing and similar matters contained in the pleadings. The rules of pleading applicable in both the Northern and Eastern parts of the country make very skeletal provision on this matter. In the East Order 33 Rule 5 provides as follows:

"Every pleading shall contain a statement of all the material facts on which the party pleading relies, but not the evidence by which they are to be proved, such statement being divided into paragraphs numbered consecutively and each paragraph containing as nearly as may be a separate allegation."

The underlined parts of the foregoing rule has to do with the form of pleadings. Also, Order 10 Rule 5 of the Rules applicable in the Northern parts of the country has exactly the same wording as Order 33 Rule 5 (East). This Rule does not state that the pleading should be headed in any court. It also does not state that it should be signed or that the name of the particular pleading whether statement of claim or defence should be stated. The courts have, however, not followed the literary interpretation of the order but have always required that the pleading should be signed with proper heading and the type of pleading. Thus, they have brought in the

practice in England since there is an obvious lacuna in the two rules. However, the Rules applicable in Lagos provide more exhaustively for the form in which pleadings should take. Order 16 Rule 4 states as follows:

"Every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved, and shall, when necessary, be divided into paragraphs, numbered consecutively. Dates, sums and numbers shall be expressed in figures and not in words, pleadings shall be signed by a Legal Practitioner, or by the party if he sues or defends in person."

The foregoing Rule is quite comprehensive and covers the essential format in which a pleading should take. It has, I believe, carefully left out some provisions like putting down the name of the Judge hearing the case as is done under the current English practice. Such a provision is definitely inappropriate in Nigeria. These provisions again highlight the disharmony in the Rules applicable in the country and the earlier they are harmonised the better for the country.

Some degree of formality in pleadings is inevitable. For example, a pleading must be given appropriate heading - the court, the suit number (which is usually provided by the Registrar but the column is provided by the party or his counsel on the top right hand

corner of the pleadings) and the names of the parties. Also, the particular pleadings must be given its correct heading, for example, statement of claim or defence, counter-claim or set off as the case may be. There are also general rules of drafting which are regarded as equally important in pleadings so as to avoid ambiguity. Thus, dates, sums and numbers must be expressed in figures. The pleading is required to be signed by the party or his counsel and it has been held that a pleading which is unsigned is a nullity.¹³ Pleadings are required to be dated in the Registry. This requirement is also important because it enables arguments as to whether it was filed within time or not to be disposed of easily by the court. There must, in addition, be inserted address for service, either on the parties or the solicitors. These requirements as to form of pleadings, though not specifically provided for in some of the Rules, have been followed by the High Courts in Nigeria. They are Rules inherited ~~under~~ the English practice and they now seem to be inevitable rules of practice. Nearly all the High Court Rules make provisions for the application of English Law where there is no specific provision in our Rules. For example, S.16 of the High Court Law (East) provides that:

"The jurisdiction vested in the court shall be exercised (as far as regards practice and procedure) in the manner provided by this Law and in any other written law or by such rules and orders of court as may be made pursuant to this

law or any other written law, and, in default thereof, in substantial conformity with the law and practice observed in England in the High Court of Justice, on the thirtieth of September, 1960."

1. Every pleading must state facts, not law

This is one of the basic rules of pleadings. A good pleading must contain facts and not law. The rule is also one of the Rules of practice in England which came into effect after the Judicature Act of 1875. Before this Act, in England, the practice was the reverse of the present rule. What was usually pleaded was law or mixed facts and law.¹⁴

Thus, for example and quoting from the speech of Lord Sumner¹⁵ "the plaintiff sues the defendant for money payable by the defendant to the plaintiff for money received by the defendant to the use of the plaintiff." This example is a pleading of law which can be supported by a variety of facts, for example;

- (a) that the defendant was the Plaintiff's Rent Collector, and had received money for him as such; or
- (b) that the plaintiff was entitled to an office which the defendant also claimed, and under colour of which the defendant had received fees which the plaintiff sought to recover from him.
- (c) That the plaintiff had paid the defendant the price of goods which he was to supply, and the defendant had never

- supplied them, or
- (d) that the plaintiff had paid a sum of money to the defendant by mistake, having taken him for another person of similar name or appearance.

The same approach was true also of the defence. A defendant could plead what was usually referred to as "the general issue" an example of which was that the defendant "never was indebted as alleged." This was also a conclusion of law. Such a defendant could at the trial lead a variety of facts to meet the pleading such as

- (a) that he never ordered the goods; or
- (b) that they were never delivered to him; or
- (c) that they were not of the quality ordered or
- (d) that they were sold on a credit which had not expired at the time the action was commenced.¹⁶

These methods of putting forward a party's case were reversed under the Judicature Act 1875. Henceforth, pleadings of law, mixed law and facts or conclusions of law were discontinued. It was reasoned that the Judge knew what law to apply if only the facts of the case were made known to him in court.

In Nigeria what is at present in practice is the position after the Judicature Act of 1875 but it must immediately be added that the Rule has been greatly whittled down in practice and in some States of the Federation there is even a specific Rule empowering parties to plead law.

Order 16 Rule 4 of the Lagos Rules, for example, does not specifically contain any provision prohibiting the pleadings of laws. It states as follows:

Every pleading shall contain and contain only, a statement in summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be but not the evidence by which they are to be proved, and shall when necessary, be divided into paragraphs, numbered consecutively. Dates, sums, and numbers shall be expressed in figures and not in words. Pleadings shall be signed by a Legal Practitioner, or by the party if he sues or defends in person.

The relevant Rule in the Eastern States is worded similarly. Order 33 Rule 5 (East) states as follows:

Every pleading shall contain a statement of all the material facts on which the party pleading relies, but not the evidence by which they are to be proved, such statement being divided into paragraphs numbered consecutively, and each paragraph containing as nearly as may be a ? separate allegation.

To be contrasted with the foregoing provision is Order 10 Rule 21(1) in the Kwara State Rules. All the Northern Rules have similar provisions. The Kwara State Order provides that "a party may by his pleading raise any point of law." Again, by Section 21(2), an objection in point of law so taken shall be disposed of by the court at the trial. Provided that by consent of the parties,

or by order of the court on the application of either party the objection may be set down for hearing and disposed of at any time before the trial."

This provision in the Northern Rules is a novel one because it specifically empowers a party to raise points of law in his pleadings and it shows the lack of harmony in the Rules applicable in the entire country. On the face of it, it appears that a party can plead law to any extent including conclusions of law. A closer look would appear to cover a situation where a defendant can raise an objection on point of law namely that assuming that all the plaintiff's allegations of fact are true, the action is still not maintainable on grounds of law, for example, that the action is statute barred. Raising defences in point of law is practised all over the Federation but it is only a defensive weapon and the practice has replaced what used to be called a "demurrer." To make a naked provision to plead law is to cause further confusion in the Rules of pleading.

Generally, however, the practice prohibiting the pleading of law does not mean that issues of law cannot be raised in the pleadings and this is perhaps the reason why none of the Rules quoted above specifically prohibits the raising of law in the pleadings. It is mainly a prohibition on pleading of conclusions of law, this being regarded as a proper

function of the court. However, if a party decides to plead conclusions of law or mixed fact and law as deduced by him from the facts of the case, such a party will nevertheless not be bound by such conclusions and it is open to him to put up any other legal arguments and to reach other conclusions as he deems necessary.

Lord Denning M.R. in *Re Vandervell's Trusts*
No. 2 states as follows:

"Mr. Balcombe for the executors stressed that the points taken by Mr. Mills were not covered by his pleadings. No such trust was pleaded. And so forth. The more he argued, the more technical he became. I began to think we were back in the bad old days before the Common Law Procedure Acts 1952 and 1854, when pleadings had to state the legal result; and a case could be lost by the omission of a single averment. All that has been long swept away. It is sufficient for the pleader to state the material facts. He need not state the legal result. If, for convenience, he does so, he is not bound by, or limited to, what he has stated. He can present, in argument, any legal consequence of which the facts permit. The pleadings in this case contained all the material facts. It does appear that Mr. Mills put the case before us differently from the way in which it was put before the Judge, but this did not entail any difference on the facts, only a difference in stating the legal consequences. So it is quite open to him."¹⁸

Also, some pleading of law is usually permissible to emphasise certain legal

principles or maxims. Thus it is permissible to plead *res ipsa loquitur*. Even here the principle that parties must not plead law but facts is still operative. Thus, it will be insufficient to merely plead the latin maxim without stating facts to support it. In ODEBISI & ORS. V. OKE¹⁹ the Supreme Court held that the case of ORAJEKWE V. MBIERI²⁰ did not decide that a Judge could travel outside the pleadings in his judgment, what it decided was that it is not strictly necessary to raise the issue of *res ipsa loquitur* only by reproducing the latin maxim, but a description of the facts on the pleadings which will suggest that a plea of *res ipsa loquitur* is intended is sufficient. By the same token, it is necessary for a purchaser of legal estate, subject to a prior equitable mortgage, to plead specifically that he is a purchaser for value without notice, failure to plead this defence or call evidence to establish lack of notice, raises a presumption that the purchaser had notice of the prior mortgage.

In defamation cases where a defendant pleads what is usually referred to as the "rolled-up plea" he must state the facts on which he bases his comment. In ODUTOLA V. WEST AFRICAN PILOT LIMITED²¹ in an action for libel one of the defences set up by the defendant was by a common form of pleading known as the "rolled-up plea". It was held that the defendant is entitled

to prove an indeed must prove, that the facts on which his comments are based are true.

The general exception to the rule against pleading of law is Customary Law. Section 14 of the Evidence Act puts the burden on any person alleging the existence of a particular customary law unless such customary law has been judicially noticed. This provision makes it necessary to plead such customary law so as to lead evidence to prove its existence. This also applies to Moslem Law.^{21(a)} In AYODLA V. FOLAWIYO²²

a case involving a customary law of inheritance, the case sent for retrial because the Judge of the lower court held that the law that governed the transaction was Mohammedan Law without the parties pleading same and giving evidence to that effect.

THE PLEADING MUST CONTAIN MATERIAL FACTS ONLY

The Rules applicable all over the country exhibit uniformity in the provision that only material facts have to be pleaded.²³ The only problem here is the determination of which facts are material and which are not. The test is not relevance as provided under the Evidence Act.²⁴ In other words, not all that is relevant is material for the purpose of pleading. What is material in one case may not necessarily be material in another case and the subject is better handled by examining some

of the decided cases on the subject. From a commonsense standpoint, it is immaterial to state whether a particular day on which an event occurred was Sunday or any other day or for the defendant to stretch himself in giving answers to issues not raised by the plaintiff or defendant in a counter-claim or set-off. What then are material facts? The word material was defined by Scott L. J. in BRUCE V. ODHAMS PRESS LIMITED.²⁵ He said, the word "material" means necessary for the purpose of formulating a complete cause of action, and if any one "material" fact is omitted, the statement of claim is bad. According to Odgers,²⁶ "Facts which are not necessary to establish either a cause of action or the defence to it are not, speaking generally "material" within the meaning of Order 18 Rule 7 (England) and should, therefore, be omitted from the pleading unless it is clear that evidence will have to be given of them at the trial." Despite these definitions the problem as to what a material fact is in any given situation is not settled.

The case of ESSO (WEST AFRICA) LIMITED V. OLADITI²⁷ is illustrative of the difficulties that can arise in the application of this principle. The facts were that during the hearing of an action for a sum of money said to be the balance of the price of goods sold and delivered to the defendant by the plaintiff, Counsel for the defendant sought to tender a document

which was one of the copies of a document signed in quadruplicate by one of the plaintiff's agents acknowledging that the defendant was entitled to a credit of a sum of money in his account with the plaintiffs. The document, a carbon copy, was however signed through one single process. Counsel for the plaintiff objected to the admissibility of the document on the ground, inter alia, that it was irrelevant since the defendant did not plead it. The defendant pleaded as follows:²⁸

"the defendant denies that the account filed with the statement of claim shows an account of the dealings between the plaintiff and the defendant. It was held by Aguda that:

- (1) not all facts which are relevant are material for purposes of pleading.
- (2) The document being sought to be tendered in this case is relevant in furtherance of the attempt by the defendant to establish that the statement relied upon by the plaintiff is inaccurate and unreliable, but it is not material for the purpose of formulating a defence to the action; it did not therefore need to be pleaded.

The Judge ended as follows:

"Mr. Onalaja would have been correct if the defendant were asking for the amount shown on the document to be set-off against the claim against him. In that case, it would have been a material fact, and as it is not pleaded, Mr. Onalaja's objection would have been sustainable."

The rule on pleading of material facts as is being applied by the court requires a re-examination. At the root of the rule is the avoidance of surprise at the hearing. Sometimes although what is pleaded may give an outline information to the other party yet it may be so skeletal that the other party is nonetheless still taken by surprise when at the hearing detailed and sometimes technical evidence is given involving a lot of novel issues which if the other party had known by the pleadings would have had time to cross-check so as to be able to cross-examine at the hearing. The definition of "material facts" ought to be wide enough to cover this kind of surprise. The case of EBELEMU V. GUINNESS NIGERIA LIMITED²⁹ is illustrative of the surprise that may still spring up at the trial despite the pleading of material facts. In this case, the first defendant's witness was giving his evidence-in-chief. Learned Counsel for the defence asked the witness to give the details of the process of brewing Harp Beer by his company, that is, the defendant company. Then Counsel for the plaintiff objected to the question on the ground that, the fact on which question is based was not pleaded in the statement of defence. In paragraph 6 of the statement of defence, the following pleading for the defendant appears:

"The defendant shall contend that great care is taken in the preparation and processing of its products and a sophisticated modern system of brewing is employed to ensure sterile cleanliness."

It was held by Oshodi J. as follows:

- (1) It is trite law that pleading must contain a statement of only and all material facts. It is absolutely essential that it should state all those facts which will put the other party on his guard, and tell him what he has to meet when the case comes up for trial.
- (2) The word "material" means necessary for the purpose of formulating a complete cause of action.

Although it is trite law that only material facts should be pleaded the problem of deciding when a fact is material in a given situation is certainly not "trite." It is submitted that in most cases, as is also in this case, the word, "material" has been too narrowly applied. To plead a defence as shown in paragraph 6 above and to go to court to plead a host of technical details is just to flabbergast the opposite party and his counsel. What is really wrong with pleading facts that are not strictly "material" but relevant if one goes by the exposition of the learned Judge in this case that "it is absolutely essential that it should state all those facts which will put the other party on his guard, and tell him what he has to meet when the case comes up for trial", it is certainly clear that not all the material facts have been pleaded in this case and the objection of Counsel with due respect to the able and learned Judge, ought not to have been overruled.

EVERY PLEADING MUST
CONTAIN FACTS NOT EVIDENCE

Provisions for this rule have been expressly made in all the High Court Rules in Nigeria.³⁰ Again this rule presents enormous difficulties, perhaps more than any other one, as to the distinction between material facts and evidence. Some old cases have tried to lay down definitions with a view to making the distinction easily understood. In WILLIAMS V. WILCOX³¹ Lord Denman stated as follows:

"When a state of facts is relied on it is enough to allege it simply without setting out the subordinate facts which are the means of producing it or the evidence sustaining the allegation."

According to Odgers³² "facts should be alleged as facts. It is not necessary to state in the pleading circumstances which merely tend to prove the truth of the facts already alleged. The fact in issue between the parties is the factum probandum, the fact to be proved, and, therefore, the fact to be alleged. It is unnecessary to tell the other side how it is proposed to prove that fact, such matters are merely evidence, facta probantia, facts by means of which one proves the facts in issue. Such facts will be relevant at the trial but they are not material facts for pleading purposes."

Formerly under the English practice, there was a different approach in the Common Law Courts and the Chancery Courts.

Under the Common Law Courts, pleading evidence was never allowed. In the court of Chancery, these strict rules of pleadings were not followed and pleadings contained lengthy essays containing a lot of evidence.

It appears that the Rules applicable in Nigeria have adopted the common law position in England. Each of the modes of pleadings has advantages and disadvantages. The method of pleading in the Chancery Courts were lengthy, burdensome to read and, therefore, unnecessarily prolix. At Common Law, the pleadings were short, precise but are required to be comprehensive. The disadvantage here is that it is very technical and elusive.

Although, the Chancery method of pleading had been discontinued yet there are still vetiges of it because in pleading equitable defences, the pleading tends to be longer. We had, therefore, advantage of choosing any of these methods or of marrying the two and adopting an independent approach. If we had adopted an independent approach by marrying the two procedures, there might have been no need to penalise parties for prolixity of pleadings except in extreme cases. In deciding on a particular pleading therefore, the court should lean in favour of copious pleading rather than a restrictive one even if the copious one contains evidence.

It is infinitely difficult to demarcate facts from evidence in most cases. This notwithstanding, the courts have tried to draw the difference which is often easier to differentiate in principle than to apply in practice. In some cases, it is easy to observe the difference in others it is not. Brett L. J. in PHILLIPS V. PHILKIPS³³ said "the difference although not so easy to express, is perfectly easy to understand." This difficulty also features in the case of PAN AFRICAN BANK LIMITED V. CHINDA & COMPANY LIMITED.³⁴ Here the document in issue to which counsel for the defence objected to being tendered by the plaintiff was a letter written by the Managing Director of the defendant company in that capacity to the plaintiff company in connection with the debt which is the subject matter of this suit. The objection was based on the ground that it was not pleaded as required under Order 33 Rule 5 of the High Court Rules (East). Counsel for the plaintiff replied that Order 33 Rule 5 requires the pleading of all material facts not evidence. To plead letter therefore by citing it, would be pleading evidence and therefore unnecessary. It was held that "the material facts, therefore, to be pleaded are such facts as would identify the grounds for the cause of action or allege the cause or the facts in issue between the parties. To go beyond this is to plead the evidence by which they are to be proved."

MANNER OF PLEADING
MATERIAL FACTS

Order 16 Rule 8(1) of the Lagos Rules ³⁵
states that "every pleading shall be as
brief as the nature of the case will admit,
and the party responsible for any
unnecessary prolixity may be ordered to pay
costs occasioned thereby." The wording of
this Order is to be preferred to the
wording in the provisions in the Eastern
and Northern States of the country. Order
10 Rule 6 (Northern States) reads:

"the facts shall be alleged
positively, precisely and
distinctly, and as briefly as is
consistent with a clear
statement."

Again, the Rule applicable in the
Eastern States (Order 33 Rule 6) has
exactly the same wording as the Northern Rule.
This is one area in which there is no uniformity
in the rules, at least, in wording. To plead
"positively, precisely, distinctly and briefly"
is to lay down a vague and imprecise rule and it
cannot even be imagined what it would look like
in practice. The wording in the Lagos Rules is
clearer. However, the courts and textbook
writers have tried to explain what the Rule
really involves. Odgers ³⁶ has put the
explanation in a succinct form based on a
similar provision under the English Rules.
He states:

"The names of persons and places,
if material, must be accurately
given. Avoid pronouns, it is
often not clear whom you mean by
he."

Repeat the plaintiff, or "the said Johnson" whenever "he" would be ambiguous. Use relative pronouns as little as possible, when you do use them see that each has its proper antecedent. Call things by their right names, so far as you can, but in any event always allude to the same thing by the same name. Keep to the same phraseology throughout the pleading; a change of phrase suggests a change of meaning. If you are suing on a document, or relying on an act of parliament, do not attempt to improve on the language of either (however strong the temptation may be, especially in the latter case.)

The rule is essentially a rule of precision, brevity and clarity and applies not only to statements of claim but also to other aspects of pleadings such as statements of defence, counter-claim and set-off. Order 16 Rule 15 of the Lagos Rules confirms this point. This rule states as follows:

When a party in any pleading denies an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance. Thus, if it be alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received. And if an allegation is made with diverse circumstances, it shall not be sufficient to deny it with those circumstances.

In ESIN V. MATSEN & TIMON (NIGERIA)

³⁷
LIMITED it was held that in pleading there ought to be a separate paragraph on every

distinct matter and every paragraph must give sufficient information.

OTHER MATTERS REQUIRED TO BE
PLEADED BY PRACTICE OF THE COURTS:

Although it is the rule that pleadings must contain only material facts and not law or the evidence by which these facts are to be proved, the courts have over the years insisted that certain specific matters have to be pleaded. The idea behind the practice is to avoid surprise to the opposite party. Some of the items required to be pleaded have gone beyond material facts and these decisions have been held not on only specific principles but on grounds of avoidance of surprise at the hearing. Aguda³⁸ has listed a number of matters which the courts have held must be specifically pleaded. Some of these matters are:

1. Where the basis of an action is Res ipsa loquitur, this must be pleaded either by specific reference or by pleading facts which justify the implication of it.

In ADEBISI V. OKE³⁹ it was stated that ORAJEKWE V. MBIERI (unreported)⁴⁰ did not decide that a Judge could travel outside the pleadings in his judgment; what it decided was that it is not strictly necessary to raise the issue of res ipsa loquitur only by reproducing the latin maxim, but that a description of the facts on the pleadings which will suggest that a plea of res ipsa loquitur is intended is sufficient.

2. Special damages have to be particularised in the pleadings. This is necessary because an item of special damage has to be strictly proved at the trial.
3. Facts relied upon for bringing a particular transaction within the ambit of a particular Act should be specifically pleaded.
4. An allegation that a failure of a condition precedent to found the plaintiff's claim exists must be specifically pleaded by the defence.
5. A written agreement must be pleaded. In DARMA V. LION OF AFRICA INSURANCE COMPANY LIMITED⁴¹ the plaintiff sought indemnification under an insurance policy for total loss of his lorry. The defendants repudiated liability on grounds of breach of one of the conditions of the policy. The plaintiff stated further that the defendant had waived the breach but this waiver was not pleaded. It was held that a waiver of a condition of a written agreement must be pleaded. It was not pleaded here and so it was not considered.
6. In a claim for declaration of title to land based upon inheritance from ancestors, the claimants must plead the names of or the histories of the several ancestors. This was stated in the case of AKINLOYE V. EYILOLA⁴²
7. The defence of laches, acquiescence and undue influence must be pleaded.

8. Whenever a civil suit is based on an allegation of fraud or of the commission of any other crime, these allegations must be pleaded. One of the reasons for the insistence on pleading such allegation is that S. 137(1) of the Evidence Law provides that "if the commission of a crime by a party to any proceeding is directly in issue in any proceeding civil or criminal, it must be proved beyond reasonable doubt." Before a party to a civil action can prove the crime beyond reasonable doubt, such allegations must be specifically pleaded. This principle was affirmed in ADEYOYE V. JINADU.⁴³ In U.A.C. V. TAYLOR⁴⁴ the court stated that "in the opinion of their Lordships there is no rule which is less subject to exception than the rule that charges of fraud and fortiori charges of criminal malversion or felony, against a defendant ought not to be made at the hearing of an action unless, in a case where there are pleadings, those charges have been definitely and clearly alleged so that the defendant comes into court prepared to meet them."
- In IKOKU V. OLI⁴⁵ a case in which the plaintiff sued the defendant for malicious prosecution, it was held that "Sub-Section 137(1) of the Evidence Law only applies where there is a specific allegation of a crime in the pleadings, so that the commission of a crime can properly be said to be the basis or foundation of the claim or defence, as the case may be."
9. In a matrimonial or other cause based upon adultery the particulars of the alleged acts

of adultery must be specifically pleaded namely the times and places of each act of adultery.

10. In libel cases the particulars of the alleged libel have to be pleaded in order to make it easily identifiable. The precise words have to be set out. If the words do not specifically refer to the plaintiff, he must plead those facts from which he wants the court to infer that the libel refers to him.

Also in slander cases, the precise words used and the names of the persons to whom they were uttered should also be pleaded. If the libel or slander is in a foreign language, the actual words alleged written or spoken must be set out in that language, followed by a literal translation thereof. This principle was affirmed in⁴⁶ the case of SOWOLE V. EREWUNMI

In both libel and slander cases, if the defence is that of qualified privilege, this must be specifically pleaded.

11. Estoppel must also be specifically pleaded. In OBANYE V. OKWUNWA⁴⁷ it was stated as follows:

"as to the point on which argument was heard, the defendants in their statement of defence pleaded estoppel but subsequently obtained the court's leave to amend by adding after the estoppel, the words, by "conduct and possession."

That estoppel by record was never originally intended in the defendants plea in the court below. The amendment allowed shows it is correct to say that it was never pleaded. It cannot therefore be raised on this appeal."

12. The purchaser of a legal estate, subject to a prior equitable mortgage, has to plead specifically that he is a purchaser for value without notice, failure to plead this defence or call evidence to establish lack of notice raises a presumption that the purchaser has notice of the prior mortgage.

13. Unenforceability of a document must be pleaded and where a party fails to plead the facts which render a document unenforceable against him, it is not open to the court to consider it.

While objections to the admission of a document not pleaded which is only of evidence value will not be sustained, it must be pleaded by a party relying on it as a basis of his cause of action, as is the case of the memorandum of a deposit of deeds in respect of claim for specific performance of an equitable mortgage. The obligation to plead the validity of a document is subject to an exception that when a document appears to be void for illegality, the court will refuse to give effect to it although illegality has not been pleaded.

14. Where a contract is not ex facie illegal and the question of illegality depends on the circumstances, as a general rule, the courts will not entertain arguments on the question of illegality unless it was raised by the pleadings.

CONCLUSION

This chapter has endeavoured to examine the general principles and practice relating to pleadings. The practical application of these principles is best noticed when the relevant documents are filed in court. These are statement of claim, statement of defence, set-off or counter-claim, replies, and sometimes rejoinders. The next chapter therefore concentrates on the actual working of these principles by examining each of these documents.

REFERENCES

1. /1958/ 2 N.B. 26.
This case is to be contrasted with Shaw v. Shaw /1954/ 2 QB 429, 141 where Lord Denning disagreed with this method of reliance on pleadings.
2. (1954) 14 WACA 659 ?
3. /1953/ 2 QB 198.
4. 1960, Current Legal Problems P. 172.
5. An example is the case of Ambrosini V. Tinko (1929) 2 N.L.R. 8, where the court sent the case back for rehearing because of the amendment of the Judge to the pleadings made suo motu.
6. (1973) 1 S.C. 113.
7. North Brewery Ltd. V. Mohammed (1973) N.M.L.R. 19 or (1972) N.N.L.R. 113.
8. (1973) N.M.L.R. 19 at 21
9. Abowaba V. Adeshina 12 WACA 18.
10. Udechukwu v. Okwuka 1 F.S.C. 70
Shell BP & Anor. v. Abedi (1974) 1 S.C. 23
See also George V. Dominion Flour Mills Ltd. (1963) 1 ALL N.L.R. 71, where it was held that facts pleaded but upon which evidence is not led in court is also to be excluded.
11. International Bank for West Africa Ltd. V. Oguma Associated Companies (Nigeria) Limited (1986) 2 N.W.L.R. Part 20, P. 124 at 141.

12. (1976) 2 B.C. 183 at P. 189.
13. Grant Australian Gold Mining Company V. Martin [1877] 5 Ch. D. 10
See also Obi-Okoye in "Essays on Civil Proceedings" Vol. 1 P. 263.
14. See Odgers' Principles of Pleading and Practice 21st Edition P. 84.
15. Sinclair V. Brougham [1914] A.C. 453, 456.
16. Odgers on Principles of Pleading and Practice 21st Edition PP. 80-85.
17. Re Vandervell's Trusts (No. 2) [1974] 3 All E.R. 205
18. Re Vandervell's Trusts (No. 2) is also reported in [1974] Ch. D. 269, 321.
19. (1967) N.M.L.R. 64.
20. (Unreported) S.C. 469/64
21. (1960) L.L.R. 27
- 21(a) Dr. Aguda, Practice & Procedure etc. P. 229
22. (1942) 8 WCA 39
23. Order 16 Rule 4 (Lagos) Order 33 Rule 5 (East). Order 10 Rule 5 Northern States).
24. S.3 of the Evidence Law.
25. [1936] 1 K.B.P. 712.
See also Philips v. Philips
[1878] 4 QBD 127, 139.

26. Odgers' Principles of Pleading and Practice 21st Edition P. 87.
27. (1968) N.M.L.R. 453.
28. (1968) N.M.L.R. 453 at 455.
29. (1979) 1 - 6 CCHCJ 34.
30. Order 33 Rule 5 (East),
Order 16 Rule 4 (Lagos)
Order 10 Rule 5 (Northern States).
31. Williams V. Wilcox [1838] 8 A & E 331
32. Odgers' Principles of Pleading and Practice 21st Edition P. 96.
33. (1878) 4 QBD at P. 133.
34. (1975/76) R.S.L.R. 77
See also George v. Dominion Flour Mills Ltd. (1963) 1 ALL N.L.R. 71
35. High Court of Lagos Civil Procedure Rules 1972.
36. Odgers' Principles of Pleading and Practice 21st Edition P. 99.
37. (1966) 1 ALL N.L.R. 233
38. Dr. Aguda, Practice and Procedure etc. PP. 232 - 235.
39. (1967) N.M.L.R. 64.
40. 'Supreme Court SC. 469/64.
41. (1970) N.M.L.R. 84.
42. (1968) N.M.L.R. 92, 95.

- 43. (1975) 5 S.C. 102.
- 44. (1936) 2 W.C.A. 70. 71.
- 45. (1962) 1 ALL N.L.R. 194 at 199.
- 46. (1961) 1 ALL N.L.R. 712.
- 47. 10 N.L.R. 3 at P. 9.

CHAPTER THREE

TYPES OF PLEADINGS

This chapter deals with those rules of pleadings which must be observed in preparing statements of claim, statements of defence including a counter-claim and a set-off, reply defence to a counter-claim or set-off as applicable in most parts of the country. The discussion will also cover further and better particulars. Finally, in this chapter, mention will be made of the disparity prevalent in the mode of ordering pleadings in many of the jurisdictions in the country.

The preceeding chapter dealt generally with principles applicable to pleadings but these general principles do not apply in their entirety to all the forms of pleadings. There is, therefore, need to state a few specifics which apply to either statements of claim, defence or other forms of pleadings as the case may be. It is appropriate to mention here that the lack of harmony in the Rules applicable in the country is very easily noticed. It is not intended to enumerate the areas of disparity serially but they will become obvious in the course of treating the various topics. It is to be noted generally that while the Lagos Rules make copious provisions in this regard¹the Rules applicable in the East and the North have made only skeletal provisions (providing mainly for a few general principles.) The result in these

the plaintiff relies to establish his claim, disclose a present cause of action in every plaintiff and a liability in every defendant.

It is usual to commence a statement of claim with some introductory statements disclosing who the parties are, their nature of business or occupation, their relationship or interactions or other circumstances leading up to the filing of the action in court. Some Counsel commence it in this way:

The Plaintiff is a businessman resident at No. 10 Old Jos Road, Zaria while the defendant, also a businessman resident at No. 8 Old Road Jos Road, Zaria, all within the jurisdiction of this Honourable Court.

These introductory matters are called "matters of inducement"³ because they explain what follows but are not really essential to the cause of action so that they have to be stated briefly.

Next in the statement of claim comes the essential part, comprising the allegation of the Plaintiff's rights which he alleges have been violated. The Rules applicable in Lagos make specific provisions for the basic requirements in a statement of claim. Order 17 Rule 3 states as follows:

Every statement of claim shall state specifically the relief which the plaintiff claims, either simply or in the alternative, and it shall not be necessary to ask for general or other relief, which may always

be given as court or Judge in Chambers may think just to the same extent as if it had been asked for. And the same rule shall apply to any counter-claim made, or relief claimed by the defendant in his defence.

Where the plaintiff seeks relief in respect of several causes of action within the same unit, Order 17 Rule 4 further provides as follows:

Where the plaintiff seeks relief in respect of several distinct claims or causes of complaint found upon separate and distinct grounds, they shall be stated, as far as may be, separately and distinctly. And same rule shall apply where the defendant relies upon several distinct grounds of defence, set-off or counter-claim founded upon separate and distinct facts.

This same provision is also found in the Eastern and Northern Rules.⁴

The current English provision made under the 1965 Rules⁵ states as follows:

"A statement of claim must state specifically the relief sought or remedy which the plaintiff claims; but costs need not be specifically claimed."

The interpretation given to the foregoing provision in the English Rules is that it enables a plaintiff to claim in one action every kind of relief to which he is entitled, whether in damages, an injunction, a declaration, appointment of a receiver or other remedy. Such a plaintiff will not be allowed to bring a second action against the same defendant in the same

cause or causes of action in order to obtain a relief which he might have obtained in the first action.⁶ Strictly, where the damages claimed are unliquidated, the plaintiff need not insert a specific figure⁷ although it is convenient for the purposes of revenue to insert an amount on the basis of which court fees will be paid. Sometimes officials in the Registry refuse filing cases unless a specific amount is stated on which court fees can be assessed.

PARTICULARS IN LIBEL AND SLANDER CASES

The Lagos Rules have provided for specific particulars to be given in certain cases and of particular interest is the provision on libel and slander. Order 16 Rule 5(2) provides as follows:

"5(2) In an action for libel or slander if the plaintiff alleges that the words or matter complained of were used in a defamatory sense other than their ordinary meaning, he shall give particulars of the facts and matters on which he relies in support of its allegation."

These provisions are not found in both the Northern and Eastern Rules, and this is another example of a case where the Rules in the country need to be harmonised. It is to be observed that even in those States where Rules do not exist, the courts have adopted them in practice, probably on the basis of pleading of material facts to avoid surprise. It would appear, therefore, that the Rules governing practice are based

almost entirely on English Rules. This is not a healthy situation.

Order 16 Rule 5(2) of the Lagos Rules usually referred to as a mode of pleading innuendo is also the current English practice.⁸

However, the Nigerian courts have even moved further by holding that in slander cases the precise words used and the names of the persons to whom they were uttered should also be pleaded. If the libel or slander is in a foreign language, the actual words alleged written or spoken must be set out in that language,⁹ followed by a literal interpretation thereof.

This mode of pleading came up for serious argument before the Supreme Court in the case of EZOMO V. OYAKHIVIE¹⁰ where the defendant, a Senior State Counsel, was alleged to have called the plaintiff, a traditional ruler, a thief, before a crowd of more than 30 people. Objection was taken by the defendant that the evidence of a witness whose name was not mentioned in the pleadings as one of those who heard the defamatory words was inadmissible. In the judgment, the Supreme Court stated as follows:

"A plaintiff, it is true, must, in his statement of claim, aver all material facts including, in the case of slander, the place where the slander was uttered, in order to enable the defendant to know exactly the case he has to meet. BRITISH V. SHEFFIELD (1911) 1 Ir. R.69. Where the circumstances of the publication are of particular significance to the plaintiff's case, I will hold

that those circumstances must, if they are to be particularly featured and relied upon by the plaintiff, be pleaded specifically. All these are intended to give the defendant an accurate picture of the case he has to defend."

Where, however, a defendant in slandering a plaintiff is talking to an indeterminate crowd, it will be virtually impossible for the plaintiff (and it will be unreasonable to demand of him) to know at the time of his filing of the claim, each and every person in that crowd who heard the slanderous words of the defendant. He may get to know more people who heard the slander later on and the law - a just law, I mean will not fairly shut out evidence which he subsequently discovered, merely because he had not become aware of it at the time of filing his writ or his statement of claim. Such a plaintiff is allowed by law to state the names of those hearers of the slander within his knowledge, and to continue as held in BANHAM V. HUNTINGFIELD (1913) 2KB. 193:

"The plaintiff believes that the said words were also published to some other person to whom he may discover the same to have been published." 11

The court emphasised that in such a situation the defendant is not without a remedy or safeguard as he could always ask for better and further particulars "and like a vendee buying, as it were a pig in a poke, goes to meet his case without those particulars, he must have himself to blame if later evidence springs on him a surprise." There is no doubt that the judgment of the Supreme Court is sound

particularly in the circumstances of the case. It must be realised, however, that the idea of pleading the names of the hearers in a slander case is a good one. For one thing, it will discourage the idea of fishing for witnesses, which is a common occurrence in the Nigerian context, and a plaintiff ought to know the names of his hearers before rushing to file an action.

ACTIONS BY MONEY LENDERS

Order 17 Rule 7 (Lagos) makes special provisions for matters to be pleaded in actions by money lenders. It provides as follows:

"In actions by a Money Lender or an assignee for the recovery of money lent by the Money Lender or the enforcement of any agreement or security relating to any such money, the statement of claim shall state, in addition to any other particulars, the particulars referred to in paragraphs (a) to (j) inclusive in Order 3 Rule 8" The facts required to be stated under Order 3 Rule 8 are as follows:

- (a) That the plaintiff or the assignor was a Licensed Money Lender.
- (b) The date on which the loan was made.
- (c) The amount actually lent to the borrower.
- (d) The rate per cent per annum of interest charged.
- (e) The date when the contract for repayment was made.

- (f) The fact that a note or memorandum of the contract was made, and was signed by the borrower;
- (g) the date when a copy of the note or memorandum was delivered or sent to the borrower.
- (h) The amount repaid,
- (i) the amount due but unpaid,
- (j) the date upon which such unpaid sum or sums became due,
- (k) the amount of interest accrued due and unpaid on every such sum.

There is no such provision in the Rules applicable to both the East and the North. The essence of the Lagos provision is to avoid fraud or exploitation by money lenders. This provision does not apply to ordinary friendly loans which do not charge interest hence the practice to state in the pleadings that the loan is without interest.

This provision is salutary one to protect members of the public and ought also to have been provided in the other jurisdictions.

IMPLIED CONTRACT OR RELATION

The relevant provision in the Lagos Rules states as follows:

Whenever any contract or any relation between any person is to be implied from a series of letters or conversations, or otherwise from a number of circumstances, it shall be sufficient to allege such contract or relation as a fact, and to refer generally to such

letters, conversations, or circumstances without setting them out in detail.

And ~~if~~ in such case the person so pleading desires to rely in the alternative upon more contracts or relations than one as to be implied from such circumstances, ~~he~~ may state the same in the alternative. 12

Although this provision is absent both in the North and East, it represents the practice even in these States.

PRESUMPTIONS

A party need not plead alleging any matter of fact which the law presumes in his favour or as to which the burden of proof lies upon the other side unless the same has been specifically denied, for example, consideration for a bill of exchange where the plaintiff sues only on the bill, and not for the consideration as a substantive ground of claim.¹³

CONDITIONS PRECEDENT:

Order 16 Rule 10 (Lagos) states as follows:

"Any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff or defendant (as the case may be) and, subject thereto, an averment of the performance or occurrence of all conditions precedent necessary for the case of the plaintiff shall be implied."¹⁴

Although worded slightly differently, the above Rule is the counter-part of Order 18 Rule 7 (4) of the English Rules. Order 18 Rule 7(4) R.S.C. 1965 reads as follows:

"A statement that a thing has been done or that an event has occurred, being a thing or event the doing or occurrence of which, as the case may be, constitutes a condition precedent necessary for the case of a party is to be implied in his pleading."

The first part of the Lagos Rule represents a situation where the defendant intends to put up as a defence that a condition precedent had not materialised or had not been complied with and a plaintiff has the same defence or objection to a counter-claim. Otherwise, the English Rule represents the present practice. In wording therefore, the Lagos Rule is wider in scope than the English Rule. However, a plaintiff who knows that a condition precedent has not been complied with by him but seeks to put forward an explanation for his inability to do so, namely, that, the defendant prevented him from complying with the condition precedent must plead it in his statement of claim. In the case of NGELEGH, V. TRIBAL AUTHORITY NONGOWA CHIEFDON¹⁵ the action by the plaintiff was for ~~damage~~ for assault and false imprisonment against the defendant, whose agent, the Paramount Chief, ordered the Plaintiff to be held in custody; later he was taken before the Native Court, which sentenced him to imprisonment. He sought damages both

in regard to the detention before the trial and to the imprisonment after conviction. S. 19(2) of the Tribal Authority Ordinance provided as follows:

No suit shall be commenced against a Tribal Authority until three months at-least after written notice of intention to commence the same shall have been served upon Tribal Authority by the intending plaintiff or his agent. Such notice shall state the cause of action, the name and abode of the intending plaintiff and the relief which he claims.

The notice was not given but the plaintiff relied on Order 16 Rule 10 (at that time) which implied the performance of any condition precedent.

The West African Court of Appeal rightly held that the defendant not having specifically pleaded non-compliance with the condition precedent, the defence was not available.

As was mentioned earlier in this chapter, it is necessary to be painstaking in the preparation of a statement of claim so that defects in the writ of summons can be cured by the statement of claim. To this effect, Order 17 Rule 2 (Lagos) provides as follows:

"Whenever a statement of claim is filed, the plaintiff may therein alter, modify, or extend his claim without any amendment of the indorsement of the writ. Provided that this Rule shall not apply where the writ has been specifically indorsed;

Provided further that the plaintiff may not completely change the cause of action indorsed on the writ without amending the latter.¹⁶

The Order applies only where the writ has not been indorsed with a statement of claim and the defendant has been duly served with a statement of claim different from the writ previously served. A general indorsement is not part of a pleading as it does not contain a very concise nature of the claim and the relief sought. It is for this reason that the plaintiff can, in his statement of claim, "alter, modify or extend his original claim without amending the writ." Thus, a properly drawn up statement of claim acts as an amendment where the writ has not been indorsed with a statement of claim.¹⁷

In the Eastern and Northern States, however, it is doubted whether this rule is applicable. First of all the Rules do not provide that a writ can be altered, modified, or extended by a statement of claim. S. 16 of the High Court Law (East) permits the adoption of the English practice where there is a lacuna in the local provisions and sets a date limit of 1960. In other words, any rule of practice in England subsequent to 1960 cannot be made use of in the Eastern States. The Rules of 1883 up to 1952 did not make this provision. So, it would appear that the use of this Rule is without any basis in the Eastern and Northern States. This highlights a serious area of disharmony between the existing Rules in the country.

ACCOUNT STATED

Order 17 Rule 5 of the High Court Rules (Lagos) states as follows:

'In every case in which the cause of action is a stated or settled account, the same shall be alleged with particulars, but in every case in which a statement of account is relied on by way of evidence or admission of any other cause of action which is pleaded, the same shall not be alleged in the pleadings.

There are basically two types of account stated.¹⁸ One type is a situation where two persons engage in a financial or business transaction in which each of them is entitled to claim some amount of money from the other. In this case, if the parties drew up an account showing a balance in favour of one of them, that party can sue for an account stated. That balance is his only entitlement and can recover nothing more. There is no need to state a consideration for the consideration is inherent in the transaction, the consideration is furnished by the satisfaction of the promise of the other party to pay the debt. The accounts cannot be reopened unless on grounds of fraud.

The second type of account stated is where the account is only on one side, that is against one party and there is no balance to be struck and there is an acknowledgement of the total amount due. This type of account stated is not conclusive and the defendant can re-open it even if there is no fraud alleged.

The validity of the original debt may even be challenged.

DAMAGES

A statement of claim usually contains a claim for damages. The damages may be either general or special. General damages need not be specifically proved or even stated as the court can infer the damages from the nature of the transaction or injury suffered.

STATEMENT OF DEFENCE

Before the defendant or counsel on his behalf settles down to answering the issues of fact and sometimes of law raised by his opponent in his statement of claim, it is necessary to consider certain basic and preliminary issues which should prevail on the pleader's mind. Strictly on principle and according to the definition of pleadings in this thesis, the points to consider are not part of pleadings, but are so vital that they ought to be considered. Some of these preliminary issues are whether causes of action have been joined which cannot conveniently be tried together or is the matter one that should be submitted to arbitration. Is the statement of claim or any part thereof embarrassing, scandalous or amounting to an abuse of the process of the court which should, therefore, be struck out. Again, where the statement of claim discloses no cause of action it can also be struck out.¹⁹

In this regard, the provision in the High Court Rules (Lagos) is slightly different. It states as follows:

the court or Judge in Chambers may at any stage of the proceedings order to be struck out or amend any matter in any indorsement or pleading which may be unnecessary or scandalous or which may tend to prejudice, embarrass, or delay the fair trial of the action, and may in such case, if the court or Judge in Chambers shall think fit, order the costs of the application to be paid as between legal practitioner and client.²⁰

The provision is different from the provisions in the East and North.²¹ The Lagos Rule appears not to permit the striking out of a pleading on grounds of non-disclosure of cause of action. Perhaps, the idea is that amendments will produce a cause of action but this is not always so. It is doubted whether a striking out of pleadings based on a delay of the fair trial of the action will cure the omission. Again, this highlights the problem of different rules in the country and the need for harmonising them.

Again, as a preliminary issue before the trial, the defendant may consider whether the proper parties are not before the court in which case efforts to join the proper parties may be made, or an application may be made to strike off the names of defendants improperly joined.²²

There are four basic principles or methods to be employed in the drafting of a statement of defence.

These are:

- (1) admitting the claim or part thereof,
- (2) Traversing,
- (3) Confession and avoidance, and
- (4) an objection in point of law.

These principles apply, by and large, to a defence to a counter-claim.

Admission of a claim or part thereof, if clearly made, puts an end to the matter or part thereof and the court can enter judgment against the defendant. It presents little difficulty where there is an admission. It is traversing that problems usually arise because of its technical nature since a bad traverse can be construed as an admission. Confession and avoidance simply means that the defendant accepts a given state of facts as pleaded by his opponent (either in a statement of claim or counter-claim) but goes on to adduce further facts which will destroy the admitted facts and make them untenable. Fourthly, an objection in point of law, formerly referred to as a "demurrer" means that the defendant is saying that even if all the averments of the plaintiff are admitted, no cause of action is disclosed in law. The discussions that follow will concentrate on traversing, confession and avoidance, and an objection on point of law.

TRAVERSING

Order 16 Rule 9 of the High Court

Rules (Lagos) provides as follows:

Every allegation of fact in any pleading, not being a petition or summons, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted, except as against an infant, lunatic, or person of unsound mind not adjudged a lunatic.

Order 16 Rule 13 states as follows:

It shall not be sufficient for a defendant in his defence to deny generally the grounds alleged by the statement of claim, or for a plaintiff in his reply to deny generally the grounds alleged in a defence by way of counter-claim, but each party must deal specifically with each allegation or facts of which he does not admit the truth, except damages.

Again, Order 16 Rule 15 states as follows:

"When a party in any pleading denies an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance. Thus, if it be alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received. And if an allegation is made with divers circumstances, it shall not be sufficient to deny it along with those circumstances.

The Rules in the Eastern and Northern States have provided similarly.²³ The provisions in the West²⁴ and Bendel are similar to those of the East and North. For the purposes of traversing, all the rules seem to be saying the same thing in substance but worded differently. Sometimes the wording gives the impression that something else is intended, as for example, Order 33 Rule 9 East, Order 10 Rule 9 (North) and Order 13 Rule 9 (West) the following provision appears.

The defendant's pleading or defence shall deny all such material allegations in the petition as the defendant intends to deny at the hearing. Every allegation of fact, if not denied specifically or by necessary implication, or stated to be not admitted, shall be taken as established at the hearing.

The use of the phrase "in the petition" is confusing but it is hoped that it means also statement of claim or counter-claim. The provision last quoted above is to be contrasted with Order 16 Rule 9 (Lagos) which reads as follows:

Every allegation of fact in any pleading, not being a petition or summons, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party shall be taken as admitted, except as against an infant, lunatic, or person of unsound mind not adjudged a lunatic.

By excluding "petition" and "summons" this Rule appears to be a direct opposite of the similar rules applicable in all the other parts of the country where petitions and summonses are included. It is a typical example of the inconsistency in the Rules. Apart from these differences, the provisions underline the need to be careful in answering an opponent's pleading. They are rules designed to compel the opposite party to deny boldly or admit frankly the opponents assertions. The effect of these rules is to prevent a defendant from pleading what used to be referred to as the "general issue." A defendant should not merely say that he "denies specifically every allegation contained in the statement of claim."²⁵

A pleading couched in this manner may be struck out. However, such a defendant is not expected to traverse sentence by sentence.²⁶ There is, however, a difference between dealing with matters of "inducement" and answering the main part of the opponent's pleading. In matters of "inducement" it is sufficient to state, for example, that the defendant denies each of the allegations contained in a given paragraph of the statement of claim. This is because these are not the substance of the allegations, they are only preliminary matters but when the pleader comes to those allegations which are the substance of the matter, he has to

be more precise and must answer paragraph by paragraph or all the averments of substance.

It is at this point appropriate to examine the attitude of the Nigerian courts in this regard.

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In EHIMARE V. EMHONYON, Oputa, J.S.C., made the following general remark:

"The aim of ordering pleadings is to secure from the defendants as many admissions as the facts of each given case warrant and thus determine and define the issues to be agitated at the hearing. Unfortunately, nowadays, the practice seems to be to hide as much of the truth as possible."²⁷

The Honourable Justice Oputa, J.S.C., was only emphasising the principle that a statement of defence must not be evasive. In the case of ATOLABE V. SHORUN²⁸ the plaintiffs pleaded that they were a trading company registered in Nigeria. In answer to this averment the defendants pleaded in their paragraph 3 as follows:

"The defendant was not in a position to admit or deny paragraph 1 and 2."

The trial Judge dismissed the plaintiffs' claim on the ground that they failed to prove that the company was registered because the certificate of registration was not produced in evidence at the trial. The trial Judge was of the view that the averment in paragraph 3 of the statement of defence

was an implied denial of the averment in paragraph 2 and therefore raised an issue that must be proved by production of the certificate of registration. The Supreme Court reversed the decision holding that the averment in the statement of defence did not raise the issue whether the plaintiffs were a registered company. In other words, the pleading of the Statement of Claim (paragraph 1 and 2) was not traversed adequately. The Supreme Court stated further that "pleadings are not to be considered as a game of skill between the advocates. They ought to be so framed as not only to assist the party in the statement of his case but the court in its investigation of the truth between the litigants."

Zigbà, J.S.C. in LEWIS V. PEAT (N.I.R) LIMITED V. AKHINMIEN²⁹ stated as follows:

In order to raise an issue of fact in these circumstances there must be a proper traverse, and a traverse must be made either by a denial or a non-admission either expressly or by necessary implication. So that if a defendant refused to admit a particular allegation in the statement of claim, he must state so specifically, and if he does not do this satisfactorily by pleading thus:

defendant is not in a position to admit or deny (the particular allegation in the statement of claim) and will at the trial put the plaintiff to proof, or

defendants put plaintiff to proof,"³⁰ amounts to insufficient denial. He continued "we are of course not unmindful of the first paragraph of the statement of defence. Nowadays, almost every statement of defence contains such a general denial."³¹ However, in respect of essential and material allegations such a general denial ought not to be adopted, essential allegations should be specifically traversed. ³²

So that if one goes by this judgment of Idigbe J.S.C. the following provision in Order 33 Rule 10 is rendered almost useless. Order 3 Rule 10 (East) states as follows:

It shall not be sufficient to deny generally the facts alleged by the statement of claim but the defendant must deal specifically therewith, either admitting or denying the truth of each allegation of fact seriatim, as the truth or falsehood of each is within knowledge, or (as the case may be) stating that he does not know whether such allegation or allegations is or are true or otherwise.

(The underlining is for emphasis and is the part of the provision referred to)

It is to be emphasized, in this same vein that a defendant or his counsel or a plaintiff faced with a counter-claim, must be on the look out for amendments coming from the opposite party. Sometimes amendments raised completely new issues and facts for which, the defendant or plaintiff as the case may be, must also amend his pleadings so as to

meet the new facts. Failure to do this will amount to admitting the new facts. The point is treated in greater details under amendments. Suffice it here to mention the case of I.B.N.I. V. OGUMA³³ where the plaintiffs amended their statement of claim and incorporated new facts. The failure of the defendant to answer these new facts was held to be an admission of the new facts.

The Lagos Rules alone have made provisions on the methods of traversing certain facts in specific actions. Order 16 Rule 19 (Lagos) provides as follows:

Where in an action for libel or slander the defendant alleges that, in so far as the words complained of consist of statements of fact, they are true in substance and in fact, and in so far as they consist of expressions of opinion, they are fair comment on a matter of public interest, or pleads to the like effect, he shall give particulars stating which of the words complained of he alleges are statements of fact and of the facts and matters he relies on in support of the allegation that the words are true.

This was the English practice long before the Lagos Rules came into effect and is usually referred to as the rolled up plea - justification and fair comments; two pless rolled up into one. This practice was also by virtue of the provisions of the High Court Laws in Nigeria have been adopted and applied by the courts in Nigeria.³⁴

Again, "when a contract, promise, or agreement is alleged in any pleading, a bare denial of the same by the opposite party shall be construed only as a denial in fact of the express contract, promise or agreement alleged, or of the matters of fact from which the same may be implied by law, and not as a denial of the legality or sufficiency in law of such contract, promise, or agreement, whether with reference to the Statute of Frauds or otherwise."³⁵

DENIAL OF DAMAGES

There is no need to plead in denial of damages since damages are always in issue. It is doubtful, however, whether this principle is of general application throughout the country. In Lagos State the authority for this assertion can be found in Order 16 Rule 13 which provides that denial must be specific except damages.³⁶ The current English equivalent is Order 18 Rule 13(4) which states that

"any allegation that a party has suffered damage and any allegation as to the amount of damages is deemed to be traversed unless specifically admitted."³⁷

Under the practice in England, damages are always in issue and no specific denial is required but defendant may plead where he alleges that the damages are too remote or insufficient in law.

There is no similar provision in the East and the North. It is likely, however, that it will apply in these jurisdictions in view of the High Court Laws authorising the application of English Rules of practice and procedure in force by 1960. The old Order 19 Rule 17 or Order 21 Rule 4 was applicable in England before 1960. Again, this clearly shows the problem in the Rules in Nigeria, problem of uncertainty and conflicts. There are many other special defences which have not been specifically provided in the rules but all the same have been in use in all parts of the country by resorting to English practice. These are illegalities, plea of the Statute of Frauds, Statute of Limitation, former Proceedings, Estoppel, Release, Tender and Payment into court.

CONFESSION AND AVOIDANCE

A defendant or a plaintiff in the case of a counter-claim, may admit the facts averred either in the statement of claim or counter-claim, as the case may be. Once an admission of facts is made by a party to a suit, no evidence is required to prove the admitted facts.³⁸ However, whether the facts admitted by the opposite party amounts to an admission or not has to be deduced from the wording and context in which the facts are stated.

Where the party merely, affirms the allegations of the opposite party and no more, this may amount to an admission. Usually, the opposite party admits a given set of facts but goes on to state other facts which completely negate or destroy the admitted facts. This is not an admission but is what is called confession and avoidance. In an action for assault and battery, for example, the defence may in his defence state that although he did the act, it was done in self-defence, that is, that the defendant admits the assault and battery but justifies it.³⁹ Odgers has given a good illustration of this principle. He states:

He can say, well, that is true so far as it goes, but it is only half the truth. There are several other facts which are omitted from your pleading, and which will put a very different complexion on the case.

The Rules applicable in Nigeria have made provisions for this principle of confession and avoidance. The Lagos Rules appear to combine this principle and objections on grounds of law. It states as follows:

The defendant or the plaintiff (as the case may be) must raise by his pleading all matters which show the action or counter-claim not to be maintainable, or that the transaction is void or voidable in point of law, and all such grounds of defence or reply as the case may be, as if not raised would be likely to take

the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings, as, for instance, fraud, limitation Decree 1966, release, payment, performance, facts showing illegality either by an enactment of by common law, or by the Law Reform (contract) Act 1961." 41

On the other hand, the Rules applicable in the Eastern States provide more directly on the principle of confession and avoidance. Order 33 Rule 13 (East) provides as follows:

"The defence must allege any fact not stated in the statement of claim which the defendant relies in defence, as establishing, for instance, fraud on the part of the plaintiff, or showing that the plaintiff's right to recover or to any relief capable of being granted on the petition, has not yet accrued, or is released, or barred, or otherwise gone." 42

The effect of these provisions is that a confession and avoidance must be specifically pleaded but the pleader must be sure of his facts. If he confesses and is unable to avoid successfully, then it will amount to an admission simpliciter. Moreover, the onus of proof shifts on him to prove the avoidance. Therefore, where a traverse would suffice a confession and avoidance should not be resorted to.

The principle, strictly speaking, appears to be an unnecessary complication

of a simple and an already existing principle for the following reasons:

- (1) It is an unnecessary principle because it is merely repeating, perhaps only more emphatically, a more basic or fundamental principle, namely that facts and law which are likely to take the opposite party by surprise must be pleaded. In other words, all material facts either by way of a claim, defence or a counter-claim must be pleaded.
- (2) The fact that fraud, for example, is not pleaded does not mean that if a document is tainted with fraud and this is known to the court, the court will enforce it if it is pleaded. It is therefore, mainly a matter of specificity that the principle is even enunciated.

OBJECTION IN POINT OF LAW

When a party to an action or counsel for a defendant objects to the plaintiff's pleading that it does not constitute a cause of action, in law or in equity, it is usually said that such a party is demurring. This expression is technically incorrect for the reason that demurrer was abolished in England as far back as 1883 and was therefore not a part of the law of general application

in England which was received in 1900. However, it was indirectly re-enacted in England and what was formerly a demurrer is now in England called an "objection in point of law" (which is practically "a demurrer.")

The position in Nigeria is almost the same as in England, in that a demurrer is strictly not a part of the law but there are provisions which have the same effect. Infact, Order 22 Rule 1 (Lagos) clearly states that "no demurrer shall be allowed" and called the Order 22 as "proceedings in lieu of demurrer." However, because of the diversity in the Rules, there is no uniformity in the methods of approach as provided in the Rules. Order 22 Rule 2 (Lagos) states as follows:

Any party shall be entitled to raise by his pleading any point of law and, unless the court or a Judge in Chambers otherwise orders, any point so raised shall be disposed of by the Judge who tries the cause at or after the trial. 43

Similarly, Order 10 Rule 21 (north) is to the same effect although the wording, particularly in Rule 1 creates some confusion as to whether it is a pleading of law simpliciter.

On the other hand, the rules in the East, West and Bendel are differently worded and creates a different approach to the problem. Order 29 Rule 1 (East)

states as follows:

"Where a defendant conceives that he has a good legal or equitable defence to the suit, so that even if the allegations of the plaintiff were admitted or established yet the plaintiff would not be entitled to any decree against the defendant, he may raise his defence by a motion that the suit be dismissed without any answer upon questions of fact being required from him."⁴⁴

From the foregoing, it is evident that there is a difference in approach when taking an objection in point of law between the Lagos, West, Bendel and Northern Rules, on the one hand, and the Eastern Rules on the otherhand.

Sometimes, counsel (in the East) in their statements of defence often state that a preliminary objection will be taken at the trial that plaintiff's action is not maintainable on grounds of law. This procedure is not correct as it is not supported by the rules. The proper procedure is that on service on the defendant of statement of claim, the defendant can bring a motion to have plaintiff's action dismissed on grounds of law. This has to be done before the filing of a statement of defence. Thus in ASHANTI ELECTRIC POWER DEVELOPMENT CORPORATION LIMITED V. THE ATTORNEY-GENERAL (Gold Coast)⁴⁵ the plaintiff had filed his statement of claim, the defendant his defence, and the plaintiff a reply. It was held that after the joinder of issues in this way a demurrer was too late.

However, this decision on joinder of issues has been watered down by the decision of the Supreme Court that issues of jurisdiction can be raised at any time even during appeal. In BRONIK MOTORS LIMITED & ANOR. V. WENA BANK LIMITED, Nnamani J.S.C. stated as follows:

It is necessary to point out at this state that the issue of jurisdiction was never taken before the high court and the Court of Appeal. There really can be no objection to this since it is well settled that jurisdiction can be raised at any stage of the proceedings.⁴⁶

Whereas in the East and Federal, the objection has to be taken before filing a statement of defence, in the North, Lagos, West and Bendel the objection has to be included in the statement of defence. Filing such an objection under a separate motion is, therefore, irregular. Where such an objection in point of law is included in the statement of defence, the Judge may on application or suo motu dispose of the matter either as an issue before the hearing or in the course of the hearing. According to Romer, J., in EVERETT V. RIBBANDS "where there is a point of law which, if decided in one way is going to be decisive of litigation, advantage ought to be taken of the facilities afforded by the Rules of Court to have it disposed of at the close of pleadings or very shortly afterwards."⁴⁷

The issue of objection in point of law is a commendable procedure designed to end a suit in its very early stages for it will be most absurd to require a party to assemble in court a host of witnesses only to discover at the end that there was no case at all. As was said by the West African Court of Appeal in MILLS V. RENNER:

It would be manifestly absurd to suggest that a court was bound to proceed with the taking of lengthy evidence of the parties to a suit where it appeared that the whole suit could be decided upon the pleadings without any evidence being called.⁴⁸

An application to have the preliminary objection on a point of law can be made by any party to the suit. If it is conceded and the point of law disposes of the entire suit, then that is the end of the matter and the suit then dismissed. If it is heard as part of the hearing of the suit, then it will form part of the judgment. Such an application need not be in writing but can be oral provided the parties are all in court.⁴⁹ A suit terminated this way is capable of operating as res judicata.

FACTS TAKEN AS ADMITTED

Order 29 Rule 2 (East) and Order 27 Rule 2 (Federal), have the following provisions:

For the purpose of such application, the defendant shall be taken as admitting the truth of the plaintiff's allegations, and no

evidence respecting matters of fact, and no discussions or questions of fact, shall be allowed.

This provision is not made in any of the other Rules and the reason for this is not known. In fact, it is not proper to file a statement of defence before raising the objection. To raise the issue of fact in the defence will mean putting forward conflicting assertions of fact and although it is not right at this state to reconcile or accept one set of facts as against the others, once all the facts are before the court, the court is humanly bound to be influenced by the facts in the defence. Since the matter is purely one of law, it ought to be taken as soon as the statement of claim is filed. It is even more expeditious to treat the matter at this stage than to wait for a defence to be filed. There is, therefore, need to accept the facts as true as put forward by the plaintiff for the purpose of the argument. Where the objection fails, then the defendant can file his own defence. It used to be thought that having accepted the facts in the statement of claim as true, the defendant is estopped from putting forward another set of facts. It is however submitted that this is not correct.⁵⁰

The provision for taking an objection in point of law (in lieu of demurrer) is one of the Rules on which there is so much diversity, and there is no reason why this should be so.

This diversity has only helped in creating more confusion than it purports to solve. A Rule common to all the States in Nigeria would have been preferred.

COUNTER-CLAIM AND SET OFF

All the Rules applicable in all parts of Nigeria have provided for the remedies of counter-claim and set-off. Although all the rules vary in their wordings, one thing is common to all of them, namely that none of the Rules defines or even appropriately describes what a counter-claim or a set-off is. If there was a comprehensive definition or description, the need for reference to other sources would only be for the purpose of seeing the application of the Rules in practice. In the absence of such definition, both the meaning and application of a counter-claim and a set-off have to be obtained from sources other than the Rules. Only the provision in East, West and Bendel and the Federal High Court Rules provide for a very vague description.

The provision is as follows:

A defendant in an action may set-off, or set up by way of counter-claim, against the claims of the plaintiff, any right or claim whether such set-off or counter-claim sound in damages or not, and such set-off or counter-claim shall have the same effect as a statement of claim in a

cross-claim. But the court may, if in the opinion of the court, such set-off or counter-claim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the Defendant to avail himself thereof."51

The provision has two main defects, it is respectfully submitted. The first is that it does not make a distinction between a set-off and a counter-claim.⁵²

The failure to make the distinction is serious because a set-off is narrower in its usage than a counter-claim and a court can disallow either of them by simply referring to the Rule without bothering about the difference. Secondly, the absence of a definition or a comprehensive description of the Rule makes the remedy very uncertain because it will be useless without reference to either the practice and procedure in England or decided cases thus complicating already existing numerous provisions on procedure in the country.

In the case of the Rules applicable to the rest of the country (other than the Rules applicable in the East, West, Bendel States of Nigeria and the Federal High Court) the situation is even more serious in that the Rules are more vague than the provision in the East, West, Bendel and the Federal Rules. Order 18 Rule 9 (Lagos) states as follows:

Where any defendant seeks to rely upon any grounds as supporting a right of counter-claim, he shall in his defence, state specifically that he does so by way of counter-claim.

The Rule does not even include a set-off in the body of the Order but in the sub-heading.

This is, to say the least, no provision at all as it does not even attempt either to separate a set-off from a counter-claim or to define either of them. All the Rules that follow are merely procedural rules.⁵³

In the case of the Northern Rules, there is a complete absence of a provision dealing directly with a counter-claim or set-off but assumes that they already exist. Where they exist is not known. Order 19 Rule 3 (North) provides as follows:

If it appears on the application of any party against whom a counter-claim is made that the subject matter of the counter-claim ought for any reason to be disposed of by a separate action, the court may order the counter-claim to be struck out or may order it to be tried separately or make such other order as may be expedient.

Again, the above provision is purely procedural and does not define a counter-claim, at all. It can, therefore, be safely said that provisions on counter-claim and set-off do not exist at all. So, Nigeria still depends on England for its practice of law in respect of this set-off and Counter-claim.

The topic highlights the urgent need to draw up comprehensive Rules harmonising the various State or Regional Rules.

However, the subject matter of counter-claim and set-off is a very important one and, therefore, the nature of the two principles and the differences between two of them ought to be known in detail.

COUNTER-CLAIM

A counter-claim is to all intents and purposes a cross-action and governed by the same rules of pleadings as a statement of claim and the reply to it by the same rules as a statement of defence.

A counter-claim need not relate to or be in any way connected with the plaintiff's claim or arise out of the same transaction. According to Fry J. in BEDDEL V. MAITLAND⁵⁴ it need not be an action of the same nature.

If the defendant has any valid cause of action, legal or equitable, against the plaintiff, there is no necessity for him now to bring a cross-action, unless his counter-claim be of such a nature that it cannot conveniently be tried by same tribunal or at the same time as the plaintiff's claim. Every cross-claim of whatever kind can now be pleaded as a counter-claim. It does not matter what the amount may be. It may be for either liquidated or unliquidated damages. It may exceed in amount the plaintiff's claim. If the amount which is found due to the plaintiff on his claim exceeds the amount established by the defendant on his counter-claim, the plaintiff will recover the difference. If, on the other hand, the balance is in favour of the defendant, judgment may be given to the defendant, for such balance. Or he may be granted such other relief as he may be entitled to on the merits of the case. It is more usual nowadays to give separate judgments upon the claim and counter-claim with the appropriate costs of each instead of judgment for the balance, but this is entirely a matter of discretion.⁵⁵

The above-quoted principles of a counter-claim as enumerated by Odgers have been the basic principles governing the subject-matter since the Judicature Act, 1873.

A counter-claim is, therefore, to all intents and purposes a cross-action and such a counter-claim will not be excluded on the argument that it is not of the same nature as the original action. Thus, a claim in tort can be counter-claimed by a claim in contract.⁵⁶ The damages claimable in such an action may be liquidated or unliquidated and may be less or greater than the amount claimed by the plaintiff in his statement of claim. The action, the foundation of the counter-claim, may even have arisen after the commencement of the plaintiff's action.⁵⁷

The Nigerian Law and practice on counter-claim is basically the same as English law. Its scope is as wide in Nigeria, as it is in England and is applicable in any situation where the two suits can conveniently be tried together. In OBOMANU V. LEVENTIS MOTORS LIMITED,⁵⁸ the plaintiff applied to the court to have the counter-claim of the defendant excluded on the

ground that the suit should be disposed of by a separate action. It was held, firstly, that a counter-claim is substantially a cross-action and not merely a defence to a plaintiff's claim, and procedurally it is for most purposes, except execution, treated as if it is a cross-action to be tried together with the original action.

Secondly, it was held that if a defendant alleges that he has a claim or is entitled to any relief or remedy against a plaintiff in an action in respect of any matter, whenever and however arising, instead of bringing a separate action he could make a counter-claim in respect of the matter and add the counter-claim to his defence.

Thirdly, the court may, however, exercise its discretion in a proper case, having regard to Order 38 of the High Court (Civil Procedure) Rules, depending on the particular nature of the transaction in order to avoid any delay or embarrassment.

Fourthly, an application to strike out or exclude a counter-claim filed by a defendant must show that the joinder of the action may embarrass or delay the trial or is otherwise inconvenient or

that the subject-matter of the counter-claim ought to be separately tried. Obomanu's case has to be contrasted with the case of ASIYANBI V. ADENIJI,⁵⁹ a case in which the plaintiff sought declaration of title to a piece of land. The defendant counter-claimed but the Supreme Court held, obiter, that it ought to have been the subject of a separate suit. The issue of a counter-claim did not form the subject of appeal and the Supreme Court, therefore, did not go fully into the matter. The counter-claim was filed out of time and without the leave of the court and this might have been responsible for the court of trial striking it out. However, it will be incorrect to read the judgment of the Supreme Court in this case though obiter as meaning that a defendant in a case of declaration of title to land cannot counter-claim. Thus, the Supreme Court has held that a defendant can counter-claim relief from forfeiture.^{59a}

A defendant can counter-claim against a plaintiff jointly with a person not already a party to the suit. Where there is a counter-claim against a person who is not already a party to the suit, the counter-claim shall be served on the third person on a return date. A person brought into the suit by a defendant's

counter-claim cannot counter-claim against the defendant.⁶⁰ There is no rationale in this rule but may be it is to avoid complexity or multiplicity of actions in one trial.

PROCEDURE FOR COUNTER-CLAIM

A defendant who intends to file a counter-claim is required to give notice of such a counter-claim at least four clear days before the return date of the summons. Order 27 Rule(a) (East) provides as follows:

No defendant shall be allowed to set up any such counter-claim or set-off unless he shall have lodged with the Registrar four days before the return day a notice in original, and as many duplicates thereof as there are plaintiffs, containing his name and address and a concise statement of the grounds of such counter-claim or set-off, and shall have paid the same court and service fees as would be payable if he were claiming by writ of summons.⁶¹

For the Lagos State the defendant has to serve the counter-claim within the time limited for the defence (Order 18 Rule 10)

CAN. COUNTER-CLAIM BE FILED
TIME BEFORE JUDGMENT.

It appears that a lot of discretion has now been given to the court as to when to admit or exclude a counter-claim perhaps entirely based on convenience.

In those States where the Rule applies it has been held that "Return Date" means the first day that the suit is fixed to come up in the court.⁶² The former view that return date meant the hearing date is not correct. A counter-claim filed after the return date is incorrect and will be struck out unless it is filed with leave of the court.⁶³

It has been stated before that a counter-claim is regarded as a statement of claim and must conform with the rules of pleadings, especially as regards necessary particulars. If any of the facts on which the counter-claim is based has already been properly pleaded in the statement of defence, it is inelegant to repeat same for the purpose of the counter-claim and may only be necessary to refer to the relevant paragraphs in the statement of defence. Again, there is a disadvantage in this process because a mere reference, for example, that "defendant relies on

paragraphs 1 to 12 of the statement of defence and counter-claims as follows "..."
.. such a general reference may include paragraphs or parts of it which may be completely irrelevant to the counter-claim.

Finally, a counter-claim being a cross-action is unaffected by the outcome of the plaintiff's case in the sense that if the plaintiff's claim is struck out, discontinued, dismissed or otherwise stayed, the defendant can proceed with his counter-claim to finality.

SET-OFF

Although a set-off is in some ways similar to a counter-claim in the sense that a defendant can meet the claim of the plaintiff by setting up his own claim against him, it has a restricted use and cannot stand on its own in case of a discontinuance or dismissal of the Plaintiff's suit. As the name implies, it sets-off a defendant's claim against a plaintiff if the defendant proves it and plaintiff also succeeds in his claim. A set-off has two main limitations as follows:

- (a) A set-off must be a monetary claim which must be a debt or liquidated demand. This means that a defendant cannot claim general damages or any other relief than liquidated monetary claim or debt.

(b) The cross-claim by way of a set-off must be a claim arising from the same transaction between the parties and must be either less than or equal to the amount being claimed by the plaintiff. However, a defendant can set-off against a trustee plaintiff a debt owed the defendant by the cestui que trust. But a personal debt owed by the trustee cannot be set-off against action in respect of the trust, nor can a debt due from the plaintiff to an executor or trustee personally be set-off against such executor or trustee when sued.⁶⁴

The procedure for a set-off is the same as that of a counter-claim. The court can exclude a set-off if it will not be convenient to try it with the claim of the plaintiff.

REPLY

In pleadings, a reply, strictly speaking, is an answer by the plaintiff to issues raised by the defendant in his statement of defence. A reply is to be distinguished from a defence to a counter-claim sometimes erroneously called a reply. The same mix up in terminology seems to have been made by

Order 18 Rule 13 (Lagos) where it is stated that "any person not already a party to the action, who is named in a defence as a party to a counter-claim thereby made, may deliver a reply within the time within which he might deliver a defence if it were a statement of claim." Order 20 Rule 1 and 2 (Lagos) states as follows:

- "1. Where the plaintiff desires to make a reply, he shall file it within seven days from the service of the defence.
2. Where a counter-claim is pleaded, a reply thereto shall be subject to the rules applicable to defences."

Here again, no distinction is made between a reply to a statement of defence and defence to a counter-claim. It is desirable that the difference should be made for the purpose of clarity so that as soon as the word "reply" is mentioned it is known precisely what is being referred to. In this regard, the view of Odgers is correct when he stated as follows:

"The student should distinguish carefully a "reply" from a "defence to counter-claim although if both are pleaded they must appear in the same document.⁶⁵

Although this proposition is based on the Rules of the Supreme Court (England), (Order 18 Rule 3) it makes good sense to make the distinction particularly since the practice and procedure relating to Reply in Nigeria are based on English law. Order 18 Rule 3 R.S.C. (England) makes the distinction very clear when it states as follows:

- 18(3) (1) A plaintiff on whom a defendant serves a defence must serve a reply on that defendant if it is needed for compliance with Rule 3, and if no reply is served, Rule 14(1) will apply.
- (2) A plaintiff on whom a defendant serves a counter-claim must, if he intends to defend it, serve on that defendant a defence to counter-claim.
- (3) Where a plaintiff serves both a reply and a defence to counter-claim on any defendant, he must include them in the same document.

The general principles relating to a Reply are the same in Nigeria and England in practice. Generally, a reply is unnecessary if the sole aim of it is to deny what has been stated in the statement of defence.

The reason is that there is an implied joinder of issues on the delivery of a defence. The plaintiff's main aim is to raise new facts to counter or destroy the defendant when he pleads in confession and avoidance or when the plaintiff intends to admit new facts raised by the defendant. Thus where a defendant pleads performance, release, statute of limitation or any fact disclosing illegality, the plaintiff must file a reply.

Also in a libel and slander cases where the defendant pleads that the words were published on a privileged occasion or as fair comment on a matter of public interest and were so published without malice, the plaintiff, if he intends to set up express malice in answer to such plea of privilege or fair comment, must serve a reply setting out the facts on which he relies.⁶⁶ In CHIEF S. B. BAKARE AND ANOR. V. ALHAJI IBRAHIM,⁶⁷ the defendants/appellants admitted publication of the words complained of, but put forward a plea of fair comment in the form of rolled-up plea, they also supplied particulars of the facts upon which they relied in their defence of fair comment. The plaintiff/respondent did not deliver any reply alleging express malice.

The learned trial Judge found that the facts in the publication have been proved to be substantially true and after adverting to the issue of express malice which in no way was ever raised on the pleadings, he found as a fact that the defendants/Appellants were actuated by malice and gave judgment against them. On appeal to the Supreme Court, it was held inter alia that in an action for defamation, where it is intended to allege express malice in answer to a plea of fair comment or qualified privilege, it is necessary to deliver a reply, giving particulars of the facts from which express malice is to be inferred.

The principles relating to a Reply seem to have brought out the difference between a Reply and a defence to a counter-claim. Whereas a Reply once a statement of defence is filed there is a joinder of issues as discussed above, in the case of a counter-claim a failure to file a defence means that all the material facts raised in the counter-claim have been admitted by the plaintiff and under the rules of pleading no evidence need be heard at the trial to prove them.

However, it is difficult to list out all the instances where a Reply is required and will to a large extent depend on the facts of each case. Generally, where the plaintiff intends to lead evidence in rebuttal to new facts raised not arising out of the previous two pleadings, a Reply has to be filed.⁶⁸ It must be noted, however, that a Reply must not contradict the statement of claim. It must not raise a new issue or new ground of claim. Obi Okoye gives a good example:

A plaintiff's claim for rent cannot be converted to damages in the reply and where the statement of claim alleges negligent breach of trust, the reply must not assert that it was fraudulent breach of trust.

It is better to seek an amendment of the statement of claim or even the writ where a change of the nature of the claim is intended.

TIME AND PROCEDURE FOR FILING A REPLY

The Rules applicable in the country exhibit considerable diversity and this is another area where harmonisation of the Rules is desirable. Order 20 Rule 11 (Lagos) states as follows:

"Where the plaintiff desires to

make a reply, he shall file it within seven days from the service of the defence."

Strictly speaking, pleadings are regarded as closed after seven days.

In the East and the North there is no specific provision for a reply but Order 33 Rule 16 is always regarded as covering a situation where a Reply is required. Order 33 (16 states as follows:

"The court if it considers that the statements of claim and defence filed in any suit insufficiently disclose and fix the real issues between the parties may order such further pleadings to be filed as it may deem necessary for the purpose of bringing the parties to an issue."⁶⁹

FURTHER AND BETTER PARTICULARS

A court can, on the application of a party to an action order the opponent to plead to further and better particulars. The practice is based on the principle that each party must plead his material facts with clarity and where this is lacking the opponent by asking for better and further particulars can ask the opponent to furnish more facts on any given points in his pleadings.

The practice is not provided for in any of our Rules instead what is provided is the procedure of interrogatories, discovery and production of documents.

The view is usually taken that it is an omission in our Rules and that resort should be made to English Rules which clearly provide for it.⁷¹ Although, the Nigerian Rules do not provide it, the view has been taken that our provisions on amendments adequately cover the situation.⁷¹ With due respect, this opinion is not well founded if one takes a look at our amendment provision. The provision in the Eastern and Northern Rules on Amendments is as follows:

"The court may at any state of of the proceedings, either of its own motion or on the application of either party, order any proceeding to be amended, whether the defect or error be that of the party applying to amend or not, and all such amendments as may be necessary or proper for the purpose of eliminating all statements which may tend to prejudice, embarrass, or delay the fair trial of the suit, and for the purpose of determining in the existing suit the real question or questions in controversy between the parties, shall be so made. Every such order shall be made upon such terms as to costs or otherwise as shall seem just."⁷²

This provision is purely a provision on amendment and to say that it covers a situation of asking for better and further particulars is to carve a meaning out of it. To use this section to ask for better and further particulars which can only be done by the Judge suo motu will be to allow the Judge to descend into the arena of the case. The opposite party in these circumstances, cannot ask the opponent to amend his pleadings. Moreover, a party who pleads too narrowly or too vaguely will either be hampered in his proof of his case or will be deemed to have denied evasively and may lose his case thereby. This is a potential check even in the absence of better and further particulars.

CONCLUSION

In this chapter we have examined at length the principles of law governing the statement of claim, defence, counter-claim and reply, and have taken the liberty to make a few suggestions. In the next chapter a group of miscellaneous matters will be discussed.

REFERENCES

1. See Orders 16, 17 & 18 High Court of Lagos Civil Procedure Rules 1972.
2. Odgers' Principles and Practice & Pleadings PP. 157 - 158.
3. Odgers' Principles of Practice and Procedure P. 160.
4. Order 10 Rules 7 and 8 (North) and Order 33 Rule 7 & 8 East.
5. Order 18 Rule 15(1) R.S.C. 1970.
6. Isaacs & Sons V. Salbsterin (1916)
2 KB 139.
7. London & Northern Bank Ltd. V. Newnass Ltd.
16 L.T.R. 481.
8. Bruce V. Odhams Press Ltd. [1936] 1 KB 697
9. Sowole V. Brewunmi (1961) ALL N.L.R. 712.
10. [1985] 1 N.W.L.R. Part 2 P. 195.
11. Ezomo V. Oyahire [1985] 1 N.W.L.R. 195, 200.
12. Order 16 Rule 21.
13. Order 16 Rule 22 Lagos.
This rule is not provided for in the Northern and Eastern Rules.
14. There is no such Rule in the East and the North.
15. 14 WACA 325.
16. There are no analogous provisions in the East and the North.
17. Hill V. Luton Corporation [1951] 2 KB 387.
discussed more elaborately under Amendments. See also Lohan V. Lajoyetan (1972) 6 S.C. 190.
18. Odgers' Principles of Practice and Pleadings P. 170. See also the cases of Joseph Evans & Co. V. Heatnote [1918] 1 KB 434 - 437. Camillor Tank SS Co. V. Alexandria Engineering Works [1921] 38 LTR 134.

19. Order 33 Rule 19 (East).
20. Order 16 Rule 25 (Lagos).
21. Order 10 Rule 20 (North) and Order 33 Rule 19 (East).
22. Odgers' Principles of Practice and Pleadings P. 174.
23. Order 33 Rules 9 - 12 (East)
Order 10 Rules 9 - 12 (North).
24. Order 13 Rules 9 - 12.
25. Odgers' Principles of Practice and Pleadings P. 1777.
26. John Lancaster Radiators Ltd V.
General Motor Radiator Co. Ltd
[1946] 2 ALL ER 685.
27. [1985] 1 N.W.L.R. Part 2 P. 185.
28. [1985] 1 N.W.L.R. Part 2 P. 360, 367.
29. (1976) 1 ALL N.L.R. 460 at P. 465.
30. Harris V. Gamble [1878] 7 Ch. D. 877.
See also Rutter V. Tregoni [1879]
12Ch.D. 758.
31. Warner V. Sampson [1959] 1 QB 287
at PP. 310 - 311.
32. Walker Stein V. Moir [1974] 1 WLR 991.
at 1002 Per Lord Denning, M.R.
33. [1986] 2 N.W.L.R. Part 20 P. 121.
34. Odutola V. West African Pilot Ltd.
(1960) LLR 27.
35. Order 16 Rule 16 High Court Rules (Lagos).
36. See also Order 18 Rule 4 (Lagos)
37. Order 18 Rule 13(4) R.S.C. 1965.
38. Kate Enterprises Ltd. V. Daewoo (Nig.) Ltd.
[1985] 2 N.W.L.R. Part 5 Page 116.
39. See Odgers' Principles and Practice of Pleadings 21st Edition Page 112.

40. Odgers Principles and Practice of Pleadings 21st Edition P. 117.
41. Order 16 Rule 11.
42. See Order 10 Rule 13 (North)
43. See Order 22 Rule 2 (West & Bendel)
44. See Order 27 (Federal).
45. (1937) 3 WACA 215. See also Glover Vs. Officer Administering the Government of Nigeria (1919) 19 NLR 45. See also Odiv. V. Okpor (1974) 2 S.C. 23.
46. (1983) 6 S.C. 158, 277.
47. 2 QB 198, 206. See also Aguda, Practice & Procedure etc. P. 393. See also Yeoman Credit Ltd. V. Latter [1961] 1 W.L.R. 828, 835.
48. Mills V. Renner (1940) 6 WACA 144, 145.
49. Odebiyi & Anor. V. Abiona (1955 - 56) WRNLR 126.
50. Akinsola V. Barclays Bank of Nigeria Ltd. CCHCJ/7/73/58. See also Aguda, Practice & Procedure etc. P. 397.
51. Order 20 Rule 3 (West & Bendel) Order 27 Rule 3 (East) Order 25 Rule 3 (F).
52. See Aguda Practice & Procedure etc. P. 374.
53. Rules 10 - 12 of Order 18.
54. [1881] 17 Ch.D. at P. 181.
55. Odgers' Principles of Practice & Procedure P. 198.
56. Beddall V. Maitland [1881] 17 Ch.D. 174 at P. 181.
57. Eyre V. Moreling [1884] WN 58.
58. (1979) 4 - 6 CCHCJ 18 See Order 18 Rule 14 (Legos).
59. (1967) 1 ALL NLR 82 (S.C)
- 59(a) Taiwo V. Ikinwunmi (1975) 4 S.C. 143, 172.

60. Street V. Gover 2 OB D 496.
See also Order 18 Rules 11 -14 (Lagos).
61. Asiyanbi V. Adeniyi (1966) NMLR 106.
This provision is now available only
in the Rules applicable in the
Eastern States, West and Bona-1
(Order 20 Rule 4) It is now not
available in Lagos and in the North.
62. Jones V. Dajal (1966) NMLR 394.
63. Asiyanbi V. Adeniyi (1966) NMLR 106.
See proviso to Order 27 Rule 4.
64. Philips V. Howel [1901] 2 Ch. 773.
See Obi Okoye, Essays on Civil Proceedings.
Volume 1 P. 297.
65. Odgers' Principles of Practice and
Pleadings 21st edition P. 207.
66. Odgers' Principles & Practice of
Pleadings 21st Edition P. 207.
67. (1973) 2 ECCLR Part 3 P. 185.
68. Obi Okoye Essays on Civil Proceedings
Volume 1 P. 270. See also Melamo V.
Olusola 15 WACA 12.
69. Order 10 Rule 17 (North)
70. Order 19 Rule 6 - 7^b OSC (England)
1952.
71. Obi Okoye - Essays on Civil Proceedings
Volume 1 P. 271 para. 244.
72. Order 34 (East) and Order 11 (North).

CHAPTER FOUR

MISCELLANEOUS MATTERS--DEFAULT OF PLEADINGS

The Shorter Oxford English Dictionary defines "default" as a "failure to perform some legal requirement or obligation especially to attend court on the proper day. Default of pleadings means an omission or neglect by a plaintiff or defendant to comply with an order of the court or a stipulation of the Rules to file a statement of claim or defence or other process within a stipulated time. The area of default of pleadings is again one of the areas where harmonisation of the Rules is very urgently required because the Rules are very different in the States of the Federation.

The Rules of Procedure applicable in the High Court of Lagos contain numerous provisions in this regard. There are no such provisions in any of the other States in the Federation and recourse has had to be made whenever the occasion arose to the Rules of practice and procedure applicable in England by virtue of the provisions of the High Court Rules and laws.

There are basically two situations when treating default of pleadings. The two situations are where the plaintiff defaults and where the defendant defaults. A default by the plaintiff is less serious and usually ends up in dismissing or striking out of his case, depending on which rules are applicable. The default by a defendant, however, is more serious, for it may involve judgment being entered against him in default of pleadings. For this reason, it is better to treat the two situations separately.

DEFAULT BY PLAINTIFF
(LAGOS STATE)

Order 24 Rule 1 (Lagos) states as follows:

"If the plaintiff, being bound to file statement of claim does not file it within the time allowed for that purpose² the defendant may, at the expiration of that time, apply to the court or a Judge in Chambers to dismiss the action with costs, for want of prosecution; and on the hearing of such application, the court or Judge may, if no statement of claim shall have been filed, order the action to be dismissed accordingly, or may make such other order on such terms as the court or Judge shall think just."

The above provision is peculiar to Lagos and is not available in the rest of the country. In the absence of such provision, recourse has always been made to the English Rules. There is another view that instead of making recourse to English Rules, there is an alternative provision in the Sheriff and Civil Process Law.^{2(a)} This is an existing enactment in all parts of the country. Order 2 Rule 12 states as follows:

Without prejudice to any other means of enforcement authorised by law or these Rules an interlocutory order may be enforced according to the following provisions:

- (a) If a plaintiff in a suit makes default or fails in fulfilling any interlocutory order, the court, may, if it thinks fit stay further proceedings in the suit until the order is fulfilled, or may give a judgment or nonsuit against such plaintiff, with or without liberty of bringing any other suit on the same grounds of action, or may make such other order on such terms as to the court shall deem just.

It appears that the above provision is not appropriate for dealing with a default on the part of plaintiff in filing a

statement of claim. Even admitting that a statement of claim is an interlocutory matter, the court cannot stay further proceedings until a statement of claim is filed. The court cannot also give judgment when there are no facts before the court based on a statement of claim and it cannot also nonsuit the plaintiff for the same reason and *moreso*, since no evidence has been led by the plaintiff. So the provision appears to be designed purely for enforcement of interlocutory orders such as when the court orders a plaintiff to pay costs on an application for relisting a case struck out. It is for the foregoing reasons that the views of the learned Author of "Essays on Civil Proceedings", with due respect, are strictly not correct.³

The correct procedure is to resort to the practice in England before 1960.⁴ The provision of Order 27 Rule 1 (England) is worded exactly like Order 24 Rule 1 (Lagos). If this is so, then the practice all over the country is the same, and all that is necessary is to streamline the Rules by adopting a uniform practice and procedure.

The Rules applicable in Lagos and the English Rule applicable to the rest of the country talk of the plaintiff's action having to be "dismissed" for default. In normal legal parlance, a dismissal connotes a finality of proceedings in the case except on appeal. This cannot be so here, as no action ought to be dismissed without leading evidence. So dismissal in the context of the Rule does not mean that the plaintiff cannot apply to the court to relist the case. The issue came up in DUKE V. ABONG.⁵ The court construing a similar English Rule stated as follows:

'Such a dismissal does not bar a continuance of the proceedings, as the effect is only to remove the cause from the list, which can be restored again on terms as to costs.'⁶

A plaintiff whose case is dismissed can reinstate it as it is even amply stated in the Lagos Rules.⁷

DEFENDANT

Whereas a default on the part of the plaintiff can lead to a dismissal and an eventual relistment of his case, a defendant who defaults in filing a statement of defence can bring very serious consequences upon himself. Again, the Rules are in diversity and it is convenient to take the Lagos situation first.

A Default of Pleadings by the Defendant or Defendants (Lagos State)

Generally, a defendant who defaults or group of defendants who default in filing a statement of defence face the risk of a judgment being entered against him or them but the possibility of entering such a judgment depends on the type of action instituted.

Debts or Liquidated Demands

Where a plaintiff's claim against a defendant is liquidated or a debt, the Judge can enter a final judgment against the defendant where he fails to file a statement of defence within the time stipulated by the Rules 8 or by Order of the court, except in an action by a money-lender or by an assignee of a money lender or an action for the enforcement of an agreement or security relating to money lent by a money lender.⁹

IN ODUME & ORS. V. NNACHI AND ORS. ¹⁰

debt or liquidated demand was defined as

meaning a specific sum of money usually due and payable under a contract. It must be such as can be ascertained by mere arithmetical calculation without any other investigation. If the sum to be adjudged payable requires investigation beyond arithmetical calculation, then it is not a debt or liquidated demand, but damages.

Where there are several defendants and default is made by one defendant, judgment can be had against that defendant. Where one defendant makes default in serving his defence within the stipulated time and judgment is entered against that defendant, this is not a bar against proceeding against the other defendants.¹¹ But this is possible only in respect of joint contractors.¹²

In an action for the recovery of land, if the defendant makes default as provided in Order 24 Rule 2, then the person whose title is asserted in the writ of summons shall recover possession of the land, with his costs.¹³ If the claim against the defendants is in the alternative a judgment against one is a bar against proceeding against the rest of the defendants.¹⁴

Again Order 24 Rule 8 makes provision for mesne profits, arrears or damages. It provides that "where the plaintiff has indorsed a claim for mesne profits, or arrears of rent in respect of premises claimed, or any part thereof or damages for breach of contract or a wrong or injury to the premises claimed upon a writ for the recovery of land, if the defendant makes default as mentioned in Rule 2, or if there be more than one defendant, and some or one of the defendants make such default, the Judge may enter judgment against one defaulting defendant or defendants and proceed as mentioned in Rules 4 and 5.

Although Order 24 Rule 7 talks about entering judgment for a person whose title is asserted, Order 24 Rule 8 makes it clear that it does not involve cases for declaration of title to land. Such cases will be covered under Order 24 Rule 11. Under Rule 11 a court can not give judgment in default without the plaintiff filing a motion for judgment.

In an action by a Money-Lender or an assignee for the recovery of money lent by a Money Lender or the enforcement of any agreement or security relating to any

such money, judgment can be obtained in default only with leave of the court following an application for leave to enter final judgment in default of defence made by notice to the defendant returnable not less than two clear days after service.¹⁵

In actions by mortgagees or mortgagors for payment of moneys secured by a mortgage or charge, sale, foreclosure, delivery of possession (whether before or after foreclosure) to the mortgagee or person entitled to the charge, by the mortgagor or person having the property subject to the charge or by any other person in, or alleged to be in possession of the property, redemption, reconveyance, delivery of possession by the mortgagee, no judgment can be obtained in default without leave of the court or a Judge in Chambers on application and the court or Judge in Chambers may require such application to be supported by evidence as might be required if relief was being sought on originating summons.¹⁶

DEFAULT OF PLEADINGS (THIRD PARTIES)

In third party proceedings judgment in default may be obtained against any

such third party who defaults in filing a pleading. The opposite party can apply to the court or a Judge in Chambers for such judgment, if any, as the opposite party may appear to be entitled upon the pleading.^{16(a)}

In Probate actions, Order 24 Rule 10 states that "if any defendant makes a default in filing a defence, the action may proceed, notwithstanding such default.

Order 24 Rule 11 makes a general provision and states as follows:

"In all actions other than those in the preceding Rules of this order mentioned, if the defendant makes default in filing a defence, the plaintiff may set down the action by motion for judgment, and such judgment shall be given as upon the statement of claim the court or a Judge in Chambers shall consider the plaintiff to be entitled to."

This is a general provision which covers all the situations where the Rules have not specifically provided for.

DEFAULT OF PLEADINGS BY
DEPENDANT (IN STATES OTHER THAN
LAGOS)

None of the Rules in the other States of the Federation has provided for the

consequence of default in pleadings either by a plaintiff, a defendant or a third party. Again, the English Rules of practice are applicable. However, Order 2 Rule 12 of the Judgment Enforcement Rules made under the Sheriff and Civil Process Law (East) has been said to cover the situation.¹⁸ Order 2 Rule 12(b) provides as follows:

"If a defendant in any suit makes such default or failure the court may give judgment by default against such defendant, or make such other order as to the court may seem just. But any such judgment by default may be set aside by the court upon such terms as to costs or otherwise as the court may think fit."

This provision seems to cover a default by a defendant. But having regard to Order 2 Rule 12(a) which appears to be unsuitable in cases of default by a plaintiff, the provision is probably not designed to meet cases of default by either plaintiff or defendant with the consequence of either a dismissal of the plaintiff's case or entry of judgment against the defendant. It is purely for interlocutory matters such as order of payment of costs by a party and other similar orders in the course of hearing.

Sometimes confusion arises as to judgment in default of pleadings and judgment in default of appearance, and Counsel have sometimes adopted a procedure designed for one and not the other. Order 41 Rule 3 (East)¹⁹ states as follows:

If the plaintiff appears and the defendant does not appear or sufficiently excuse his absence, neglects to answer when duly called, the court may, upon proof of service of the summons, proceed to hear the case and give judgment on the evidence adduced by the plaintiff, or may postpone the hearing of the cause and direct notice of such postponement to be given to the plaintiff.

This provision also does not apply to default of pleadings and it is inappropriate to ask for judgment in default of pleadings or for setting aside judgment obtained in default of pleadings. In OSAYANDE V. OSAGIE BEGHO J. stated the law, it is submitted, correctly when he said:

It does not appear to me right to bring a motion under Order 26 Rule 8 of the High Court (Civil Procedure) Rule 1958 to set aside a judgment obtained on a motion for judgment when a defendant fails to deliver a defence

within the time allotted for that purpose. Rule 8 in my view is only applicable where the defendant "does not appear or sufficiently excuse his absence" as in Rule 6 (3).²⁰

From the foregoing it is clear that the correct procedure in States other than Lagos State is to resort to English practice and procedure. This is not a welcome development of the law. The disadvantages are many. It makes our Rules dependent on foreign rules of practice which savours on colonialism. Secondly, it makes our rules clumsy.

The Rules applicable in the Eastern States of Nigeria²¹ provide for resort to the English Rules where there is no local provision. These are the Rules in practice as at 30th September, 1960. On the other hand, the Rules applicable in the West and Bendel²² are even more perplexing as they incorporate the Rules for the "the being" applicable in England. This makes the rules dependent on English Rules where there is no local provision. To be able to make use of the rules, one has not only to be conversant with the local rules but must also keep abreast with the changes in the rules in England.

Nevertheless, in the case of default of pleadings by a defendant, the English Rules are applicable because there is no exact local provision. Order 27 Rule 2, Rules of the Supreme Court (England) 1952 provides as follows:

If the plaintiff's claim be only for debt or liquidated demand and the defendant does not, within the time allowed for that purpose, deliver a defence, subject as provided by Rule 17 of this order, the plaintiff may, at the expiration of such time, enter final judgment for the amount claimed with costs.

The above provision in the English Rules is the same as the Order 24 Rule 2 of the Lagos High Court Rules. Since this provision is still applicable in England, the provision applies to both the West, Bendel, Eastern and Northern States.

EFFECT OF A JUDGMENT ENTERED IN DEFAULT OF A DEFENCE

The effect of a judgment against a defendant in default of a statement of defence (which is the same as a failure to file a defence to a counter-claim) is that any such judgment can be set aside by motion at the instance of the defendant.

Order 24 Rule 15 (Lagos) states as follows:

Any judgment by default, whether under this order or under any other of these Rules, may be set aside by the court or a Judge in Chambers, upon such terms as to costs or otherwise as such court or Judge in Chambers may think fit, and where an action has been set down on motion for judgment under Rule 11 of this Order, such setting down may be dealt with by the court or Judge in Chambers in the same way as if judgment by default has been signed when the case was set down.

The above rule is exactly the same wording as Order 27 Rule 11 of the Rules of the Supreme Court (England) 1952 which is applicable in all the other States except Lagos. The only minor difference is that in other States, the setting aside may be by motion or by summons as is the practice in England.

A judgment in default of pleadings by the defendant must clearly be distinguished from a case of abandoning the defence. The difference is illustrated by the Supreme Court in the case of OMOREGBEE V. PENDOR LAWANI.²³ The facts briefly as stated in the judgment are as follows:

Following an order of the trial court on the 21st day of February, 1972, the parties to these proceedings filed and exchanged their pleadings. At the trial the respondent and his witnesses testified in support of the allegations in his statement of claim. The sum of the evidence in support was that in April 1964 the plaintiff on his application was granted a building plot measuring 300 ft. by the Evbogida Plot Allocation Committee which allocation was confirmed by the Oba of Benin. When on the 2nd day of March, 1976, hearing began in this case, the plaintiff gave evidence in chief and put in evidence his Deed of Conveyance in respect of the land in dispute to which was attached a survey plan of the land. The defendant although absent was represented by his counsel who later duly cross-examined the plaintiff. The case was then adjourned. When further hearing resumed the defence counsel intimated that his client was serving a prison sentence at Kirikiri and requested for the case to be adjourned sine die or be excused to withdraw from the case. The adjournment was refused but withdrawal was permitted. Having refused the application for adjournment

the learned trial Judge proceeded to receive further evidence from the plaintiff who on being recalled put in further exhibits. Thereafter, the plaintiff closed his case and the learned trial Judge non-suited the plaintiff's case and ordered that the case be tried by another Judge de novo. The plaintiff appealed against the judgment of the trial court to the Court of Appeal and subsequently the case was appealed to the Supreme Court.

In this case, there was no default at all. The statement of defence was filed by the defendant but the defendant did not appear to defend his case at the trial. In fact the counsel on behalf of the defendant even conducted the case but withdrew. The Supreme Court was rightly of the view that it was a case of the court acting on an unchallenged evidence.³⁸ It was therefore not even a case of pleadings but of on-appearance of the defendant at the hearing. There is, however, a very narrow margin between this case and a judgment obtained in default of appearance which can always be set aside if valid reasons are advanced by the absent party. But the Supreme Court held that it was a case of the defendant abandoning his defence and cannot be set aside.

EVIDENCE

The point has often arisen whether if the defendant defaults in filing a statement of defence, evidence has to be led by the plaintiff before the court can enter judgment for him. The point arose seriously in the case of CYRIL OBASI V. MESSRS WITT AND BUSCH LIMITED.²⁵ It was held by Oputa J. as he then was, that where the claim of the plaintiff is for liquidated damages oral evidence is not necessary if no statement of defence is filed but where the claim is for unliquidated damages and no statement of defence is filed the plaintiff will need to give evidence. The decision is based on the provision in Order 27 Rule 2 of the Rules of the Supreme Court (England) 1952 which is applicable in all the States other than Lagos.²⁶

The Rules apart, there is no rationale in the reasoning that judgment cannot be entered against a defaulting party without leading evidence unless the claim is in debt or liquidated damages. Some of the Rules of pleadings, for example, provide as follows:

"The defendant's pleading or defence shall deny all such material allegations in the

petition as the defendant intends to deny at the hearing. Every allegation of fact, if not denied specifically or by necessary implication, or stated to be not admitted, shall be taken as established at the hearing.²⁷

Commenting on this provision in relation to a default of defence in WEBBERS STRAND SCANDINAVIA LIMITED v. UNION DRUG CO. LTD.²⁸

Oputa J., as he then was, stated as follows:

'The plaintiff's claim has not been denied by the defendant filing any statement of defence. No application is before the court for extension of time. The result is that it may then be safely implied that the defendant is not really contesting the plaintiff's claim. If the defendant expressly admitted the plaintiff's claim in such a case the plaintiff is not usually asked to prove his case by oral evidence. It is my view that in a situation like the present, where there is a tacit admission, nothing prevents the court from giving judgment on the plaintiff's claim without first hearing evidence.

This reasoning is sound and is a necessary implication of the Rules. By this line of argument, one is not trying to lose sight of the fact that general damages are usually inflated out of proportion with the

loss actually suffered but if the amount claimed is not reflective of the true damage suffered, it is the place of the defendant to contest it in a statement of defence.

However, this problem of dismissing a plaintiff's action or entering judgment against a defendant in default can be avoided by filing a motion for extension of time to file the relevant pleading, explaining adequately the reasons for the failure. This is an important topic and requires a separate and detailed treatment.

EXTENSION OF TIME TO FILE A STATEMENT OF CLAIM OR DEFENCE

Extension of time within which to carry out an order of the court is provided generally by the Rules. Order 11 Rule 3 of the High Court Rules (East) provides as follows:

"The court may, as often as it thinks fit, and either before or after the expiration of the time appointed by these rules, or by any judgment, order, or rule of the court, extend or adjourn the time for doing any act or taking any proceeding.

This provision also applies to applications for extension of time within which to file pleadings.

Since slightly different considerations apply in situations where a party applied for extension of time to file a statement of claim and a statement of defence, it is more convenient to treat the two separately.

EXTENSION OF TIME TO FILE STATEMENT OF CLAIM

The general rule is that where a plaintiff defaults in filing a statement of claim within the time stipulated either by the rules or by order of the court, any statement of claim filed without the leave of the court is of no effect and is null and void.²⁹ The leave of the court is obtained by filing a motion on notice to the other party seeking leave of the court to file the statement of claim. Sometimes the motion to dismiss the plaintiff's action in default is filed and placed before the court at the same hearing with a motion for extension of time within which to file a statement of claim. If this happens the consideration is not given to the motion which was filed first. It has been held that a motion for extension of time, if properly filed, prevails and the motion for dismissal should either be withdrawn or struck out. In such a case the defendant or applicant who filed the motion for

dismissal of the plaintiff's case for want of prosecution will be entitled to costs. In REV. ABIEGSE & ORS. V. UGBODUME AND ORS.³⁰ two motions were before the court, one by the defendants to dismiss the plaintiffs' case for want of prosecution and the other for enlargement of time to file a statement of claim or in the alternative for leave of the court to treat the statement of claim and plan already filed as having been duly filed. The main argument of the defendants' counsel against the granting of enlargement of time was that the plaintiffs delay in filing the motion was inordinate and the affidavit lacked sufficient facts to support the plaintiff/applicants' motion. The court upheld the argument and dismissed the motion for extension of time and the plaintiffs' action. In reversing the judgment, the Supreme Court stated as follows:

"With respect, we think that the learned trial Judge, howbeit within his competence, was putting the cart before the horse. If it was intended, as we were persuaded to believe, by the learned trial Judge, to exercise his discretion to deal with both applications together, we would have thought that it would have been fair and just that the application for

enlargement of time should have been considered and determined before dealing with the other one; and this is mainly because the fate of the application for dismissal depends largely on the result of the application for enlargement of time.³¹

It has to be noted that the granting or refusal of an application for extension of time to file pleadings is a discretionary one and usually a party is not to be deprived of the opportunity to prosecute his case on the merits. From the two cases of REV. ABIEGBE & ORS. V. UGBODUME AND ORS.³² and CLOUGH V. CLOUGH³³ three principles emerge as a result of which a party's application for extension of time to file a pleading can be refused (although the list cannot be said to be exhaustive). These grounds are:

1. That there has been an inordinate delay by the plaintiff. What is an "inordinate delay" must depend on the facts of each particular case.
2. That this inordinate delay is inexcusable. The burden of excusing the inordinate delay is on the party alleging it.
3. That the defendant is likely to be seriously prejudiced by the delay.

As a result the longer the delay,
the greater the likelihood of
prejudice.³⁴

The stand of the Supreme Court in not
subscribing to the idea of dismissing plaintiff's
action for default in pleadings without very
good and substantial reasons is an admirable
one. Most often the courts are willing to
set aside the dismissal on application and
the usual penalty is the payment of costs to
the other side. Such a dismissal almost
invariably ends in a relisting of the case.
To encourage hasty dismissals is to cause
further delays in civil cases in court.
A better approach ought to be the award of
punitive costs against a party defaulting
followed by adjournments, in fact, long
adjournments, in the case of default on the
part of the plaintiff.

Sometimes, defaults in filing pleadings
are caused, not by the party himself but by
the solicitor³⁵ or his clerk.³⁶ In such a
situation to dismiss the plaintiff's case is
to cause a lot of injustice to the plaintiff
who himself is blameless. It is for these
considerations that the courts are always
willing to grant extension of time to perfect
the default.

In A. G. LEVENTIS & CO. LIMITED V. OBIAKO,³⁷

the plaintiffs asked for an extension of time within which to file a statement of claim three times. On the third occasion the defendants asked for the plaintiffs' case to be struck out. The only explanation of the plaintiff was that it was due to an oversight of their counsel. The High Court granted the extension of time to the plaintiffs. The court stated that since there had been no extraordinary delay on the part of the plaintiffs, the court would follow the usual course in the absence of special circumstances such as excessive delay, by giving the plaintiffs time to take the next step upon their paying costs. But in OGIRI & ANOR. V. IGWU IDU & ORS.³⁸ the plaintiffs' action was struck out.

If a suit is struck out or dismissed for want of prosecution with liberty to apply for relisting, such a suit is a pending suit and it cannot be statute barred during the period it is thus pending.³⁹

EXTENSION OF TIME TO FILE A STATEMENT OF DEFENCE

The principles governing applications for extension of time when a defendant has defaulted in filing his defence within the time stipulated by the rules or by an order

of the court are basically the same as for a plaintiff. If a defendant defaults in filing a statement of defence within time, the plaintiff may obtain judgment against the defendant, with or without leading evidence depending on the circumstances as previously discussed.

The point has been canvassed that in filing a motion for judgment in default by the plaintiff against the defendant, notice need not be given to the defendant,⁴⁰ and the case of IBIONO R. D. C. V. UDO⁴¹ was cited as the authority. With due respect to the learned author, this proposition of law cannot be correct as it will be against the rule of natural justice to obtain judgment against the defendant without hearing from him. It is not one of those situations where the court can act ex-parte. The case cited by the learned author also does not support the proposition of law. What happened in the case was that there was no affidavit of service of the motion on the two defendants by the bailiff but the two defendants admitted in court that they had been served.

Again, an application for judgment by the plaintiff and an application for extension of time within which to file

a defence may come up on the same day before the same court, one asking for judgment and the other asking for an extension of time to file a statement of defence. Going by some old authorities, for example, the case of NWOBI & ORS. V. IJEH⁴² the discretion is that of the Judge but it is submitted that a better authority is the case of REV. ABIEGBE & ORS. V. UGBODUEME & ORS.⁴³ in which was decided that the court had to take the motion for extension of time first.

Extension of time to file pleadings is not always with the consent of the court. The Lagos Rules provide that the parties by themselves can enlarge the time provided for the filing of a statement of claim or defence. The provision is a salutary one because it avoids the pestering of the courts with minor and non-contentious motions which eat deep into the court's time for substantial business. The Lagos Rules provides as follows:

Statement of Claim (Order 17 Rule 1(b))

Subject to the provisions of Order 9 Rule 12, as to the filing of a statement of claim when there is no appearance, the plaintiff shall unless he has filed a statement of claim under Order 3 Rule 4, or the court or a Judge in Chambers otherwise orders file a statement of claim either with the writ of summons, or notice in lieu of writ of summons, or within

ten days after appearance:
Provided that the times
prescribed by this paragraph
may be enlarged by consent in
writing or by the court or Judge
in Chambers.

Statement of Defence Order 18 Rule 6
(Lagos)

Where a defendant has entered an appearance he shall file his defence within fourteen days from the time limited for appearance or from the service of the statement claim, whichever shall be the later, unless such time is extended by consent in writing

It is only where one of the parties refuses to concede to the request for enlargement of time by consent that a resort is made to the court.

This provision is peculiar to Lagos State and not available in other States. It is respectfully suggested that the Lagos State rules be adopted by all other States.

Sometimes, a statement of claim or defence might have been filed irregularly by filing it out of time. At other times, the filing out of time might not have been noticed by the parties, until the time of addresses. To discard such an **irregularly**

filed pleading is to prefer technicality to substance particularly when the parties had assumed the correctness of the pleading and had acted on it. Azuora Ag. J. in NWOB I & ORS. V. IJEH⁴³ put it rightly when he said:

".....the court will not take the circuitous course of giving a judgment without regard to it (statement of defence) and obliging the defendant to apply under Rule 14, to have the judgment set aside on terms, but will have the case properly tried on the merits."

Sometimes, when problems arising from default of pleadings have been resolved, other problems may arise from the pleading filed. These problems may be omissions to state relevant facts, misstatement of facts or new facts might have become known since the filing of the pleadings. The procedure for curing such defects are different from the ones already discussed in this chapter. Such problems are cured by amending the particular pleading which is the subject dealt with in the next chapter.

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27. Order 33 Rule 9 (East). There are
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31. (1973) 1 SC. 133, 149 - 150.
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- 35. Rev. Abiegbe & Ors. V. Udogume & Ors.
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- 38. (1972) 2 ECLSR 179.
- 39. Ebet V. Kassim (1966) NMLR 123.
- 40. See Obi Okoya, Essays on Civil
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- 42. (1965) NMLR 175.
- 43. 1965 NMLR 175.

CHAPTER FIVE

AMENDMENT

Jowitt's Dictionary of English Law defines "amendment" as the correction of some error or omission, or the curing of some defect, in judicial proceedings.¹

In judicial proceedings, the main area where amendments occur is in pleadings, particularly in the statements of claim, defence, counter-claims and set-off.

No matter how ingenious or meticulous a lawyer may be, there may be occasions where some vital facts or documents may inadvertently not be pleaded. Sometimes, new facts may come to light after the filing of pleadings. A good lawyer should, whenever the need arises, move swiftly to seek an amendment to his pleadings.

The need for a party or his counsel to amend his pleadings may arise on several occasions. Aguda² has given three occasions on which amendments need to be effected in one's pleadings. He says that amendments may become necessary on the following occasions:

- (a) The other party may raise objection to the writ or the

pleading, which objection is well founded and which may prove fatal to the whole pleading unless it is amended.

(b) The person seeking the amendment may have become aware of new facts which have come to light after the filing of the pleadings.

(c) Sometimes it may so happen that counsel discovers during the course of the proceeding that he has made an error in stating his case in his pleading, or has failed to raise defences, etc. which he ought to have raised in his pleadings.

All the States in the Federation have made provisions in their Rules for amendment, and, as usual, there is diversity in the Rules. A similar provision is made in almost all the States in the Federation except Lagos State. In other words the Northern States, the Western States and Bendel, the Eastern States and the Federal High Court have the same Rule which is as follows:

"The court may, at any state of the proceedings, either of its own motion or on the application of either party, order any proceeding to be amended, whether the defect or error be that of the party applying to amend or not; and all such amendments as may be necessary or proper for the purpose of eliminating all statements which may tend to prejudice, embarrass, or delay the fair trial of the suit, and for the purpose of determining in the existing suit the real questions or question in controversy between the parties, shall be so made.^{2(a)} Every such order shall be made upon such terms as to costs or otherwise as shall seem just."

This provision although compendious is archaic and perhaps inexhaustive. For example, it does not state what the effect is there, if a failure on the party amending to amend within the period stipulated. Consequently, one has to go outside the rules to look for such a provision, a process which is inconvenient. Also, the Rules does not provide for minor clerical errors after judgment to obviate the need to go on appeal on such minor amendments. On the other hand, Order 25 of the Lagos State Rules makes elaborate provisions for amendments covering most of the omissions in the other Rules. But even the Lagos Rules, too, have not gone far enough. Although it has a provision³ dealing with "amendments, how made", it

does not state the procedure for making applications for amendment, whether it is by motion or summons. Secondly, there should be a provision indicating the occasions when oral amendments can be made to take care of very minor amendments, without necessarily depriving the court of its discretion. Thus, there is not only a diversity in the Rules but also inadequacies which should be removed.

TYPES OF AMENDMENT

An amendment can be effected in one of three ways. These are:

- (a) Amendment without leave of the court.
- (b) Amendment with leave of the court, and
- (c) Amendment suo motu; that is to say, at the instance of the court.

The extent to which these types can be put to use has been a subject of controversy amongst writers and Judges alike. It is, therefore, proper to discuss them separately.

AMENDMENT WITHOUT LEAVE OF THE COURT

Commenting on Order 14 (West and Bendel) Order 11 (North) Order 34 (East) and Order 32 (Federal) all of which have provisions on amendment with exactly the same wording

the learned writer, Dr. Aguda, says that no amendment can be effected without the leave of the court. He says:

There is no provision in this order by which the writ or any pleading once filed can be amended without leave before service in the case of the writ or of the pleading.⁴

This claim by Dr. Aguda has been disputed. A learned Ghanaian author, Mr. Kom, in his book "Civil Procedure in the High Court of Ghana", has stated that amendments without leave of court can be effected in some instances. He gives the following instances:

1. A plaintiff can under Order 20 Rule 4 of the Ghana High Court Civil Procedure Rules alter, modify or extend his claim without an amendment of the writ when preparing his statement of claim.⁵ He stated that a plaintiff can so alter, modify or extend his writ provided two conditions exist;
 - (a) provided that the plaintiff does not completely alter the cause of action or introduce an entirely new and different cause of action which cannot in the normal course of things be conveniently tried with the original claim; and
 - (c) provided that the writ is only

defective, and not void
ab initio, such a defect
can be cured by filing a
proper statement of claim.⁶

The learned author then cautioned that
such an amendment of a writ by a
subsequent statement of claim can only
be effective if the writ is generally
and not specially indorsed.

2. The learned author further states that
a "plaintiff may again without leave
amend his statement of claim once at
any time before the expiration of the
time limited, for reply and before
replying. Where, however, no defence
is filed, then before the expiration
of four weeks from appearance."⁷
3. A defendant may also amend his counter-
claim or set-off without leave.⁸

It is necessary to examine whether the
proposition of law by the learned Ghanaian
author is applicable to Nigeria. In doing
this it is better to divide the rules into
two parts because of the difference in the
Rules in the various parts of the country.

The Rules in Lagos seem strongly to
support the proposition of Mr. Kom.

Order 17 Rule 2 (Lagos) provides as follows:

Whenever a statement of claim is filed, the plaintiff may therein alter, modify, or extend his claim without any amendment of the endorsement of the writ; provided that this Rule shall not apply where the writ has been specially indorsed; provided further that the plaintiff may not completely change the cause of action indorsed on the writ without amending the latter.

This provision is similar to Order 20 Rule 1 (Ghana) on which the learned author has based his opinion. So, as far as the Lagos Rules are concerned, the statement that a statement of claim supercedes the writ of summons is correct, subject to the restrictions imposed by the Rule.⁹

The other aspect of amending a statement of claim once before reply or time limited for it does not appear to have been provided for in the Lagos Rules. However, to make recourse to English Rules will appear to be consistent with the Lagos Rules on amendment.

In the other parts of the country, the applicability of the views of the Ghanaian author is contentious. The Rules in the rest of the country do not provide for these views at all.

It is, therefore, uncertain the source of the claim that a subsequent statement of claim cures defects in a writ. In LAHAN V. LAJOYETAN'S case, the Supreme court merely assumed that the principle applied even outside Lagos and held that even though the writ of summons sought a setting aside of a sale of family land, the inconsistent relief to declare the sale null and void contained in the statement of claim was held to have superceded the writ but the source of the authority was not disclosed. Perhaps, the source is traceable to the English Rules, which, by virtue of the various High Court Laws and Orders, is applicable in the country.¹⁰ Order 19 Rule 15 of the Rules of the Supreme Court (England) 1952 has a similar provision with the Order 17 Rule 2 (Lagos), and if resort is made to the English Rules then the principle can be said to apply. Order 18 Rule 15(2) provides as follows:

A statement of claim must not contain any allegation or claim in respect of a cause of action unless that cause of action is mentioned in the writ or arises from facts which are the same as, or include or form part of, facts giving rise to a cause of action so mentioned, but, subject to that, a plaintiff may in his statement of claim alter, modify or extend any claim made by him in the indorsement of the writ without amending the indorsement.

Firstly, the above provision appears to be a little more restrictive than the provision in the Lagos Rules, and a plaintiff who departs widely from it may lose the protection of the Rule.

Secondly, it was the intention of the legislature not to provide for the rule in other States. That is, that the English practice should not apply, and made amendments possible only through the court. It is not every omission from the rules that has to be brought in from England as the legislature might well have intended to cover the field. Since the rules outside Lagos show that amendments can only be by leave of court to incorporate English practice which allows a plaintiff to modify his writ almost as he likes by a subsequent statement of claim may be inconsistent with the local Rules.

AMENDMENT WITH LEAVE OF THE COURT

Except with the modification in the Lagos Rules, all amendments of pleadings, once filed can only be amended by leave of the court. The court may at any stage of the hearing permit a party to amend his pleadings subject to such terms as may be deemed just by the court. The procedure for amendment is discussed later in this chapter.

AMENDMENT BY THE COURT, SUO MOTU

This is the third type of amendment. A trial Judge has power to order amendments to the pleadings if the facts and justice of the case require it. It is, however, a discretion exercisable by the Judge sparingly. A Judge being an umpire and being bound, more or less, by the facts presented by the parties, to make amendments without caution will be to descend into the arena of the case. That is why counsel are usually invited to address the court before amendment. In the case of AJOKE AMUSA OBA, Brett F.J. said¹¹

Prudence requests that it should be invariable rule of practice for the Judge to invite the parties to address him before he amends the writ or pleadings of his own motion.

However, an appeal court may not disturb the judgment of a trial court on the grounds that the trial Judge, in the course of his judgment of his own motion and without previously inviting the parties to address him thereon, amend the claim provided that the amendment does not cause any prejudice to the opposite party.¹² In CHIEF ADJARHO V. AGHOGHOVIA¹³ the Court of Appeal (Benin) was of the view that the trial Judge was in error in the pleadings suo motu to the prejudice of the defendants.

GENERAL PRINCIPLES
GOVERNING AMENDMENTS

There are basic principles by which amendments can be granted. These basic principles apply to all the States. The courts, however, seem to be extending these principles and under this heading efforts will be made to state these basic principles and their applications in the courts. It must be remembered, however, that these basic principles were enunciated mainly in decisions of the courts.

Some of the principles as enunciated by the courts are as follows:

1. The purpose of granting leave to amend is to enable the court determine in the existing suit the real question or questions in controversy between the parties. This appears to be the cardinal principle behind the grant of leave to amend. In the case of AMADI V. THOMAS APLIN & CO. LIMITED¹⁴ the Supreme Court stated as follows:

It is contrary to the provisions of Order 14 of the High Court Rules of Eastern Nigeria for the trial Judge, at any stage of the proceedings before judgment is delivered, to

refuse a party's application for leave to amend his pleadings, if, as in this case, the facts sought to be pleaded are such as would enable issue to be properly joined between the parties on the questions in controversy between them, unless the applicant acts mala fide or has by his blunder caused some injury to the other party which cannot be compensated for by costs or otherwise, furthermore, it is denial of a fair trial to dismiss the application summarily without hearing the application."

2. An amendment will be granted if it will enable the court to do substantial justice. In the case of GBOGBOLULU V. HODO, the West African Court of Appeal stated as follows

"It is the duty of courts to aim at doing substantial justice and to make any formal amendment in the claim as to the capacity in which parties sue.¹⁵

In ADELEKE V. AWOLIYI, Ademola, C.J.F., stated as follows:

"..... each party has a right to have the dispute determined upon the merits, and courts should do every thing to favour the fair trial of the questions between them.

Blunders must take place from time to time and it is unjust to hold that because a blunder during interlocutory proceedings has been committed, the party blundering is to incur the penalty of not having the dispute between him and his adversary determined upon the merits. All such cases of blunder may be remedied by payment of costs or the imposition of terms and conditions."

3. Leave to amend will be granted with ease if the amendment sought is only to correct a misnomer. In S. M. WARRISTON V. SHELL BP PETROLEUM DEVELOPMENT CO. OF NIGERIA LIMITED, Ademola C.J.P. states the law as follows:

"It appears to me that two mistakes were made at the beginning of the trial of the case. The first mistake was by counsel for the plaintiff in Suit W(9)56 - when the objection was raised about a misnomer, he had the opportunity of asking the court for leave to amend, especially when the Judge ruled there was a misnomer if application is made to amend the writ by substituting the proper names, it should be granted."¹⁷

Thus, it is implied that where only a misnomer is involved, leave to amend need not be by motion but by an oral application in court as soon as the need to do so arises.

The court will grant leave to amend a party's pleading for the purpose of enabling the use of evidence that had been obtained for the purpose of settling the real controversy between the parties. In ABABIO V. QUARTEY¹⁸ the Privy Council made the following pertinent observation:

"If there was any capacity discussed in the course of the action which would have enabled the plaintiff to have maintained his suit, he ought not to have been non-suited, but the court ought to have allowed all the necessary amendments that were required for the purpose of enabling the use of evidence that had been obtained for the purpose of settling the real controversy between the parties.¹⁹

Following the same principle, the court amended the statement of claim in an action for slander to conform with the words proved at the trial, which were not those set out in the statement of claim even though the Judge at the trial had offered plaintiff's counsel an amendment of the pleadings and it had been refused.²⁰

Just as leave to amend can be granted under certain circumstances, leave to amend may be refused on other grounds.

Again, these grounds can be deduced from the cases. Some of the grounds on which leave can be refused are as follows:

1. An amendment will be refused if it will cause injustice to the other party. An old English case stated the following:

"I know of no kind of error or mistake which, if not fraudulent or intended to over-reach, the court ought not to correct, if it can be done without injustice to the other part."²¹

In the case of ENGLAND V. PALMER²² the plaintiff on appeal was allowed to amend his statement of claim to include the words "and in possession" in a trespass case. This was permissible because no injustice was done to the defendant by the amendment. The court stated that "as the case was fully contested on possession and all the same matters were then discussed, the amendment caused no injustice to the defendant appellant."

A court will refuse leave to amend if the amendment is made mala fide, or where the amendment will cause undue delay or (b) if it is irrelevant or useless or would raise merely technical points. Where the amendment has the effect of making a new case,

the court may refuse such an amendment. In FOKO V. FOKO²³ Aguda J. stated as follows when commenting on amendment to change a cause of action.

The court has the power under Order 14 of the High Court (Civil Procedure) Rules (West) to allow an amendment by a Plaintiff even if that amendment will add to or substitute a new cause of action provided that the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which the plaintiff has already claimed relief in the action. In the present case, the court cannot order an amendment of the writ which is seeking the setting aside of some deeds of conveyance to one seeking a declaration of title to the pieces of land conveyed by the conveyances as the reliefs are different and the amendment will alter the nature of the case entirely.

If granting of an amendment would unduly delay the trial of the case, the court can use its discretion to refuse it. In DOMINION FLOUR MILLS V. GEORGE²⁴ after the parties had delivered their pleadings, the case proceeded to hearing. After the Plaintiff's case, the Defendant sought to amend the statement of defence by alleging illegality in the dealings in question in the suit, and alleging that he was the agent

of the plaintiffs. It was held that amending the statement of defence on account of the first reason would unduly delay the trial, and that to allow it at the stage would unduly prejudice the plaintiffs who had closed their case and moreover the bona fides of the defence was in doubt, as this point could not have escaped the defendant while filing the statement of defence. The court also refused to add the new issue of agency to the defence especially when facts already admitted in the statement of defence impliedly negatived any suggestion of agency.

STAGES AT WHICH AMENDMENTS MAY BE MADE

There are three main stages at which amendments may be made after filing the pleadings. These are before the hearing of the case, during the hearing and after the hearing (on appeal).

BEFORE THE HEARING

This is the stage at which the courts are most willing to grant leave to amend one's pleading. The reason is that at this state, the opposite party can hardly be said

to be prejudiced by the amendment. It is important to emphasize, however, that it is always advisable to make amendments as soon as defects are noticed so as to avoid delays which can possibly prejudice the case of the other party. Where the other party is not likely to be prejudiced by the amendment, they can be effected at any time during the trial because the Rules themselves provide that leave to amend may be granted "at any stage of the proceedings."

LEAVE TO AMEND
DURING THE TRIAL

This is the period when the bulk of the amendments are made. Sometimes, a party while giving evidence states facts not pleaded which are normally objected to. Sometimes, however, these facts are not objected to and amendments are made to correlate the evidence with the pleadings. Again, the discretion is that of the court and if it will not prejudice the opponent the amendment is usually granted. Thus in OGUNTIMEHIN V. GUBERE,²⁵ leave to amend was even granted during the address and it was held to be in order.

Although the essence of amendment is to secure substantial justice the applicant must

give reasons why an amendment is sought.²⁶ This principle is sound and it is only by giving some reason for the proposed amendment that the court will be enabled in exercising its discretion one way or the other. But it must be emphasized that amendments must be formally sought²⁷ unless it is a case of a mere misnomer or typographical errors. In SOLANKE V. SOMEFUN²⁸ the court granted the amendment on a formal request even though the plaintiff amended his statement of claim so extensively that almost the entire statement of claim was replaced.

LEAVE TO AMEND AFTER HEARING

Sometimes leave to amend can be granted even on appeal but this seems to be a tricky area. At the level of the appellate court, hardly can fresh evidence be led, for the court depends on the recorded proceedings of the lower court. This, at once, suggests that the appellate court cannot amend or give leave to amend facts not already pleaded and the evidence therefor led. However, provided the justice of the case warrants it and the amendment sought is on record, amendments can be made to enable the court decide on the issues actually in controversy between the parties.

In AFOLABI V. ADENKULE, the trial Judge refused to amend the capacity in which the plaintiff sued, but the court of appeal did, and entered judgment for the plaintiff. Commenting on the competence of the court of Appeal to do so, the Supreme Court, per OBASEKI J.S.C. stated as follows:

This court has held times without number that once the pleadings and evidence show conclusively a representative capacity and the case was fought throughout in that capacity, the trial court can justifiably enter judgment for or against the party in that capacity, even if amendment to reflect that capacity had not been applied for and obtained.²⁹

PROCEDURE FOR AMENDMENT

Apart from a few cases such as cases of misnomer and obvious typographical errors, leave to amend must be formally applied to the court. This is by motion on notice to the opposite party. The practice of bringing applications for leave to amend pleadings by motion is not provided for in the various orders dealing with amendments, but is provided for generally under the orders dealing with interlocutory matters.

For, example, Order 35 Rules 1 and 2 (East) provides as follows

Rule 1. "Interlocutory applications may be made by motion at any stage of a cause or matter."

Rule 2. Unless the court shall otherwise order, no motion shall be entertained until the party moving has filed a motion paper, or made verbal application to the Registrar, distinctly stating³⁰ the terms of the Order sought.

Such motions shall be accompanied by an affidavit sworn to by a party who has personal knowledge of the facts contained therein. All necessary documents must be duly exhibited and correctly marked. For example,

"This is exhibit "A" referred in the paragraph 10 of the affidavit of Mr. Long John."

Usually, one of these exhibits is the proposed amendment. Some counsel insert the proposed amendment in the affidavit or motion paper itself. Unless the proposed amendment is very short, this practice has the disadvantage of making either the affidavit or motion paper unduly long and inelegant and is, therefore, better to separate the attachment from the affidavit. When the sworn and filed affidavit is inadequate, a

further affidavit can be sworn to and filed. But before a further affidavit can be filed or made use of in the court, leave of the court must be sought and obtained.³¹

Some counsel, apart from exhibiting the proposed amendment also exhibit the particular pleading, be it statement of claim, defence, counter-claim or otherwise, as it would appear whenever the leave to amend shall have been granted. This appears good practice and saves a lot of time by having to take a new date to file the amended pleading. The Supreme Court appears to have given recognition to this practice by holding that a statement of claim exhibited to a motion is deemed to be properly filed after the leave is granted.³²

The foregoing discussion on procedure should not be taken to mean that there is no divergence in the Rules related to the procedure for amendment in the country. In Lagos State, applications made to a Judge in Chambers shall be by summons.³³ It states as follows:

"Every application in Chambers not made ex-parte shall be made by summons."

Again, this is an area requiring harmonisation.

EFFECT OF AMENDMENT

Once an amendment is made to a pleading by a party, such an amendment relates to the parties as if the amendment was originally contained in the particular pleading. In other words, the amended portion of the pleading should be regarded as never to have existed, and it is the new facts put forward that now define the issues between the parties. The Supreme Court in the case of ROTIMI V. MACGREGOR³⁴ expressed the matter as follows:

Manifestly, therefore, the plaintiff's amended statement of claim filed on the 24th April, 1971, spoke in effect as from the date of the original statement of claim and it should be treated as such since the amendment was effected by leave or order of the court.

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Again, in WARNER V. SAMPSON Hodson L.J., stated the law as follows:

I do not think that this amendment can be ignored. Once pleadings are amended, what stood before the amendment is no longer material before the court and no longer defines the issues to be tried. Here, the defendant has obtained leave to amend, and there has been no appeal against that order; and,

whatever may have taken place at the hearing of the application to amend, the court must, I conceive, regard the pleadings as they stand, the purpose of amendment being to determine the real question in controversy between the parties."

Sometimes, counsel argue strenuously in court as to whether questions can be asked on facts deleted as a result of an amendment. Going by the foregoing principles on the effect of an amendment, there is no reason why questions cannot be asked on facts removed from such an amendment provided reference is not made to the amendment. This is because facts are usually asked on matters relevant but extraneous to the pleadings. In the case of OKAFOR V. IGBCNGIDI³⁶ objection was taken to a question which was asked touching on facts deleted by an amendment. The objection, in my view, was rightly over-ruled by Okara, J.

Since an amendment relates back to the date of the filing of the pleading, a cause of action which accrues after the filing of a pleading can be included by an amendment. This principle has been judicially considered with reference to a writ.³⁷

When a plaintiff's pleading has been amended, this is not an opportunity for the

defendant to amend generally. The only amendment permissible by the defence is only a consequential one. That is, an amendment resulting naturally as a result of the amendment of the plaintiff. Any amendment without leave it is null and void and of no effect.³⁸

A party can be compelled to make amendments by the opposite party objecting that the statement of claim or defence does not either disclose a cause of action or that it does not disclose a defence. When such an objection is successfully taken, the opposite party is compelled to amend if only to save the pleading from being struck out. This is the subject covered in the next chapter.

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CHAPTER SIX

APPLICATION TO STRIKE OUT THE OPPONENT'S PLEADING

A party to a civil suit in the High Court can have the opponent's pleading struck out on the ground that it either does not disclose a cause of action or a defence to the statement of claim. Also, a party's pleading can be struck out if it is embarrassing, scandalous, or amounts to an abuse of the process of the court or that it is frivolous and vexatious. It is different from the process of dismissing a plaintiff's case on grounds of law or equity formerly referred to as a demurrer.

All the High Court civil procedure rules in the country provide for it but again there is no uniformity although in practice there is no difference in their applications. Order 16 Rule 25 of the Lagos High Court Rules provides as follows:

"The court or a Judge in Chambers may at any stage of the proceedings order to be struck out or amend any matter in any indorsement or pleading which may be unnecessary or scandalous or which may tend to prejudice, embarrass, or delay

the fair trial of the action, and may in any such case, if the court or Judge in Chambers shall think fit, order the costs of the application to be paid as between legal practitioner and client.

The provision in the Eastern States is worded differently and the difference is best brought out by reproducing the provision. Order 33 Rule 19 (East) provides as follows:

The court may at any time, on the application of either party, strike out any pleading of any part thereof, on the ground that it discloses no cause of action, or no defence to the action, as the case may be, or on the ground that it is embarrassing, or scandalous, or vexatious, or an abuse of the process of the court, and the court may either give leave to amend such pleading, or may proceed to give judgment for the plaintiff or defendant, as the case may be, or may make such other order, and upon such terms and conditions, as may seem just.

The provision in the other States of the Federation are the same as that of the East.¹ There are significant differences in the provisions of Lagos from those of the other States. By using the phrase, "on the application of either party" (in the East) it appears that an application to

strike out a pleading on the grounds stated in the order can only be at the instance of either the plaintiff or the defendant and, therefore, a striking out by the court suo motu, on any of those grounds is erroneous. On the other hand, the provision in the Lagos Rules, by using the expression "the court or Judge in Chambers may at any stage of the proceedings order to be struck out" makes it appear that in the Lagos State, the Court, suo motu, can strike out a pleading based on the grounds enumerated in the Rule. The reason for the exclusion of the parties is far from being clear. Usually, applications for pleadings to be struck out are at the instance of the opposing party and not of the court suo motu and a frequent use of such a power by the court should be discouraged to avoid allegations of the Judge taking sides. A better approach would have been to give power both to the court, and the parties to apply for a faulty pleading to be struck out on those grounds.

Again, the grounds on which such a pleading can be struck out are not uniform. While the Lagos Rules provide for striking out a pleading where it is "unnecessary or scandalous or which may tend to prejudice,

embarrass, or delay the fair trial of the action", the Rules in other States speak of striking out a pleading where it is "embarrassing, or scandalous, or vexatious or an abuse of the process of the court." More important is the omission in the Lagos Rule of the basic provision that a pleading can be struck out if it discloses no cause of action or defence. This omission is only explicable on the ground that to include the provision on a striking out when there is no cause of action or defence disclosed is to make it cover the same grounds as an objection on point of law or equity (formerly known as a demurrer) but an objection on points of law is available against a plaintiff only. The provisions in both Rules are inadequate. A similar provision in the English Rules² is as follows:

1. The court may at any stage of the proceedings order to be struck out or amend any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that:
 - (a) It discloses no reasonable cause of action or defence, as the case may be, or
 - (b) it is scandalous, frivolous or vexatious, or

- (c) it may prejudice, embarrass or delay the fair trial of the action, or
 - (d) it is otherwise an abuse of the process of the court, and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
2. No evidence shall be admissible on an application under paragraph 1(a).
 3. This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading.

The English provision quoted is more comprehensive than any of the Nigerian Rules and seems to have made provision for all the criticisms stated above.

Here again, the problem of the diversity in the rules and its disadvantages appear to be exemplified. This time the Rules are not only diverse but incomplete. The need for harmonisation cannot be overemphasized.

SCOPE AND NATURE OF THE RULE

The foregoing rule is said to be a useful and necessary one relating to pleadings.

The Rule enables the court:

- (1) by summary process, that is, without a trial in the normal way, to stay or dismiss an action or enter judgment against the defendant, where the pleading discloses no reasonable cause of action or defence, or where the action or defence is shown to be frivolous or vexatious or otherwise an abuse of the process of the court, and
- (2) to strike out any pleading or indorsement or any matter contained therein which does not conform with the overriding rule that a pleading must contain only material facts to support a party's claim or defence, and must not therefore be, or contain any matter which is, scandalous, frivolous or vexatious or which may prejudice, embarrass or delay the fair trial of the action or is otherwise an abuse of the process of the court.³

The Rule creates a situation where, by taking objection to a pleading, a party to the suit can compel his opponent to amend his pleading or have the offending pleading

or portion of it struck out, amended, dismissed, stayed and in the case of a defendant, judgment may be entered against him. The powers of amendment granted under this Rule is in addition to the general powers of amendment conferred by the Rules, for example, Order 25 Rule 1 (Lagos), and Order 34 (East). It must be remembered, however, that not every pleading which offends against the rule will be struck out and the applicant is usually expected to show that he is prejudiced by the faulty pleading. Still, "the defendant may claim ex debito justitiae to have the plaintiff's case presented in an intelligible form so that he may not be embarrassed in meeting it."⁴

In England, apart from the provision of the Rule, the courts have always had an inherent jurisdiction to stay or dismiss actions, and to strike out pleadings which are vexatious or frivolous, or in any way an abuse of the process of the court, and is virtually covered in this Rule.⁵ In view of our culture and set backs I think it would be dangerous to give wide power to the courts to strike out suit without the parties themselves taking the initiative in that direction.

Although it is not so clearly stated in the Nigerian Rules, the Rule should apply to an originating summons or a petition but not a mandamus.⁶

APPLICATION OF THE RULE

Although the Rule states that it can be invoked "at any stage of the proceeding" in the case of Lagos and "at any time" in the rest of the country, such an application must be made promptly. Thus, where the statement of claim is being attacked, the application has to be made before the defence is served. Where the application is an attack directed at the statement of defence, or any subsequent pleading, the application should be taken as early as possible and is not too late if brought even after the close of pleadings.⁷

The application to the court under the Rule should specify the kind of order(s) sought from the court, that is, either a dismissal, a striking out, or to enter judgment for the plaintiff, as the case may be.

No evidence is required or admissible where the application is that the pleading does not disclose a cause of action or a defence.⁸

The English practice, however, is that where the application is based on the other grounds, affidavit evidence is admissible. The reason for the distinction is not known and cannot be rationalised. If evidence is not admissible in one, why should it be admissible in the other? If the prejudice, embarrassment, etc. is not shown on the pleading then the case can proceed to trial.

According to Lindley M.R. in HUBBUCK V. WILKINSON⁹, it is only in plain and obvious cases that recourse should be had to the summary process under the Rule. Hence, the court must be satisfied that there is no reasonable cause of action.¹⁰

The court, however, will usually give leave to amend a defect.

The terms used in the Rule usually present difficulties in their application. For example, it is difficult to know when a pleading is vexatious, frivolous, or an abuse of the process of the court and is, therefore, better to take the phrase one after the other.

REASONABLE CAUSE OF ACTION OR DEFENCE

According to Chitty J. in
¹¹
OWEN V. MORGAN

"in point of law every cause of action is a reasonable one. Therefore, once there is a question fit to be decided by a Judge, the mere fact that the case is weak and is not likely to succeed, is no ground for striking it out."¹²

Consequently, where a material averment has been omitted in the pleading and as a result this has caused the pleading to disclose no cause of action or defence, the court will rather give leave to amend rather than dismiss, strike it out or give judgment. It is only where no amendment will cure the defect that the case will be dismissed or judgment entered against the defendant.¹³ The same considerations are given to the defence and, therefore, so long as the defendant has not made admissions and has raised questions triable by the court, his defence will be gone into.

EMBARRASSING, SCANDALOUS
AND VEXATIOUS PLEADINGS

Sometimes counsel in drawing up their pleadings go completely outside the subject matter of the suit to allege facts which are most unnecessary for the proof of the case. Such irrelevant statements of facts which are included for motives other than the proof or defence of the Statement

claim or defence respectively are regarded by the law, as embarrassing, scandalous and vexatious. The reason for the choice of these words is not known. The Lagos Rule¹⁴ has appropriately jettisoned most of these words and has replaced them with suitable words such as "unnecessary", delay or fair trial of the motion" and "prejudice." For example, in an action for recovery of premises based on arrears of rent, it will be most irrelevant to plead, as has happened in an unreported case, that defendant is having three wives, twenty children and harbours not less than ten holiday makers, causing noise and disturbance in the premises. Such an averment is certainly a delay of the fair trial of the case, an embarrassment well as a prejudice to the defendant. However, nothing relevant and sustainable should be regarded as scandalous and embarrassing. Mere prolixity is not embarrassment.

CONCLUSION

The last six chapters have shown how much in disarray or divergent the Rules applicable in the country are. In the next chapter some suggestions and recommendations will be made with a view to improving the Rules and harmonising them country-wide.

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5. Stephenson V. Garnett [1898] 1 QB 677.
6. A.G. of Duchy of Lancaster V.
L. & N. W. RY. [1892] 3 Ch. 274.
See also Wright V. Prescott U.D.C.
[1916] 115 L.T. 772.
See Electrical Co. V. Attorney-
General for Ontario [1919] A.C. 687.
7. Tuck V. Collinson, 34 W.R. 354 but
the application was refused after
the application had been set down
for hearing in Fletcher V. Bethom
68 L.T. 438.
8. A.G. of Duchy of Lancaster V.L. and
N.W. RY [1892] 3 Ch. 278.
9. [1899] 1 QB 86, 91.
10. Hetton Coal Co. V. Haswell Co.
[1898] 1 Ch. 465.
11. [1887] 35 Ch.D. 492.
12. Wenlock V. Moloney [1965] 1
WLR 1283 or [1965] 2 ALL ER. 871.

13. Republic of Peru V. Peruvian Guano Co.

/1887/ 25 Ch.D. 496.

14. Order 16 Rule 25.

CHAPTER SEVEN

CONCLUSION AND RECOMMENDATIONS

The solution of the problem resulting from the diversity of the Rules on pleadings applicable in the High courts in the country lies in harmonisation of the Rules. The harmonisation desired need not be on orthodox lines. Nigerian legal system, which is a modification of the British system appears to thrive on orthodoxy and any proposals for drastic change are at best regarded as novel and, if not tailored to the British system, not good enough. This approach need not be so, and a complete or radical departure from the British system is what is desired.

A thorough examination of the rules of pleading applicable in India, Ghana and Nigeria reveals two trends. The first trend is to endeavour to keep pace with amendments in Britain relating to practice and procedure generally and pleadings in particular. In this context, a country whose rules are not as close to the changes in the British Rules as possible is regarded as a country with out-dated rules of procedure. This is typical of Nigeria. This, to say the least, is a colonial mentality. We have become helpless in extricating ourselves from the shackles of British legal thoughts.

We seem to have forgotten that the changes in British practice and procedure along a particular line are consistent with the growth of other spheres of the British economy and culture. For example, the practice of a defendant "appearing" in a civil suit (not part of pleadings) by posting the documents of "Appearance." This provision has been incorporated in the **Lagos Rules**. Order 8 Rule 1(i) states as follows:

"A defendant may enter an appearance by delivering or sending by post to the Registrar the requisite documents"

In making this provision we have not taken into consideration the efficiency of our postal services and our attitude to work.

The second trend is not to endeavour to keep pace with changes in Britain, but growing at its own pace and making sure that the orthodox British approach is not departed from. This appears to be the position with the Indian Civil Procedure Code.

The method of harmonising the Rules that will be proposed here will be neither of the two trends shown above, but will be a complete departure from the old practice or at least, a serious modification of the existing rules. The first will involve a total abolition of

pleadings and all its technicality and the second suggestion will be a retention of pleading, but completely rid of its technicality but retained for evidentiary purposes only.

CASE FOR ABOLITION OF PLEADINGS

Background History:

It was noted in Chapter One that by the Supreme Court Ordinance of 1914 filing of pleadings in the Supreme Court for the purpose of a civil suit was not mandatory, and pleadings were to be filed only if the court so ordered.¹ The effect of this provision was that parties generally litigated without pleadings. The reason for not making pleadings mandatory was not clear but it would appear that it was based on the level of literacy in the country at the material time. Order 25 Rule 2 of the 1914 Civil Procedure Rules states that

in making any such order, the court shall have regard to the conditions of the parties, and shall not require any party to file a written statement who, from want of education, is incapable of preparing or understanding the same.

The main disadvantage in litigating without pleadings appeared to be the difficulties of determining the issues in controversy

between the parties. Thus in LARYEA V. QUAO², the West African Court of Appeal complained of "waste of time" as a result of the absence of pleadings. It will be seen later that the filing of pleadings appears to waste more time than absence of pleadings because of endless amendments, extensions of time, asking for better and further particulars and a host of other interlocutory applications.

As was also seen in Chapter One, the attempt to litigate in civil suits in the High court without pleadings was not peculiar to the 1914 Supreme Court of Nigeria Ordinance. Even in England there had been moves to abolish pleadings and two instances in British Legal History can be mentioned here. In 1880, a Committee on Procedure was set up presided over by Lord Coleridge, C.J; and this committee was expected to recommend the abolition of pleadings.³ It did recommend that no pleadings should be filed in any action without leave of the court. This recommendation was embodied in a Rule made in 1897. However, the lawyers apparently clung to their old idea of trial with pleadings and the court always granted leave to file pleadings just for the asking. Consequently, the Rule fell into disuse and was revoked in 1933.

Again, there was the Evered Committee on the "Supreme Court Practice and Procedure" whose final report was published in 1953.⁴

In the first of its recommendations, the 1880 stand was taken namely that parties should be encouraged to go to trial without pleadings. This recommendation was embodied in a new order called Order 14^B, made in 1953. Under this Order a party, if he so decided, could endorse his writ with a notice that he intended to go to trial without pleadings. Such a notice must be supported by an affidavit deposed to by the plaintiff or any fit person, stating the following facts amongst others

- (a) summarising the questions believed to be in controversy between the parties;
- (b) stating the grounds for the opinion that the case was suitable to be tried without pleadings.

The aim of Order 14^B was to facilitate speedy and less expensive trials. The arguments raised against Order 14^B were as follows:

- "1. That it is not easy to express what the issues are with clarity or precision without stating the whole case of each party,
- 2. that a party would usually prefer to state his own case rather than to have the opposite party state it for him; and

3. that alternative, and still more inconsistent, claims or defences are better left to be realised by the party wishing to put them forward.⁵

It has to be mentioned here that the problem of expressing the issues in a case or the issues in controversy between the parties is not aggravated by the absence of pleadings. Even where pleadings are filed, it can be stated without fear of contradiction that issues in controversy are hardly settled until perhaps judgment has been delivered in the case. This is because of the elastic Rule that amendments can be effected at any stage of the trial until judgment. Sometimes evidence is led in court which is not pleaded and counsel then hurries up seeking to amend his pleadings to accord with the evidence. There are a host of grounds for amendment which make the issues in controversy almost as uncertain, if not more uncertain, than when pleadings are not filed.

There is also no question of one party stating the case for the other. Even with pleadings, by a number of interlocutory procedures, such as interrogatories, better and further particulars, an opposite party is compelled to state more facts than he would willingly wish to do.

The second major recommendation of the Evershed Committee was for the increased use of

originating summons. By this means the entire facts and evidence is put down on affidavit by the parties involved and thus pleadings are dispensed with. The deponents will be subjected to cross-examination if need be. The sole aim was to save time and reduce costs. The originating summons has been in use since then; but, again, due to the conservatism of the profession, it has been confined to cases where the facts are not seriously contested by the parties, and has been held to be unsuitable otherwise.

THE EXPERIENCE OF

THE CUSTOMARY COURTS IN NIGERIA:

The customary courts in the former Eastern Nigeria, when they existed, adjudicated without pleadings and this covered the situation even in serious land cases. There was no miscarriage of justice simply because pleadings were not filed. In fact, better and pure justice was administered, except for cases of corrupt judges which was not peculiar to those courts. What happened was that after the issue of a writ, the parties went to court and the case started with the plaintiff and his witnesses. If there was need for a plan, the court ordered one, and such a plan was usually drawn up by a Government Surveyor at the litigants' expense. There was no question of amendments, some of which are frivolous and

a source of considerable delay to the present day. Some amendments are even designed by parties deliberately to delay cases in court and to buttress false claims which are included in amendment as after thoughts. This is why I describe the trial in those courts as "pure"; pure because parties and witnesses gave evidence in court as best as they knew the facts of the case and not giving evidence according to a pleading which is sometimes padded to make a good case.

DISADVANTAGES OF PRESENT DAY PLEADINGS

In present day cases, the party to the suit is beset with two main problems. In the case of a plaintiff or a counter-claimant, the first problem is to ensure that the facts of his case disclose a cause of action known to the substantive law governing the subject-matter of the action. Secondly, he has to formulate his case in such a way that will accord with the procedural rules to enable the court adjudicate on the facts and to give judgment in his favour. In the case of a defendant, his liability or otherwise under the substantive law is one matter. But the more important point is that the defendant in modern litigation must ensure that he denies the allegation of the plaintiff in such a way that he should not be seen or understood to be indirectly admitting liability.

In other words, the defendant's denials must not be evasive or else, quite apart from his innocence, he may be held liable on purely technical grounds. These and other problems highlight the danger inherent in the system of adjudication by pleadings. We cannot shy away from the fact that nowadays substance is fast giving way to procedural technicality and form, and a party may lose his family land, for example, inherited from his ancestors from time immemorial through an error in pleading. So, generally, although statistics are not available, it can be said that a good proportion of cases won or lost, may be as much as 50%, depend on pleadings, in utter disregard of the facts of the case and substantive law. Such a situation ought not to be tolerated.

There is no gainsaying that in modern times the rules of pleading have become very technical and a few examples may be noted. The cardinal rules of pleadings are that:

- (a) every pleading must contain facts not law,
- (b) it must contain only material facts,
- (c) it must not state the evidence by which these facts are to be proved.
- (d) It must allege facts, positively, precisely, distinctly and briefly.

As has earlier been noted, these prerequisites of a good pleading are very difficult to obtain in practice. What is in fact wrong with pleading law provided that conclusions are not made thereon? Lord Denning in the case of RE VANDERVELL'S TRUST (NO. 2)⁶ was emphatic that the fact that a party had pleaded law did not bind him to the point of law canvassed and the counsel is free to argue other points in addition.

There is also sometimes a very narrow distinction between facts and evidence and the wise advice is that where there is a doubt as to whether a given set of facts is law or evidence, it should be pleaded to avoid insufficient pleading at the trial. These are some examples of the technical nature of pleadings. Again, certain allegations must be pleaded in order that the plaintiff or whoever is relying on them will be able to lead evidence or defend himself at the trial. These are undue influence, fraud, misrepresentation, allegations of commission of crime in a civil suit, unenforceability of a document, and many others. Besides, the Rules have laid down very many other technical modes of pleading, particularly in Lagos State. These are certain particulars in libel suits, conditions precedent, account stated and others.

The situation is even more precarious for the defendant who does not plead correctly. It is now not enough to plead a general traverse. The defendant must go on to deny the allegations of the plaintiff specifically and in substance. To plead, for example, that the "defendant is not in a position to admit or deny (the particular allegation in the statement of claim) and will at the trial put the plaintiff to proof" has been held to be insufficient denial.⁸ There are other technical principles of pleading such as confession and avoidance, objections of points of law, striking out of pleadings for failure to disclose a cause of action or defence and many others. All these technicalities are a disadvantage to the litigant and epitomise a big drift away from substantive justice to form. Justice has ceased to be pure.

RECOMMENDATION

As was mentioned earlier the proposals for harmonisation of the Rules will not take the orthodox approach. What is recommended below is a complete departure from the old practice and these are of two types:

- (1) Abolition of pleadings in all the High Courts of the country. Bearing the foregoing discussions in mind, the new approach will involve only the issuance of the writ.

After the issuance of the writ what follows is the oral evidence, followed by the witnesses, then the defendant and the defence witnesses. If it is a case involving a plan, this can be ordered and the parties will be responsible for producing their own plans.

2. This second proposal is an alternative to the first one. This second proposal involves the retention of pleadings but completely stripped of their technicalities. Before the trial, parties will be allowed to exchange pleadings, in the nature of abstracts in a criminal case, but such pleadings will be for evidentiary purposes only. That is, the purpose of exchanging pleadings is just to enable a party to have an idea of the nature of the case of the opponent but at the trial he will be free to depart from it (without any amendment), and will not be bound by what he has stated in the abstract. The pleadings so exchanged will be used only to contradict the maker, his privies or witnesses, if they depart materially from its contents just as any document made previously by a party in writing prior to the trial.

If the departure is material and unsatisfactorily explained, the entire area governed by those facts will attract no evidentiary weight at all. This is what I mean by filing a pleading only for evidentiary purposes.

THE ADVANTAGES OF THE TWO PROPOSALS

Of recent, and more than ever before, there has been a public outcry about congestion in the courts in both civil and criminal cases. In fact the problem is not new and the recent outcry might have been as a result of sharpened or increased public awareness. There has always been an inexplicable delay in civil cases in the High Courts. The main area of delay has been in respect of pleadings. In land cases, the problem is even aggravated by the need to file plans drawn up by land surveyors. One way of decisively dealing with the problem of delay(s) is by the abolition of pleadings all over the country or by modifying it as discussed above to strip it of all its technicalities. There are other advantages to be gained by accepting these proposals. Some of these advantages are as follows:

1. More Speed and Less Costs

The longer the period a case

stays in court the greater the expense or costs. These arise from a host of interlocutory applications such as motions for leave to amend, to extend time, further and better particulars et cetera.

It has been argued that the use of pleadings in its present form saves costs. This is because the parties usually know what case they have to meet at the trial and when the strength or weakness of their respective cases is known, it is easy to settle the case out of court without going through the whole process of trial. In other cases, since the issues in controversy between the parties are considerably narrowed down, parties can procure only witnesses in proof ⁹ or disproof of the issues so narrowed down.

In principle, there is much force in these arguments but in practice none of the principles is tenable or realistic. The number of cases where the parties are compelled to compromise as a result of pleadings, even without statistics, is negligible. Most cases go through the entire spectrum of trial and once a case goes through a trial the

usual incidents of interlocutory applications causing delays will arise. The abolition or modification of the effect of pleadings will definitely quicken the trials in the High Courts and will thus reduce costs.

Absence of Technicality and Judgment on the Merits

This point has been discussed before. To say that form is not being preferred to substance in the High Courts as a result of pleadings is to be hypocritical. A litigant can lose a case in which the facts are in his favour purely on technical grounds. It has been argued that the problem of drawing up pleadings in the present formalistic and technical style is usually left for those who have had adequate training to cope with it. This is true, but it must be frankly admitted that even very senior counsel fall into the mesh of the technicality of pleadings.

Reduction of Interlocutory Applications

The abolition or modification of pleadings will drastically reduce the need for many interlocutory applications such as amendments. Since there will be

no pleadings, there will be nothing to amend. Many other applications such as better and further particulars, interrogatories, will die naturally. There will also be no need to strike out a plaintiff's or defendant's pleadings for failure to disclose a cause of action or a defence. If at the close of the plaintiff's case, there is no case on points of law or equity, these can be raised. It is only when it fails that witnesses for the defence can be called. Since there are only a few cases where points of law and equity are raised to destroy a plaintiff's case, it can cause no problems.

The main argument against the abolition of pleadings has been that the issues in controversy will not be known by the parties until evidence is commenced in court, in which case the opposite party will be taken by surprise. This argument has been taken care of by the second proposal to rid pleadings of their technicality by retaining them for evidentiary purposes only.

Finally, the harmonisation should take the form of making a country-wide abolition of pleadings or in the alternative to use pleadings only for evidentiary purposes. To do this will be to solve the problem once and for all. The technicality inherent in civil procedure

and practice has got to an extent where the courts sometimes have found it difficult to do justice even in a case glaringly calling for justice. If a party's case is not properly pleaded a Judge is not expected to go outside the pleadings seeking to do justice, or the Judge will be caught "off-side." In ADELEKE V. AWOLIYI,¹⁰ Ademola C.J.F. correctly expressed the following views:

"..... each party has a right to have the dispute determined upon the merits, and courts should do everything to favour the fair trial of the questions between them. Blunders must take place from time to time and it is unjust to hold that because a blunder during interlocutory proceedings has been committed, the party blundering is to incur the penalty of not having the dispute between him and his adversary determined upon the merits. All such cases of blunder may be remedied by payment of costs or the imposition of terms and conditions."

The learned Chief Justice made the remarks on the subject-matter of leave to amend pleadings. Now, we have reached a stage of technicality in pleadings where injustice will necessarily be occasioned and amendments alone cannot solve the problem. Indeed, amendments are a source of delays. The only solution is to get rid of pleadings either completely or rid them entirely of their technicalities.

REFERENCES

1. Order 25 of the Schedule to the Supreme Court Ordinance.
2. (1940) 6 WACA 228.
3. See the Article "The Present importance of Pleadings by I. H. Jacob in 1960, Current Legal Problems P. 171, 178.
4. 1960, Current Legal Problems Page 178.
5. I. H. Jacobs, 1960, Current Legal Problems P. 178.
6. [1974] Ch. 269, 322.
7. Lewis and Peat Ltd. V. Akhinmien [1985] 1 N.W.L.R. Part 2 P. 367.
8. Atolagbe v. Shorun [1985] 1 N.W.L.R. Part II P. 360 at 367.
9. I. H. Jacobs "The Importance of Pleadings" 1960, Current Legal Problems 171, 183.
10. (1962) 1 ALL N.L.R. Part 2, 260 262 - 3.