IN THE HIGH COURT OF JUSTICE
OF EDO STATE OF NIGERIA
IN THE UROMI JUDICIAL DIVISION
HOLDEN AT UROMI
BEFORE HIS LORDSHIP, HON.JUSTICE P.A.AKHIHIERO,
JUDGE, ON TUESDAY THE
15TH DAY OF MAY, 2018.

SUIT NO: HCU/1CA/2017

BETWEEN:
P.E. AYEWOH-ODIASE ESQ é é é é é é é é é é é ..RESPONDENT

AND

MR. HENRY BALOGUN
(Suing for himself and on behalf
of the Balogun family of Efandion
Uromi) } é ..é é é é é é ..APPELLANT

JUDGMENT

This is an appeal against the Ruling of the Amendokhian District Customary Court, delivered on the 16th of March 2017 wherein the Court granted leave to the Respondent to amend his claim and to deem the amended claim as properly filed and served, the appropriate filing fees having been paid.

The facts giving rise to the ruling culminating in this Appeal is that the Respondent sued the Appellant in the lower court for declaration of title to land, an order of specific performance and general damages for breach of an agreement.

At the lower court, the Respondent led evidence and closed his case. The Appellant opened his case, gave his evidence in chief and was being cross-examined when the Respondent filed an application to amend his claim.

The Appellant filed a counter affidavit in opposition to the motion for amendment. The Respondent filed a reply to the counter affidavit. The application was argued and the court granted the amendment.

Dissatisfied with the ruling of the lower court, the Appellant filed his Notice of Appeal, containing a sole Ground of Appeal.

The Ground of Appeal bereft of its particulars is as follows:

"The Learned President and members erred in law when they granted leave for the Claimant/Respondent to amend his claim."

Thereafter, Counsel for the parties filed and exchanged their respective briefs of arguments in consonance with the rules of this Court.

In his Brief of Argument, the learned Counsel for the Appellant, F.E.Eireyi Esq., identified a sole Issue for Determination as follows:

Whether the lower court was right to grant the respondent's amended claim.

On his part, learned counsel for the Respondent, C.O.Akue Esq., formulated two Issues for Determination as follows:

1. ***Whether the appellant's notice of appeal filed on the 22nd of May, 2017 against the interlocutory decision of the Lower Court delivered on the 16th day of March, 2017 is not incompetent and invalid? And if the answer is in the affirmative;***
2. ***Whether the Lower Court was right in over-ruling the appellant's objection to the respondent's application for leave to amend his claim?***

Before the appeal was argued, the learned counsel for the Appellant observed a defect in his appeal and filed a motion seeking extension of time to seek leave to appeal, leave to appeal and extension of time to appeal. This motion was not opposed by the learned counsel for the Respondent and was accordingly granted.

Thereafter, both counsel adopted their briefs of arguments.

In his brief of argument the learned counsel for the Appellant submitted that amendments are allowed to correct errors or defects in the proceeding. He said that the Respondent led evidence, closed his case and the Appellant had concluded his evidence in chief and was being cross examined when the Respondent applied to amend his claim.

He contended that at that stage, the Appellant was no longer in a position to reply or counter the Respondentôs claim. Furthermore, he maintained that the amendment will change the nature of the claim before the court and ought not to be allowed. According to him, the amendment is introducing a new concept of a ñbinding agreement between the partiesò.

Learned counsel referred the Court to the case of: ***JESSICA TRADING CO. LTD V. BENDEL INSURANCE CO. LTD (1993) 10 LRCN 233 at page 245*** where Nnaemeka-Agu JSC held thus:

"Any amendment which will result in injustice to the other party or which will violate the rules of audi-alteram partem ought not to be allowed. The

rule will be infringed if an amendment is introduced at such a stage that the other side no longer has the opportunity of adducing its own answer to the point which that the amendment has enabled the applicant to introduce."

He further contended that the amendment is not to correct any error in the proceedings and for a court to grant a specific performance there must be an agreement.

He submitted that a party cannot ask for specific performance while at the same time asking for damages as is being done by the Respondent.

Counsel submitted that the principle has always been that no amendment would be allowed if it would enable the applicant to over reach his adversary. He concluded that the amendment was not meant to prevent any injustice to the Respondent but to reformulate the claim of the Respondent thereby over reaching the Appellant.

He urged the Court to resolve the sole issue in favour of the Appellant and allow the appeal accordingly.

Before adopting his brief of argument P.E.Ayewoh Odiase Esq. informed the Court that he was abandoning his Issue One and the arguments in support because the said issue has been overtaken by events.

In his Issue Two, the learned counsel submitted that the lower court was right in over-ruling the objection of the appellant to the respondentôs motion on notice for amendment of his claim.

He submitted that the argument of the appellant to the effect that the respondent through his amendment introduced a new concept is totally misconceived. That an amendment can be made to reflect the real issue in controversy.

He further submitted that no new issue was introduced by the respondent as the subject matter of the claim for which the amendment was sought, borders on specific performance of the contract between both parties.

He contended that the amendment was made to properly identity and bring into focus, the issues in controversy between both parties. That the essence is to cure, add to or correct errors in the processes already filed. For this view, counsel relied on the case of: ***Yesufu V. Obasanjo (2003)16 NWLR part 847, page 532 at page 55 para, H.A.***

He posited that the amended claim and the earlier claim are one and the same except for some errors and omissions which were corrected by the amendment.

He contended that since the Appellant is still in the witness box and has not concluded his case, he can apply to the Court to recall the Respondent to further cross-examine him in respect of the amended claim. He maintained that the submission of the appellantôs Counsel that the amendment will occasion injustice to the appellant or violate the rule of ***audi-alteram partem*** is misconceived.

He submitted that it is trite law that an amendment can be made at anytime, before judgment. On when the Court will refuse to grant leave for amendment he referred to the case of: ***Ajila V Lawal (2006)2 FWLR part 312 page 251 at pp 2530 para F-F.***

He therefore urged the Court to resolve issue two in the affirmative and dismiss this appeal with substantial cost same being incompetent, unmeritorious and frivolous.

I have carefully considered all the processes filed in this appeal, together with the arguments of the learned counsel for the parties.

Upon a careful examination of the Issues formulated by the learned counsel for the parties I am of the view that the Issues are essentially the same. In the event, I adopt the Issue as formulated by the Appellant with a slight modification to read as follows:

Whether the lower court was right when it granted the respondent's application to amend the claim?

Generally, an amendment can be made at any time before judgment. See: ***Celtel (Nig.) Ltd. vs. Econet Wireless Ltd. (2011) 3 NWLR (Pt.1233) 156 at 167.***

An amendment for the purpose of determining the real question in controversy between the parties ought to be allowed at any stage of the proceedings unless such amendment will entail injustice or surprise or embarrassment to the other party or the applicant is acting mala fide or by his blunder the applicant has done some injury to the other party which cannot be compensated by cost or otherwise. See the case of: ***Bank of Baroda vs. Iyalabani (2002) 13 NWLR (Pt.785) 551 at 593.***

In the instant case, the Respondent was granted leave to amend his claim to incorporate the phrase: ñ***pursuant to the binding agreement between both parties"*** in paragraph 1 of the Claim.

In paragraph 4 of the affidavit in support of the motion for amendment, the reason for the amendment was stated to be to: ***"reflect the real issue in controversy."***

The main thrust of the Appellants objection is that the amendment has altered the nature of the claim.

I have compared the amended claim with the original claim and I observed that the amendment has not introduced anything that is new. As a matter of fact, paragraph 2 of the original claim already contained a similar phrase which was couched thus: ***"…the said agreement which is legally binding on both parties."*** So it cannot be said that the amendment altered the nature of the claim. The amendment only served to emphasize the element of a ***binding agreement between both parties*** which appears to be the real issue in controversy. It is this agreement which the Respondent is seeking to enforce in the suit.

In drafting the claim; the element of the agreement ought to have featured at the beginning, in the very first paragraph. The Respondentôs counsel brought the application for amendment to correct this apparent anomaly. It is settled law that an amendment can be granted to prevent the manifest justice of the case from being defeated or delayed by formal slips which arise from the inadvertence of counsel. See: ***Celtel (Nig.) Ltd. vs. Econet Wireless Ltd. (2011) 3 NWLR (Pt.1233) supra at p.168.***

The point must be emphasised that the era of allowing technicalities to impede justice is over. In all civil litigations, it is the duty of the court to do substantial justice and to allow formal amendments as are necessary for the ultimate achievement of justice. Litigation is not a fencing game in which the parties engage themselves in a whirling of technicalities. See: ***Adewumi vs. A.G. Ekiti State (2002) 2 NWLR (Pt.751) 474 at 507.***

Again, it is settled law that the inherent power of the court to amend is not to be mechanically applied. Each case must be considered on its merit. The court must consider the attitude of the parties, the nature of the amendment sought in relation to the main suit, the questions in controversy, the time factor, the stage of the proceedings and indeed, all circumstances surrounding the case. See: ***Nigerian Dynamic Ltd. vs. Emmanuel Dumbai (2002) 15 NWLR (Pt.789) 139 at 154.***

Applying the foregoing principles to the instant case, I am of the view that the amendment granted was necessary for the purpose of determining the real question in controversy between the parties.

Furthermore, the time is alright. I uphold the submission of the learned counsel for the Respondent that the ***audi alteram partem*** rule has not been breached in any way. Since the Appellant is still in the witness box and has not concluded his case; he can apply to the Court to recall the Respondent to further cross-examine him in respect of the amended claim. He is also at liberty to call witnesses to respond to the amendment.

On the whole, the sole issue for determination is resolved in favour of the Respondent. The Appeal is accordingly dismissed and I hereby affirm the Ruling of the Amendokhian District Customary Court, delivered on the 16th of March 2017.

Costs is assessed at N20, 000.00 (twenty thousand naira) in favour of the Respondent.

P.A.AKHIHIERO
JUDGE
15/05/18

COUNSEL:
F.I. Eireyi Esq.é ..Appellant

P.E.Ayewoh Odiase Esqé é é é é é é é é é é é é é é é Respondent