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- Otun & Ors vs. Otun and Anor (2004) LPELR-2832 (SC);*  
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*Industry (2006) 7 NWLR (Pt. 978) 198.*

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**Justina Luna vs. The Commissioner of Police, Rivers State Police Command (2018) JSCNLR (Vol. 5), 315 S.C.**

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**1. COMPANHIA BRASIFEIRA DE  
2. INFRAESTRUTURA, (INFAZ)  
AND  
COBEC (NIGERIA) LIMITED**

**SC. 139/2005**

**IN THE SUPREME COURT OF NIGERIA  
HOLDEN AT ABUJA**

**FRIDAY, 2<sup>ND</sup> FEBRUARY, 2018**

**BEFORE THEIR LORDSHIPS**

**OLUKAYODE ARIWOOLA  
KUMAI BAYANGAKA' AHS  
AMINA ADAMU AUGIE  
PAUL ADAMU GALINJE  
SIDIDAUDABAGE**

**JUSTICE, SUPREME COURT  
JUSTICE, SUPREME COURT  
JUSTICE, SUPREME COURT  
JUSTICE, SUPREME COURT  
JUSTICE, SUPREME COURT**

*COMPANY LAW: Company incorporated in a foreign country – Legal personality – Whether can validly sue in Nigerian courts.*

*PRACTICE AND PROCEDURE: Where a party did not challenge material evidence either cross examination or appeal – Status of such evidence.*

*EVIDENCE: Presumption – Unchallenged evidence – Whether deemed to be accepted.*

*EVIDENCE: Presumption of position of the law in a foreign country – Documents made in a foreign country exhibited – No opposition or challenge – Presumption under S. 149 of the Evidence Act – Relevant considerations.*

*STATUTE: S. 149 of Evidence Act 2011 – Purport, essence and significance.*

## **Issues for Determination**

- 1. Whether the Court of Appeal was right in holding that the appellant ought to have complied with the conditionality contained in section 31(1) to (8) of CAMA also enumerated in the judgment of the court on page 267 of the record of appeal. (Distilled from grounds 1 and 2 of the amended notice of appeal).**
- 2. Whether the Court of Appeal was right in holding that the appellant was not a contributing shareholder of the respondent. (Distilled from Ground 3 of the amended notice of appeal).**

## **Facts of the Matter**

The appellant, Companhia Brasileira De Infraestrutura (INFAZ) filed a Winding Up Petition before the Federal High Court, Lagos on the ground that the relationship between the Petitioner, respondent and the respondent's Chairman, Chief Ogunbanjo, had deteriorated. And pursuant to Rule 10 of the Companies Winding Up Rules, 1983, the petitioner brought a motion on notice dated 18 March, 1992 seeking an order to advertise the petition filed.

The respondent, in opposition to the application of the petitioner filed a 19 paragraphs affidavit opposing the petition. The respondent also filed a motion on notice dated 31 March, 1992 seeking an order of court striking out/staying/dismissing the petition filed.

The grounds for opposing the petition were:

- (a) that the petitioner was neither a creditor nor a contributory;**
- (b) that they are not one of the persons allowed to present a petition under section 401 of the Companies and Allied Matters Act 1990;**
- (c) that the petitioner was not a party to the Joint Venture Agreement (JVA) entered into with Companhia Brasileira De Entrepósitos E Comercio and the Nigeria partners;**

- (d) that the petitioner is not a known legal entity;**
- (e) that Companhia Brasileira De Entrepotos E Comercio of Brazil was the only foreign shareholder known to the respondent.**

In opposition to the motion by the respondent, the petitioner filed a 4 paragraph affidavit dated 6 July, 1992 annexing Exhibits AA-AA2.

In his ruling delivered on 3 November 1992, Edet J of the Federal High Court, Lagos struck out the petition and the motion to advertise the petition for being illegal. The trial judge held that for the change of name of the petitioner in Brazil to be legally cognizable in Nigeria, it must also conform with section 31(3),(5),(6)(7) and (8) of the Companies and Allied Matters Act 1990. It was also held that the petitioner, INFAZ of Brazil is not a legal person in Nigeria and therefore cannot be a creditor or shareholder in the respondent's company.

The petitioner was dissatisfied with the ruling of the Federal High Court and filed a notice of appeal containing two grounds of appeal. The Court of Appeal in dismissing the appeal held that since no foreign law, in particular Brazilian Law, governing the consequence of change in the name of the company was placed before the court and none was pleaded, it follows that to legally effect a change of name, the petitioner ought to have complied with conditions contained in section 31 of CAMA.

The court further held that once there is doubt as to the legal identity of a legal fiction or personality which has undergone metamorphosis by way of change in name as in the instant case, a court of law must get that doubt cleared before allowing the new legal entity to proceed with a winding up petition.

Being aggrieved with the judgment of the lower court delivered on 26 November, 2003, the appellant further appealed to the Supreme Court in its notice of appeal dated 8 December, 2003 and filed on 19 December, 2003.

**Held:** *(Unanimously allowing the appeal)*

1. *A foreign incorporated company whose State is recognized by Nigeria can sue in Nigerian courts.*

**This court decided in Saebby Jernstoberi Maskinfabric A/S vs.**

**Olaogun Enterprises Ltd. (1999) 14 NWLR (Pt. 637) 128** which was cited to the court below that the principle of law that a foreign corporation, duly created according to the laws of a foreign state recognized by Nigeria, may sue or be sued in its corporate name in our courts is part of the common law.

The court per Ayoola JSC at p. 146 went further to state:

**“It suffices to say that the appellant company which was admitted by the respondent to be a limited liability company with its registered office in Copenhagen properly sued in its corporate name”.**

In the *Saeby Jernstoberi Maskinfabric A/S* case (*supra*) it had been argued by counsel on behalf of the respondent that even though it may be a legal entity in its country of incorporation, it had no artificial personality in Nigeria since the Companies Act is silent on whether a company such as the appellant would be allowed to sue or not. This court held that the submission was misconceived.

*(P 10 Paras A–F)*

2. *Where material evidence are not challenged*

At the trial court Edet J. concluded that the plaintiff (petitioner) was duly incorporated under the laws of Brazil and the company had changed its name (see page 102 of the record of appeal). And in the lower court Aderemi JCA (as he then was) made the following findings:

1. **Going by the facts of the case as agreed by both parties Companhia Brasileira De Entrepotos E Commercial (COBEC) is a contributory.**
2. **The company, Companhia Brasileira De Entrepotos E Commercial (COBEC) can justifiably bring the petition. (See pages 264 and 266 of the record).**

**The respondent did not cross-appeal against the above findings to the court below or to this court. The consequence in law is that the said findings are deemed to be correct. See: Standard (Nig.) Engineering Co. Ltd Anor vs. Nigerian Bank of Commerce of Industry (2006) 7 NWLR (Pt. 978) 198. (Pp 10--11 Paras F–B)**

3. *Presumption as to documents under S. 149 of the Evidence Act, 2011*  
**Professor Kasunmu SAN who argued the appellant's case submitted that there is a presumption under section 149 of the Evidence Act that Exhibits AA-AA2 represent the position of the law in Brazil on the change of name of the appellant until the contrary is proved by the respondent who did not challenge the authenticity of Exhibits AA-AA2.**

**I entirely agree with this submission. Section 149 of the Evidence Act provides:**

**“149. When any document is produced before any court purporting to be a document which by the law in force for the time being in any country other than Nigeria would be admissible in proof of any particular in any court of justice in that country, without proof of the seal or stamp or signature authenticating it, or of the judicial or official character claimed by the person by whom it purports to be signed, the court shall presume**

- (a) that such seal, stamp or signature, is genuine; and**
- (b) that the person signing it held, at the time when he signed it, the judicial or official character which he claims, and the document shall be admissible for the same purpose for which it would be admissible in the country where the document is produced”.**

**A In the ruling of the High Court at page 102 of the record of appeal Edet J. Said:**

**B “I have carefully studied the arguments of both sides. There is no denying the fact that COBEC of Brazil changed its name in Brazil to INFAZ of Brazil Exhibits AA-AA2 testify to that fact, if Exhibits AA-AA2 accord with the Brazilian trade law, then INFAZ and COBEC are one and the same company in Brazil”.**

**D In view of the finding of the trial court that Exhibits AA-AA2 accorded with Brazilian law on the change of name, it was wrong for the Court of Appeal to embark on a futile exercise seeking evidence of compliance with the Brazilian law governing change of name of the company and proceeding to hold that once there is doubt as to the legal fiction or personality which has undergone some metamorphosis by way of change in name and there is no disclosure as to the legality of the change in name, a court of law and justice must get that doubt patently cleared before allowing a new legal entity to proceed with winding up petition. (Pp 11 – 12 Paras B – D)**

**F Per Akaahs (JSC)**

**G “If COBEC in Brazil was changed to INFAZ it follows that INFAZ is a contributory shareholder of the respondent company and therefore has the locus standi to apply for the winding up of COBEC (NIGERIA) LIMITED.**

**H The appeal is meritorious and it is hereby allowed. The judgment of the Court of Appeal, Lagos delivered on 26 November, 2003 in Appeal No. CA/L/237/95 is hereby set aside. The matter is remitted to the Chief Judge of the Federal High Court for assignment of suit No. FHC/L/CP/M14/92 to another judge other than Edet J. for the expeditious hearing. Costs of N500,000.00 is**

**A** awarded to the appellant against the respondent”.  
(P 12 Paras E – G).

**Nigerian Cases Cited**

**B** *Saeby Jernstoberi Maskinfabric A/S vs. Olaogun Enterprises Ltd. (1999) 14 NWLR (Pt. 637) 128.*  
*Standard (Nig.) Engineering Co. Ltd Anor vs. Nigerian Bank of Commerce of Industry (2006) 7 NWLR (Pt. 978) 198.*

**C**

**Nigerian Statutes**

*The Evidence Act Section 149*

**D** The Companies and Allied Matters Act 1990 Section 31(3),(5),(6)(7) and (8); *Section 401.*

**Representation**

A. B. Kasunmu (Esq.), for the appellant.

**E** A. Salawu (Esq.), for the respondent.

**F** **BAYANG AKAAHS, (JSC) (Delivering the Lead Judgment):** The appellant, Companhia Brasileira De Infraestrutura (INFAZ) filed a Winding Up Petition before the Federal High Court, Lagos on the ground that the relationship between the petitioner, respondent and the respondent's Chairman, Chief Ogunbanjo, had deteriorated. And pursuant to Rule 10 of the Companies Winding Up Rules, 1983, the petitioner brought a motion on notice dated 18 March, 1992 seeking an order to advertise the petition filed.

**G** The respondent, in opposition to the application of the petitioner filed a 19 paragraphs affidavit opposing the petition. The respondent also filed a motion on notice dated 31 March, 1992 seeking an order of court striking out/staying/dismissing the petition filed.

**H** The grounds for opposing the petition were:

**I** (a) that the petitioner was neither a creditor nor a contributory;

- A (b) that they are not one of the persons allowed to present a petition under section 401 of the Companies and Allied Matters Act 1990;**
- B (c) that the petitioner was not a party to the Joint Venture Agreement (JVA) entered into with Companhia Brasileira De Entrepósitos E Comercio and the Nigeria partners;**
- C (d) that the petitioner is not a known legal entity;**
- (e) that Companhia Brasileira De Entrepósitos E Comercio of Brazil was the only foreign shareholder known to the respondent.**

**D** In opposition to the motion by the respondent, the petitioner filed a 4 paragraph affidavit dated 6 July, 1992 annexing Exhibits AA-AA2.

**E** In his ruling delivered on 3 November 1992, Edet J of the Federal High Court, Lagos struck out the petition and the motion to advertise the petition for being illegal. The trial judge held that for the change of name of the petitioner in Brazil to be legally cognizable in Nigeria, it must also conform with section 31(3),(5),(6)(7) and (8) of the Companies and Allied Matters Act 1990. It was also held that the petitioner, INFAZ of Brazil is not a legal person in Nigeria and therefore cannot be a creditor or shareholder in the respondent's company.

**F** The petitioner was dissatisfied with the ruling of the Federal High Court and filed a notice of appeal containing two grounds of appeal. The Court of Appeal in dismissing the appeal held that since no foreign law, in particular Brazilian Law, governing the consequence of change in the name of the company was placed before the court and none was pleaded, it follows that to legally effect a change of name, the petitioner ought to have complied with conditions contained in section 31 of CAMA.

**G** The court further held that once there is doubt as to the legal identity of a legal fiction or personality which has undergone metamorphosis by way of change in name as in the instant case, a court of law must get that doubt cleared before allowing the new legal entity to proceed with a winding up petition.

**H**

**I**

**A** Being aggrieved with the judgment of the lower court delivered on 26 November, 2003, the appellant further appealed to the Supreme Court in its notice of appeal dated 8 December, 2003 and filed on 19 December, 2003. The notice of appeal was amended by an order of court dated 12

**B** January, 2017 and filed on 18/1/2017 but was deemed filed on 11 April, 2017. The amended notice of appeal contained three grounds of appeal from which the appellant distilled two issues in the amended appellant's brief also deemed filed on 11 April, 2017.

**C** The two issues are:

**D** **1. Whether the Court of Appeal was right in holding that the appellant ought to have complied with the conditionality contained in section 31(1) to (8) of CAMA also enumerated in the judgment of the court on page 267 of the record of appeal. (Distilled from grounds 1 and 2 of the amended notice of appeal).**

**E** **2. Whether the Court of Appeal was right in holding that the appellant was not a contributing shareholder of the respondent. (Distilled from**

**F** **Ground 3 of the amended notice of appeal).**

The respondent also amended its brief filed on 6 April, 2017 and was deemed duly filed on 11 April, 2017 in which it raised two issues for

**G** determination which are as follows:

**H** **1. Whether on the facts of this case and in law the appellant/petitioner has a locus to institute winding up proceedings against the respondent and/or.**

**I** **2. Whether anyone not coming within the permissible persons under section 410 of the Company and Allied Matters Act 1990 can make an application to the court for the winding up of a company by way of petition.**

A This appeal stems from the statement by the court below that if there is a change in the name of the foreign company evidence of compliance with the law of the land where it was incorporated must be given.

This court decided in **Saeby Jernstoberi Maskinfabric A/S vs. Olaogun Enterprises Ltd. (1999) 14 NWLR (Pt. 637) 128** which was cited to the court below that the principle of law that a foreign corporation, duly created according to the laws of a foreign state recognized by Nigeria, may sue or be sued in its corporate name in our courts is part of the common law.

The court per Ayoola JSC at p. 146 went further to state:

D **“It suffices to say that the appellant company which was admitted by the respondent to be a limited liability company with its registered office in Copenhagen properly sued in its corporate name”.**

E In the **Saeby Jernstoberi Maskinfabric A/S** case (supra) it had been argued by counsel on behalf of the respondent that even though it may be a legal entity in its country of incorporation, it had no artificial personality in Nigeria since the Companies Act is silent on whether a company such as the appellant would be allowed to sue or not. This court held that the submission was misconceived.

F At the trial court Edet J. concluded that the plaintiff (petitioner) was duly incorporated under the laws of Brazil and the company had changed its name (see page 102 of the record of appeal). And in the lower court G Aderemi JCA (\*as he then was) made the following findings:

- H
1. **Going by the facts of the case as agreed by both parties Companhia Brasileira De Entrepotos E Commercial (COBEC) is a contributory.**
  2. **The company, Companhia Brasileira De Entrepotos E Commercial (COBEC) can justifiably bring the petition. (See pages 264 and 266 of the record).**
- I

A The respondent did not cross-appeal against the above findings to the court below or to this court. The consequence in law is that the said findings are deemed to be correct. See: **Standard (Nig.) Engineering Co. Ltd Anor vs. Nigerian Bank of Commerce of Industry (2006) 7 NWLR (Pt. 978)**

B **198.**

C Professor Kasunmu SAN who argued the appellant's case submitted that there is a presumption under section 149 of the Evidence Act that Exhibits AA-AA2 represent the position of the law in Brazil on the change of name of the appellant until the contrary is proved by the respondent who did not challenge the authenticity of Exhibits AA-AA2.

I entirely agree with this submission. Section 149 of the Evidence Act provides:

D

**“149. When any document is produced before any court purporting to be a document which by the law in force for the time being in any particular in any court of justice in that country, without proof of the seal or stamp or signature authenticating it, or of the judicial or official character claimed by the person by whom it purports to be signed, the court shall presume:**

E

F

**(a) that such seal, stamp or signature, is genuine; and**

G

**(b) that the person signing it held, at the time when he signed it, the judicial or official character which he claims, and the document shall be admissible for the same purpose for which it would be admissible in the country where the document is produced”.**

H

In the ruling of the High Court at page 102 of the record of appeal Edet J. Said:

I

- A** “I have carefully studied the arguments of both sides. There is no denying the fact that COBEC of Brazil changed its name in Brazil to INFAZ of Brazil Exhibits AA-AA2 testify to that fact, if Exhibits AA-AA2 accord with the Brazilian trade law, then INFAZ and COBEC are one and the same company in Brazil”.

**C** In view of the finding of the trial court that Exhibits AA-AA2 accorded with Brazilian law on the change of name, it was wrong for the Court of Appeal to embark on a futile exercise seeking evidence of compliance with the Brazilian law governing change of name of the company and proceeding to hold that once there is doubt as to the legal fiction or personality which has undergone some metamorphosis by way of change in name and there is no disclosure as to the legality of the change in name, a court of law and justice must get that doubt patently cleared before allowing a new legal entity to proceed with winding up petition.

**E** If COBEC in Brazil was changed to INFAZ it follows that INFAZ is a contributory shareholder of the respondent company and therefore has the locus standi to apply for the winding up of COBEC (NIGERIA) LIMITED.

**F** The appeal is meritorious and it is hereby allowed. The judgment of the Court of Appeal, Lagos delivered on 26 November, 2003 in Appeal No. CA/L/237/95 is hereby set aside. The matter is remitted to the Chief Judge of the Federal High Court for assignment of suit No. FHC/L/CP/M14/92 to another judge other than Edet J. for the expeditious hearing. Costs of **G** N500,000.00 is awarded to the appellant against the respondent.

**K. B. Akaahs**  
*Justice, Supreme Court*

**H** **OLU ARIWOOLA, (JSC):** I had the privilege of reading in draft the lead judgment of my learned brother **Akaahs, JSC** just delivered. I agree entirely with the reasoning and conclusion that the appeal is meritorious and should be allowed. I too will allow the appeal.

**I** Appeal allowed.

**A** I abide by the consequential orders including the order on costs.

**Olu Ariwoola**  
*Justice, Supreme Court*

**B ADAMU AUGIE, (JSC):** I have had the advantage of reading in draft the judgment handed out by my learned brother Akaahs, JSC. The facts of the matter relating to this appeal have been carefully set out in the lead judgment. I entirely agree that the matter be remitted back to the chief judge of the Federal High Court for rehearing. I abide by the consequential orders therein contained, inclusive of that relating to costs.

**Amina Adamu Augie, Jsc**  
*Justice, Supreme Court*

**D**

**ADAMU GALINJE, (JSC):** I have had the privilege of reading in draft, the judgment just delivered by my learned brother AKA' AHS, JSC and I agree with the reasoning contained therein and the conclusion arrived thereat. The trial court by **Exhibit AA – AA2** having found that INFAZ and COBEC are one and the same company in Brazil, and that COBEC Brazil is a contributory shareholder of the respondent company, it will be wrong to hold that INFAZ has no locus standi to apply for the winding up of the respondent.

**F** I find the appeal meritorious and I join my brother in allowing it. I abide by the consequential orders made in the lead judgment including order as to costs.

**G**

**Paul Adamu Galinje**  
*Justice, Supreme Court*

**H DAUDABAGE, (JSC):** I have had the benefit of reading in draft the lead judgment of my learned brother **Kumai Bayang Akaahs, JSC**, just delivered. I agree entirely with the reasoning and conclusion reached. I do not have anything useful to add. The appeal is meritorious, and it is hereby allowed by me. I abide by all the orders contained in the lead judgment.

**I**

**Sidi Dauda Bage**  
*Justice, Supreme Court*

- 1. DICKSON OGUNSEINDE**  
**2. VIRYA FARMS LIMITED**  
**AND**  
**1. SOCIETE GENERALE BANK LTD**  
**2. ALHAJI A. ARINOLA**  
**3. MRS. MONISOLA ALAKE AYOOLA**

**SC. 209/2005**

**IN THE SUPREME COURT OF NIGERIA**  
**HOLDEN AT ABUJA**

**9<sup>TH</sup> FEBRUARY, 2018**

**BEFORE THEIR LORDSHIPS**

**OLABODE RHODES-VIVOUR**  
**MARY UKAEGO PETER-ODILI**  
**CLARA BATA OGUNBIYI**  
**AMIRU SANUSI**  
**SIDI DAUDA BAGE**

**JUSTICE, SUPREME COURT**  
**JUSTICE, SUPREME COURT**  
**JUSTICE, SUPREME COURT**  
**JUSTICE, SUPREME COURT**  
**JUSTICE, SUPREME COURT**

*APPEAL: Time within which to appeal to the Supreme Court – S. 27 of the Supreme Court Act 2004 – Relevant considerations thereof.*

*CONSTITUTIONAL LAW: Right of fair hearing – Whether does not apply to a party who has no right to be heard – Relevant considerations thereof.*

*COURT: JURISDICTION Nature, purport and relevance.*

*COURT: Jurisdiction of the Court of Appeal – Application for leave to appeal – Whether an application for leave to appeal at the Court of Appeal does become incompetent at the expiration of 3 months.*

*COURT: Jurisdiction to stay a judgment – Absence of proper appeal – Whether jurisdiction to stay a judgment is not exercisable where there is*

*no proper appeal.*

*COURT: Taking a point suo motu – Relevant principles thereto – Failure to comply – Whether cannot overturn a judgment where no evidence of miscarriage of justice exists.*

*JUDGMENT AND ORDER: Stay of execution – Whether an application for stay of execution cannot be granted where there is no valid appeal.*

### **Issue for Determination**

**Whether the Court of Appeal was right and empowered to strike out the two applications pending before it.**

### **Facts of the Matter**

On the 15<sup>th</sup> of June 2005 the appellants had three pending applications before the Court of Appeal Ibadan, as follows:

- 1. A motion for leave to appeal on grounds of mixed law and fact dated the 9<sup>th</sup> of February, 2005.**
- 2. Motion for stay of execution dated the 2<sup>nd</sup> of March, 2005.**
- 3. Motion to substitute the 3<sup>rd</sup> respondent dated the 16<sup>th</sup> of May, 2005.**

On the 15<sup>th</sup> of June 2005 counsel for the appellants herein withdrew the motion of 16<sup>th</sup> May, 2005 for substitution and same was struck out.

Thereafter as evident from the records of appeal, the other pending applications were brought to the attention of the court by counsel for the 3<sup>rd</sup> respondent, one Chief Mathew Adepoju in the following terms:

**“Counsel for the respondent Chief Adepoju says the application is incompetent since the three months period within which to appeal has elapsed. He says the motion be struck out.**

**Court: Regard to the fact that the three months period within which to appeal to the Supreme Court has elapsed, this court no longer has jurisdiction to grant leave or extend the time within which to appeal. That can only be taken at the Supreme Court. The result is that the application of 19/2/2005 for leave to appeal to the Supreme Court and that for stay of execution filed on 2/3/05 are struck out.”**

It is against that decision that the appellant herein has filed this appeal now before the Supreme Court.

**Held:** *(Unanimously dismissing the appeal)*

1. *Time within which to appeal to the Supreme Court.*

**It is pertinent to say that by the provision of section 27 of the Supreme Court, Act, 2004, where a person desires to appeal to this court, he shall give notice of appeal or notice of his application for leave to appeal in such manner as may be directed by rules of court within the period prescribed by subsection (2) of the said section that is applicable to the case.**

**Section 27 subsection (2) provides for the period prescribed for the giving of notice of appeal or notice of application for leave to appeal which relates to an appeal in a civil case. In other words it provides for fourteen days in an appeal against an interlocutory decision and three months in an appeal against a final decision.**

**Subsection (3) of section 27 of the Act also provides that where an application for leave to appeal is made in the first instance to the court below, a person making such application shall, in addition to**

**the period prescribed by subsection (2) above, be allowed a further period of fifteen days from the date of the hearing of the application by the court below to make an application to this court.**

*(P 27 Paras D–G)*

2. *The jurisdiction to grant an application for leave to appeal*

**For all intents and purposes, I seek to say that at the time the said applications were struck out on the 15<sup>th</sup> of June 2005, they were both in fact incompetent and the Court of Appeal had no jurisdiction to entertain same. This is bearing in mind that the jurisdiction to grant an application for leave is limited to the 3 months period as stipulated by section 27 of the Act Supra. Again *See the cases of Bowaje vs. Adediwura (reference supra) and Owoniboys Tech Service Ltd vs. John Holt Ltd (1991) 6 NWLR (Pt. 199) pages 550 at 559.***

*(Pp 27–28 Paras H–A)*

3. *Jurisdiction nature purport and relevance*

**Jurisdiction as entrenched in various judicial authorities implies the power or authority of a court to adjudicate over a particular subject matter. It is the nature of the claim that determines the jurisdiction of a court. The law is well established also that all the courts, in this country without exception, have no power to prescribe jurisdiction to themselves. Neither, do they have the power to expound or reduce on their areas of jurisdiction. It is constitutionally prescribed. See case of *Gafar vs. Government of Kwara State & 2 ors (2007) 1-2 SC. 189.***

**As rightly submitted by the 3<sup>rd</sup> respondent's counsel herein, the appellants cannot be heard to complain that they were denied fair hearing because the applications that were struck out were incompetent. The principles of fair hearing can apply only in a case where a party has the right to be heard on a court process but was denied. To the contrary, if a party has no right to be heard in respect of a process because it did not comply with the Rules of Court, the**

**party cannot be heard to invoke the principles of fair hearing. See Sosanya vs. Onadeko (2005) 2 SC (Part 11) 13. (P 28 Paras A – E)**

4. *An application for stay of execution is predicated on a valid appeal.*  
**The appellants' counsel had submitted vehemently also in respect to the application for stay of execution which was struck out. It is trite and a well established general principle of law that stay of proceeding/execution will not be entertained unless an appeal has been lodged. See the case of NDLEA vs. Okorodudu (1997) 3 NWLR (Pt. 492) 221, and Fatoyinbo vs. Osadeyi (2002) 5 SC Part 11) 1.**  
**In other words, the jurisdiction to stay execution of a judgment can only be exercised pending a valid appeal. Accordingly in the absence of a pending appeal (and indeed a valid motion for leave to appeal) the lower court in the case at hand, did not have jurisdiction to grant the relief sought. (P 28 Paras E – G)**
5. *Limitation to right of fair hearing.*  
**The appellants' counsel had argued in strong terms that there was a denial of fair hearing; I seek to say that it is not on every occasion where an applicant is refused hearing that it would amount to a breach of fair hearing. As a matter of fact, when an application, in which the court has no jurisdiction to entertain, is maintained, same will amount to an abuse of court process. The lower court in the case at hand was perfectly within the exercise of its powers therein when it struck out the said applications. (Pp 28 – 29 Paras H – A)**
6. *The principles to be observed where a court takes a point suo motu*  
**The law is well entrenched further that the appeal court has the discretion to take on a point suo motu and the general principle is that the parties must be given an opportunity to be heard. However, authorities have shown that the failure to observe this principle would result into a misdirection which will be over-turned only if there has been a substantial miscarriage of justice.**

**An example is the case of Saude vs. Abdullahi (1989) 4 NWLR (Part 116) page 387 at page 408 where this court held:**

**“There is no doubt that the Court of Appeal committed a serious misdirection in the lead judgment when it inappropriately raised and considered new issues in the appeal before it. The question is: what is the effect of the misdirection, unless the misdirection is so grave as to have occasioned a miscarriage of justice, an appeal court will not ordinarily interfere with decision of the lower court.” (P 29 Paras A – E)**

*Per Ogunbiyi (JSC)*

**“The law is well entrenched further that the appeal court has the discretion to take on a point *suo motu* and the general principle is that the parties must be given an opportunity to be heard. However authorities have shown that the failure to observe this principle would result into a misdirection which will be over-turned only if there has been a substantial miscarriage of justice.**

**An example is the case of Suade vs. Abdullahi (1989) 4 NWLR (Part 116) page 387 at page 408 where this court held:**

**“There is no doubt that the Court of Appeal committed a serious misdirection in the lead judgment when it inappropriately raised and considered new issues in the appeal before it. The question is: what is the effect of the misdirection, unless the misdirection is so grave as to have occasioned a miscarriage of justice, an appeal court will not ordinarily interfere with decision of the lower court.” (P 29 Paras A – E)**

*Per Rhodes Vivour (JSC)*

**“I must observe that section 27 of the Supreme Court Act 2004 provides for the time within which an appeal may be filed. As at the time the Court of Appeal struck out the applications seeking leave to appeal and stay of execution on 15 June 2005, three months had elapsed. The Court of Appeal no longer had jurisdiction to grant leave or extend time within which to appeal. See *Bowaje vs. Adediwura (1976) 6 SC P. 143.***

**The resultant effect of striking out the application for leave to appeal is that there is no valid appeal. The application for stay of execution becomes incompetent and is also struck out”.**  
*(P 30 Paras C – E)*

*Per Odili (JSC):*

**“It is to be said that the provisions of section 27(3) of the Supreme Court Act, 2004 are clear and left no room for equivocation and so on the 15<sup>th</sup> June, 2005 when the Court of Appeal struck out the two pending applications for leave to appeal to the Supreme Court dated 19<sup>th</sup> February 2005, the applications had ceased to be a competent processes and the court below had no jurisdiction at that point to adjudicate on the applications and so when the counsel for the 3<sup>rd</sup> respondent made the observation regarding the competence, the natural result was that the applications had to be struck out. Therefore the suggestions by appellants' counsel of bias on the part of the Court of Appeal or inordinacy and unreasonableness were clearly baseless. This is so because counsel needs be reminded that jurisdiction which implies the power or authority of a court to adjudicate over a particular subject matter and it is the nature of the claim that determines the jurisdiction of the court.**

**Again to be brought out is that all courts in the land none excepting have no power to endow itself with jurisdiction and in that**

**wise has no power to expand or reduce the jurisdictional boundary. I place reliance on *Gafar vs. Govt of Kwara State & 2 Ors*(2007) 1-2 SC 189.**

**It is to be reiterated that appellants in this case cannot be heard to complain about fair hearing when the applications that were struck out were incompetent. That is the exception to the fair hearing principle as it only applies where the party has the right to be heard and when that right does not exist on account of a process that is incompetent or dead on arrival then the party has no leg on which to stand to cry about fair hearing. See cited: *Sosanya vs. Onadeko* (2005) 2 SC. (Pt. 11) 13; *Bowaje vs. Adediwura*(1976) 6 SC 143; *Owoniboy Tech. Service Ltd vs. John Holt Ltd* (1991) 6 NWLR (Pt. 199) 550 at 559.**

**Since the application for leave to appeal was struck out for incompetence there is no valid appeal on which the stay of execution application could stand as the none existence of a valid appeal renders the motions for stay of execution pending appeal incompetent and liable to be struck out”. (P 35 Paras A – H)**

### **Nigerian Cases Cited**

*Bowaje vs. Adediwura* (1976) 6 SC 143;

*Bowaje vs. Adediwura* (1976) 6 SC P. 143.

*Fatoyinbo vs. Osadeyi* (2002) 5 SC Part 11) 1.

*Gafar vs. Government of Kwara State & 2 ors* (2007) 1-2 SC. 189.

*NDLEA vs. Okorodudu* (1997) 3 NWLR (Pt. 492) 221,

*Owoniboy Tech Service Ltd vs. John Holt Ltd* (1991) 6 NWLR (Pt. 199) 550

*Sosanya vs. Onadeko* (2005) 2 SC (Part 11) 13.

*Suade vs. Abdullahi* (1989) 4 NWLR (Part 116) page 387

### **Nigerian statutes**

The Supreme Court, Act, 2004 Section 27

**A Representations**

**ANTHONY ROTIMI DARAMOLA (Esq.)** for the appellants.

**OLAYODE DELANO (Esq.)** with Ahmed Oyegbami for 1<sup>st</sup> and 2<sup>nd</sup> respondents.

**B ALEX EJESIEME (Esq.)** with M. Oputa and C. Nweke for the 3<sup>rd</sup> respondent.

**C BATA OGBUNBIYI, (JSC) (Delivering the Lead judgment):** The facts of this case are fairly straight forward. On the 15<sup>th</sup> of June 2005 the appellants had three pending applications before Court of Appeal Ibadan, as follows:

**D 1) A motion for leave to appeal on grounds of mixed law and fact dated the 9<sup>th</sup> of February, 2005.**

**2) Motion for stay of execution dated the 2<sup>nd</sup> of March, 2005.**

**E 3) Motion to substitute the 3<sup>rd</sup> respondent dated the 16<sup>th</sup> of May, 2005.**

**F** On the 15<sup>th</sup> of June 2005 counsel for the appellant herein withdrew the motion of 16<sup>th</sup> May, 2005 for substitution and same was struck out.

Thereafter as evident from the records of appeal, the other pending applications were brought to the attention of the court by counsel for the 3<sup>rd</sup> respondent, one Chief Mathew Adepaju in the following terms:

**G “Counsel for the respondent Chief Adepaju says the application is incompetent since the three months period within which to appeal has elapsed. He says**

**H the motion be struck out.**

**I Court: Regard to the fact that the three months period within which to appeal to the Supreme Court has elapsed, this court no longer has jurisdiction to**

**A** grant leave or extend the time within which to  
**B** appeal. That can only be taken at the Supreme  
 Court. The result is that the application of  
 19/2/2005 for leave to appeal to the Supreme Court  
 and that for stay of execution filed on 2/3/05 are  
 struck out.”

**C** It is against that decision that the appellant herein has filed this appeal now  
 before us.

In accordance to the rules of this court briefs were filed by counsel on  
 behalf of their clients as follows:

- D** 1) Amended appellants brief was settled by one A.R.  
 Daramola Esq., and filed on the 10<sup>th</sup> March, 2017,  
 but deemed properly filed on 14<sup>th</sup> March, 2017.
- E** 2) Amended 1<sup>st</sup> and 2<sup>nd</sup> respondents Brief was settled by  
 one Olayode O. Delano Esq and filed on 13<sup>th</sup> March,  
 2017 but deemed properly filed also on 14<sup>th</sup> March,  
 2017.
- F** 3) 3<sup>rd</sup> respondent's brief of argument was settled by  
 Alex Ejesieme, Esq. and filed on 20<sup>th</sup> March, 2017.

**G** On the 13<sup>th</sup> November, 2017, all counsel adopted and relied on their  
 respective briefs of arguments. On the one hand, the learned counsel for the  
 appellant urged in favour of allowing the appeal and remit the applications  
 dated 9<sup>th</sup> February, 2005 and 2<sup>nd</sup> March, 2005 back to the lower court for  
 hearing.

**H** On the other hand however, the learned counsel on behalf of the 1<sup>st</sup>  
 and 2<sup>nd</sup> respondents prayed the court to strike out the said applications  
 which were not within the jurisdiction of the lower court to grant and the  
 counsel for the 3<sup>rd</sup> respondent urges further that the appeal be dismissed for  
 being incompetent and also an abuse of process.

**I** Two issues were formulated on behalf of the appellants as follows:

- A**        **1) Whether there is any justiciability on the part of the Justices of the lower court in striking out applications dated 9<sup>th</sup> February, 2005 and 2<sup>nd</sup> March, 2005. See Ground one (1).**
- B**        **2) Whether failure of the justices of the lower court to hear the appellants applications is not a breach of the principle of fair hearing. See Ground two (2).**

**C**        The lone issue formulated on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> respondents reads as follows:

**D**        **Whether the Court of Appeal was right and empowered to strike out the two applications pending before it.**

**E**        Lastly, and on behalf of the 3<sup>rd</sup> respondent, two issues were also formulated with the 1<sup>st</sup> issue being similar to that of the appellant, while issue no. 2 reads thus:

**F**        **1. Whether the notice of appeal, the initiating process in this appeal was signed in any manner known to law.**

**G**        I seek to restate again that since the appellant's issue 2 is similar to that of 3<sup>rd</sup> respondent, the issue is subsumed in the 1<sup>st</sup> issue which was brought about as a result of questioning the initiating process.

The two issues would be taken together with both having been subsumed or integrated one into the other.

**H**        The appellants by the fore-going issues contend that the two applications struck out on the 15<sup>th</sup> June, 2005 were not justifiable in that the one of 9<sup>th</sup> February, 2005 in particular was not heard. Counsel submits that the lower court ought to have taken argument on the application especially the one dated 9<sup>th</sup> February, 2005 since it was filed within the (3) months statutory period.

**I**

**A** The Court of Appeal, in applying the decision of this court in the **case of Bowaje vs. Adediwura (1976) 6 SC. 143**, the learned counsel submits, took argument of counsel on the applications for leave of the court to appeal on point of facts and mixed law and fact, **Chief K. Oje & Anor vs. Chief G.**

**B Babalola (1987) 4 NWLR (Pt. 64) 208; Unlike** in the present case, counsel submits no argument whatsoever was taken by the lower court.

The learned counsel in further submission re-iterates that where a party has no input as to the date a matter is adjourned at the lower court, such party cannot be made to bear the brunt of the act of the lower court. **C** The applicants, the counsel argues, have no control over the diary at the lower court, hence the adjournment before it is at its discretion; that the exercise of such discretion when made unjustly, parties should not be made **D** to suffer the consequential effect of the unjust exercise or bear the pains thereof.

Counsel submits again that any matter to which an affidavit of urgency is attached, stating reasons why the application should be heard on time, ought to be given a short adjournment. **E**

In the matter at hand, the lower court adjourned for a long period of four months- February to May, 2005; counsel submits that such adjournment is very unreasonable and in-ordinate.

**F** The learned counsel submits with emphasis again that the decision of the lower court in the present matter, by striking out the applications of 9<sup>th</sup> February, 2005 and 2<sup>nd</sup> March, 2005 is misconceived, premature and portrays bias against the appellants. The lower court, counsel contends, **G** never availed the appellants the opportunity of arguing their applications on the peculiarity and therefore did not act justifiably in striking out the appellants applications on 15<sup>th</sup> June, 2005.

Submitting on Issue 2, appellants' counsel argues that his clients **H** were not given hearing on the two applications struck out, especially the application of 9<sup>th</sup> February, 2005. Hence the failure amounted to denial of fair hearing and breaching the appellants' right as enshrined in section 36(1) of the Constitution of the Federal Republic of Nigeria 1999. Counsel cites **I** in support, the case of **Agbahomovo vs. Eduyegbe (1999) 3 NWLR (Pt.**

**A 594) Page 170 at 184-185. A further authority is the case of Igboho L.G. vs. Boundary Settlement Commissioner & Anor (1988) 1 NWLR (Pt. 69) page 189 at 201 – 202 per Nnamani JSC and Amoo vs. Alabi (2003) FWLR (Pt. 174) Page 198 at 213 – 214 per Iguh, JSC.**

**B** The proceeding of 15<sup>th</sup> June, 2005, counsel submits, shows clearly that the appellants were not heard at all. It is the reaction of counsel that this is a breach of the principle of Audi alteram partem and a grave violation of the appellants/applicants' right to fair hearing. Hence the court should find that the lower court failed to give the applicants the necessary fairness in the determination of the applications before it.

**C** The learned counsel urges this court on the totality to allow this appeal and remit the appellants applications dated 9<sup>th</sup> February, 2005 and 2<sup>nd</sup> March, 2005 back to the lower court for hearing in the circumstance.

**D** In response to the two issues raised by the appellants, the learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents made a joint and brief submission thereon in terms of the lone issue he raised. The learned counsel submits on the totality that the lower court was perfectly within the exercise of its powers when it struck out the said applications which were not within its jurisdiction to grant *ex facie*.

**E** The 3<sup>rd</sup> respondent's counsel formulated two issues for determination. For all intents and purposes. I am of the firm view that only the 1<sup>st</sup> issue is relevant to this appeal as it is in line with the grounds of appeal filed. In respect of the 2<sup>nd</sup> issue raised however, it is not shown to arise from the two grounds of appeal on the amended notice of appeal filed 10/3/2017. The said issue as a consequent is of no relevance and it is discountenanced.

**F** In his submission in reply to the appellants' issues therefore, the counsel for the 3<sup>rd</sup> respondent relates copiously to section 27 of the Supreme Court, Act, 2004 at sub-sections (2) and (3) which counsel argues are clear and unequivocal. Counsel submits further that on the 15<sup>th</sup> June, 2005 when the court struck out the two pending applications, it had no jurisdiction at that point to adjudicate thereon, hence same were struck out, following the observation made by the counsel who appeared for the 3<sup>rd</sup> respondent.

**G**

**H**

**I**

**A** The learned counsel on the totality urges that this appeal be dismissed as being incompetent and also an abuse of process.

The determination of this appeal can easily be disposed of on the lone issue raised by the 1<sup>st</sup> and 2<sup>nd</sup> respondents which raises the question

**B** thus:

**Whether the Court of Appeal was right and empowered to strike out the two applications pending before it.**

**C**

The two main complaints by the appellants are: (1) that they were never given the opportunity to argue their applications on the merit and (2) that they were not given a fair hearing, therefore.

**D** It is pertinent to say that by the provision of section 27 of the Supreme Court, Act, 2004, where a person desires to appeal to this court, he shall give notice of appeal or notice of his application for leave to appeal in such manner as may be directed by rules of court within the period prescribed by subsection (2) of the said section that is applicable to the case.

**E** Section 27 subsection (2) provides for the period prescribed for the giving of notice of appeal or notice of application for leave to appeal which relates to an appeal in a civil case. In other words it provides for fourteen days in an appeal against an interlocutory decision and three months in an appeal against a final decision.

**F** Subsection (3) of section 27 of the Act also provides that where an application for leave to appeal is made in the first instance to the court below, a person making such application shall, in addition to the period prescribed by subsection (2) above, be allowed a further period of fifteen days from the date of the hearing of the application by the court below to make an application to this court.

**G** For all intents and purposes, I seek to say that at the time the said applications were struck out on the 15<sup>th</sup> of June 2005, they were both in fact incompetent and the Court of Appeal had no jurisdiction to entertain same. This is bearing in mind that the jurisdiction to grant an application for leave is limited to the 3 months period as stipulated by section 27 of the Act Supra. Again *See the cases of Bowaje vs. Adediwura (reference supra)*

**A** *and Owoniboys Tech Service Ltd vs. John Holt Ltd (1991) 6 NWLR (Pt. 199) pages 550 at 559.*

Jurisdiction as entrenched in various judicial authorities implies the power or authority of a court to adjudicate over a particular subject matter.

**B** It is the nature of the claim that determines the jurisdiction of a court. The law is well established also that all the courts, in this country without exception, have no power to prescribe jurisdiction to themselves. Neither, do they have the power to expound or reduce on their areas of jurisdiction.

**C** It is constitutionally prescribed. **See case of Gafar vs. Government of Kwara State & 2 ors (2007) 1-2 SC. 189.**

As rightly submitted by the 3<sup>rd</sup> respondent's counsel herein, the appellants cannot be heard to complain that they were denied fair hearing

**D** because the applications that were struck out were incompetent. The principles of fair hearing can apply only in a case where a party has the right to be heard on a court process but was denied. To the contrary, if a party has no right to be heard in respect of a process because it did not comply with the Rules of Court, the party cannot be heard to invoke the principles of fair hearing. **See Sosanya vs. Onadeko (2005) 2 SC (Part 11) 13.**

The appellants' counsel had submitted vehemently also in respect to the application for stay of execution which was struck out. It is trite and a well established general principle of law that stay of proceeding/execution will not be entertained unless an appeal has been lodged. **See the case of NDLEA vs. Okorodudu (1997) 3 NWLR (Pt. 492) 221, and Fatoyinbo vs. Osadeyi (2002) 5 SC Part 11) 1.**

**G** In other words, the jurisdiction to stay execution of a judgment can only be exercised pending a valid appeal. Accordingly in the absence of a pending appeal (and indeed a valid motion for leave to appeal) the lower court in the case at hand, did not have jurisdiction to grant the relief sought.

**H** The appellants' counsel had argued in strong terms that there was a denial of fair hearing; I seek to say that it is not on every occasion where an applicant is refused hearing that it would amount to a breach of fair hearing. As a matter of fact, when an application, in which the court has no jurisdiction to entertain, is maintained, same will amount to an abuse of court process. The lower court in the case at hand was perfectly within the

A exercise of its powers therein when it struck out the said applications.

The law is well entrenched further that the appeal court has the discretion to take on a point *suo motu* and the general principle is that the parties must be given an opportunity to be heard. However authorities have

B shown that the failure to observe this principle would result into a misdirection which will be over-turned only if there has been a substantial miscarriage of justice.

C An example is the case of **Suade vs. Abdullahi (1989) 4 NWLR (Part 116) page 387 at page 408** where this court held:

D **“There is no doubt that the Court of Appeal committed a serious misdirection in the lead judgment when it inappropriately raised and considered new issues in the appeal before it. The question is: what is the effect of the misdirection, unless the misdirection is so grave as to have occasioned a miscarriage of justice, an appeal court will not ordinarily interfere with decision of the lower court.”**

E Following from the foregoing authority therefore, the question to pose in the matter herein is, was there a miscarriage of justice done to the appellants? The answer I hold is in the negative. This is predicated on the fact that, *ex-facie* and *ab initio*, the lower court never had the jurisdiction to either entertain/grant the applications brought by the appellants.

F *See the case of Odiase vs. Agho (1972) 3 SC. 73* where it was held that a fundamental issue of jurisdiction is one of the circumstances where a court can indeed take a point *suo motu*.

G With the striking out of the application for leave to appeal therefore, it became clear that no valid appeal exists in the eyes of the law. As a result, the application for stay of execution became an incompetent process before the court which was liable to be struck out.

H The striking out of the two incompetent applications, on 15/9/2005 by the court below was in the circumstance done within the ambit of the law. The said issue is hereby resolved against the appellants and in favour of the respondents.

**A** The appeal, on the totality is devoid of any merit and same is hereby dismissed on the ground of being an abuse of court process.  
There shall be no order made as to costs.  
Appeal is dismissed and no order is made as to costs.

**B** **Clara Bata Ogunbiyi**  
*Justice, Supreme Court*

**C** **RHODES-VIVOUR, (JSC):** I have had the advantage of reading in draft the leading judgment of my learned brother, **Ogunbiyi JSC**. I agree with it and for the reasons given I too dismiss the appeal. I must observe that section 27 of the Supreme Court Act 2004 provides for the time within which an appeal may be filed. As at the time the Court of Appeal struck out the applications seeking leave to appeal and stay of execution on 15 June 2005, there months had elapsed. The Court of Appeal no longer had jurisdiction to grant leave or extend time within which to appeal. See ***Bowaje vs. Adediwura (1976) 6 SCP. 143.***

**E** The resultant effect of striking out the application for leave to appeal is that there is no valid appeal. The application for stay of execution becomes incompetent and is also struck out.

**F** For these brief reasons as well as those more fully given by my learned brother, **Ogunbiyi JSC**, I, too also dismiss the appeal.

**Olabode Rhodes-vivour**  
*Justice, Supreme Court*

**G** **PETER-ODILI, (JSC):** I agree with the judgment just delivered by my learned brother, Clara Bata Ogunbiyi (JSC) and to underscore that support, I shall make some comments.

**H** This is an interlocutory appeal against the order of the Court of Appeal, Ibadan Division or lower court or court below dated 15<sup>th</sup> June, 2005 striking out the application of the appellant for leave to appeal against the judgment of the court below delivered on the 2<sup>nd</sup> December, 2004 and another application dated 2<sup>nd</sup> March, 2005 for stay of execution of the said judgment.

**A** The fuller facts of this matter are well set out in the lead judgment and so I shall refrain from repeating them unless the occasion warrants a reference to any part thereof.

**B** On the 13<sup>th</sup> day of November, 2017 dated of hearing, learned counsel for the appellant, Anthony Rotimi Daramola Esq. adopted the amended appellant's brief filed on 10/8/17 and deemed filed on 14/3/2017. He raised two issues for determination which are thus:

**C** 1. **Whether there is any justiciability on the part of the justices of the lower court in striking out applications dated 9<sup>th</sup> February, 2005 and 2<sup>nd</sup> March, 2005 (Ground 1).**

**D** 2. **Whether failure of the justices of the lower court to hear the appellants' applications is not a breach of the principle of fair hearing (Ground 2).**

**E** Olayode O. Delano Esq, learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondent adopted their brief of argument filed on the 13/3/2017 and deemed filed on 14/3/2017. A single issue was distilled for determination which is as follows:

**F** **Whether the Court of Appeal was right and empowered to strike out the two applications pending before it.**

**G** Alex Ejiesime Esq. of counsel for the 3<sup>rd</sup> respondent adopted his brief of argument filed on 20/3/17 and raised two issues for determination which are thus:

**H** 1. **Whether the Court of Appeal was right to have struck out the two pending applications.**

**I** 2. **Whether the notice of appeal, the initiating process in this appeal was signed in any manner known to law.**

- A** I see the single issue as crafted by the 1<sup>st</sup> and 2<sup>nd</sup> respondents as adequate in the determination of this appeal and I shall utilize it.

### **SOLE ISSUE**

- B** Whether the Court of Appeal was right and empowered to strike out the two applications pending before it.

Learned counsel for the appellant stated that the court below ought not to have struck out the two applications particularly the one of 9<sup>th</sup> February, 2005 without taking arguments as it was filed within the three months statutory period. He cited: **Bowaje vs. Adediwura** (1976) 6 SC 143; **K. Oje & Anor vs. Chief G. Babalola** (1987) 4 NWLR (Pt. 64) 208.

**C** That the application for leave dated 9<sup>th</sup> February, 2005 was fixed for hearing on the 17<sup>th</sup> February, 2005 which application could not be heard on that day because counsel rejected service of the application on them. That the lower court had to adjourn the application and the matter to which an affidavit of urgency is attached, stating reasons why the application should be heard on time ought to be given a short adjournment but the court below adjourned for the long period of 4 months i.e. from February to May, 2005. Learned counsel said the long adjournment was done in bad faith as the court below did not take the appellants into consideration on that day of hearing.

**D** He stated that the proceedings of 15<sup>th</sup> June, 2005 was meant for the hearing of the application dated 16<sup>th</sup> May, 2005. That the application having been withdrawn and struck out, the respondent's counsel having placed their appearances for the respondents on record once again, the court ought to have taken argument on the application of 9<sup>th</sup> February, 2005 or at worst adjourned for hearing of same. That the lower court striking out the applications of 9<sup>th</sup> February, 2005 and 2<sup>nd</sup> March, 2005 is misconceived, premature and biased towards the appellants as the appellants were never availed the opportunity of being heard and this was not an act justifiably done when those applications were struck out on 15<sup>th</sup> June, 2005.

**E** Mr. Daramola of counsel for the appellant contended that the appellants were denied their right to fair hearing on account of the striking

**F**

**G**

**H**

**I**

- A** out of the applications without hearing an argument from the appellants. He cited Section 36(1) Constitution of the Federal Republic of Nigeria 1999; **Agbahomovo vs. Eduyegbe** (1999) 3 NWLR (Pt. 594) 170 at 184 – 185; **Igboho L.G. vs. Boundary Settlement Commissioner & Anor.** (1988) 1 NWLR (Pt. 69) 189 at 201 – 202; **Amoo vs. Alabi** (2003) FWLR (Pt. 174) 198 at 213 – 214; **Adigun vs. A.G of Oyo State** (1987) 1 NWLR (Pt. 53) 678 at 684.

- C** Olayode Delano Esq. of counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents contended that the two applications were incompetent and the Court of Appeal had no jurisdiction to grant the applications for leave being limited to the 3 months period as stipulated by section 27 of the Supreme Court Act. He referred to **Bowaje vs. Adeiwura** (1976) 6 SC 143; **Owonibo vs Tech. Service Ltd vs. John Holt Ltd** (1991) 6 NWLR (Pt. 199) 550 at 559.

- D** He stated further for the 1<sup>st</sup> and 2<sup>nd</sup> respondents that the jurisdiction to stay execution of a judgment can only be exercised pending a valid appeal and in the absence of a pending appeal showed the Court of Appeal did not have jurisdiction to grant the relief sought. That there was no breach of fair hearing on the appellants.

- E** That even though the court exercised the discretion suo motu since there was no miscarriage of justice the decision would not be overturned. He cited **Saude vs. Abdullah** (1998) 4 NWLR (Pt. 116) 387 at 408.

- F** Learned counsel for the 3<sup>rd</sup> respondent contended that the principles of fair hearing can only apply in a case where a party has the right to be heard on a court process and in this instance the appellants do not have the right to be heard and so cannot invoke the principles of fair hearing. He cited **Sosanya vs. Onadeko** (2005) 2 SC. (Pt. 11) 13.

- G** That the application for stay of execution which was also struck out will not be entertained until the appeal had been lodged which is not the case here. He referred to **NDELEA vs. Okorodudu** (1997) 3 NWLR (Pt. 492) 221; **Fatoyinbo vs. Osadeyi** (2002) 5 SC (Pt. 1) 1.

- H** He stated that the notice of appeal, the initiating process was not properly signed as it was signed by the law firm instead of the legal practitioner. He cited **SLB Consortium Ltd vs. NNPC** (2011) 9 NWLR

- I**

**A** (Pt. 1252) 317; **Olagbenro vs. Olayiwola** (2014) 17 NWLR (Pt. 1436) 313 at 366 to 367; **Nigeria Army vs. Samuel** (2013) 14 NWLR (Pt. 1375) 466 at 483.

The stance of the appellant is that the application of 9<sup>th</sup> February, 2005 was filed within time and adjournment of the application of 9<sup>th</sup> February, 2005 was unreasonable, inordinate and without basis at it was done mala fide. That the rejection of service by counsel for the respondents was done in bad faith in order to place the appellants in a difficult position and make it practically impossible to appeal.

**B** **C** Respectively counsel for 1<sup>st</sup> and 2<sup>nd</sup> respondents and that of the 3<sup>rd</sup> respondent disagreed with the position of the appellants holding that the Court of Appeal exercised its discretion properly.

**D** The process of initiating appeals from one stage of litigation to the appellate stage is guided statutorily and by rules of court.

**E** Section 27 of the Supreme Court Act, 2004 has provided that where a person desires to appeal to the Apex court he shall give notice of appeal or notice of his application for leave to appeal in such manner as may be directed by rules of court within the period prescribed by subsection (2) of the this section that is applicable to the case.

**F** Subsection (2) of the said section 27 provides that the period prescribed for the giving of notice of appeal or notice of application for leave to appeal.

**G** **(a) In an appeal in a civil case, fourteen (14) days in an appeal against an interlocutory decision and three (3) months in appeal against a final decision.**

**H** Then subsection (3) of section 27 stipulates that where an application for leave to appeal is made in the first instance to the court below, a person making such application shall, in addition to the period prescribed by subsection (2) of this section, be allowed a further period of fifteen days, from the date of the hearing of the application by the court below to make an application to the Supreme Court.

**I**

- A** It is to be said that the provisions of section 27(3) of the Supreme Court Act, 2004 are clear and left no room for equivocation and so on the 15<sup>th</sup> June, 2005 when the Court of Appeal struck out the two pending applications; application for leave to appeal to the Supreme Court dated 19<sup>th</sup>
- B** February 2005 had ceased to be a competent process and the court below had no jurisdiction at that point to adjudicate on the application and so when the counsel for the 3<sup>rd</sup> respondent made the observation regarding the competence, the natural result was that the applications had to be struck
- C** out. Therefore the suggestions by appellants' counsel of bias on the part of the Court of Appeal or inordinacy and unreasonableness were clearly baseless. This is so because counsel needs be reminded that jurisdiction implies the power or authority of a court to adjudicate over a particular
- D** subject matter and it is the nature of the claim that determines the jurisdiction of the court.

- Again to be brought out is that all courts in the land none excepting have no power to endow itself with jurisdiction and in that wise has no
- E** power to expand or reduce the jurisdictional boundary. I place reliance on **Gafar vs. Govt of Kwara State & 2 Ors** (2007) 1-2 SC 189.

- It is to be reiterated that appellants in this case cannot be heard to complain about fair hearing when the applications that were struck out
- F** were incompetent. That is the exception to the fair hearing principle as it only applies where the party has the right to be heard and when that right does not exist on account of a process that is incompetent or dead on arrival then the party has no leg on which to stand to cry about fair hearing. See
- G** cited: **Sosanya vs. Onadeko** (2005) 2 SC. (Pt. 11) 13; **Bowaje vs. Adediwura** (1976) 6 SC 143; **Owonibo ys Tech. Service Ltd vs. John Holt Ltd** (1991) 6 NWLR (Pt. 199) 550 at 559.

- Since the application for leave to appeal was struck out for
- H** incompetence there is no valid appeal on which the stay of execution application could stand as the non existence of a valid appeal renders the motions for stay of execution pending appeal incompetent and liable to be struck out.

- I** As if the fundamental vice discussed above are not enough, the notice of appeal which is the initiating process to this court was signed by

**A** “Kayode Alli Balogun & Co”. That clearly is not signed by a legal practitioner as provided for by Order 6 Rules 2 (4) of the Court of Appeal Rules, 2011 and the Supreme Court has put its stamp of interpretation on who can sign an originating process upon which the process would be taken  
**B** as valid.

In the case of **SLB Consortium Ltd vs. NNPC** (2011) 9 NWLR (Pt. 1252) 317, this court had interpreted Order 26 Rule 4 (3) of the Federal High Court (Civil Procedure) Rules, 2000 which stipulates that “Pleadings shall be signed by a legal practitioner or by the party if he sues or defends in person.”  
**C**

Order 3 Rule 12(3) of same Federal High Court provides that every originating process shall be signed by the “Legal Practitioner or by the plaintiff where the plaintiff sues in person”.  
**D**

My learned brother, Rhodes-Vivour JSC in the said **SLB Consortium Ltd vs. NNPC** (supra) spelt out the position at pages 237-338 thus:

**E** “All processes filed in court are to be signed as follows:  
**F** First, the signature of counsel, which may be any contraption.  
**F** Secondly, the name of counsel written.  
**F** Thirdly, who the counsel represent.  
**F** Fourthly, name and address of legal firm.” His Lordship further held at 337 (para G) that:

**G** “Once it cannot be said who signed a process it is incurably bad, and rules or court that seem to provide a remedy are of no use as a rule cannot  
**H** override the law (i.e. the Legal Practitioner Act.)”

In the lead judgment, Onnoghen JSC at pages 331-332 (para H-A) held that:

**I**

**A** “.....A process prepared and filed in a court of law by a  
legal practitioner must be signed by the legal practitioner  
and that it is sufficient signature if the legal practitioner  
simply write his own name over and above the name of  
**B** his/or firm in which he carries out his practice.

**C** It has been argued that non-compliance with the provision  
of Order 26 Rule 4(3) supra is mere irregularity ..... as the  
same involves the procedural jurisdiction of the court. I  
hold the view that the submission is misconceived on the  
authority of *Madukolu vs. Nkemdilim (supra)*..... the  
provision of the rules of court involved herein are, by the  
**D** wordings mandatory not discretionary”.

The Court of Appeal followed that interpretation in the case of: **Olagbenro vs. Olayowola (2014) 17 NWLR (Pt. 1436) 313 at 366 to 367 (para H-C)**,  
**E** where the Court of Appeal per Uwa JCA held thus:

**F** “The learned counsel to the respondents had argued that  
with the amendment of the writ of summons and statement  
of claim granted by the trial court, the 1<sup>st</sup> – 3<sup>rd</sup> appellants  
could not be heard to complain about the incompetence of  
the amended processes. The learned counsel tried to  
distinguish *Okafor vs. Nweke (supra)* *Oketade vs.*  
**G** *Akinwumi (supra)* *SLB Consortium Ltd vs. NNPC (supra)*  
and *First Bank Plc & Anor. vs. Salmon (supra)* from the  
present case, and gave reasons why they should be  
distinguished, two of which are, that in the above cases, the  
**H** processes were notices of appeal, secondly no amendment  
had been sort and granted to amend the original processes.  
This argument is not tenable in law. Whether the  
originating process is a notice of appeal, writ of summons  
or statement of claim, it makes no difference, once such  
**I** process is not signed by a legal practitioner where required,

**A**            **it is incompetent.**

**On the issue of amendment .....it is the law that an incompetent process cannot be amended”.**

**B**

See also the Supreme Court decision in *Nigeria Army vs. Samuel* (2013) 14 NWLR (Pt. 1375) 466 at 483 para E-H), where the Court per Onnoghen JSC (as he then was) held thus:

**C**

**“N.O.O. Oke & Co. is not a legal practitioner registered in Nigeria to practice law and thereby clothed with the powers to sign/frank legal documents and file same in the court of law, it is also not a legal person known to law which makes its position worse .....**

**D**

**The lack of legal personality is a fundamental defect which cannot be cured by an amendment. It is a defect that goes to the root of the proceedings and renders same void ab initio. In the eyes of the law, the notice of appeal in this case did not exist and can therefore not be accorded validity by an amendment. What is void is void.”**

**E**

**F**

Similarly, at page 486, F-G of the above case, His Lordship **Ogbunbiyi, JSC** in his respect held thus:

**G**

**“The originating notice of appeal as the initiating process must be competent for any subsequent amendment to be sustained. To hold otherwise and as contended by the respondent's counsel is to put something on nothing and which would surely crumble. The amendment has no foundation to stand thereon.”**

**H**

**I**    Aka'ahs JSC in the same **SLB Consortium Ltd vs. NNPC** in dealing on what should obtain upon amendment of the defective notice of appeal

A stated thus:

**“The originating process i.e. the notice of appeal (which was purportedly amended) upon which the lower court allowed the appeal from the General Court Martial was fundamentally defective which could not be cured by an amendment. Consequently the judgment of the lower court predicated on an invalid notice of appeal is a nullity”.**

C

From the above guides of this court it follows that the amendment granted by this court by which the signature column was rectified was an amendment in futility as the motion on notice of 10<sup>th</sup> March, 2017 seeking leave to amend the defective notice of appeal was a prayer to resuscitate a dead process and so the grant was erroneously made and the error has to be admitted.

D

From the foregoing, whether in respect of the incompetent notice of appeal on account of effluxion of time or the wrongly signed purported notice of appeal this appeal lacks merit and the Court of Appeal was right in striking out the defective process. I am at one with the well rendered lead judgment I too strike out the appeal for incompetence.

E

I abide by the consequential orders made.

F

**Mary Ukaego Peter-odili**  
***Justice, Supreme Court***

**AMIRU SANUSI, (JSC):** I had the advantage of reading before now, the judgment rendered by my learned brother Clara Ogunbiyi JSC. I am in entire agreement with the reasoning therein and the conclusion arrived at that this appeal lacks merit and deserves to be dismissed. I abide by the consequential orders made in the lead judgment.

H

**Amiru Sanusi**  
***Justice, Supreme Court***

I

**A DAUDA BAGE, (JSC):** I have had the benefit of reading in draft the lead judgment of my learned brother **Clara Bata Ogunbiyi, JSC**, just delivered. I agree entirely with the reasoning and conclusion reached. The appeal lacks merit, and it is accordingly dismissed by me.

**B** **Sidi Dauda Bage,**  
*Justice, Supreme Court*

**C**

**D**

**E**

**F**

**G**

**H**

**I**

**DR. SAMUEL U. ISITOR  
AND  
MRS. MARGARET FAKARODE**

**SC/364/2007**

**IN THE SUPREME COURT OF NIGERIA  
HOLDEN AT ABUJA**

**FRIDAY 16<sup>TH</sup> FEBRUARY, 2018**

**BEFORE THEIR LORDSHIPS**

**MUSADATTIJO MUHAMMAD  
KUMAI BAYANGAKAAHS  
AMINA ADAMU AUGIE  
COURT**

**JUSTICE, SUPREME COURT  
JUSTICE, SUPREME COURT  
JUSTICE, SUPREME**

**PAUL ADAMU GALINJE  
SIDIDAUDABAGE**

**JUSTICE, SUPREME COURT  
JUSTICE, SUPREME COURT**

*EVIDENCE: Proof – Plaintiff testified that she bought land from a person and tendered receipt – Defendant did not offer a contrary evidence – Whether the trial court was entitled to rely on the said evidence to enter judgment on behalf of the plaintiff.*

*EVIDENCE: Proof – Where plaintiff has produced evidence in support of his claim which prima facie entitles him to judgment – Onus on the defendant – Whether the defendant needs to produce some evidence to enable the court decide on whose side the case preponderates.*

*LAND LAW: Dispute over land – Where plaintiff tenders an unchallenged land purchase receipt – Effect – Whether it entitles plaintiff to an equitable ownership of the land.*

## **Issue for Determination**

**Whether the learned justices of the Court of Appeal were right in failing to consider the issue of forgery raised and argued by the appellant which issue raised questions that remains (sic) unanswered even though the same was not responded to by the respondent at the lower court.**

## **Facts of the Matter**

By a writ of summons and statement of claim dated 27<sup>th</sup> April, 1999 the plaintiff (now respondent) sued the defendants Mr. Akinola Lukman Gbenga and Dr. S.U. Isitor who is now (the appellant at the Kaduna State High Court claiming several declaratory reliefs which included trespass, injunction and damages over a property known as R. 27, Giraj Abdulwahab Road, Mando, Kaduna which was acquired by and in possession of the plaintiff. The plaintiff and the 1<sup>st</sup> defendant later agreed to settle the dispute and entered into terms of settlement dated 20<sup>th</sup> July, 1999 which were filed in court on 22/2/2001. The plaintiff thereafter brought an application to strike out the 1<sup>st</sup> defendant's name from the suit. This was granted on 17/7/2001 leaving Dr. S. U. Isitor as the only defendant in the action. In paragraph 15 of the amended Statement of Claim, the plaintiff claimed against Dr. S.U. Isitor (the remaining defendant) the following reliefs:

- 15. WHEREOF, the Plaintiff claims against the defendant as follows:**
  - 1. A DECLARATION that the defendant (sic) action in entering into and continuing the erection of structures on the property of the plaintiff No. R. 27 Giraji Abdulwahab Road, Mando, Kaduna without the consent and authority of the Plaintiff constitutes trespass.**
  - 2. A DECLARATION that the plaintiff is the legal**

owner of the other part of the property now known and referred to as No. R. 27 Giraji Abdulwahab Road, Mando, Kaduna, respectively, the said property being carved out of her larger plot, which was sub-divided into plots Nos. R. 26 and . 27 respectively.

3. **A DECLARATION that the purported sale and assignment of the said plot No. R. 27 Giraji Abdulwahab Road, Mando, Kaduna to the defendant by person other than the plaintiff is illegal, null void and of no effect whatsoever.**
4. **AN ORDER of perpetual injunction restraining the defendant either by himself, agents, servant or privies or anybody whatsoever, from further trespass, entering into or carrying on any construction/building on the said property.**
5. **AN ORDER setting aside the purported sale of the said property to the defendant.**
6. **AN ORDER directing the defendant to vacate the said property forthwith.**
7. **GENERAL DAMAGES OF N500,000.00 for trespass, against the defendant jointly and severely (sic)."**

**The trial court delivered judgment in favour of the plaintiff. The Court of Appeal affirmed the judgment hence this further appeal to the Supreme Court.**

**Held** (*unanimously dismissing the appeal*).

1. *Respondent proved ownership of the land.*  
**At the Court of Appeal, the appellant erroneously submitted on the first issue that the respondent did not prove title to the disputed land by any of the five methods enunciated in Idundun vs. Okumagba**

**(1976) 1 NMLR 200.** Having stated that she bought the land from Usman Adamu at the cost of N400.00 on 18/12/1976 who issued her with a receipt (a photocopy of which she tendered), the burden shifted to the appellant to disprove her claim of deriving the title from the said Usman Adamu. Since no evidence to the contrary was forthcoming, the learned trial judge was entitled to rely on it to enter judgment on her behalf. See: *Okonkwo vs. Okolo* (1988) 2 NWLR (Pt.79) 632. (Pp 51–52 Paras I–B)

*Per K. B. Akaahs (JSC)*

In resolving the issue about the legal ownership of the land, the lower court referred to the evidence which the plaintiff gave regarding the sale of the land to her by Usman Adamu and how she commenced building by engaging a contractor Rabson Construction Company which erected the building up to lintel level in one of the buildings and constructed a german floor in respect of the second building and found that the respondent gave unchallenged and uncontradicted testimony in line with her pleadings and claim No. 2 to the effect that she is the legal owner or at best the equitable owner of the property in dispute. The lower court correctly stated the legal position that which is required of the respondent in an action of declaration of ownership of land is to establish his claim by preponderance of evidence. Where the plaintiff has produced evidence in support of his case which prima facie entitles him to judgment, the defendant will need to lead some evidence to enable the court consider on whose side the case preponderates. See: *Aromire vs. Awoyemi* (1972) 2 SC 1; *Adeleke vs. Iyanda* (2001) 13 NWLR (Pt.729) 1. The appellant did not adduce any evidence in the case; consequently there is nothing on which to put on the scale and weigh against the evidence given by the respondent". (P 52 Paras C–G)

2. *Sale receipt entitles plaintiff to be the equitable owner.*

**The sale receipt tendered by the respondent entitles her to an equitable ownership of the disputed land. See: *Agwunedu vs. Onwumere* (1994) 1 NWLR (Pt.321) 375.**

**The respondent initially instituted the action against the present appellant and Mr. Akinola Lukman Gbenga who laid claim to No. R. 26 Giraj Abdulwahab Road, Mando, Kaduna which is adjacent to No. 27. She led evidence to show that she reached an out of court settlement with Mr. Gbenga and he paid her N90,000.00. There is a presumption that since she established her claim in respect of No. 26 Giraj Abdulwahab Road, Mando, Kaduna she would be the owner of the adjacent land. See: *Idundun vs. Okumagba* (1976) 9 – 10 SC 227; *Nkado vs. Obiano* (1997) 5 NWLR (Pt.503) 31.(Pp 52 – 53 Paras G – A)**

3. *No evidence to show that documents tendered were false.*  
**The appellant made a wild allegation that the documents tendered by the respondent were false documents. There is no shred of evidence to prove that the documents were false. The respondent laid the necessary foundation before tendering the photo copies of the receipt of purchase of the land and that does not make it a false document.(P 53 Paras B – C)**
  
4. *All issues raised by appellant were considered by the lower court.*  
**The lower court dealt with all the issues the appellant raised in his appeal. It concluded that the third issue was primarily an attack on the credibility and cogency of the exhibits tendered which were covered in issue 2. I agree that the lower court did not omit to deal with any issue raised by the appellant in the lower court. (P 53 Paras C – D)**

### **Nigerian Cases Cited**

*Adeleke vs. Iyanda* (2001) 13 NWLR (Pt. 729) 1.  
*Agwunedu vs. Onwumere* (1994) 1 NWLR (Pt.321) 375.  
*Aromire vs. Awoyemi* (1972) 2 SC 1;

- A** *Idundun vs. Okumagba (1976) 1 NMLR 200.*  
*Nkado vs. Obiano (1997) 5 NWLR (Pt. 503) 31.*  
*Okonkwo vs. Okolo (1988) 2 NWLR (Pt. 79) 632.*

**B Representation**

Godswill Iyoha Iyoke (Esq.) with Patrick Ojeka Iyayi (Esq.) and Ahmed Ladan Gobir (Esq.) for Appellant.

- C** Tajudeen O. Oladoja (Esq.) with Fausat Abdulsalam (Esq.), Chioma Williams (Esq.), Hauwa Ibrahim Boli (Esq.) and Barnabas John (Esq.) for Respondent.

- D BAYANG AKAAHS (JSC) (Delivering the Lead Judgment):** By a Writ of Summons and Statement of Claim dated 27<sup>th</sup> April, 1999 the plaintiff (now respondent) sued the defendants Mr. Akinola Lukman Gbenga and Dr. S.U. Isitor who is now (the appellant at the Kaduna State High Court claiming several declaratory reliefs which included trespass, injunction and damages over a property known as R. 27, Giraj Abdulwahab Road, Mando, Kaduna which was acquired by and in possession of the plaintiff. The plaintiff and the 1<sup>st</sup> defendant later agreed to settle the dispute and entered into terms of settlement dated 20<sup>th</sup> July, 1999 which were filed in court on 22/2/2001 (See pages 21 – 22 of the records). The plaintiff thereafter brought an application to strike out the 1<sup>st</sup> defendant's name from the suit. This was granted on 17/7/2001 leaving Dr. S. U. Isitor as the only defendant in the action. In paragraph 15 of the amended statement of Claim, the plaintiff claimed against Dr. S.U. Isitor (the remaining defendant) the following reliefs:

**H “15. WHEREOF, the Plaintiff claims against the defendant as follows:**

- I 1. A DECLARATION that the defendant's (sic) action in entering into and continuing the erection of structures on the property of the plaintiff No. R. 27 Giraji Abdulwahab Road,**

- A** Mando, Kaduna without the consent and authority of the Plaintiff constitutes trespass.
- B** 2. **A DECLARATION that the plaintiff is the legal owner of the other part of the property now known and referred to as No. R. 27 Giraji Abdulwahab Road, Mando, Kaduna, respectively, the said property being carved out of her larger plot, which was sub-divided into plots Nos. R. 26 and . 27 respectively.**
- C** 3. **A DECLARATION that the purported sale and assignment of the said plot No. R. 27 Giraji Abdulwahab Road, Mando, Kaduna to the defendant by person other than the plaintiff is illegal, null void and of no effect whatsoever.**
- D** 4. **AN ORDER of perpetual injunction restraining the defendant either by himself, agents, servant or privies or anybody whatsoever, from further trespass, entering into or carrying on any construction/building on the said property.**
- E** 5. **AN ORDER setting aside the purported sale of the said property to the defendant.**
- F** 6. **AN ORDER directing the defendant to vacate the said property forthwith.**
- G** 7. **GENERAL DAMAGES OF N500,000.00 for trespass, against the defendant jointly and severely (sic)."**

**H**

The plaintiff brought an ex parte application dated 11<sup>th</sup> November, 1999 in Suit KDH/KAD/846/98 praying for:

- I** 1. **An order granting leave to the Plaintiff/Applicant to serve the writ of summons and the statement of**

- A** claim as well as all other court processes in this suit,  
**B** on the 2<sup>nd</sup> defendant/respondent, by substituted  
service by pasting same at Iman Hospital Building  
No. 2, College Road beside Luchia Hotel, Ungwan  
Dosa Kaduna, the last known place of business of  
the 2<sup>nd</sup> defendant/respondent.
- C** 2. An Order deeming service on the 2<sup>nd</sup> respondent due  
and proper upon the pasting of the court processes  
on the said house No. 2, College Road, Ungwan  
Dosa, Kaduna.

**D** The application was moved and granted on 26/11/99. In granting the  
application Dalhatu Jaafaru J (of blessed memory) said:

**E** “Court: The application deserves to succeed. Leave to  
serve the writ of summons, the statement of claim  
and other processes in this suit on the 2<sup>nd</sup> defendant is  
hereby granted. The writ of summons and other  
processes are to be pasted at IMAN HOSPITAL  
BUILDING NO. 2 COLLEGE ROAD beside  
**F** LUCHIA HOTEL UNGWAN DOSA KADUNA.  
The above mode of service is deemed to be proper  
and sufficient service on the 2<sup>nd</sup> defendant. Case  
remains adjourned to 16/2/2000 for mention. The  
**G** two defendants are to be served” (See page 88 of the  
records).

**H** On 21/11/2000 learned counsel for the plaintiff moved an application to  
amend the statement of claim. He informed the court that there was  
affidavit of service sworn to by the bailiff of the court. The application was  
granted and the matter was adjourned to 27/2/2001 for mention. On  
17/7/2001 when the name of the 1<sup>st</sup> defendant was struck out, the suit was  
**I** adjourned to 4/10/2001 for hearing and an order was made to serve hearing

**A** notice on the 2<sup>nd</sup> defendant. On 31<sup>st</sup> October, 2001 after the motion to amend the statement of claim was granted, the suit was adjourned to 11/2/2002 for hearing. On 11/2/2002, the plaintiff testified and tendered exhibits after the Registrar informed the court that the defendant was on

**B** notice and that there was an affidavit of service to that effect. (See page 91).

The learned trial judge delivered his judgment on 15/4/2002 granting the reliefs sought in paragraph 15 of the amended statement of claim except reliefs 3 and 5 which he said were not proved. He awarded

**C** N60,000.00 as general damages and costs of N1,000.00 to the plaintiff against the defendant.

**D** The defendant by motion on notice dated 27<sup>th</sup> December, 2002 prayed for extension of time to apply to set aside the judgment entered on the 15<sup>th</sup> April, 2002. The motion was opposed. The defendant appealed against the substantive judgment to the court of Appeal, Kaduna.

**E** The appeal was dismissed on 30<sup>th</sup> April, 2007. On 27<sup>th</sup> July, 2007 the appellant further appealed to this court. The notice of appeal contained two grounds from which the appellant formulated a sole issue for determination to wit:

**F** **“Whether the learned justices of the Court of Appeal were right in failing to consider the issue of forgery raised and argued by the appellant which issue raised questions that remains (sic) unanswered even though the same was not responded to by the respondent at the lower court.”**

**G** The respondent also formulated a single issue namely:

**H** **“Whether the Court of Appeal heard, determined and resolved all the issues formulated by the appellant before it.”**

The appellant filed a reply brief.

**I** **At the trial court the plaintiff/respondent testified as**

**A follows:**

**B “Sometime in 1998 I visited my plot at Mando. On  
reaching there I discovered that the plot was  
partitioned into two. The one part was built on. A  
house was built and somebody was living in it. The  
plot was at Giraji Abdulwahab road i.e. No. R. 26.  
The second one R. 27 the work is going on and is yet  
to be completed. I consulted a solicitor, i.e. Sonny  
C Olorunmola Ake Esq. He wrote a letter to Mr.  
Akinola Lukman Gbenga's Solicitor. I do not know  
the person that delivered the letter. There was a  
reply to the letter. Iyoha Iyoke Esq. replied the  
D letter. I, Iyoke replied on behalf of the defendant. G.  
Ogundiran Esq. replied on behalf of A.L. Gbenga. I  
contacted the A.L. Gbenga personally before my  
Solicitor wrote him. I however did not see the  
E defendant. A.L. Gbenga said he bought the land  
from one Alhaji Tanimu Magaji i.e. plot No. R. 26.**

**F The d(sic) claimed to be owners (sic) of the two plots. I  
bought the plots in 18/2/1976. I bought them from Usman  
Adamu (the owner). I bought the plot at a cost of N400.00.  
The plot was originally one. I built one to lintel level then  
G one I only constructed a German floor in R. 26. I did not do  
the partitioning. It was only the defendant that did the  
portioning (sic). The sale was evidence in writing. It was  
written in Hausa Language. The original of the document  
is misplaced. I however have a photocopy. I can identify  
H the photocopy. It has my name. It also has the name of  
Mai Unguwa i.e. Alhaji Abubakar.**

**I Bawa: We seek to tender it.**

**Court: Exhibit 1 deemed read. The English translation is**

**A Exhibit 1A. It is also deemed read.....**  
**PW1 contd: ... I saw the reply written by I. Iyoke Esq. I made a photocopy of it. I returned the original to the lawyer. I have also seen the letter written by Gbenga**  
**B Ogundiran Esq. i.e. Solicitor to A.L. Gbenga. I can identify the copies of the two replies. they bore my name. They also bore the names of the two defendants and their solicitors. These are the two copies of the replies.**

**C Bawa: We seek to tender them.**  
**Court: Exhibits 3 and 3A. All deemed as read.**

**D PW1conted: I have settled with Mr. A.I. Gbenga. He has paid N90,000.00 for R. 26. It was in July 1999 that we settled. He has paid all the amounts. There is a settlement agreement. It has my name. The name of the 1<sup>st</sup> defendant is also there. The agreement was made on 6/6/2000. This is the agreement.**

**E Bawa: We seek to tender it.**  
**F Court:Exhibit 4 Deemed as read.**

**G PW1 contd: Pray for an order of court enabling me to claim my property from Dr. S.U. Isitor. The property is at R. 27 Giraji Abdulwahab Road, Mando, Kaduna. I also want an order for payment of N500,000.00 damages for the property. The said Dr. S.U. Isitor should be ejected from the place.”**

**H I have reproduced in extenso the evidence adduced by the plaintiff/respondent on which the learned trial judge proceeded to enter judgment on her behalf. Judgment was entered for the respondent on the**  
**I merits.**

At the Court of Appeal, the appellant erroneously submitted on the

- A** first issue that the respondent did not prove title to the disputed land by any of the five methods enunciated in **Idundun vs. Okumagba (1976) 1 NMLR 200**. Having stated that she bought the land from Usman Adamu at the cost of N400.00 on 18/12/1976 who issued her with a receipt (a photocopy of which she tendered), the burden shifted to the appellant to disprove her claim of deriving the title from the said Usman Adamu. Since no evidence to the contrary was forthcoming, the learned trial judge was entitled to rely on it to enter judgment on her behalf. See: **Okonkwo vs. Okolo (1988) 2 NWLR (Pt.79) 632**.

- In resolving the issue about the legal ownership of the land, the lower court referred to the evidence which the plaintiff gave regarding the sale of the land to her by Usman Adamu and how she commenced building by engaging a contractor Rabson Construction company which erected the building up to lintel level in one of the buildings and constructed a German floor in respect of the second building and found that the appellant gave unchallenged and uncontradicted testimony in line with her pleadings and claim No. 2 to the effect that she is the legal owner or at best the equitable owner of the property in dispute. The lower court correctly stated the legal position that which is required of the respondent in an action of declaration of ownership of land is to establish his claim by preponderance of evidence.
- D** Where the plaintiff has produced evidence in support of his case which *prima facie* entitles him to judgment, the defendant will need to lead some evidence to enable the court consider on whose side the case preponderates. See: **Aromire vs. Awoyemi (1972) 2 SC 1; Adeleke vs. Iyanda (2001) 13 NWLR (Pt.729) 1**. The appellant did not adduce any evidence in the case; consequently there is nothing on which to put on the scale and weigh against the evidence given by the respondent.

- The sale receipt tendered by the respondent entitles her to an equitable ownership of the disputed land. See: **Agwunedu vs. Onwumere (1994) 1 NWLR (Pt.321) 375**.

- The respondent initially instituted the action against the present appellant and Mr. Akinola Lukman Gbenga who laid claim to No. R. 26 Giraj Abdulwahab Road, Mando, Kaduna which is adjacent to No. 27. She led evidence to show that she reached an out of court settlement with Mr.

**A** Gbenga and he paid her N90,000.00. There is a presumption that since she established her claim in respect of No. 26 Giraj Abdulwahab Road, Mando, Kaduna she would be the owner of the adjacent land. See: **Idundun vs. Okumagba (1976) 9 – 10 SC 227; Nkaduo vs. Obiano (1997) 5 NWLR (Pt.503) 3.**

**B** The appellant made a wild allegation that the documents tendered by the respondent were false documents. There is no shred of evidence to prove that the documents were false. The respondent laid the necessary foundation before tendering the photo copies of the receipt of purchase of the land and that does not make it a false document.

**C** The lower court dealt with all the issues the appellant raised in his appeal. It concluded that the third issue was primarily an attack on the credibility and cogency of the exhibits tendered which were covered in issue 2. I agree that the lower court did not omit to deal with any issue raised by the appellant in the lower court.

**D** In the affidavit which Monday Abraham deposed to in support of the application for extension of time to apply to set aside the judgment of 15/4/2002, he averred in paragraphs 6, 9, 10, 11, 12, 13, 14, 15, 16, 21 and 22, 23 as follows:

- E**
- F**           **6. That the property at the time of purchase was developed up to the window level and neither floored nor fenced.**
- G**           **9. That sometime in 1998 and subsequent to the facts in paragraph 8 the judgment creditor who introduced herself as Mrs. Farode made claims to the property which she claimed to have acquired and abandoned for over 12 years.**
- H**           **10. That the said development was brought to the applicant's attention through his caretaker, Alhaji Yusuf Abubakar who lives opposite the property.**
- I**           **11. That in view of the said development the applicant, his caretaker and the said Mrs. Farode all went to the office of the traditional leader, the Sarkin Afaka.**

- A**     **12.**   **That further to the above the Local Traditional Authorities disclaimed her person and requested her to produce prima facie evidence of her claims which she promised to, but failed to do.**
- B**     **13.**   **That subsequently and by letter dated 25/9/1998 a legal firm of Sunny Olorunmola Ake & Co. wrote and pasted a letter on the premises of the subject property which letter was retrieved by the caretaker and delivered to the applicant. Copy of the said letter is marked Exhibit**
- C**                     **3.**
- 14.**   **That the applicant immediately directed the letters to our chambers to which we promptly responded as per the terms of the attached letter marked Exhibit 4.**
- D**     **15.**   **That at the instance of the applicant our Goddy Iyoha Iyoke Esq. subsequently met with Mr. Sunny Ake, the judgment Debtor's Solicitor at the time, who informed him that he had not heard any further instruction from respondent but promised to get in touch with our office in the event of any further development.**
- E**                     **16.**   **That in the course of the foregoing developments the applicant was working with the Nigerian Agricultural and Co-operative Bank and resided with his family at the Bank's official quarters at High Cost Barnawa Kaduna until 1999 when he secured any employment in Lagos where he now resides.**
- F**                     **21.**   **That surprisingly on Tuesday 15<sup>th</sup> October, 2002 the erstwhile caretaker in company of the buyer's wife visited our office and informed us of an order of the court demanding the surrendering of possession of the premises to the respondent. Copy of the Warrant is attached and marked Exhibit 7.**
- G**                     **22.**   **That in view of the foregoing development our Goddy Iyoke Esq. contacted the applicant in Lagos who visited our chambers on Friday 18<sup>th</sup> October, 2002, and on the**
- H**
- I**

- A**                    **said date at about 4 p.m. informed me, and I verily believe him to be true and correct as follows:**
- B**                    **(i) That he lived and worked in Kaduna until 1999 when he secured an appointment in Lagos where he moved to with his family.**
- C**                    **(ii) That while he was in Kaduna he was never served any court process neither was he aware of any pending litigation on the property.**
- D**                    **(iii) That whilst in Kaduna he lived at the High Cost official quarters of NACB and all communications on the property had been through the caretaker who lives opposite the subject property, has the keys to the property and farms within the enclosed premises.**
- E**                    **(iv) That the caretaker on his behalf sold the property to a retired Military man by name MWO Jantiku James who has completed the remaining works on the property and moved in with his family.**
- F**                    **(v) That he was never notified nor was he aware of any pending suit against him.**
- G**                    **(vi) That no process in this suit was served on him at any time and the caretaker confirmed that no process was ever pasted on the property.**
- G**                    **23. That our Goddy Iyoke Esq. further informed me and I verily believed him to be true that sometime in December, 2002 he conducted a search at the registry of the court and confirmed as follows:-**
- H**                    **(i) That no order for substituted service was at anytime obtained or served on the applicant in this suit.**
- I**                    **(ii) That the applicant sought the leave of court to serve all processes in the suit on the applicant by substituted means of pasting them at No. 2**



- A                    **and (c) respectively.**
8.                   **That the said house No. 2 College Road, beside Luchia Hotel, Unguwar Dosa, Kaduna was the applicant's last known place of business.**
- B                    **11. That what the judgment debtor/applicant purportedly purchase (sic) as could be seen from the purchase receipt annexed to his affidavit in support as Exhibit 1, is a building situated at UBA ALASAN Street, Afaka, Mando while my house is situate and known as No. R.27 Giraji Abdulwahab Road Mando, Kaduna.**
- C                    **12. That the Mai Anguwa Tanimu Magaji, who purportedly also signed the purchase receipt (Exhibit 1), sold the other half of my said plot, known as R. 26 Giraji Abduwahab Road Mando Kaduna, to one Mr. Akinola Lukman Gbenga.**
- D                    **13. That the said Mr. Akinola Lukman Gbenga upon realizing the fact that I am the actual owner of the plots R. 26 and R. 27 Giraji Abdulwahab Road, Mando Kaduna, pleaded to pay me in order to retain the house and consequently a settlement agreement dated 6/6/2000 was executed, and filed in court resulting in the striking out of the name of Mr. Akinola Lukman Gbenga, as co-defendant in this case on 17/7/2001. A photo copy of the said settlement agreement is hereto attached as Exhibit KC 2.”**
- E
- F
- G
- H                    **In giving the background facts of the case, the learned counsel for the appellant stated in paragraph 1:2 of the brief that:**
- I                    **“Consequent upon the service and execution of the writ of possession on the premises, the appellant became aware of the proceedings and applied by motion to set aside the**

**A judgment of the trial court which was refused.”**

- I checked through the file and I am unable to see any appeal filed against the refusal to grant the prayers sought for in the motion filed on 27/12/2002. There is however a similar motion filed on 25<sup>th</sup> October, 2002 which has an endorsement S/O on 11/3/2003. I presume that the motion of 25<sup>th</sup> October, 2002 was withdrawn and struck out while the one filed on 27/12/2002 was not moved. If that motion had been moved the issue regarding No. 2 College Road, Unguwar Dosa, Kaduna which was the address where the writ of summon, statement of claim and hearing notice were served on the appellant being his last place of business would have been ironed out because if it turned out that the appellant had nothing to do with that address there would be no service of the processes on the appellant known to law.
- B** By section 168(1) Evidence Act there is presumption of regularity as regards the granting of the order for substituted service of all processes served on the appellant including the hearing notices. See. **Ogbuanyiya vs. Okudo (No. 2) (1990) 4 NWLR (Pt.146 551).**

- E** I find that there is no merit in this appeal and I dismiss it with cost of N300,000.00 in favour of the respondent against the appellant.

**K. B. Aka'ahs**  
*Justice, Supreme Court.*

- F** **ADAMU AUGIE, (JSC):** I had a preview of the judgment delivered by my learned brother **Akaahs, JSC** and I agree entirely with his reasoning and conclusions, and I have nothing useful to add thereto. I abide by the consequential orders made.
- G**

**Amina Adamu Augie, Jsc**  
*Justice, Supreme Court*

- H** **ADAMU GALINJE, (JSC):** I have had the privilege of reading in draft the judgment just delivered by my Learned brother, Akaahs JSC and I agree with the reasoning contained therein and the conclusion arrived thereat. The lower court had in its judgment considered the issue of forgery raised and argued by the appellant and all other issues appropriately before arriving at its decision. I find no reason to disturb the concurrent findings
- I**

**A** of facts by the two courts below. The appeal lacks merit and same is hereby dismissed by me as well. I endorse all the consequential orders made in the lead judgment including order as to costs.

**Paul Adamu Galinje,**  
*Justice, Supreme Court.*

**B**

**DAUDABAGE, (JSC):** I have had the benefit of reading in draft the lead judgment of my learned brother **Kumai Bayang Akaahs, JSC,** just delivered. I agree entirely with the reasoning and conclusion reached. I do not have anything useful to add. The appeal lacks merit, and it is accordingly dismissed by me. I abide by all the orders contained in the lead judgment.

**D**

**Sidi Dauda Bage,**  
*Justice, Supreme Court.*

**E**

**F**

**G**

**H**

**I**