

SUPREME COURT OF NIGERIA
24TH SEPTEMBER, 1993 SC 134/1988
CORAM:- S. KAWU, S.M.A. BELGORE,
O. OLATAWURA, I.L. KUTIGI, S.U. ONU, JJSC.

JOSEPH ANIE & 3 ORS PLAINTIFFS

AND

CHIEF UOMA UZORKA & 10 ORS DEFENDANTS

PRACTICE AND PROCEDURE - *Proceedings conducted on a Saturday but during normal Court session-whether leave of the Chief Judge or Administrative Judge is required to enable the Court do so.*

PRACTICE AND PROCEDURE - *Proceedings conducted on a Saturday but during normal Court session - whether the principle in Itaye v. Ekaidere (1978) 9-10 SC. 35 is applicable.*

PUBLIC - *Saturday - whether it is only a work free day or also a HOLIDAYS/public holiday.*

WAIVER - *Party participating fully in proceedings in trial court - whether the principle of waiver applies to prevent them from complaining against some proceedings.*

FACTS

The Appellants as Plaintiffs sued the Respondents at the High Court of Bendel State claiming declaration of title, damages and injunction. The Respondents also brought a cross action seeking similar reliefs. The trial commenced and the learned trial Judge after hearing evidence of the witnesses called by both parties and also address of counsel reserved judgment. The judgment was eventually read on a Saturday in the presence of the parties and their counsel none of whom complained. Being dissatisfied with the judgment of the learned Judge, the Respondents appealed to the Court of Appeal which allowed their appeal holding that the proceedings before the trial Court was a nullity because the judgment was delivered on a Saturday. Being aggrieved by this decision, the Appellants then appealed to the Supreme Court which now had to determine among other issues, whether proceedings conducted during normal Court sessions

2 ANIE V. UZORKA (1993) 12 KLR 1; (1993) 8 NWLR

on a Saturday was a nullity when leave of the Chief Judge or Administrative Judge was not had and obtained.

HELD (unanimously allowing the appeal)

1. It would appear clear enough that while it is generally generally acknowledged that Saturday is work free day in Nigeria, it is not one of those days designated or appointed as a public holiday unless any of the appointed holidays falls into a Saturday. (P 9 L18)
2. By virtue of Order 25 Rule 6 of the High Court (Civil Procedure) Rule of Bendel State, it is only during the annual vacation that leave of the Chief Judge or Administrative Judge on the application of both parties, is required to enable the Court sit and hold proceedings. In this case at hand, the proceedings were conducted during normal Court session and not during annual vacation so the Court of Appeal was in error in holding that permission of the Chief Judge of the State must be obtained to enable the Court conduct proceedings on a Saturday during Court sessions. (P10 L32)
3. The Court of Appeal erred in law in applying the principles of *Itaye v. Ekaidere* which was a case decided on the discretionary powers of the Chief Judge on the one hand and a High Court Judge on the other during annual Court vacation. This principle does not apply in this case in which proceedings were conducted not during annual Court vacation but during normal Court session. (P11 L2)
4. The learned trial Judge acted within his competence, jurisdiction and compass of the relevant law as well as the rules in conducting proceedings on the Saturday in question, such day being a work free day and falling within normal Court session. The Court of Appeal was clearly in error in holding that the delivery of the judgment in the case on Saturday was unlawful and incurably bad. (P11 L26)
5. While a public holiday necessarily includes a work free day, a work free day like a Saturday, is not synonymous with a public holiday unless expressly so declared. (P14 L20)
6. The principle of waiver will in this case prevent the respondents from complaining about the proceedings in the trial Court held on a Sat

(PT. 309) 1

urday after participating fully in the said proceedings. (P15 L24)

7. The learned trial Judge acted rightly and indeed was possessed of the jurisdiction and authority under the law, to sit on the Saturday in question. As no prejudice or substantial miscarriage of justice was occasioned to the Respondents, the proceedings were not a nullity but were proper and lawful. (P16 L27)
8. The appeal in this case succeeds and is allowed. The decision of the Court of Appeal is therefore set aside while the case is remitted to Court of Appeal, Benin to be heard and determined by a new panel of Judges. (P17 L4)

REPRESENTATION:

P.O. Balonwu, SAN, for the Appellants.

J.O.K. Agbettor Esq.,S for the Respondents.

CASES REFERRED TO

1. A-G Bendel State v. Aiyedan (1989) 4 NWLR (pt. 118) 646
2. Buraimoh v. Bamgbose (1989) 3 NWLR (pt.109) 352
3. Ubih v. Onoyivwe (1991) 1 NWLR (pt 166) 166
4. Nwosu v. Imo State Environmental Sanitation Authority (1990) 2 NWLR 688
5. Adelaja v. Fanoiki (1990) 2 NWLR 137
6. Agu v. Ikwewibe (1991) 3 NWLR (pt.180) 385
7. Nwokoro v. Onuma (1990) 3 NWLR (pt 136) 22
8. Ugo v. Obiekwe (1989) 1 NWLR (pt.119) 566
9. Macaulay v. NAL Merchant Bank (1990) 4 NWLR (pt.144) 283
10. Ogbuanyinya v. Okudo (No. 2) (1990) 4 NWLR (pt.144) 283
11. Western Steel Workers Ltd. v. Iron & Steel Workers Union of Nigeria (1987) 1 NWLR (pt.49) 284
12. Chinweze v. Masi (1989) 1 NWLR (pt.97) 254
13. Itaye & Ors v. Chief Ekaidere & Ors (1978) 9-10 S.C. 35
14. Brown & Co v. Harrison (1927) 43 TLR 394
15. Green v. Premier Glynrhonwy State Co Ltd (1928) 1 KB 561
16. Veritas Insurance Co Ltd v. Citi Trust Investment Ltd. (1993) 3 NWLR (pt.281) 349
17. Ososami v. G.O.P (1952-54) 14 WACA 24
18. In re "N" (Infants) 1966 N. No. 1622 Chancery Law Reports - 512
19. MacFoy v. U.A.C. (1962) AC 152
20. Aladegbemi v. Fasanmade (1988) 3 NWLR (pt.81) 129
21. Obodo v. Olomu (1987) 3 NWLR (pt.59) 111
22. Esioghe v. Agholor (1990) 7 NWLR (pt.161) 234

23. Kaugama v. N.E.C. (1993) 3 NWLR (pt. 281) 681
24. Arirori v. Elemo (1983) 1 S.C. - 13
25. Ezomo v. Oyakhire (1985) 1 NWLR (pt.2) 195
26. Atuyeye v. Ashamu (187) 1 NWLR (pt.49) 267
27. Williams v. T.A. Hammonds Projects (1988) 2 SCNJ 318 5
- 5 28. Falobi v. Falobi (1976) 1 NWLR 169
29. State v. Salihu Gwonto (1983) 3 S.C. 62
30. Aliu Bello v. A-G Oyo State (1986) NWLR (pt.45) 828
31. Isaac Okonjo v. Dr. Mudiaga Odje (1985) 10 S.C. 267

STATUE REFERRED TO

- 10 High Court Law of Bendel State S.32(2)

LEAD JUDGMENT BY ONU JSC

- 15 This appeal which emanates from the Court of Appeal sitting in Benin turns solely on the point as to whether a judgment delivered by High Court of Bendel (now Delta) State presided over by Idahosa, J. and holden at Kwale on a Saturday - 18th July, 1981 to be precise was a nullity by reason of its having been so delivered on that day purported to be a public holiday.

- 20 For a clearer understanding of the case, it is pertinent to narrate in a brief outline hereunder facts showing how it originated as follows:

The appellants as plaintiffs sued the respondents who were defendant in Suit No. HCK/44/76 in the High Court of Bendel (now Delta) State then holden at Ughelli in the Ughelli Judicial Division for:

- 25 (a) declaration of title to land at Ashaka called Ekpaizabu/Akpaizebu/Osu-Ogbe.

(b) recovery of possession, damages for trespass and

(c) Injunction.

- 30 After the exchange of pleadings by the parties, the respondent brought a cross-action as plaintiffs in Suit No. HCK/49/76 against the present appellants, who were defendants, seeking similar reliefs in respect of a part of the area earlier claimed by the appellants. The case which had been transferred from the Ughelli Judicial Division to the newly created Kwale Judicial Division went to trial before Idahosa, J. sitting at Kwale. The learned
- 35 Judge proceeded to hear evidence from all the witnesses called by both sides between 15th March, 1978 and 12th June, 1981. Counsel thereafter addressed the trial Court on 30th June, 1981 and it reserved judgment to 16th July, 1981. For reasons not stated, the judgment was not ready on 16th July, 1981 and it had to be further adjourned to 17th July, 1981 - a

Friday and this in the presence of the parties. For reasons also not apparent on record, judgment was not delivered until the following day, Saturday 18th July, 1981 and this in the presence of counsel for both sides none of whom complained as the record clearly indicates.

The respondents feeling dissatisfied with the judgment however, 5
appealed to the Court of Appeal where the only ground of appeal argued on their behalf (they had earlier) filed 4 original and one additional grounds all renumbered 1 to 5, out of which ground 5 was the one argued) attacking the delivery of the judgment on Saturday, 18th July, 1981 as being a nullity. The Court of Appeal sitting in Benin allowed the respondents' appeal, holding that the proceedings before the trial Court were a nullity 10
because the judgment in the case was delivered on a Saturday which was not a normal working day.

Being aggrieved by the decision of the Court of Appeal (hereinafter in the rest of this judgment referred to as the lower Court) the appellants 15
have appealed to the Supreme Court on four original grounds, and with leave, an additional ground of appeal. Parties exchanged briefs of argument in accordance with the rules of Court. The appellants through their counsel have formulated seven tautologous issues, which in my view, are amorphous and in the apt words of the respondents in their brief of argument at page 2 thereof "are constructed upon a misapprehension of the 20
true reasoning and the judgment of the Court of Appeal." That this attack is to a large extent justified stems from the now firmly established principle of law that it is wrong for counsel to formulate issues for determination in excess of the grounds of appeal filed. Indeed it is now a very well established 25
principle of law that except in special cases where the grounds of appeal so dictate, it is undesirable to formulate an issue in respect of each ground of appeal. See *Attorney-General of Bendel State v. Aideyan* (1989) 4 NWLR (Pt. 118) 646; *Buraimoh v. Bamgbose* (1989) 3 NWLR (Pt. 109) 352 and *Utih v. Onayivwe* (1991) 1 NWLR (Pt. 166) 166 - 214. Hence, where as in the instant case, there are five grounds of appeal but learned 30
Senior Advocate on appellants' behalf has submitted seven issues for the determination of Court, such a proliferation of issues can hardly be justified. This is the moreso, when the preponderance of decided cases point irrevocably to the formulation of issues in general practical terms that must be tailored to the issue in controversy. In fact, it is now well settled that 35
such issues for determination must of necessity be limited by, circumscribed and fall within the scope of the grounds. See: *Nwosu v. Imo State Environmental Sanitation Authority* (1990) 2 NWLR (Pt. 135) 688 at 714 and *Adelaja v. Fanoiki & Anor.* (1990) 2 NWLR (Pt. 131) 137 at 148. All told,

not only do the seven issues formulated outstrip the five grounds of appeal in numerical strength falling as they do, outside the scope of those grounds, but are, in my respectful view superfluous and unnecessarily prolix. See Agu v. Ikewibe (1991) 3 NWLR (Pt. 180) 385 at P. 401. The seven questions submitted on behalf of the appellants are therefore accordingly dis-

5 discountenanced for neither being limited by, circumscribed nor falling within the scope of the grounds of appeal.

I will next consider whether the four questions submitted on behalf of the respondents would ideally provide an answer or come readily in use here.

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While it is now well settled that it is not right for a court to suo motu formulate or single-handedly raise issues for the parties (See Nwokoro v. Onwna (1990) 3 NWLR (Pt. 136) 22 at 35 and Ugo v. Obiekve (1989) 1 NWLR (Pt. 119) 556 the four issues put forward on respondents' behalf if

15 contracted into three (by reason of their issues 3 and 4 overlapping each other and for the sake of convenience are better argued together as one issue), I will respectfully adopt them for the argument of this appeal. They are (as modified) set out hereunder thus:

- 20 1. *Can a Judge sit on a Public Holiday when the conditions precedent in accordance with the provisions of the Public Holiday Act, 1979 have not been complied with?*
- 25 2. *Is the sitting by a Judge without compliance with the conditions precedent in accordance with the relevant law "The Public Holidays Act" 1979 on a Saturday, a work-free day declared a Public Holiday, not illegal and dies non juridicus?*
- 30 3. *Is the illegality, if any, resulting from the proceedings a nullity and if a nullity, had the respondents through their compromise not" waived such illegality?*

When the learned Senior Advocate in his brief therefore commenced the argument of the appeal by heading his purported issues 1, 2, 3 and 4 at page 4 of the appellant's brief with Ground 2, and after the condensed or

35 contracted three issues have been given a stamp of approval and adopted by me, I must correct the impression created by him (learned S.A.N.) therein, that it is the grounds of appeal that are argued rather than the issues. A principle which this Court has held times without number leaving no room for doubt, that it is upon the basis of the issues that the

parties found their contention. See Macaulay v. NAL Merchant Bank (1990) 4 NWLR (Pt. 144) 283 at 321. The purpose of issue for determination being to enable the parties narrow the issues in the grounds of appeal so filed in the interest of accuracy, clarity and brevity, they must perforce be related to the ground of appeal. A proliferation of issues as in the instant case, therefore, is not encouraged in the Supreme Court. See Ogbuanyinya v. Okuda (No.2) (1990) 4 NWLR (Pt.146) 551 at 567 - 568. 5

Further still, as can be seen at page 10 of the appellant's brief, is the heading titled "ADDITIONAL GROUND 5", in relation to which from pages 10 to 14, are arguments in support of issues 5 and 6. Now, the fundamental lapse noticeable in the general outlay of the brief, in fairness to learned Senior Advocate, is that while the issues may be related to the captioned grounds, I take the firm view that he albeit went astray in the art of brief writing before commencing to argue the issues, by stating under the heading "LEGAL ARGUMENT" at page 4 of the appellant's brief thus: 10

"It is proposed with the leave of this Honourable Court, to argue the Grounds of appeal in the following order, that is, Grounds 1, 4, 2 and the additional 5. Ground 3 is being abandoned altogether." 15

While Ground 3 which has been abandoned is accordingly struck out, I wish to stress here that it is now firmly settled by decided authorities that it is the issue that are argued and not the grounds as herein before pointed out. 20

See:

1. Western Steel Works Ltd. & Anor v. Iron & Steel Workers Union of Nigeria & Anor (1987) 1 NWLR (Pt. 49) 284 at 304. 25
2. Adelaja v. Fanoiki (supra)
3. Chinweze v. Masi (1989) 1 NWLR (Pt. 97) 254.

I will now commence the consideration of this appeal by taking all three Issues together to wit: Issue 1 which embraces appellants' grounds 1 and 4, issue 2 which overlaps ground 2 and Issue 3 which is related to additional ground 5. While I entirely agree with learned counsel for the respondents that the observation made by the Court at page 299, lines 25 - 32 of the trial Court's record has been quoted out of context, that extract coupled with the court's conclusion at page 300, lines 1 - 8 to the effect that the combined provisions of section 32(2) of High Court Law of Bendel State and Order 25 Rules 1, 5 and 6 of the High Court (Civil Procedure) Rules, also of Bendel State, relied upon as most relevant in aiding the court below to reach its decision, I rather share learned Senior Advocate for the appellants' views that the trial court was under no obligation to seek and obtain 30 35

leave of the Chief Judge before adjourning the case herein on appeal to the Saturday in question to deliver its judgment. This is because the period in question was not during annual court vacation as contemplated by Order 25 of the High Court Rules, Rule 1 which pertinently states that:

"Subject to the provisions of the High Court Law, the Court may, in its discretion, appoint any day or days and any place or places from time to time for hearing of causes as circumstance require."

Therein lies the difference between the facts of the instant case and those decided in *Itaye & Ors v. Chief Ekaidere & Ors* (1978) 9 - 10 S.C. 35, the latter upon which the Court below heavily relied. In *Itaye's* case (*supra*) the issue canvassed was with regard to the continuation of hearing of a case during the annual vacation and whether the delivery of the statement of claim during the period, and consequently the proceedings on that day, was a nullity rather than being only voidable for irregularity *vis a vis* the instant case on appeal where the question agitated is whether a judgment delivered by the High Court of Bendel (now Delta) State on Saturday, 18th July, 1981, was a nullity, having been delivered on that day said to be a public holiday. The next twin questions one would pose for answers thereto are whether Saturday, 18th July, 1981 was a Public holiday and what in essence is a Public holiday?

I will answer the second arm of the two questions rolled up together by me above as follows:

The Interpretation, Act (Cap. 192) Laws of the Federation of Nigeria, 1990 in section 18(1) states that:

*" 'Public Holiday' means a day which is a public holiday -
(a) as respects Lagos, by virtue of the Public Holidays Act.
(b) as respects any other part of Nigeria, by virtue of any corresponding enactment in force in that part. "*

Further, section 1 of the Public Holidays Act, Cap, 378, Laws of the Federation (hereinafter referred to simply as the Act) provides:

"1. The days mentioned in the schedule to this Act shall be kept as public holidays throughout Nigeria."

The schedule to the section then lists the following days as public holidays, to wit:

1. New Year's Day
2. Good Friday
3. Easter Monday
4. Workers' Day (May)
5. National Day (1st October)
6. Christmas Day
7. Such day as the Minister may declare to be public holiday in celebration of the Muslim Festival of Id el Fitr.

8. Such day as the Minister may declare to be a public holi day in celebration of the Muslim Festival of Id el Kabir.
9. Such day as the Minister may declare to be a public holi day in celebration of the birth day of the Prophet Mohammed (Id el Maulud).

Section 2 of the Act states as follows:

"(1) *In addition to the days mentioned in the Schedule to this Act, the President may by public notice appoint a special day to be kept as a public holiday either throughout Nigeria or in any part thereof, and any day so appointed shall be kept as a public holiday.*

(2) *Subject to section 1 of this Act and sub-section (1) of this section, the Governor of a State may by public notice appoint a special day to be kept as a public holiday in the state concerned or in any part thereof, and any day so appointed shall be kept as a public holiday."*

Section 4 of the Act then goes on to stipulate:

"No person shall be compellable to do any act on a day appointed by or under the provisions of this Act to be kept as a public holiday which he would not be compellable to do on a Sunday."

From the foregoing, and in answer to question one above, it would appear clear enough that Saturday while it is acknowledged is a work-free day in Nigeria, is not one of the days designated or appointed to be kept as a public holiday unless of course, any of the holidays set out above as public holidays (excepting Good Friday which must perforce be a Friday) happens to fall to a Saturday. The dichotomy is brought out more glaringly in the provisions of sections 5 and 6 of the Act which enacts particularly in sections 6(1) and (3) thereof as follows:

"6. (1) *Notwithstanding any of the foregoing provisions of this Act, the Director-General of a ministry or the head of any Government Department may, unless otherwise ordered by the appropriate authority, if the interest of the public service or the convenience of the public demand it, require all or any of the persons serving in his Ministry or Department, as the case mat be, to perform on a Saturday, Sunday or public holiday such of their duties as he may deem necessary*

.....
(3) *In this section, references to Department include references to any Court or tribunal set up pursuant to any written law or any other public institution the emoluments of whose employees are paid out of the Consolidated Revenue Fund of the Federation of a State or any other public fund of the Federation or of a State, and references to members of the armed forces of the Federation and*

The italics above are mine to emphasis the use of the word "OR" which has sometimes been used as "and" See Brown & Co. v. Harrison (1927) 43 TLR 394. For instance, MacKinnon, J. read "or" as "and" in the Carriage of Goods by Sea Act, 1924 and his decision was confirmed by the Court of Appeal (England). One does not do it unless one is obliged to because "or" does not generally mean "and" and "and" does not generally mean "or". See Green v. Premier Glynrhonwy State Co. Ltd (1928) 1 K.B. 561 at P. 568 C.A. (per Scrutton L.J.). In the context that "or" is used in the Act in the italicised clause above, its true meaning in the clause "The Permanent Secretary of Ministry 'OR' the Head of any Government Department e.t.c." it is bound to be disjunctive rather than conjunctive as respondents' counsel in his brief would want us to hold. Black's Law Dictionary, 5th Edition at P. 987 defines "OR" as "A disjunctive particle used to express an alternative or to give a choice of one among two or more things."

However, in respect of the Judiciary, the Chief Judge and Judges of a State High Court being special administrative creatures in relation to their role in the administration of justice in that regard, are empowered under section 6(1) and (3) (ibid) when the need arises, to request for work to be done even on public holidays. The above coupled with the provisions of Order 25 rule 1 hereinbefore alluded to, would, subject to the provisions of the High Court Law dealing with court sittings and vacations, imbue the court with a discretion to appoint any day or days and any place or places from time to time for the hearing of causes as circumstances require. The foregoing is however, subject to the provisions of the High Court Law, including section 32(2) thereof which invests the Chief Judge discretionary powers as regards Court sittings in the State. The discretionary powers of the Chief Judge notwithstanding a careful perusal of section 32(2) of the High Court Law read together with the provisions of Order 25 rule 1 of the High Court (Civil Procedure) Rules, will show that every Judge in the State has the discretion to conduct proceedings on any day or days during normal Court sessions. I therefore share learned Senior Advocate's view that by virtue of Order 25 rule 6 of the Rules, it is only during annual vacation that the leave of the Chief Judge or administrative Judge on the application of both parties, is required to enable the Court sit and hold proceedings. In the instant case, it being palpable that the proceedings were conducted not during annual vacation but during normal court session, I take the firm view that the lower Court erred in law in applying the principles of Itaye v. Ekaidere (supra) which was a case decided entirely on the discretionary powers of the Chief Judge on the one hand and a High

Court Judge on the other hand during annual court vacation.

I further hold that the lower Court also erred in law in holding that the permission or leave of the Chief Judge of the State was a sine qua non and must be obtained for there to be a valid conduct of proceedings on a Saturday during normal court session. What the Judge could do was to obtain, as indeed he did in the instant case, the consent of the parties and their counsel. It would be tedious and cumbersome, in my view, to require a Judge under the above provisions of the High Court Law and Rules, to seek and obtain leave of the Chief Judge any time he proposes to hold proceedings on a Saturday, even in the face of mounting backlog of cases before him. It is in this regard that, I accept as valid the point made by learned Senior Advocate for the appellants that any Judge has the jurisdiction to sit in any court and has the right to sit on Saturday or even Sunday which is dies non juridicus, provided he did not compel the litigants who are members of the public and their counsel to attend, the application if any; of the Act notwithstanding. It is in this wise that it is only right to spin out the distinguishing features of Itaye's case (*supra*). The defendants/appellants in that case vigorously objected to the holding of proceedings during vacation. Their counsel was not present in Court, but had written asking for an adjournment. In spite of all these, the trial court went ahead and conducted proceedings during vacation without the participation of some of the absenting and abstaining appellants, against the background of opposition from those present. It was on this basis that the Supreme Court nullified the entire proceedings, thus leading to the return of the case for retrial. See also *Veritas Insurance Co. Ltd v. Citi Trust Investment Ltd.* (1993) 3 NWLR (Pt.281) 349 at 369.

The end result is that the learned trial Judge, in my view, acted within his competence, jurisdiction and compass of the relevant law as well as the rules in conducting proceedings on the Saturday in question, such day being a work-free day and having fallen within normal court session. The lower Court therefore erred in law in holding that the delivery of the judgment in the case on Saturday, 18/7/81, was unlawful and incurably bad. See the case of *Justus Olayemi Ososami v. The Commissioner of Police* (1952 - 54) 14 WACA 24, where during the trial, the case was adjourned to a day which was later proclaimed a public holiday, and though the Magistrate sitting on it at first instance pointed it out, the defence still importuned him to sit on that day and desired him to hear a witness who might not be available afterwards. The Magistrate obliged by hearing him. He believed the witness, but eventually convicted the appellant neverthe-

less.

The appellant in his appeal to the old Supreme Court sought to add a ground of appeal that owing to the Magistrate's sitting on a public holiday, the proceedings were null and void; the Judge refused to allow this ground to be added and dismissed the appeal. The appellant appealed further to the West African Court of Appeal on that point. It was held inter alia that a public holiday in this country is like a Sunday dies non juridicus and that no law proceedings can be held on such a day; that while the appellant might be held to have established the point raised in his ground of appeal, by reason of section II of the West African Court of Appeal Ordinance and the (proviso) thereto, the Court must look further than that, and although the point raised by the ground might be upheld, if the Court considers that no substantial miscarriage of justice has actually occurred, it will dismiss the appeal. The Court went on to say:

"Now, it is difficult to see how in this case the irregularity of the Magistrate sitting on a public holiday can possibly have occasioned any miscarriage of justice. He did so at the request of Counsel for the appellant in the interest of the appellant that his witness might be heard. He heard the witness; in fact, he accepted the truth of that witness's statement but nevertheless convicted him (appellant). Everything the Magistrate did, although it was irregular, was done in the interests of the defence and at the request of the defence.....Although therefore it is incumbent upon us to say that the Magistrate should not have sat on a public holiday, the appeal must be dismissed."

(Parenthesis supplied by me).

A further contrasting example can be seen in the case of *In re "N"* (Infants) 1966 N. No. 1622 (1967) Chancery Law Reports page 512 at pages 526 and 527 in which a Judge made an Order on a Sunday in his home, not even in Court. It was held that:

"although Sunday was a dies non juridicus on which at common law (subject to statutory exceptions) judicial acts could not lawfully be done, the making of an interlocutory injunction Ex parte for the protection of an infant in the exercise of the parental jurisdiction of the Lord Chancellor which always could be exercised on a Sunday (post Pp. 523, 524 & 525) and that since the jurisdiction could now be exercised by all the Judges of the High Court and the rule of Equity prevailed where they differed from the rules of Common Law and the Queen's Bench Judge in Chambers could make a valid order for such injunction on a Sunday."

What in essence it all boils down to is that the High Court Judge in Bendel (now Delta) State, like his counterpart in England as demonstrated above, can validly make an order for a sitting to be held on a Saturday, a work-free day, as he did in the present case and that in doing so, he would be exercising his powers under section 14 of the High Court Law of Bendel State (now applicable to Delta State) which enacts that: 5

"Subject to the express provisions of any Law, in every civil cause or matter commenced in the High Court, Law and Equity shall be administered by the High Court concurrently and in the same manner as they are administered by the High Court in England or by the Supreme Court." 10

When therefore the learned trial Judge in the instant case read his judgment on that Saturday which as I have already held was a work-free day; that day not having fallen to vacation period but to a period when court was in session, he was perfectly entitled, at his convenience and if the parties so requested due to time constraints, to sit and deliver the judgment without seeking and obtaining anyone's permission. In this case he opted to sit on a Saturday and both litigants as well as their counsel raised no objection thereto. Indeed, counsel on either side is on record as having attended the sitting and none can now be heard to complain. There being no compulsion of any of the parties to work on 18/7/81 and what transpired on that day was done in the interest of the Public Service or, that Public convenience demanded it, the fact that it was ordered by the head of the department who in the instant case I hold the trial Judge is vide sections 5 and 6 of the Act, the respondents' contention on the point to the contrary would appear to me to be of no avail. Any right the appellants had in objecting to the proceedings being conducted on a Saturday had, in my respectful view, been waived by them by their very act of attendance in Court and/or representation of them by their counsel and failure on their counsel's part to raise an objection therein. Indeed, one is prompted to ask, what injustice has the respondents' suffered by the fact that the judgment was delivered on a Saturday? My answer is respectfully none. 15 20 25 30

It is in the light of the foregoing that I share learned Senior Advocate's view that the proceedings in the case in hand were at worst an irregularity but surely not a nullity. Support for this view could be found in the case of Macfoy v. United Africa Co. (1962) A.C. 152 at p. 160 where Lord Denning had the following to say in a case in which pleadings had been filed during long vacation thus: 35

".....But if the act is only avoidable then it is not automatically void. It is only an irregularity which may be waived."

It is not to be avoided unless something is done to avoid it. There must be an order of Court setting it aside and the Court has a discretion whether to set it aside or not."

See also *Aladegbemi v. Fasanmade* (1988) 3 NWLR (Pt. 81) 129 at pages 154-161.

5 Authorities on this issue, both Nigerian and English, are few and scarce. This is evident in the judgment of the Court below herein on appeal regarding which the court could only muster the two cases of *Itaye and Ososami v. C.O.P.* (supra), (the latter a criminal case), where the main features were that the Courts there did the acts complained of during annual vacation
10 and on a day designated as a public holiday respectively, pursuant to section 2(3) of the Act which states:

"In this section "public holiday" includes part of a day and any day declared as a work-free day."

I need only remark here in passing that when one looks back in retrospect
15 that times were in the nineteen seventies when several countries including Nigeria that hitherto observed a six-day working week (judicial notice of which I take) enacted legislations to ensure for employees a minimum of 40 - hour week of five working days in place of longer working periods, all aimed at affording to workers (employees) enough rest per working week,
20 the origin of the observance of a work- free Saturday will not be hard to come by or decipher. I must say hereafter all I have said above, that while a public holiday necessarily includes a work-free day, a work-free day like a Saturday, is not synonymous with a public holiday unless expressly so declared.

25 Indeed as *Tobi, J.C.A.*, in *Veritas Insurances Co. Ltd v. Citi Trust Investments Ltd* (supra) said at Page 370 paras A - C regarding the effect of delivering a judgment on a day falling within the Christmas Vacation:

"Parties and or their counsel sit in Court and listen to the judgment being delivered. They do not play any role beyond listening and at times taking down random notes in the course of the delivery of the judgment. Some do not take notes. They just listen and leave the court at the end of the judgment, with the usual cliché as the court pleases, even when the pleasure of the court is not the pleasure of the party who lost the case.

In my view, since the appellant, even if in Court, was not to take any legal steps to vindicate his legal 'right' if any, he has not suffered any injustice. The best she could have done was to apply to arrest the judgment. In my opinion, failure to do so is not tantamount to a miscarriage of justice, in the light of the circumstances of and level of the non-compliance with the rules. The appellant

merely raised and fomented a heavy storm inside a very small tea cup. Beyond the turbulence of the storm, there is really nothing. Perhaps the position should have been different if the matter was at the stage of physically taking evidence or at the point of address."

See generally *Obodo v. Olomu* (1987) 3 NWLR (Pt. 59) 111 and *Esieghie v. Agholor* (1990) 7 NWLR (Pt. 161) 234. 5

However, in *Kaugama v. National Electoral Commission* (1993) 3 NWLR (Pt. 281) 681 Achike, J.C.A. faced with different facts at page 710 paras. B - D of the Report, in interpreting the provisions of section 15(3) of the Interpretation Act in relation to an election petition to the effect that "when by an enactment any act is authorised or required to be done on a particular day and that day is a holiday, it shall be deemed to be duly done if it is done on the next following day which is not a holiday" held thus: 10

"Sundays and public holidays having been expressly mentioned as holidays, i.e. non dies, it follows that the other days in the week, including Saturday, are excluded from the terminology of a holiday. Consequently, the provisions of sub-section (3) of section 75 cannot operate in favour of the Tribunal to deliver its judgment on Monday, 5th October, 1992. That judgment has expired on 3rd October, 1992, Saturday. Indeed, the record of proceedings is replete with the fact that the Tribunal sat on certain Saturdays. There was obviously no misapprehension on the part of the Tribunal that it could sit on a Saturday. In conclusion, I am of the opinion that the judgment delivered by the Tribunal on 5th October, 1992 was delivered outside the date allowable under Decree No. 18 of 1992. Accordingly, I hold and declare the said judgment a nullity." 15 20 25

In the instant case, however, it is trite law that a party cannot let sleeping dogs lie and thereafter complain in the vain illusion that they did not bark. This is the principle of waiver which in the circumstances of this case prevents the respondents from complaining about the proceedings in the trial court of 18/7/81, after participating fully in the said proceedings. 30 See *Ariori & Ors. v. Muraino B.O. Elemo & Ors* (1983) 1 SCNLR 1; (1983) 1 S.C. 13; *Ejomo v. Oyakhire* (1985) 1 NWLR (Pt. 2) 195; *Saka Atuyeye & Ors v. E. O. Ashamu* (1987) 1 NWLR (Pt. 49) 267 at 283 and *Williams v. T.A. Hammond Projects* (1988) 1 NWLR (pt.71) 481; (1988) 2 SCNJ 318, the latter in which it was held that a party is deemed to have waived the failure to fulfil a condition precedent. In so far as in the instant case it has been shown that there is no miscarriage of justice, this Court would opt to lean against technicalities in the interest of doing substantial justice. See *Falobi v. Falobi* (1976) 1 NMLR 169. Clearly therefore, the respondents would appear to have obtained their 35

victory in the instant case in the court below on pure technical grounds. The attitude which this Court has in recent times adopted and consistently followed thereafter is that it will not accept such technicalities but will rather strive to achieve justice as between the parties by looking at the substance of the case. See for example its decisions in *The State v. Salihu Mohammed*
5 *Gwanto & 4 Ors* (1983) 1 SCNLR 142; (1983) 3 S.C. 62; *Aliu Bello & Ors. v. Attorney-General of Oyo State* (1986) 6 NWLR (pt. 45) 828 and *Isaac Okonjo v. Dr. Mudiaga Odje & Ors* (1985) 10 S.C. 267.

As pointed out from the onset of this judgment, the fulcrum upon
10 which the appeal herein revolves is whether the sitting by the trial Court on Saturday, 18/7/81, a work-free day amounted to a nullity it being argued that that day was dies non juridicus. It is clear from the record before us that the respondents were content to abandon all other grounds of appeal at the lower court which attacked the judgment of the trial court on the
15 merit but rather chose to pitch his battle on arguing the ground that attacked the jurisdiction and authority of the trial court to pronounce on the matter of a work-free day, which he submitted, was a nullity. The only reasonable inference one can arrive at here is that it being impossible at that stage for the respondents to obtain judgment on the merit they rather
20 chose the narrow, blind and strait alley of impeaching the decision on mere technicalities. Hence, non-compliance with the Rules of Court in the instant case, if any, can at worst be regarded as an irregularity and the act consequent upon its non-observance will only be void where the non-compliance will result in a miscarriage of justice. See *Veritas Insurance Co. Ltd* case (supra). The respondents' contention that the Law does not permit a
25 person to contract himself out of or waive the effect of a rule of public policy that says that Saturday be observed as a public holiday or work-free in accordance with the provisions of section 6(1) and (3) of the Act is not applicable in the instant suit and therefore there could be neither acquiescence in any illegality nor that laches applied. I therefore take the view that
30 by the conduct and acquiescence of the parties as well as their counsel in the case in hand, the learned trial Judge acted rightly and indeed was possessed of the jurisdiction and authority under the law, to sit on the Saturday in question and that no prejudice or substantial miscarriage of justice was done to the respondents as the records clearly show, by the
35 purported fact that Saturday is a dies non juridicus under the Act. See *Ososami's case* (supra). Accordingly, I hold that the proceedings of that day and indeed, the entire proceedings, were not a nullity but were proper and lawful.

The parties and the learned trial Judge, in my view, neither com-

promised any illegality to render the decision arrived at on 18/7/81, a purported dies non juridicus, a nullity, nor permitted a miscarriage of justice to be occasioned thereby.

While issue is answered in the positive, issues 2 and 3 are accordingly both answered in the negative in the light of all have said above.

In the result, this appeal succeeds and it is allowed by me. The decision of the court below dated June 4, 1987 is hereby set aside. The case is remitted to the Court of Appeal Benin, constituted by a new panel of Justices of that Court, to hear and determine the appeal on its merits. Costs in this appeal are assessed at N1,000.00 against the respondents and in the lower Court costs are to abide the outcome of the hearing therein.

KAWU JSC

I have had the advantage of reading, in draft, the lead judgment of my learned brother, ONU, J.S.C. which has just been delivered. I agree with him that there is merit in this appeal and that this appeal ought to be allowed. The Court of Appeal was in error to have concluded that Saturday 18th August, 1981 on which the learned trial Judge delivered his judgment was a public holiday. Even if the day was a public holiday, it had not been shown that the mere delivery of the judgment had occasioned a miscarriage of justice. For all the reasons cogently set out in the lead judgment of my learned brother, Onu, J.S.C. I too will allow the appeal and set aside the judgment of the Court below delivered on 4th June, 1987. I abide by the consequential order made in the lead judgment, including the orders as to costs.

KUTIGI JSC

The single issue for determination in this appeal is whether or not the judgment of Ugehli High Court delivered on the 18th day of July, 1981 which was a Saturday, was a nullity as pronounced by the Court of Appeal, Benin in its judgment of 4th June, 1987. I have myself read through the Public Holidays Act Cap. 378 Vol. 21 Laws of the Federation, 1990 and the High Court (Civil Procedure) Rules of Bendel State and found nothing against the practice, particularly when the High Court was not on vacation at the time. Circumstances largely dictate whether or not one will work on a work-free day or on a day declared as a public holiday. That much is recognised by the law itself. (See section 6 of the Public Holidays Act). The parties herein suffered nor lost nothing by that act alone. I agree

with the conclusion in the lead judgment of my learned brother Onu, J.S.C., that the judgment as delivered was not a nullity. I will also allow the appeal and send the case back to the Court of Appeal, Benin to be heard on merit by a fresh panel. The appellants are awarded costs of N1,000.00 .

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BELGORE JSC

I had the privilege of reading in advance the judgment of Onu, J.S.C. with which I agree. I adopt his reasoning and conclusion as mine in
10 allowing this appeal and I award the same costs as he has done.

OLATAWURA JSC

15 I had a preview of the judgment of my learned brother Onu, J.S.C., just delivered. I agree with his reasoning and conclusions. I will also allow this appeal. We must now realise that there are situations in view of developments throughout the world which can make a court sit on any day even on a Sunday. As long as parties are not forced to sit on a public holiday I
20 think the proceedings on such a day should not be declared a nullity. There are numerous examples e.g. where, an absconding defendant decides to leave the country by plane on a Saturday or a Sunday, and to wait until Monday which is a working day may be too late in order to seek the remedy required.

25 Where again, a non-Nigerian who is indebted to a Nigerian plans secretly to leave the country on Sunday so as to escape justice, I think the court can sit on a Saturday where the court processes have been duly filed so as to stop him from leaving the country. My learned brother, Onu, J.S.C has dealt in details with the facts of the case and I also will allow this
30 appeal and I hereby set aside the decision of the lower court dated 4th June, 1987 and remit the case to the Court of Appeal to be heard on its merits by another panel. I also abide by the order for costs made in the lead judgment.

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