

SUPREME COURT OF NIGERIA
29TH JANUARY, 1993. SC.18/1992
CORAM:- A. G. KARIBI-WHYTE, A. B. WALI,
O. OLATAWURA, I. L. KUTIGI, M. E. OGUNDARE, JJSC

1. PROF. OGBUEFI JOSEPH
CHIKE EDOZIEN & ORS APPELLANTS

AND

CHIEF (ENGR.) ONIA EDOZIEN RESPONDENT

APPEALS - notice of withdrawal of appeal - whether an appellant having filed a notice of withdrawal can subsequently revoke the notice.

CIVIL PROCEDURE - filing of notice of withdrawal of appeal under O. 8 r. 6(1) of the Supreme Court Rules, 1985 - effect thereof - when appeal is deemed to have been withdrawn.

LEGAL PRACTITIONERS - relationship between Counsel and Client where two or more counsel are briefed by a party - action of junior Counsel whether binding on the Senior Counsel and their Client.

FACTS

The Plaintiff/Respondent brought an action against the Appellants as Defendants in the Asaba High Court seeking the Court to declare null and void the selection of the first Defendant as the Asagba of Asaba. Plaintiff subsequently applied for interim injunction restraining the first Defendant from parading, holding out himself as or for installation as the Asagba of Asaba which was granted. Also granted was an injunction restraining the Defendants/Appellants jointly and severally from parading, holding out, presenting, recognizing and/

or installing the 1st Defendant as the Asagba of Asaba. Application by the 1st, 2nd and 3rd Defendants to discharge the order was refused. Applicants also filed a motion to have the Plaintiffs action dismissed or struck out for want of jurisdiction and their application was struck out by the High Court.

The Defendants appealed to the Court of Appeal against inter alia, the striking out of their application in respect of jurisdiction and their appeal was dismissed by that Court. They then gave notice of appeal to the Supreme Court against the dismissal of their said appeal by the Court of Appeal. The case was subsequently transferred to another Judge. When it came up for hearing, Counsel for the Plaintiff/Respondent pointed out that there was a pending appeal in the Supreme Court challenging the jurisdiction of the High Court and as such he could not go on. The trial Judge indicated his readiness to start and complete the matter quickly saying that he would not like to be obstructed by interlocutory applications. Counsel to the Applicants thereupon undertook that the appeal in the Supreme Court has to be discontinued. Appellants then filed a notice of withdrawal of the appeal. They subsequently brought this application for leave to withdraw that "Notice of withdrawal". It was also contended on their behalf that the junior counsel who withdrew the notice of appeal had no authority to withdraw it and that the Respondent or his Counsel did not sign the said Notice of withdrawal.

HELD (unanimously dismissing the application)

1. The Appellant, or the legal practitioner can file the notice of withdrawal of appeal and the one filed in this case is a proper notice having been filed in compliance with order 8 rule 6 (1) of Rules of the Supreme Court. (p. 102 L. 21)

2. Once a notice of withdrawal of an appeal has been filed by a legal practioner or one of the legal Practitioners retained by the Appellants, the notice is effective and binding on the Appellants, as if the notice has been filed by the appellants themselves. (p.103 L.3)

3. An appeal is withdrawn under Order 8 rule 6(1) of the Supreme Court Rules when the notice of withdrawal is filed by the party entitled to do so, in this case the Appellant. (p.103 L.28)

4. The right of a leading Counsel to address the Court where there are Junior Counsel is a rule of practice which has the force of law. If the leading Counsel announces that one of his junior counsel will address the court or conduct the case, the senior is equally bound by the result of the case. To shift in responsibility thereafter is to engage in a game of hide and seek in legal practice. (p.105 L. 9)

5. Where two or more Counsel are briefed in a case, they have right to conduct, settle or compromise in so far as their actions are within the ethics of the profession. (p.105 L.19)

6. There are no condition precedent attached to withdrawal of an appeal under O. 8 r. 6(1) as may be the case in other sub-rules of the Supreme Court Rules, 1985. The purpose of O. 8 r. 6(1) is to simplify without any impediment the withdrawal of an appeal by the party affected by the decision appealed against. (p.106 L. 6)

7. Where a party by his words or conduct has led another to believe in a particular state of affairs, he will not be allowed to go back on it when it will be unjust or inequitable to that other person. (p. 106 L. 27)

8. Once the notice of withdrawal of appeal has been filed by the Applicant, the appeal stands dismissed, and there can be no leave to withdraw an action that has already been dismissed. (Ezomo V. A.G. Bendel State applied). (p. 106 L. 33)

PER KARIBI-WHYTE JSC "The general and accepted view is that Counsel acts on the general instruction of his Client. He must adhere to any special instructions given by or on behalf of his Client. Counsel, however, as a general rule has complete control over how these instructions are to be carried out. This is the usual dominant and general instruction to Counsel to conduct the litigation in Court to final (PT.

(PT. 272) 678

ity. In carrying out this instruction. Counsel functions as an independent contractor who exercises his skill and judgment and is free to act as he considers fit within the instruction in the interest of his client. (p. 118 L.12)

REPRSENTATION

Chief Olisa Chukura, S.A.N., K.N. Njiokuemeni, O.O Holloway, For the Appelants

Dr. I A. Okafor, O. Onyekwuluje, For the Respondents

CASES REFERRED TO

1. Ezomo v. Attorney General of Bendel State (1986) NWLR (pt. 36) 448
2. Ezeomu v. Agheze (1991) 4 NWLR (pt. 189) 631
3. Eronini v. Iheuko (1989) 3 NWLR (pt. 101) 46
4. Majekodunmi v. WAPCO (1992) 1 NWLR (pt. 219) 564
5. Ariori & ors v. Elemo & ors (1983) 1 SCNLR 1
6. Akeredolu v. Akinremo (1986) 2 NWLR (pt. 25) 710
7. Ogunremi v. Dada (1962) 1 ALL NLR 663
8. Performing Right Society Ltd. v. Mitchell & Booker Palaisdedanse Ltd. (1924) 1 KB 702
9. Matthews v. Munster (1887) 20 QBD 141
10. Swinfen v. Swinfen 26 L.J. Co. 97
11. Adewunmi v. Plastex Ltd. (1986) 3 NWLR 767
12. Benin-Owena River Basin Development Authority v. Obateru & anor CA/B/157m/86. Unreported
13. Government of Gongola State v. Tukur (No.2) (1987) 2 NWLR (pt. 56) 308.

STATUTES & RULES

1. Traditional Rulers and Chiefs Edict of 1979 Bendel State and B. S.L.N. 139 of 1979
2. Constitution of the Federal Republic of Nigeria, 1979 SS. 32 (2), 33
3. Supreme Court Act. s 22.
4. Rules of the Supreme Court of Nigeria 1985 order 1 rule 2 order

8 rule 6 (1), (2), (4), (5), & (6)

5. Rules of the Supreme Court of Nigeria 1977 order 7 rule 2

6. Court of Appeal rules, 1981 order 3 rule 18 (1), (5)

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LEAD JUDGMENT BY OLATAWURA JSC

10 This application before us has nothing to do with the merit of
the appeal filed against the judgment of the Court of Appeal, Benin
Division delivered on 28th June, 1991. It raises issue of procedure as
to the legality or propriety of withdrawing a "notice" already filed by
an appellant that he does not wish to prosecute the appeal. To with-
draw an appeal is straightforward and uncomplicated but to with-
15 draw a notice already filed has now given rise to the eloquent sub-
missions made before us. Whatever be the merits of this application,
it is necessary to state background facts which are not in issue.

20 The plaintiff at the court of trial sued the defendants and
claimed the following reliefs

25 *"1. A declaration that in accordance with the Customary Law
of Asaba, the provisions of the Traditional Rulers and Chiefs Edict
1979. and of 8.S.L.N. 139 of 1979, regulating the succession to the
title of Asagba of Asaba, it is the turn of Umuezei (Ezenei) Quarter of
Asaba to nominate, select and present a candidate for appointment
as the next Asagba of Asaba.*

30 *2. A declaration that pursuant to the Customary Law of
Asaba, the provisions of the Traditional Rulers and Chiefs Edict, 1979.
and of B.S.L.N. 139 of 1979 regulating the succession to the title of
Asagba of Asaba no candidate or candidates have been nominated
by the said Umuezei Quarter of Asaba.*

35 *3. A declaration that pursuant to the Customary Law of Asaba
and provisions of the Traditional Rulers and Chiefs Edict, 1979, and
of B.S.L.N. 139 of Asagba of Asaba, no candidate or candidates have
been duly presented to the 2nd defendant for the vacant stool of
Asagba of Asaba.*

4. A declaration that the purported meeting summoned on 31st January, 1990 by the 2nd defendant was summoned, and/or constituted contrary to the Customary Law of Asaba, the provisions of the Traditional Rulers and Chiefs Edict 1979, and of B.S.L.N. 139 of 1979, regulating the succession to the title of Asagba of Asaba, 5 and in further violation of the principles of natural justice, equity and good conscience and accordingly illegal, unconstitutional, null and void and of no effect whatsoever.

5. A declaration that the Customary Law of Asaba, the provisions of the Traditional Rulers and Chiefs Edict 1979, and of B.S.L.N. 139 of 1979, regulating the succession to the title of Asagba of Asaba, "adult males" include males of the age of 18 to 55 years and accordingly are entitled to attend meeting participate, or vote in the nomination, selection, and/or presentation of the next Asagba of Asaba. 10 15

6. A declaration that the 1st defendant has not been duly nominated, presented and or/ selected as the next Asagba of Asaba, in accordance with the Customary Law of Asaba, the provisions of the Traditional Rulers and Chiefs Edict 1979, and of B.S.L.N. 139 of 1979, regulating the succession to the title of Asagba of Asaba. 20

7. An order settling (sic) aside the purported selection of 1st defendant as the next Asagba of Asaba. 25

8. An order of injunction restraining the defendants, jointly and severally, from parading, holding-out, presenting, recognizing and/or installing the 1st defendant as the next Asagba of Asaba." 30

Pleadings were filed by the plaintiff and 1st-3rd defendants. Interlocutory applications were made by the plaintiff and the 1st to 3rd defendants.

Rulings were delivered by the learned Judge. The ex-parte application filed by the plaintiff for an order of interim injunction restraining the 1st defendant from parading, holding out or presenting himself as or for installation as Asagba of Asaba and other prayers pending the determination of the substantive application was granted on 12- 35

12-90. Consequently the 1st, 2nd and 3rd defendants brought an application for the discharge of that order. It was refused on 31st January, 1991. The substantive application for the interlocutory injunction was granted.

5 The 1st, 2nd and 3rd defendants filed a motion on notice praying the court for:

10 *"An order dismissing/striking out the action of the plaintiff/respondent as the court as at present stage lacks jurisdiction as the condition precedent to assuming jurisdiction has not been complied with."*

On 15th February 1991, the application was dismissed. On 18th February, 1991 the 1st-3rd defendants filed notice of appeal
15 against the said ruling of 15th February, 1991. On 19th, 1991 the 1st-3rd defendants also filed an appeal against the ruling of 7th February 1991 whereby the learned Judge granted the application for interlocutory injunction. In sum there were two appeals to the Court of Appeal. One was allowed and the other dismissed. The 1st-3rd
20 defendants appealed against the decision of the lower court dated 28th June, 1991.

On an application dated 13th March, 1992 and filed on 18th
25 March, 1992, the 1st-3rd defendants (hereinafter referred to as the applicants) filed an application praying this Court:

30 *"for an order granting the 1st, 2nd and 3rd defendants leave to withdraw the NOTICE OF WITHDRAWAL OF APPEAL" filed at the Registry of the Supreme Court on 7th February, 1992 OR otherwise to retain or restore the appeal on the list so that it may be heard on the merit and for such further or other orders as the Supreme Court may deem fit to make."*

35 There is an affidavit in support of the application. The material averments in the said affidavit are paragraphs 4-18 which read as follows:

"4. On 25th July, 1991 the 1st, 2nd and 3rd defendants filed a motion praying for an order staying or adjourning proceedings in the

suit pending the determination of the appeal to the Supreme Court.

5. *The motion for stay of proceedings was argued before Edah, J. and ruling thereon was adjourned to 11th December, 1991 but before 11th December, 1991 the matter had been transferred to another Judge Maidu, J. and nothing further has yet been said or done about the motion.* 5

6. *Because the plaintiff had not been served, the suit was on 10th December, 1991 before Maidu, J. adjourned to 17th December, 1991 and thence to 6th January, 1992 for service.* 10

7. *On 6th January, 1992, Chief Olisa Chukura was sworn in as Chairman of the Lagos and Ogun States Governorship and Legislative Houses Tribunals and he left the files with me and my senior colleague, Cyril O. Okonkwo, Esquire.* 15

8. *On 23rd January, 1992 the trial Judge indicated that he would wish to hear the case as he was specially assigned by warrant to travel from his station at Agbor to Asaba for the case and would not allow interlocutory matters to delay the hearing.* 20

9. *Leading Counsel for the plaintiff; Dr. Ilochi Okafor, raised the issue of the pending appeal in the Supreme Court which raised the question of jurisdiction. He urged that the appeal be discontinued so that the trial would begin and be completed if possible on the next adjourned dates i.e. 18th and 20th March, 1990.* 25

10. *I thereupon settled and filed a Notice of withdrawal of the appeal at the Registry of the Supreme Court on 7th February, 30 1992.*

11. *When Chief Chukura returned to Asaba during the first week in March, he questioned the propriety of withdrawing the appeal and directed that steps be taken to have it restored on the cause list for hearing on the merit.* 35

12. *The record of appeal has not been sent to the Supreme Court from the Court of Appeal, Benin City.*

13. *The Notice of withdrawal of the appeal was signed by myself alone. Neither the plaintiff nor counsel representing him joined in signing or presenting the Notice of withdrawal.*

5 14. *The appeal raises important and substantial issues of constitutional and administrative law, particularly, the issue of the fundamental right of fair hearing.*

10 15. *The appeal has not been called up for hearing at the Supreme Court.*

15 16. *On 11th February, 1992 the plaintiff filed a motion seeking leave to amend his statement of claim but after argument the application was dismissed.*

20 17. *The plaintiff appealed from this dismissal on 21st February, 1992 and on 3rd March, 1992 applied for a stay of proceedings pending the determination of his appeal. This was served on me on 9th March, 1992.*

25 18. *I agreed to, and did, withdraw the appeal to the Supreme Court on the prospect of a speedy hearing of the suit - without consultation with senior counsel leading me (who was not then available). "*

The plaintiff (hereinafter referred to as the respondent) filed a counter-affidavit. The counter-affidavit was filed by one of his Solicitors. Mr. Onyekwuluje deposed in paragraphs 2-15 as follows:

30 "2. *That I am an associate in the legal firm of Okafor, Okere, Ugolo & Co. the Solicitors to Chief (Engr) Onia G. Edozien, the plaintiff/ respondent in the above-mentioned matter.*

35 3. *That on 6/1/92, I appeared alone on behalf of the Chambers for the plaintiff/respondent, and informed the court that the suit was not ripe for hearing since there were pending an appeal to the Supreme Court challenging the jurisdiction of the Honourable Court as well as a motion for stay of proceedings pending the determination of said*

appeal.

4. That in reply, B.O.I. Ogbolumani, Esq. who was led on said date by C.O. Okonkwo, Esq. for the appellants, assured the court that they were ready to go on with the hearing of the main suit and undertook to abandon the said pending matters.

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5. That upon said assurance, I maintained that it would still be necessary that both appeals and motions be formally withdrawn to enable hearing in the main suit to proceed.

6. That in his Ruling, the learned trial Judge said he was prepared to give accelerated hearing to the main suit and adjourned same to 22/1/92, 23/1/92 and 24/1/92.

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7. That on 22/1/92, I was led for the plaintiff/respondent by Dr. Ilochi A. Okafor, while C.O. Okonkwo, Esq. again appeared with B.O.I. Ogbolumani, Esq. for the appellants.

8. That Dr. Okafor re-iterated our earlier position that unless both appeals and motions were formally withdrawn the hearing of the main suit could not go on, and despite the contrary position of the learned trial Judge, Dr. Okafor refused to open the case for the plaintiff.

9. That on his part, B.O.I. Ogbolumani, Esq. wanted the suit to go on as the appellants would abandon the appeal.

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10. That in the end, the learned trial Judge adjourned the hearing to 18/2/92 and 19/2/92 respectively before which dates, the appellants would in keeping with their undertaking, have filed an application to withdraw said appeal.

11. That before the adjourned date of 18/2/92, the formal notice of withdrawal filed at the Supreme Court on 7/2/92 was served on our chambers.

12. That before the withdrawal was formally made and filed, the appellants through their counsel, had undertaken to do so, and

had ample time to consider or re-consider their position.

13. *That B.O.I. Ogbolumani, Esq. never, on any of the material dates, appeared alone but was led by C.O.Okonkwo, Esq. who never repudiated any statements or undertaking made by him, and similarly the appellants.*

14. *That at the hearing of this matter, I shall seek leave of the Supreme Court to tender a certified copy of the relevant proceedings at the High Court, same not being ready at the moment.*

15. *That subject to the foregoing, I deny all the averments stated in the affidavit of the appellants except as admitted herein-above."*

He filed a further counter-affidavit wherein he attached a certified true copy of the proceedings of 22nd January, 1992. The material proceedings of that day read:

"Court: Since Ogbolumani indicates that the appeal in relation (sic) jurisdiction of court over this case, is to be abandoned in the Supreme Court, Lagos, this Court has ordered that notice of discontinuance to that effect be filed in the appropriate Court and shown to this Court on the adjourned date before the commencement of this case.

Case is adjourned to 18th and 19th of February 1992 for hearing.

*(Sgd) A.N. Maidoh - Judge
22/1/92"*

Both parties filed briefs of argument. The applicants formulated one issue for determination:

"Whether in the particular circumstances of this case, an applicant should not be granted leave to withdraw a notice of his appeal given under Order 8 rule 6 of the Supreme Court Rules 1985."

On the other hand the respondent has three issues for determination:

(1) Whether the appellants can withdraw the notice of withdrawal of appeal duly filed under Order 8 rule 6(1) of the Supreme

Court Rules.

(2) Whether a notice filed by the appellants under Order 8 rule 6(1) is ineffective if all parties in the appeal had not given their consent to the withdrawal of the appeal under Order 8 rule 6(2) of the Supreme Court Rules.

(3) Whether a notice for the withdrawal of the appeal duly⁵ filed by a legal representative of the appellants is ineffective because of the absence of the leading counsel for the appellants."

In his oral submission in support of his brief filed along with the application, Chief Olisa Chukura, S.A.N., the learned counsel to the applicants referred to the affidavit in support of the application and relied on the facts deposed to in the affidavit. 10

In reply, Dr. Okafor, the learned counsel for the respondents, referred to the counter-affidavit and further counter-affidavit in opposition to the application. Learned counsel also relied on the brief of arguments and the documents filed. Counsel then submitted that once a notice of withdrawal has been filed by a party to an action, "the matter is already dismissed": Ezomo v. Attorney-General of Bendel State (1986) NWLR (Pt.36) 448 or (1986) 2 N.S.C.C. 1154. Learned counsel referred to the judgments of Aniagolu and Karibi-Whyte, JJ.S.C, Ezeonu v. Agheze (1991) 4 NWLR (Pt.187) 631,642-3; Eronini v. Iheuko (1989) 2 NWLR (Pt.101) 46; 15 Majekodunmi v. WAPCO (1992) 1 NWLR (Pt.219) 564, 576-577. Learned counsel further submitted that the appellant intended to withdraw the matter and acted on that intention. The mere fact that the appellants' counsel was a junior counsel did not affect the intention to withdraw the appeal. 25 Learned counsel pointed out that since the applicants have not asked the court to depart from our earlier decisions, the court should therefore not depart from them. He also submitted that the amendment to Order 8 rule 6 notwithstanding, the earlier principles stated in the earlier decision should be followed. 30

I will now set down the provisions of Order 8 rule 6 of the Supreme Court Rules, 1985. They are as follows:

"6(1) An appellant may at any time before the appeal is called on for hearing serve on the parties to the appeal and file with the Registrar a notice to the effect that he does not intend further to prosecute the appeal.

(2) If all parties to the appeal consent to the withdrawal of the appeal without order of the court the appellant may file in the Registry the document or documents signifying such consent and

signed by the parties or by their legal representatives and the appeal shall thereupon be deemed to have been withdrawn and shall be struck out of the list of appeal by the court, and in such event any sum lodged in court as security for the costs of the appeal shall be paid out to the appellant.

5 (3) X X X

(4) *If all the parties do not consent to the withdrawal of the appeal as aforesaid, the appeal shall remain on the list, and shall come on for the hearing of any issue as to costs or otherwise remaining outstanding between the parties, and for the making of an order as to the disposal of any sum lodged in court as security for the costs of appeal.*

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(5) *An appeal which has been withdrawn under this Rule, shall be deemed to have been dismissed.*

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(6) *Any application under this Rule may be considered and determined by the court in chambers without oral argument."*

Sub-rule 1 of rule 6 makes provision for the withdrawal of the appeal "before the appeal is called on for hearing". This withdrawal as provided by Form 19 envisages a situation where one or all the appellants, where they are more than one, can file the Notice in the prescribed form. "Appellant" by virtue of order 1 rule 2 Rules of the Supreme Court includes the legal practitioner acting for the appellant. In other words, the appellant or the legal practitioner can file the Notice of Withdrawal. I therefore hold, and this is not in dispute, that the Notice dated 27th January, 1992 and filed on 7th February 1992 is in compliance with order 8 rule 6(1) of the Supreme Court Rules 1985. It is a proper Notice. And where the Notice is signed by either a legal practitioner acting for the appellant or the appellant, there has been due compliance with order 8 rule 6(1) of the Rules of the Supreme Court. In this appeal as at the time the Notice of Withdrawal was filed on 7th February 1992 the appeal has not been called for hearing. "Called for hearing" under this sub-rule means the listing of the appeal on the cause list for the purposes of hearing the appeal.

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It appears to me that sub-rule 2 of the same rule of order 8 applies to where all the parties jointly signed and filed Notice of With-

drawal as a result of agreement reached by the parties to the appeal.

Parties here also relate to the appellant and respondent or their legal practitioners. This is the requirement of Form 20. I will therefore agree with the submission of Dr. Okafor that once a Notice of Withdrawal of an appeal has been filed by a legal practitioner retained by the appellants, "the notice is just as effective and binding on the appellants, as if the notice had been filed by the appellants themselves". Similarly, a notice signed by one of the legal practitioners retained by an appellant is as good as if all of them signed the Notice of withdrawal. It has not been alleged by the applicants that the Notice of Withdrawal settled and signed by Mr. Ogbolumani, one of the junior counsel in the case was signed as a result of negligence of counselor that he had no authority of the parties to do so. Infact, paragraphs 9 and 10 of the affidavit in support of the application leave no one in doubt that it was a decision taken after a due consideration of the circumstances that led to the adjournment of the case by Maidoh, J., on 22nd January, 1992. For ease of reference I will reproduce those paragraphs 9 and 10 of the affidavit in support again. They read thus:

"9 Leading Counsel for the plaintiff, Dr. Ilochi Okafor, raised the issue of the pending appeal in the Supreme Court which raised the question of jurisdiction. He urged that the appeal be discontinued so that the trial would begin and be completed if possible on the next adjourned dates i.e. 18th and 20th March, 1990.

10. I thereupon settled and filed a Notice of Withdrawal of the appeal at the Registry of the Supreme Court on 7th February, 1992."

One can at this stage ask a pertinent question:

When is an appeal withdrawn? In my view an appeal is withdrawn under order 8 rule 6(1) of the Rules of the Supreme Court when the notice of withdrawal is filed by the party entitled to do so; in this case the appellant. The filing of the noticed implies full knowledge and implication of the said notice. There can be no better manifestation of intention to withdraw an appeal than an appeal withdrawn by the appellant or by one of the solicitors briefed by the party withdrawing

the appeal. The court will believe in the sincerity of that intention. The applicants i.e. 1st, 2nd and 3rd defendants had predicated their submissions on these arguments.

1. Only the applicants' counsel signed the notice of withdrawal.
5 Neither the plaintiffs' counsel for the plaintiff nor the plaintiff joined in signing it.

2. It is believed the appeal has not been entered in the cause
10 list of the Supreme Court.

3. The issues raised in the appeal are constitutional and administrative matters relating to section 32(2) of the 1979 Constitution which guarantees right of fair hearing.
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4. Whether a party who favours a speedy trial can resile from that stand and thereafter creates a situation that will stall speedy trial.

20 5. Whether such a party is not stopped and if not whether the opposite party cannot change his own position.

What is really in issue here is the interpretation of Order 8
25 rule 6(1) of the Supreme Court Rules to which I had made earlier reference. The arguments and submissions made by the applicants are not dissimilar to the issues and arguments canvassed in this court in the case of Ezomo v. A.G. Bendel State (1986) 4 NWLR (Pt.36) 448, (1986) 2 N.S.C.C. 1154. I will now deal with the issue
30 hearing raised by the applicants. Reliance is placed on section 32(2) of the Constitution of the Federal Republic of Nigeria. This section reads:

"Any person who is arrested or detained shall have the right
to remain silent or avoid answering any question until after consulta-
35 tion with a legal practitioner or any other person of his own choice"

I cannot see the relevance of this section of the Constitution to the matter before us. Right of fair hearing is enshrined under section 33 of the same constitution. In so far as the notice of withdrawal filed by

the applicants is concerned, invocation of this section by the applicants is an attempt to confuse the real issue. Notice of withdrawal in the case was filed by one of the counsel in the case, though it is being urged indirectly that since it was filed in the absence of the leading counsel we should disregard that notice. See paragraph 18 of the affidavit in support of the application. Senior counsel are briefed to lead junior counsel. The right to appear in a case is an authority conferred by law on a counsel properly briefed. The authority or right of the leading counsel in a case to address the court where there are junior counsel is a rule of practice which has the force of law. If however the leading counsel announces that one of his junior counsel will address the court or conduct the case, the senior is equally bound by the result of the case. To shift responsibility thereafter is to engage in a game of hide and seek in legal practice. No court should be put in a straight jacket. A client who briefs a counsel is presumed to have confidence in the counsel. This confidence will continue for the entire duration of the case unless the brief is withdrawn. The number of counsel that appears in a case sometimes depends on the complexity of the case. All those briefed have right to conduct, settle or compromise in so far as their actions are within the ethics of the profession. The question of fair hearing does not arise in this matter. It can only avail the applicants if the court has forced the applicants to withdraw the action. It is also being suggested that the respondents had been lured into a position where the notice can be withdrawn. The position taken by Dr. Okafor that he would not go on until the appeal filed was withdrawn is right in that until the appeal filed is withdrawn, it is still pending; besides it is an appeal that is based on jurisdiction and unless it is heard and determined or withdrawn, any step taken in respect of the case may amount to an exercise in futility. The solemn undertaking given by Mr. Ogbolumani on 22/1/92 was that the appeal on jurisdiction would be abandoned. He was given time to do so, hence the learned Judge Maidoh G J. adjourned the case to 18th and 19th February 1992. It was there after that the same counsel, Mr. Ogbolumani filed the notice of withdrawal dated 27th January, 1992 more than three weeks before the action was to be heard. Exhibit R1 the proceedings of 22nd January, 1992 has not been impugned.

It is the submission of the applicants that there cannot be a successful withdrawal of the notice until all the parties consent to the

withdrawal, in other words, there must be compliance with order 8 rule 6(2). I cannot easily contemplate a situation where an appellant who gave notice of appeal and filed the grounds of appeal and later changes his mind, about the appeal will be forced to continue with the case. In an extreme case one can ask what will happen if he fails to turn up when the
5 appeal is fixed for hearing? The appeal may be struck out or dismissed. The successful notice of withdrawal of an appeal filed under order 8 rule 6(1) is not dependent on the consent stated under Order 8 rule 6(2) nor can it be called a condition precedent to the successful withdrawal of the appeal under Order 8 rule 6(1) of the Rules of the Supreme Court. The intention of
10 rule 6(1) of Order 8 is to simplify and without any impediment, the withdrawal of an appeal by the party affected by the judgment or decision appealed against.

There cannot be a resort to Order 8 rule 6(4) of the Rules of the Supreme Court in this matter before us. This sub-rule contem-
15 plates where there are more than one plaintiffs or defendants where one of the parties decides to withdraw an appeal without the consent of others. A party comes to court for an alleged wrong done to him, or he seeks a declaration in respect of certain rights but the moment he decides to exercise his unfettered right not to pursue his action,
20 what is left for the court is the order to be made, as it is outside the court's jurisdiction to force a party to continue an action filed by him. There is clearly a difference between the right to withdraw an action filed by a party and a consequential order to be made following the
25 withdrawal. In Ozomo's case (supra) this court held that a party who has filed a notice of withdrawal has no power to revoke his withdrawal, and therefore the appeal cannot be heard. A party is bound by his words, and where by his words or conduct he has led another to believe in a particular state of affairs, he will not be allowed to go
30 back on it when it will be unjust or inequitable to that other, for him to do so. Although we have not been asked to overrule that decision, it is a decision which applies to this application and I will follow it.

In sum I will answer in the affirmative the question posed by
35 the applicant that once the notice of withdrawal has been filed, the appeal stands dismissed. There can be no leave to withdraw an action that has already been dismissed. Costs of N100.00 are awarded in favour of the respondent to this application.

KARIBI-WHYTE JSC

The application before us is for leave by applicants to withdraw the notice to withdraw their notice of appeal, and to restore the appeal on the list for hearing and determination on the merits. Respondent is opposing the application. Appellants, who are the Applicants are the Defendants in the substantive action. Respondents are the Plaintiffs. 5

The point in issue in this ruling is a very short and narrow one. It is however of great procedural and constitutional significance. The question is whether an appellant having filed a valid notice of withdrawal of appeal, can subsequent thereto withdraw such notice of withdrawal. Applicant has contended that in certain circumstances which includes his own situation in this application, he can, Respondent has contended the contrary. 10 15

This otherwise simple point of law can be better understood if discussed with the background of the surrounding circumstances. The facts are as follows. 20
The filling of the vacant chieftaincy of Asaba, known as the Asagba of Asaba, resulted in a dispute between the Respondent and the 1st Appellant. The 1st Defendant has been selected as the Asagba, but has not been formally installed. Before the installation, and on the 9th March, 1990. Respondent brought an action at the Asaba High Court seeking certain reliefs against the 1st Appellant and four others as Defendants. Among the reliefs claimed is a declaration that the purported selection of the 1st Defendant as the Asagba of Asaba was null and of no effect. 25 30

Plaintiff subsequently applied ex parte for interim injunction restraining the 1st Defendant from parading, holding out or presenting himself as or for installation as Asagba of Asaba. This was granted on 12-12-90 by Edah J. He was also on the same application granted injunction restraining the Defendant/Respondent as the Asagba of Asaba. The application of the 1st, 2nd, 3rd Defendants to discharge the Order was refused on 31st January, 1991. On the 7th February, 1991 Edah J. granted Plaintiffs an order of interlocutory injunction 35

restraining the Defendant in the manner stated above.

On the 15th February, 1991; Edah J. struck out the application of the Defendants seeking to dismiss/strike out the action of the Plaintiffs on the grounds of want of jurisdiction. Defendants appealed to the Court of Appeal against the decision. They also appealed against
5 the decision of Edah J. dated 7th February, 1991 granting interlocutory injunction to the Plaintiffs.

On the 28th June, 1991, the Court of Appeal Division, Benin City dismissed the appeal against the ruling of Edah J., dated 15/2/91, i.e. the application to dismiss/strike out the substantive action on the ground of want of jurisdiction. Defendants gave notice of appeal to this Court dated 8/7/91. Appellants brought a motion praying for Stay of proceedings. After argument and before ruling on the motion which was adjourned to 11/12/91, the matter was transferred to
15 Maidoh J.

When the matter came up for hearing on the 23rd January, 1992, Maidoh J. indicated his eagerness to conclude the matter having been specially assigned to hear it. Dr. Okafor for the Plaintiff pointed out that there was a pending appeal in the Supreme Court challenging the jurisdiction of the Court and suggested that it was only proper
20 that the appeal was discontinued, before the trial was commenced; and to complete it if possible. Presumably adopting this suggestion and to facilitate hearing of the case. Appellants filed a notice of withdrawal of the Appeal on the 7th February, 1992. On the 11th February, 1992, Plaintiff filed a motion seeking leave to amend his statement of claim. Defendant opposed the application which was accordingly dismissed. Plaintiff appealed to the Court of Appeal against the decision dismissing his application and on the 3rd March, 1992
25 applied for a stay of proceedings pending the hearing and determination of his appeal. The proceedings would appear to have returned Defendants/Applicants to the situation they were avoiding and for which they have withdrawn their appeal, namely delay in the trial of the action.

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On the 13th March, 1992, Appellants then brought this application for leave to withdraw the "NOTICE OF WITHDRAWAL OF APPEAL" filed at the Registry of the Supreme Court on the 7th February, 1992 or otherwise to retain or restore the appeal on the list so

that it may be heard on the merit.

It would appear from the above account that this application was prompted by the appeal of the Plaintiffs against the dismissal of the application to amend the statement of claim, and the ancillary application for stay of proceedings pending the determination of his appeal. Defendants having withdrawn their own appeal in consideration for expeditious hearing of the matter would wish and expect that no appeal was interposed to delay the matter before the Court. But is this the real issue between the parties?

It is common ground between the parties that the issue is entirely a question of law, and of the correct interpretation of the rule of Court enabling withdrawal of an appeal and the legal consequences thereof. The relevant provision applicable to the facts is Order 8 r. 6, Rules of the Supreme Court, 1985.

Both Counsel filed briefs of argument which they adopted and relied upon in argument before us. The issue for determination has been formulated differently in each brief of argument, Learned Counsel to the Applicant has formulated only one issue which is as follows -

"Whether in the particular circumstances of this case, an applicant should not be granted leave to withdraw a notice of withdrawal of his appeal given under Order 8 rule 6 of the Supreme Court Rules 1985."

Applicant seems to have based his formulation of the issue on the particular circumstances of the case thereby purporting to take the facts of this case out of the general rule. In such a situation, the onus is on him to show the particular circumstances which should take the case out of the general rule.

The Respondent has in his brief of argument formulated three issues for determination as follows:

1. Whether the appellants can withdraw the notice of appeal duly filed under Order 8 rule 6(1) of the Supreme Court Rules.
2. Whether a notice filed by the Appellants under Order 8 rule 6(1) is ineffective if all parties in the appeal had not given their consent to the withdrawal of the appeal under Order 8 rule 6(2) of the Supreme Court Rules.
3. Whether a notice for the withdrawal of the appeal duly filed by a legal representative of the appellants is ineffective because

of the leading counsel of the appellants."

The formulation of the issues for determination by the Respondent had adequately taken care of all the situations envisaged in the arguments of the applicants. I must however mention one aspect in respect of which the formulation is deficient, namely, the consideration for an expeditious trial which prompted applicants to withdraw their appeal in the first instance, and the possibility of delay from the appeal and application for stay of proceedings by the Plaintiff. These were accentuated in the applicant's affidavit and in his brief of argument. In paragraphs 16 and 17 of the affidavit in support of the application it was deposed to as follows:

16. On 11th February, 1992, the Plaintiff filed a motion seeking leave to amend his statement of claim but after argument the application was dismissed.

17. The Plaintiff appealed from this dismissal on 21st February, 1992, and on 3rd March, 1992 applied for a stay of proceedings pending the determination of his appeal. This was served on him on 9th March, 1992."

These and other situations referred to in the brief of argument are presumably the particular circumstances referred to by the Applicant in the formulation of the issue.

I prefer the issues for determination as formulated by the Respondent. This is because they cover all the aspects of excuses which Applicant has raised in the effort to demonstrate the invalidity of the notice of withdrawal of the Appeal. Moreover, the issues as formulated by the Respondent encompass the only issue formulated by the Applicant.

I shall begin with the first two issues for determination which I consider together.

In arguing the only issue for determination, Applicant listed seven circumstances which he regard, deserving consideration in granting the application. Learned Counsel pointed out that (1) although the conditions of appeal had been duly perfected, Appellant had not been notified that the record of appeal had been forwarded to the Supreme Court. (2) Only the applicant's Counsel signed the notice of withdrawal of the appeal. Neither the Plaintiff's counsel, nor Plaintiff joined in signing it, (3) The appeal has not been entered in the

cause list of the Supreme Court. (4) The issues raised in the appeal are constitutional and administrative matters relating to section 32(2) of the Constitution 1979. (5) Can a party who had indicated that he agreed to speedy trial created a situation which will stall such speedy hearing" (6) If a party did that, is his opponent not entitled to change his position corresponding to reverse the steps taken on faith of an earlier understanding? (7) It is understood that the Notice of Withdrawal has been listed in the Supreme Court for 3rd June, 1992.

Relying on the above circumstances, learned Counsel to the applicant submitted that a notice of withdrawal may be rescinded before the Court acts on it and disposes of the appeal. In construing Order 8 rule 6(2) it was further submitted that because both parties or their counsel did not sign the notice of withdrawal the appeal is not deemed to have been withdrawn. In any event it was argued that responsibility for striking out the appeal is that of the Court, and not of the Registrar. Learned Counsel relying on order 8 rule 6(4) submitted that even after the notice of withdrawal had been filed, the appeal remains on the list for issues remaining outstanding between the parties. In the instant case learned Counsel referred to the issues raised in the grounds of appeal. It was submitted citing *Ariori & Ors. v. Elemo & Ors*, that an issue of fundamental right to fair hearing cannot be waived.

On his part learned Counsel to the Respondents referred to the issue whether Appellant can withdraw the Notice of Withdrawal of the appeal duly filed under order 8 rule 7(1). It was submitted that the Respondent was entitled *exdehito justitias* to have the appeal dismissed, it was further submitted that since the appeal has ceased to exist, this Court cannot grant the application, and to restore the appeal on the list.

Learned Counsel referred to the *ipsissima verba* of Order 8 rule 6(1) which states in the notice of withdrawal, that "*the appellants herein intend and doth hereby wholly withdraw their appeal against the respondent.*" Learned Counsel also referred to the definition of Appellant in Order 1 rule 2 which includes the legal practitioner retained or assigned to represent him in the proceedings before the Court.

It was submitted that once a Notice of withdrawal of an Appeal has been filed by a legal practitioner retained by the appellants, the notice is as binding on the appellants as if the notice had been

filed by the appellants themselves.

It is immaterial whether the notice is signed by one of the legal practitioners retained by the appellants or not.

5 It was finally submitted on this issue, referring to Order 8 rule 6(5) that an appeal withdrawn under this rule whether with or without an order of the Court, shall be deemed to have been dismissed.

10 "An Order of court is therefore not necessary once a notice of withdrawal of the appeal has been filed by the appellants or by the legal practitioner representing them - *Akeredolu v. Akinremi* (1986) 2 NWLR (Pt.25) 710.

15 On the second issue, learned Counsel to the respondent referred to the provisions of Order 8 rule 6(1) and submitted that appellant can serve on the respondent a notice of intention to withdraw the appeal and file same with the Registrar of the Supreme Court. This will be sufficient compliance with the Rules and will be sufficient and effectual as a dismissal of the appeal. However, under Order 8 r.
20 6(2) where all the parties consent to the withdrawal of the appeal, the appellant may file in the Registry the documents signifying such consent and signed by the parties or their legal representatives. The appeal shall thereupon be deemed to have been withdrawn.

25 It was submitted that in each case, once the notice of withdrawal was filed, the appeal shall be deemed to have been withdrawn, and deemed to have been dismissed.

30 The above submissions relate to the construction of the provisions of Order 8 rule 6. The question whether a counsel in the matter filed the notice of withdrawal without knowledge and consent of leading counsel will be discussed later.

It is more convenient to consider the submissions on the construction of Order 8 r. 6 which govern the facts of this case.

35 Order 8 r.6(1) (2) (4) (5) (6) provide as follows

"(1) An appellant may at any time before the appeal is called on for hearing serve on the parties to the appeal and file with the Registrar a notice to the effect that he does not intend further to

prosecute the appeal.

(2) If all parties to the appeal consent to the withdrawal of the appeal without order of the Court, the appellant may file in the Registry the document or documents signifying such consent and signed by the parties or by their legal representatives and the appeal shall thereupon be deemed to have been withdrawn and shall be struck out the list of appeal by the Court, and in such event any sum lodged in Court as security for the costs of the appeal shall be paid out to the appellant.

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X X X

(4) If all the parties do not consent to the withdrawal of the appeal as aforesaid, the appeal shall remain on the list, and shall come on for the hearing of any issue as to costs or otherwise remaining outstanding between the parties, and for the making of an order as to the disposal of any sum lodge in Court as security for the costs of appeal.

(5) An appeal which has been withdrawn under this Rule shall be deemed to have been dismissed.

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(6) Any application under this Rule may be considered and determined by the Court in chambers without oral argument.

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It seems on analysis of the facts of this case that only rr.1 and 5 are applicable. Rules 2 & 4 which relate to withdrawal of appeal by consent are not applicable to the facts. In construing any of the enabling rules. It is of crucial importance that they be read together with the rules which declare the effect and result of acting of the enabling rules. Accordingly Order 8 rule 6 (1) and (5) shall be read together.

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Rule 6(1) deals with circumstances of unilateral withdrawal of an appeal by an appellant. For the rule to apply the following conditions must co-exist.

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(a) An appeal by the Appellant.

(b) There must be a withdrawal of the appeal in the words of Form 19, 20 or such words indicating that there is no intention fur-

ther to prosecute the appeal.

(c) the withdrawal may be made at any time before the appeal is called on for hearing.

5 (d) the notice of withdrawal shall be served on the parties to the appeal.

(e) the notice of withdrawal shall be filed with the Registrar. The effect of compliance with Order 8 rule 6(1) is that the appeal shall be deemed to have been dismissed. See Order 8 Rule 6(5).
10

(5) In the instant case, there is no dispute that there is an appeal by the Appellant. It is also not in dispute that Appellant unilaterally filed a notice of withdrawal of the appeal.

15 One of the contentions of the Applicant is that the appeal had not been entered on the list for hearing. Otherwise, the notice of withdrawal of the appeal was made before hearing served on the parties to the appeal. It was also filed with the Registrar. It seems to me that there has been compliance with Order 8 r. 6(1), if before the
20 appeal is called for hearing, appellant had served on the respondent and filed with the Registrar a notice that he no longer desires to prosecute the appeal.

Order 8 r.6(1) & (5) in pari materia with Order 3 r.18(1) and (5) of the Court of Appeal Rules 1981. The later rules considered by this Court in *Ezomo v. A-G, Bendel State* (1986) 4 NWLR. (Pt.36) 448. In *Ezoma's* case, this court construing Order 3 r.18(1)(5) held that a notice of withdrawal of an appeal filed by an appellant cannot be withdrawn by a subsequent notice of an intention to do
30 so. The facts were that the High Court gave judgment in an action by the Respondent seeking a declaration that the order of forfeiture of his property by the Bendel State Government was null and void. An injunction restraining the Government from trespassing into the property was also granted. The Bendel State Government through the
35 Attorney-General gave notice of appeal against the judgment of the High Court, and actually filed the appeal in 1980. On the 15th April, 1983 and before the hearing, the Attorney-General filed a notice of withdrawal of the Appeal in the High Court. Subsequently the ap-

peal was set down for hearing in the Court of Appeal.

The Attorney-General appeared to have ignored the notice of withdrawal filed. But Plaintiff who was Respondent in the Court of Appeal raised a preliminary objection that the withdrawal of the appeal meant that the appeal was deemed to have been dismissed. The Court of Appeal rejected the preliminary objection on the ground 5 that the Notice of Withdrawal was not properly filed having been filed in the High Court instead of the Court of Appeal in accordance with Order 1 Rule 18(1) of the Court of Appeal Rules

One of the arguments of the learned Counsel to the Applicant in the application before us was that although the conditions of appeal had been perfected, the notice of appeal could be withdrawn before the court had acted on it. It was submitted that Appellant had not been notified that the record of appeal had been forwarded to 15 the Supreme Court.

It seems to me learned Counsel to the Appellant misunderstood the effect of the applicable rules. I have already pointed out that the facts of the case are covered by Order 8 rule 6(1) which enables a unilateral withdrawal of Notice of Appeal. It is clear from Order 8 rule 6(1), that as soon as the Appellant serves on the Respondent the Notice of Withdrawal of the Appeal and files same with the Registrar, to the effect that he does not intend further to prosecute the appeal, the appeal is deemed to have been dismissed. Order 8 rule 6(1) contemplates two different but closely 25 related situations. First, there is the situation where Appellant has given notice of appeal, which is regarded as when an appeal has been brought - See *Ogunremi v. Dada* (1962) (1962) 1 All NLR.663. Secondly, there is the situation when the appeal is called for hearing, that is, when it has been entered.

For the purpose of Order 8 r.6(1) there appears to be no difference in the two situations. The expression "*at any time before the appeal is called for hearing*" covers the period between when notice of appeal was given, when the appeal is entered for hearing. Hence, an appellant may at any time before the appeal is called for 35 hearing unilaterally give a notice that he does not intend further to prosecute the appeal. Learned Counsel to the Respondent elaborating on the words of Order 8 rule 6(5) has put it quite succinctly and

graphically as follows:

"The Supreme Court cannot grant the application of the 1st, 2nd and 3rd defendants/appellants to withdraw the Notice of Withdrawal of the Appeal. The appeal ceases to exist once the Notice of Withdrawal of the appeal has been filed - Ex nitulo nihil fit. The Supreme Court cannot restore the appeal on the list because the appeal had come to an end by the filing of the notice of withdrawal."

I agree entirely with this submission as a correct interpretation of the applicable rules. This is the effect of a valid withdrawal of a Notice of Appeal. The question is whether a valid withdrawal of a notice of appeal can be withdrawn. I now turn to the second issue which is whether it is necessary for all parties to consent to withdrawal of an appeal within the provision of Order 8 r.6(1). I have already held in my construction of Order 8 r.6(1) that the rule enables a unilateral withdrawal of an appeal by the Appellant. It is therefore not necessary to have the consent of the other parties to render the withdrawal effective.

The question of consent comes into consideration when all parties to the appeal wish the withdrawal of the appeal without an order of Court. The appellant is in this case required to file in the Registry, the documents signifying such consent and signed by the parties or by their legal representatives. It seems to me that absent the expression "at any time before the appeal is called for hearing" in Order 8 r.6(2) which is the limiting expression in Order 8 r. 6(1), the parties may by consent in the manner prescribed in Order 8 r.6(2) and form 20 give a notice of withdrawal of an appeal even after the appeal has been called for hearing. The effect of such a notice is that the appeal shall be deemed to have been withdrawn and shall be struck out of the list by the Court. A consequence of the striking out of the appeal under this rule is that any sum lodged in Court as security for costs of the appeal shall be paid out to the appellant. If all the parties do not consent to the withdrawal of the appeal, that is, if the Respondent does not consent, the appeal shall nevertheless stand withdrawn, but shall remain on the list for the hearing of any issue as to costs or otherwise remaining outstanding between the parties and for making of any order as to the disposal of any sum lodged in

Court as security for the costs of appeal.

Thus the differences between Order 8 rule 6(1), and Order 8 r.6(2)(4) are that in r.1, the withdrawal of the appeal is unilateral, and before the appeal is called on for hearing. In the other cases, the withdrawal is only by consent of the parties, and after the appeal is called on for hearing. Furthermore whereas the question of costs is not involved in rule 1, and the intervention of the Court is not required, the payment to Appellant of any sum lodged in court as security for costs is involved in Order 8 r.6(2). The hearing of any issue as to costs or otherwise remaining outstanding between the parties, and for making any order as to the disposal of any sum lodged in Court as security for the costs of the appeal is o involved in Order 8 r.6(4).

It is pertinent to observe that under Order 8 r.6(2) where consent to the withdrawal is required, the documents signifying consent is to be signed by the parties or by their legal representatives. In all cases, once the notice of appeal is withdrawn, there ends the matter. The appeal stands dismissed and ceases to exist. It is an important principle of our administration if justice interest rei publicae ut Sit finis litium. The rationale for the rule is to enable disposal of cases where there is no real basis to contest the issues. Thus having unequivocally signified the intention it will be preposterous to resurrect it. The third issue is whether the withdrawal of notice of appeal, by learned Counsel, other than the leading Counsel, or the appellant is ineffective. In other words, is counsel in the case other than leading counsel competent to withdraw the notice of appeal filed by the Appellant? *Stricto sensu*, this is the real issue for determination in this application. It is on this fact that the application was based.

Learned Counsel to the Applicant submitted to us that the withdrawal of the notice of appeal was ineffective because the notice was not signed by leading Counsel. It was argued further that Counsel who filed the notice of withdrawal had no authority to do so. This submission raises the question of the general or special authority of counsel with respect to a matter for which he has been instructed.

Learned Counsel to the Respondent in his reply to the submission of learned Counsel to the Applicant argued that the case of Applicant/Appellant was in the absence of leading counsel been con-

ducted by two experienced and senior counsel who were capable of taking the appropriate decisions to file the notice of withdrawal of the appeal. It was submitted that it is wrong in law and untenable for the position of the parties in the case to be altered because of the return of leading counsel.

5 It has not been denied that apart from leading Counsel in the case, there are other Counsel. Cyril O. Okonkwo, Esqr. and B.O. Ogbolumani, Esqr, are regular members of the team of solicitors appearing for the Defendants.

10 It is well settled that the relationship between counsel and client arises from contract. The contract is with respect to the service or services which counsel has agreed and undertaken to render in respect of his client. The general and accepted view is that counsel 15 acts on the general instruction of his client. He must adhere to any special instructions given by or on behalf of his client. Counsel however as a general rule has complete control over how these instructions are to be carried

20 There is the usual dominant and general instruction to Counsel to conduct the litigation in court to finality. In carrying out this instruction, counsel functions as an independent contractor who exercises his skill and judgment and is free to act as he considers fit within the instruction in the interest of his client, - See *Performing Right Society Ltd. v. Mitchell & Booker Palais de danse Ltd*, (1924) 1 KB.762 25

Counsel acting within the scope of his authority express or implied can bind the client. This was the position in *Mathews v. Munster* (1888) 20 QB.D.141. This was an action for malicious prosecution 30 against the Defendant Counsel in the absence of the Defendant and without his express authority assented to a verdict for the Plaintiff for 350 pounds with costs upon the understanding that all imputations against the Plaintiff were withdrawn. Defendant objected. He applied to the Queen's Bench to set aside the verdict. His reason was that he 35 neither consented to the concession nor gave authority to consent to any terms of settlement. The Court of Appeal held that the settlement was within the apparent general authority of Counsel and binding. In defining the scope of authority of Counsel. Lord Esher said; at

p. 143, "

But when the client has requested Counsel to act as his advocate, he has done something more, for he thereby represents to the other side that counsel is to act for him in the usual course and he must be bound by that representation so long as it continues, so that a secret withdrawal of authority unknown to the other side would not affect the apparent authority of counsel. The request does not mean that counsel is to act in any other character than that of advocate or to do any other act than such an advocate usually does. The duty of a counsel is to advise his client out of Court, and to act for him in court, and until his authority is withdrawn, he has with regard to all matters that properly relate to the conduct of the case, unlimited power to do that which is best for his client."

There is no question that the instruction of learned Counsel who filed the notice or withdrawal of the appeal was neither limited nor was it withdrawn. He was still acting for Appellant at the time he file the notice. It is helpful and relevant to refer to the affidavit in support of this application sworn to by learned Counsel who filed the notice. I reproduce hereunder paragraphs 1,8, 9, 10, 16, 17, 18. Particularly relevant are depositions in 1,8,9,10 and 18.

"1. I am one of the Counsel assisting Chief Olisa Chukura O.F.R, S.A.N. Senior Counsel representing the 1st, 2nd and 3rd Defendants in these proceedings and I know the history and facts of this case now on appeal in the Supreme Court.

X X X

8. On 23rd January, 1992, the trial Judge indicated that he would wish to hear the case as he was specially assigned by warrant to travel from his station at Agbor to Asaba for the case and would not allow interlocutory matters to delay hearing.

9. Leading Counsel for the Plaintiff, /Dr. Olochi Okafor raised the issue of the pending appeal in the Supreme Court which raised the question of jurisdiction. He urged that the appeal be discontinued so that the trial would begin and be completed if possible on the next adjourned dates, i.e. 10th and 20th March, 1990.

10. I thereupon settled and filed a Notice of withdrawal of the Appeal

at the Registry of the Supreme Court on 7th February, 1992.

X X X

16. *On 11th February, 1992, Plaintiff filed a motion seeking leave to amend his statement of claim but after argument the application was dismissed.*

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17. *The Plaintiff appealed from this dismissal on 21st February, 1992 and on 3rd March, 1992 applied for a stay of proceedings pending the determination of his appeal. This was served on me on 9th March, 1992.*

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18. *I agreed to, and did withdraw the appeal to the Supreme Court on the prospect of a speedy hearing of the suit - without consultation with Senior Counsel leading me (who was not then available)."*

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The averments in paragraphs 8,9, and 18 are unequivocally eloquent of the reasons why learned Counsel in the exercise of his discretion filed the notice to withdraw the appeal. In his own words *"I agree to, and did withdraw the appeal to the Supreme court on the prospect of a speedy hearing of the suit"* consultation with leading senior Counsel though desirable is not essential to the validity of the act of junior counsel in the case.

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The considerations averred in paragraphs 8, 9, 10 are not only persuasive but compelling. Not the least also is the prospect of a speedy hearing of the suit. I think learned Counsel in the exercise of his discretion did his best in the circumstance. Enumerating some of the qualities and duties of Counsel in *Swinfen v. Swinfen* 26 L.J. Co. P97, Blackburn J rejecting the contention that it cannot be seriously suggested that

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" the retainer of Counsel in a cause simply implies the exercise of his power of eloquence went on to say. "But Counsel have far high attributes, namely, the exercise of judgment and discretion on emergencies arising in the conduct of a cause, and a client is guided in his selection of counsel by his reputation of honour, skill and discretion.

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Counsel, therefore, being ordinarily retained to conduct a cause without any limitation, the apparent authority with which he is clothed when he appears to conduct the cause is to do everything which, in the exercise of his discretion, may think best for the interest of his client in the conduct of the cause; and if within the limits of his appar-

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ent authority he enters into an agreement with the opposite counsel as to the cause on every principle this agreement should be binding."

These observations apply mutatis mutandi to the application before us. Mr Ogbolumani was appearing for the Appellant/Applicant as counsel in the case. He has acted within his apparent authority as Counsel, confronted with a situation in which he had to decide 5 between withdrawing the appeal and having a speedy trial, and insisting on the appeal and delaying the trial. He wisely chose the former. His choice is therefore binding on the applicant.

Learned Counsel stressed before us the additional factor of the Plaintiffs appeal against the ruling refusing the application for the amendment of his statement of claim, and the application for stay of proceedings. There is no doubt that these actions are a negation and contradictions of the position taken by the Plaintiff before Applicant filed his notice of withdrawal of the appeal to the Supreme Court. But a scrutiny of the dates 15 when the events occurred demonstrates quite clearly that these subsequent acts were not the cause of the withdrawal of the appeal.

The notice of withdrawal of the appeal was filed on the 7th February, 1992. Plaintiff sought to amend his statement of claim on 11th February, 1992, filed the appeal against the dismissal on the 20 21st February, 1992 and applied for a stay of proceedings pending determination of the appeal on 3rd March, 1992. They are therefore irrelevant in my consideration of this application.

One of the arguments of the Applicants as averred in paragraph 18 of the affidavit in support of the application was that learned Counsel 25 who filed the notice to withdraw the appeal did so without consultation with senior counsel leading him. This was sworn to by learned Counsel himself. Learned Counsel seems not to have appreciated his legal relationship with the client. There is no evidence of the limitation to the scope of his authority as counsel. In the discharge of his professional service to his client, in this case, the applicant, he is expected to exercise his skill and discretion in the interest of the applicant. His relationship with Counsel leading him in the case is different. I have already pointed out in this ruling that consultation with 30 leading senior counsel is undoubtedly desirable. But is not essential to the validity of acts of junior counsel in the case. Hence exercise of skill and discretion in the post of junior Counsel is not vitiated by absence of consultation with or consent of leading senior Counsel. 35

Adewunmi v. Plastex Ltd. (1986) 3 NWLR. (pt.32) 767 which involves the same general principle is slightly different on the facts. The facts were that Respondents appealed to the Court of Appeal, and there sought leave to adduce additional evidence by tendering certain documents. The application was refused. The opposing counsel
5 did not object to the application. The Court made the order dismissing the appeal. Subsequently application was made by another Counsel who was instructed in the case, seeking an order to set aside the judgment of the Court of Appeal dismissing the appeal. The ground
10 was that Counsel who withdrew the appeal had no instructions to do so. The Court of Appeal agreed with the submission, granted the application, set aside its decision and restored the appeal for hearing on its merits. The Court of Appeal was of the opinion that the notice of withdrawal of appeal having been given without authority was
15 ineffectual. The Respondents appealed to this Court.

This Court set aside the decision of the Court of Appeal and held that the withdrawal of the notice of Appeal was valid. It was held that it is within the general authority of Counsel retained to conduct
20 a case to consent to the withdrawal of the case. It is within the scope of the apparent authority with which counsel is clothed when he appears to conduct a case to do everything which in the exercise of his skill and discretion he considered best for his client. Any agreement
25 reached with the opposite counsel within the scope of this principle is binding on the client. The appeal was properly withdrawn. So in this case the appeal having been validly withdrawn, has ceased to exist. There is therefore nothing left to restore on the list for hearing and determination as urged. See Order 8 r.6(5) Rules of the Supreme
30 Court, 1985.

For the reasons I have given in this ruling, and for the fuller reasons in the judgment of my learned brother Olatawura JSC which I agree with, I am unable to accede to the contentions of the Applicant. The arguments demonstrate a misconception of the provisions
35 of Order 8 rule 6.

The prayer is accordingly refused. The application is dismissed. Applicants shall pay N100 as costs to the Respondents.

WALI JSC

I have had a preview of the lead Ruling of my learned brother, Olatawura, J.S.C., which has just been delivered. I agree with his reasoning and conclusion that (the appeal lacks merit and it must therefore fail. 5

There is no ambiguity in the wording of Order 8 rule 6(1) of the Supreme Court Rules, 1985. The sub-rule confers on an appellant a right to withdraw his appeal before it is called on for hearing. This is what was done by the appellants in this case. They cannot be allowed to approbate and reprobate. The situation in the present appeal is similar to that decided by this court in Ezomo v. A.G. Bendel State (1986) 4 NWLR (Pt.36) 448, (1986) 2 NSCC 1154 where an application to withdraw a Notice of Withdrawal of an appeal was refused. It is still a valid decision of this court and it applies to the present appeal with equal force. 15

With regard to the section 32(2) of the 1979 Constitution, I cannot see its relevance to this appeal. The appellants through their counsel, filed a valid notice of withdrawal of the appeal. There was no allegation that they were forced by the court to do so. The notice was properly filed and from that time the appeal stood dismissed by virtue of sub-rule 6(5) of Order 8. I cannot see in what way or manner their right to fair hearing was infringed. What the appellants are seeking to do by way of this appeal is to put life back to something that is already dead. 20 25

As my learned brother Olatawura, J.S.C. had indicated in his lead Ruling, there was no allegation by the appellants that the Notice of Withdrawal was signed by Mr. Ogbolumani, their learned counsel, as a result of negligence of the said counselor lack of authority of the parties to do so. 30

It is for these and the more detailed reasons in the lead Ruling of my learned brother Olatawura, J.S.C. which I hereby adopt as mine, that I too dismiss this appeal with N100.00 costs to the respondent. 35

KUTIGI JSC

I have had the advantage of reading in draft the lead Ruling of my learned brother Olatawura, J.S.C. which has just been delivered. I agree with his conclusion that there is no merit in this application. A notice of withdrawal of an appeal duly filed and served has the effect of a dismissal of the appeal. So that a party who has filed a notice of withdrawal of an appeal, as was done in this case, has no power to revoke his withdrawal and therefore the appeal cannot be heard. (See Order 8 rule 6(5) Supreme Court Rules, 1985 and Ezomo v. Attorney-General of Bendel State (1986) 4 NWLR (Pt.36) 448. The application to withdraw the notice of withdrawal of appeal in this case is accordingly dismissed with N100.00 costs to the respondent in the application.

OGUNDARE JSC

By motion on Notice brought pursuant to section 6(6)(a) of the Constitution of the Federal Republic of Nigeria, 1979 and section 22 of the Supreme Court Act, the 1st to the 3rd defendants applied to this court for leave to withdraw their "NOTICE OF WITHDRAWAL OF APPEAL" signed by junior counsel to the applicants and filed at the Registry of the court on 7th February, 1992 or, in the alternative, an order "to retain or restore the appeal on the list so that it may be heard on merit." The motion is supported by an affidavit and a further affidavit both sworn to by Chief Bernard Obidinma Ikenye Ogbolumani, junior counsel to the applicants. There are counter affidavit and further counter affidavit filed on behalf of the plaintiff and both sworn to by Ogochukwu Onyekwuluje, Esq., junior counsel to the plaintiff. The main affidavit in support of the motion sets out in full the facts leading to this application and I shall quote the affidavit in extenso:

"I. I am one of the counsel assisting Chief Olisa Chukura, OFR, S.A.N., Senior Counsel representing the 1st, 2nd and 3rd Defendants and I know the history and facts of this case now on appeal in the Supreme Court.

2. On 9th March, 1990 the 'plaintiff filed his writ at the Registry of the High Court of Justice, Asaba (Suit A/18/90) in which he challenged the selection of the first defendant as Asagba-elect of Asaba and claimed certain injunctions against all the defendants.

5

3. A number of interlocutory applications were made, two of which are:-

1(i) Application filed by the plaintiff for an injunction restraining the first defendant from parading, holding himself and or presenting himself for installation as Asagba of Asaba and restraining all the defendants from jointly or severally parading, holding out, presenting recognizing and/or installing the 1st defendant as the Asagba of Asaba.

15

(ii) This application was filed on 23rd November, 1990 and the prayers were granted on 7th February, 1991.

(iii) The 1st, 2nd and 3rd defendants filed their appeal to the Court of Appeal Benin City on 19th February, 1991 and their appeal was heard and determined and allowed on 28th June, 1991.

20

2(i) Application filed by the 1st, 2nd and 3rd defendants on 23rd January, 1991 for "an order dismissing/striking out the action of the plaintiff/respondent as the Court as at present stage lacks the jurisdiction as the condition precedent to assuming jurisdiction has not been complied with."

25

(ii) This application was dismissed on 15th February, 1991 and the 1st, 2nd and 3rd defendants lodged an appeal to the Court of Appeal, Benin City on 18th February, 1991

(iii) The Court of Appeal dismissed the appeal on 28th June, 1991, whereupon the 1st, 2nd and 3rd defendants filed an appeal to the Supreme Court on 9th July, 1991.

35

(iv) The conditions of appeal imposed by the Court of Appeal were duly satisfied on 18th July, 1991.

4. On 25th July, 1991 the 1st, 2nd and 3rd defendants filed a motion praying for an order staying or adjourning proceedings in the suit pending the determination of the appeal to the Supreme Court.

5. The motion for stay of proceedings was argued before Edah, J. and ruling thereon was adjourned to 11th December, 1991 the matter had been transferred to another Judge Maidoh, J and nothing further has yet been said or done about the motion.

6. Because the plaintiff had not been served, the suit was on 10th December, 1991 before Maidoh, J. adjourned to 17th December, 1992 for service.

7. On 6th January, 1992, Chief Olisa Chukura was sworn in as Chairman of the Lagos and Ogun States Governorship and The Legislative Houses Tribunals and he left the files with me and my Senior colleague, Cyril O. Okonkwo, Esq.

8. On 23rd January, 1992 the trial Judge indicated that he would wish to hear the case as he was specially assigned by warrant to travel from his station at Agbor to Asaba for the case and would not allow interlocutory matters to delay the hearing.

9. Leading counsel for the plaintiff, Dr. Ilochi Okafor, raised the issue of the pending appeal in the Supreme Court which raised the question of jurisdiction. He urged that the appeal be discontinued so that the trial would begin and be completed if possible on the next adjourned dates i.e. 18th and 20th March, 1990.

10. I thereupon settle and filed a Notice of withdrawal of the Appeal at the Registry of the Supreme Court on 7th February, 1992.

11. When Chief Chukura returned to Asaba during the first week in March, he questioned the propriety of withdrawing the appeal and directed that steps be taken to have it re stored on the cause list for hearing on the merit.

12. The record of appeal has not been sent to the Supreme Court from the Court of Appeal, Benin City.

13. The Notice of withdrawal of the appeal was signed by myself alone. Neither the plaintiff nor counsel representing him joined in signing or presenting the Notice of Withdrawal. 5

14. The appeal raises important and substantial issues of constitutional and administrative law, particularly, the issue of the fundamental right of fair hearing. 10

15. The appeal has not been called up for hearing at the Supreme Court.

16. On 11th February, 1992 the plaintiff filed a motion seeking leave to amend his statement of claim but after argument the application was dismissed. 15

17. The plaintiff appealed from this dismissal on 21st February, 1992 and on 3rd March, 1992 applied for a stay of proceedings pending the determination of his appeal. This was served on me on 9th March, 1992. 20

18. I agreed to, and did, withdraw the appeal to the Supreme Court on the prospect of a speedy hearing of the suit - without consultation with senior counsel leading me (who was not then available). 25

"In his counter affidavit Mr. Onyekwuluje gave his own account of the events leading to the withdrawal by applicant's counsel of the applicants' appeal. He exhibited to his further counter affidavit the proceedings of the trial High Court of the relevant day, that is, 22nd January, 1992. It would appear that Chief Ogbolumani is mistaken as to the date in paragraph 8 of his affidavit. I shall come to the proceedings later. The submissions made in the applicant's brief in support of their application are rather short and they are as follows: 35
"It is submitted that:

(I) a Notice of Withdrawal may be rescinded before the court acts on it and disposes of the appeal.

(II) *Where both parties or their counsel did not sign such Notice of Withdrawal, the appeal is not deemed to be withdrawn and even then the responsibility for striking out is that of the court - not of the Registrar. (See Order 8 Rule 6(2) of the Supreme Court Rules 1985 as amended)*

5 (III) *Under Order 8 Rule 6(4), the appeal remains on the list for issues remaining outstanding between the parties, i.e. in this case, the issues raised in the grounds of appeal.*

10 (IV) *It is doubtful if a party having filed an appeal raising an issue of fundamental right of fair hearing and has thus made it a public issue; or shown that other public interests are involved - can subsequently waive such a right. In R. Ariori & Ors. v. Muriamo B.O. Elemo and Ors (1983) 1 SCNLR 1, this Court held that fundamental*
 15 *rights entrenched in our 1963 and 1979 Constitutions are out of reach of the operation of the law of waiver.*

20 (V) *In an appropriate case, such as this, where no one but the applicants have suffered detriment and no other party has taken any steps on faith of the intended withdrawal, this Court should enable a party to withdraw a Notice of Withdrawal.*

25 (VI) *There is at present a new approach by the Supreme Court to hear an appeal on the merit and not give room to technicality.*

4. CONCLUSION

30 *The Supreme Court is urged to exercise its discretion in favour of the applicants and permit them to withdraw the Notice of Withdrawal of their appeal for the reasons given above."*

At the hearing, Chief Chukura, S.A.N., learned leading counsel, in moving the Court, relied on the affidavits in support and adopted the submissions in the applicant's brief. He urged the Court to grant the prayer sought and observed that the appeal raised im-
 35 portant questions of constitutional and administrative law.

Dr. Okafor, learned leading counsel for the plaintiff/respondent also relied on the counter affidavits and his brief. He submitted in the brief as follows:

(1) that this Court cannot grant the application to withdraw the NOTICE FOR WITHDRAWAL OF THE APPEAL as the appeal ceases to exist once the Notice of Withdrawal has been filed. He adds that once a Notice of Withdrawal of an Appeal has been filed by a legal practitioner retained by the appellants, the Notice is just as effective and binding on the appellants as if the Notice has been filed by the appellants themselves and that it is immaterial whether the Notice of Withdrawal was signed by only one of the legal practitioners retained by the appellants or not, or whether it was signed by the leading counsel for the appellants or not.

(2) that by virtue of Order 8 Rule 6(5), once a Notice of Withdrawal of Appeal has been filed by the appellants or the legal practitioner representing them, the appeal is *ex debito justitiae* deemed to be dismissed whether there had been an order of court or not.

(3) that where an appeal is being withdrawn under Order 8 Rule 6(1), all the appellant need do is to file in the Registry of this Court a Notice of his intention to withdraw the appeal but where the appeal is being withdrawn under Order 8 Rule 6(2), all the parties must consent to the withdrawal. The appellant will then file in the Registry the document or documents signifying such consent and signed by the parties or by their legal practitioners; in either case, the appeal would have been deemed to have been withdrawn.

(4) that where an appeal is withdrawn under sub-rule 1, the respondent is not barred from continuing with other proceedings such as where he has a respondent's Notice or across-appeal he may proceed with same or he may apply for his costs in respect of the withdrawn appeal but where the appeal is withdrawn under sub-rule 2 the respondent is barred from continuing with the further proceedings as stated above That, according to learned counsel, is the difference between withdrawal under sub-rules (1) and (2).

(5) Where only the appellant has filed a Notice of withdrawal the appeal remains on the Cause List but only for the purpose of the hearing of any issue as to costs or otherwise remaining between the parties and for the making of an order as to the disposal of any sum lodged in court as security for the cost of appeal. It is only for this

limited purpose that the Supreme Court has jurisdiction to act on the remnants of the appeal. The court does not have jurisdiction to act outside the specific area enumerated in Order 8 Rule 6(4).

(6.) that a contrary interpretation, as the applicants urged, will do great violence to the clear meaning of the provisions of Order
5 8 Rule 6(5).

Learned counsel refereed in his brief to a number of authorities in support of his contentions. He also referred at the hearing of the application to more decisions of this Court and of the Court of
10 Appeal. I shall consider them presently.

I agree with Dr. Okafor's submissions that where a Notice of Withdrawal of an appeal is filed and served on the respondent, the appeal is automatically deemed to be dismissed. This Court has in a previous case, so decided. In *Ezomo v. Attorney General of Bendel State* (1986) 4 N.W.L.R. (Pt. 36) 448; (1986) 2 NSCC 1154; the
15 plaintiff has sued the Attorney General of Bendel State claiming inter alia that the purported forfeiture of his property was null and void and that he was entitled to possession of the said property. Judgment was entered in favour of the plaintiff, and the defendant appealed to
20 the Court of Appeal. The Notice of appeal was filed in 1980 but in April 1983 the Attorney-General, Mr. Obasuyi, filed a Notice of withdrawal of the appeal, in the High Court, under Order 3 Rule 18 (1) of the Court of Appeal Rules, 1981 (Order 3 Rule 18 is in *pari materia* with Order 8 Rule 6 of the Supreme Court Rules now under
25 consideration in this Ruling.) The Notice was however, not sent to the Court of Appeal. Mr. Obasuyi was replaced by another Attorney-General, Mr. Okolo. Sometime in 1984, a motion was brought before the Court of Appeal on behalf of the Attorney-General seeking
30 leave to argue additional grounds of appeal. The plaintiff filed a notice of preliminary objection stating that the withdrawal of the appeal by the former Attorney-General meant that the appeal was deemed to have been dismissed. Ruling on the preliminary objection, the Court of Appeal, per Pepple J.C.A., held that "the purported Notice of With-
35 drawal, served on the respondent and filed in the Court below on 15th April, 1983 was not given under Order 3 Rule 18(1) of the Court of Appeal Rules" and that accordingly it "is incompetent and is not before this Court."

The plaintiff then appealed to the Supreme Court. This Court held that the effect of a Notice of Withdrawal validly filed is that Order 2 Rule 18 of the Court of Appeal Rules automatically takes effect and as Rule 18(5) provides that an appeal which has been validly withdrawn under this Rule whether with or without an order of the court, shall be deemed to have been dismissed, the appeal filed in that case is automatically dismissed according to the provisions of the Rule. 5

It further held that the party who has filed a Notice of Withdrawal of an appeal has no power to revoke his withdrawal and therefore the appeal cannot be heard. Aniagolu J.S.C. delivering the lead judgment of this Court observed at page 1164 of the latter report: 10

"Having held that the withdrawal notice filed by Mr. Obasuyi was validly filed, Order 3 Rule 18 of the Court of Appeal Rules would automatically take effect. By sub-rule 5 of Rule 18. 15

'An appeal which has been withdrawn under this Rule whether with or without an order of the Court, shall be deemed to have been dismissed'. 20

This sub-rule 5 is in identical terms with Order 7 rule 17(5) of the Supreme Court Rules, 1977 and the current Order 8 Rule 6(5) Supreme Court Rules, 1985. The effect of the withdrawal notice filed by Mr. Obasuyi in my view was to terminate the appeal filed against the judgment of the High Court, with or without an order of Court. 25

If the effect of the filing of the withdrawal notice was the dismissal of the appeal as indeed it was, the question of estoppel raised by the appellant in this appeal to which objection has been raised by the respondent, will pale into an inconsequential issue." 30

He added:

"As it has turned out, however Order 3 Rule 18(5) of the Court of Appeal Rules, 1981 has brought into being the legal effect of Mr. Obasuyi's withdrawal, without the necessity of resorting to the equitable doctrine of estoppel." 35

and, finally, concluded at page 1166:

5 *"By reason of all the foregoing, I must allow this ap-
 10 peal and hereby allow it. The judgment of the Court of Ap-
 15 peal dated 30th October, 1984 which overruled the objection
 20 of the appellant as contained in the appellant's notice of pre-
 25 liminary objection dated 20th July, 1984 is erroneous and in
 30 its place it is hereby adjudged:*

(1) that the preliminary objection was well founded;

15

*(2) that the withdrawal notice dated 14th April, 1983
 20 filed by the Attorney-General of Bendel State , of the appeal
 25 against the judgment dated 10th October, 1980 of the High
 30 Court Benin per Uwaifo, J, was validly filed and had the effect
 35 of a dismissal of the appeal;*

25 (3) that the judgment of the Court of Appeal dated 30th Octo-
 30 ber, 1984 which overruled that preliminary objection was er-
 35 roneous in law and is hereby set aside; and,

30

*(4) that the dismissal of the appeal against the said judgment
 of Uwaifo, J., following the filing of that notice of withdrawal
 by the Attorney-General Mr. Obasuyi, is hereby dismissed."
 35 Coker, J.S.C., for his part said at page 1167:*

"Since the Notice of Withdrawal was filed pursuant to Order 3, rule 22(1) (sic) the appeal was deemed to have been dismissed, even without an order of the Court as provided in sub-rule 5 of the aforesaid rule 18. The result was that there was no longer any subsisting appeal in the court below. There was no need for any formal order of the court to give effect to the dismissal for by the rule, it was deemed to have been dismissed."

10

And Karibi-Whyte J.S.C., in his contribution, said at page 1170 of the report:

15

The relevant provisions of Order 3 rule 18 are as follows:

'(1) An appellant may at any time before the appeal is called on for hearing serve on the parties to the appeal and file with the Registrar a notice to the effect that he does not intend further to prosecute the appeal.'

20

(5) An appeal which has been withdrawn under this rule, whether with or without an order of Court, shall be deemed to have been dismissed.'

25

In accordance with these rules all an appellant withdrawing his appeal need do is to, any time before the appeal is called for hearing, serve the respondent with a notice that he no longer desires to prosecute the appeal, and file such notice with the Registrar." Continuing, the learned Justice of the Supreme Court observed at page 1172:

35

"First, the effect of a valid notice of withdrawal results in a dismissal of the appeal in the Court of Appeal

.....

Having held that the notice of withdrawal dated 28th October, 1980 of the appeal against the judgment of the High Court of Bendel State dated 10th October, 1980 is valid and having been filed before the appeal was entered, there is no appeal
5 before the Court, the appeal having been deemed to have been dismissed.

I prefer to decide this appeal on the question of the validity of the notice of withdrawal of the appeal filed by the Attorney-General. I do not consider it necessary to decide the question whether the Respondent are
10 estopped by their conduct in resiling from their notice of withdrawal. This is because the appeal having been dismissed by virtue of Order 3 rule 18(5), it is only the Respondent to such dismissed appeal who had given notice under Order 3 rule 14 that the judgment should be affirmed or varied on
15 other grounds, and on fulfilling the conditions prescribed in that Rule who can continue with the appeal. There is no provision enabling the appellant to relist the appeal so dismissed. I am therefore unable to conceive from the rules, how having validly withdrawn the appeal it could again be entered for hearing.

For the reasons I have given above, the Court of Appeal
20 was wrong to have overruled the preliminary objection raised by the Appellant, that there was no appeal before the Court, the notice of appeal filed by the Appellant having been validly withdrawn." (Italics are mine)

25 This decision has been followed by the Court of Appeal in a number of other decisions. May I be permitted to reiterate what I said in Appeal No.CA/B/157M/86: Benin-Owena River Basin Development Authority v. Chief SA. Obateru & Anor, in a
30 judgment of the Court of Appeal (Benin Judicial Division) delivered on 19th day of May, 1989 (unreported.)

"The effect of the Notice of Withdrawal was, of course, to put an end to the appeal as under Order 3 Rule 18(5) of the Court of Appeal Rules, the appeal would be deemed to have been dismissed." In
35 Majekodunmi v. WAPCO (1992) 1 N.W.L.R. (Pt. 219) 564, 576 - 577, Salami J.C.A., in his lead judgment, with which Akanbi J.C.A. (as he then was) and Ogwuegbu, J.C.A. (as he too then was) agreed, observed:

"I have taken a hard look at the provisions of Order 3 rule 18(2) upon which the learned counsel for the appellant, Chief Adisa urged us to place greater reliance and cannot see how the provisions of that sub-rule assist their case. The resultant effect, it seems to me is the same. There is however, no evidence of consent to the withdrawal by the other parties to the appeal. The Court cannot proceed under the provisions of Order 3 rule 18(2) because the subrule is predicated on the concurrence of all the parties. There being no evidence before the Court signifying the consent of the parties to withdrawal of the appeal the same cannot be my candid opinion I find and hold that Order 3 rule 18(2) of the Court of Appeal Rules, 1981 is not applicable to the circumstance of the present appeal.

The provisions of Order 3 rule 18 called for consideration and determination in the case of *M.U.O. Ezomo v. Attorney-General, Bendel State* (1986) 4 N.W.L.R. (Part 36) 448. In that case Aniagolu, J.S.C. at page 460 of the report said: 'The questions any-one dealing with this appeal would like to ask himself are:

- (a) Was there an intention to withdraw the appeal by a person competent under the law to withdraw?
- (b) Did he act to implement the intention?
- (c) After the intention to withdraw was acted upon, was there anything left on which the respondent could withdraw his withdrawal?

The resolution of this appeal will depend on the answers to these questions. There was no doubt. Having held that the withdrawal notice filed by Mr. Obasuyi was validly filed, Order 3 Rule 18 of the Court of Appeal Rules would automatically take effect. By sub-rule 5 of Rule 18.

'An appeal which has been withdrawn under this Rule, whether with or without an order of the Court, shall be deemed to have been dismissed.'

This sub-rule 5 is in identical terms with Order 7 rule 17(5) of the Supreme Court Rules (1977) and the current Order 8 Rule 6(5) Supreme Court Rules, 1985. The effect of the withdrawal notice filed by Mr. Obasuyi, in my view, was to terminate the appeal filed against the judgment of the High Court with or without an order of court.'

The purport of the above quoted passage is that once a competent party puts in a valid notice of discontinuance the appeal abates and it is deemed as dismissed. The order of the court to that effect if it is not superfluous it rates not higher than a mere formality, the burial of the carcass of the case." (italics are mine)

5 At page 578 of the report the learned Justice of the Court of Appeal added:

"If (SIC) there is no provision in the Court of Appeal Rules, 1981 whereby a notice for (sic) withdrawal can be withdrawn it follows that the appeal is deemed withdrawn and consequently dismissed with or without a formal court order to that effect. There is, therefore, no pending appeal in respect of which notice of preliminary objection could be filed. Since you cannot file notice of preliminary objection in respect of an appeal which exists only in form."

15 Akanbi J.A. (as he then was) in his own contribution said at page 579 of the report:

"Unfortunately, the Notice of withdrawal of the appeal to which attention was drawn at the hearing of the appeal, put paid to any argument on whether or not the correct procedure was adopted at the hearing in the Court below. The issue at this stage was whether or not there was an appeal properly so called before us. My learned brother Salami. J.C.A., has made useful and detailed analysis of that issue and has for reasons with which I agree come to the conclusion that a Notice of Withdrawal of the appeal having been filled in the circumstances described in the leading judgment, there is no pending appeal before us.

I agree with my learned brother that the case of Ezomo v. Attorney General of Bendel State (1986) 4 N.W.L.R. (Pt.36) 448 at 449 cited in the leading judgment, is authority for saying that with the filing of the Notice of withdrawal of the Appeal, the life of the appeal has automatically and prematurely been brought to an end. I said so in the case of Government of Gongola State v. Umaru Abba Tukur (No.2) (1987) 2 N.W.L.R. (Pt.56) 308 at 324-325.

35 "I am not unmindful of Mr. Brown Peterside 's contention that Ezomo's case "(supra) is the relevant authority on the point. If it is, then I am bound by it being a judgment of a Superior Court. To my mind, that case no doubt is authority for the proposition that an appeal that has been properly dismissed pursuant to Order 3 Rule

13 (5), (sic) of the Rules of the Court of Appeal cannot be revived or resuscitated. It is dead for all times.

To my mind, there is hardly any doubt that an appellant who gave notice of an intention to withdraw an appeal filed by him and went on to give effect to his intention by actually withdrawing the appeal, would be held bound by his conscious act of withdrawing the appeal. He would not be allowed to resile from the position he has consciously or intentionally taken. ' 5

So for the foregoing reasons and the more detailed exposition made in the leading judgment of my learned brother, I too hold that this appeal has to be and is hereby dismissed. I also endorse the order of costs as made by him." 10

Ogwuegbu J.C.A. (as he then was) summarised the facts briefly and went on to hold that where a Notice of Withdrawal of an appeal is filed pursuant to Order 3 Rule 18(15) of the Court of Appeal Rules the suit is deemed to have been dismissed and stood dismissed without any further order of the Court of Appeal. I agree with all the views expressed by all these learned Justices. 15

I now come to the case on hand. As shown by the affidavit of Chief Ogbolumani, he was, and is still, counsel to the applicants and as counsel, the Notice of Withdrawal of appeal signed and filed by him and in the form as prescribed by the Rules of this court was validly given. Learned counsel had a right and authority as counsel to the applicant to withdraw the appeal as this was within the scope of his authority as counsel so to do. See *Adewunmi v. Plastex (Nig.) Limited* (1986) 3 NWLR (Pt.32) 767. In *Ezomo v. Attorney-General of Bendel State* (supra) Coker. J.S.C. said at page 1167 of the report: 20

"In SC./26/1985: *Festus L. Adewunmi v. Plastex Nigeria Limited* (1986) 3 NWLR (Pt.32) 767. The question of right of counsel to withdraw an appeal filed on behalf of his client was considered. It was there held that counsel representing an appellant has the authority to withdraw the appeal even without consultation with his client in as much as such power is not collateral but part of his implied authority as agent of his client, excepting he has specific instructions to the contrary, and provided counsel on the other side was aware of the limitation to his general authority." 25

It is not the case here that counsel in filing the Notice of Withdrawal of the appeal was acting other than on the general authority

of his client, that is, the applicants herein.

A feeble attempt was made to suggest that the other side re-neged on their promise to proceed to the speedy hearing of their action if applicants' appeal was withdrawn. This suggestion is not borne out by the trial court's record for the relevant day. The proceedings
5 read: A/18/90: CHIEF (ENGR.) ONIA G. EDOZIEN

v.

PROF. (OGBESHI) J.C. EDOZIEN. 18/90:

Plaintiff is present, 2nd defendant is present, 1st, 3rd, 4th & 5th defendants are absent. A. Okafor (with him Onyekwulige) for plaintiff.
10 O. Okonkwo (B.O.I. Ogbolumani with him) for the 1st-3rd defendants.

O. Onakpachere Legal Officer for 4th and 5th defendants.

Okafor reminds court of the appeal filed by the defendants in
15 respect of lack of jurisdiction by the court.

Ogbolumani asks that the case should go on notwithstanding the said appeal.

Ogbolumani undertakes to abandon the Appeal in the Supreme Court.

20 Court: Since Ogbolumani indicates that the appeal in relation to jurisdiction of court over this case, is to be abandoned in the Supreme Court, Lagos. This court has ordered that notice of discontinuance to that effect be filed in the appropriate court and shown to this court on the adjourned date before the commencement of this case.

25 Case is adjourned to 18th and 19th of February, 1992 for hearing.
(Sgd) A.N. Maidoh - Judge

22/1/92"

Clearly it was the desire of Chief Ogbolumani (who was counsel for
30 the appellants) to have the trial of the main case to proceed that made him give an undertaking before the trial court to withdraw the applicants' appeal to the Supreme Court. In pursuance of that undertaking he filed the Notice of Withdrawal. I cannot see how, from the record, it could be said that the withdrawal of the appeal was
35 consequent to any representation made by counsel for the plaintiff. It is to be noted also, that in the applicants' brief no argument therein is predicated on any suggestion that any representation was made by plaintiff's counsel which induced the applicants to act to their detri-

ment by withdrawing their appeal to the Supreme Court.

On a proper evaluation of the facts before us one fact stands clear and that is, the applicants, as appellants, acting through their counsel, Chief Ogbolumani intended to withdraw their appeal to the Supreme Court and acting through their counsel did in fact act on that intention by filing in the appropriate form in the Registry of this Court a Notice of Withdrawal of Appeal and serving the respondent therewith. In the circumstances therefore, I must hold that the Notice of Withdrawal of the appeal is valid and put an automatic end to the appeal. An order of this court dismissing it is only a formality since by Order 8 rule 6(5) the appeal is deemed to have been dismissed. Sub-rule 2 of rule 6 would not in any way affect the operation of sub-rule 5. That sub-rule only applies where withdrawal is with the consent of all parties to the appeal and that is not the case here. Sub-rule (4) is more to the point. I think I need, at this stage, set out Order 8 rule 6 in extenso. The rule reads:

"6(1) An appellant may at any time before the appeal is called on for hearing serve on the parties to the appeal and file with the Registrar a notice to the effect that he does not intend further to prosecute the appeal.

(2) If all parties to the appeal consent to the withdrawal of the appeal without order of the court, the appellant may file in the Registry the document or documents signifying such consent and signed by the parties or by their legal representatives and the appeal shall thereupon be deemed to have been withdrawn and shall be struck out of the list of appeal by the court. In such event any sum lodged in court as security for the costs of the appeal shall be paid out to the appellant.

(3) delete

(4) If all the parties do not consent to the withdrawal of the appeal as aforesaid, the appeal shall remain on the list, and shall come on for the hearing of any issue as to costs or otherwise remaining outstanding between the parties, and for the making of an order as to the disposal of any sum lodged in court as security for the costs of appeal.

(5) An appeal which has been withdrawn under this Rule, shall be deemed to have been dismissed.

(6) Any application under this Rule may be considered and

determined by the court in chambers without oral argument.

Where the appeal is withdrawn with consent of all the parties, sub-rule 2 applies in relation to the consequential orders that the court could make. As I said earlier, the withdrawal here concerned is not with the consent of all parties to the appeal such as where all or
5 some of the respondents do not consent to the withdrawal of the appeal.

The clause:

"the appeal shall remain on the list, and shall come on for the hearing of any issue as to costs or otherwise remaining outstanding between
10 the parties, and for the making of an order as to the disposal of any sum lodged in court as security for the costs of the appeal" cannot, in my respectful view, be interpreted as meaning that the appeal is still alive. By sub-rule 5 the appeal from the moment of its withdrawal is
15 dead. What remains for consideration under sub-rule 4 would only be the determination of the question of costs and the disposal of the security for costs. Where the Rules allowed for the filing of a respondent's Notice that would have been an issue remaining outstanding between the parties which this court would have had to
20 determine. But respondent's Notice is already abolished in this court.

It is only such outstanding issues that remain for consideration on an application made to the court by either party, particularly the respondent. And such an application by virtue of sub-rule 6, is to be determined by the court in-chambers without oral argument. If it
25 is meant that the substantive appeal which had been withdrawn by a valid Notice of Withdrawal should remain alive, sub-rule 6 would not have provided for the determination of such an application to be in-chambers without oral argument.

Ezomo v. Attorney-General of Bendel State (*supra*) remains
30 a binding decision of this court. The applicants have not invited us to depart from it and I can see no justification for our so doing now. Although that decision relates to Order 3 rule 18 of the Court of Appeal Rules, as that rule is in identical terms with our Order 8 rule 6,
35 I am of the view that it equally applies to a consideration of our own rule. Indeed, Aniagolu J.S.C., did make mention of the identity in terms of the two rules. The phrase "whether with or without an order of the Court" appearing in sub-rule (5) has been deleted from our rule. This, in my respectful view, will make no difference to the inter-

pretation of the rule given in Ezomo v. Attorney-General, Bendel State.

For the reasons I have stated above and following the decision of this court in Ezomo v. Attorney-General, Bendel State (supra), I agree with Olatawura, J.S.C. that the application before us is incompetent. The applicants' appeal' having been deemed to have⁵ been dismissed by the rules following the filing, by their counsel, of the Notice of Withdrawal of the same cannot be put back on the list nor can the applicants, by seeking to withdrew their Notice of Withdrawal, bring back to life that which is already dead. In my respectful judgment, this application fails and it is dismissed by me with N100.00¹⁰ costs to the respondents.

Application dismissed.

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