

**SUPREME COURT OF NIGERIA**

**2ND APRIL, 1993. SC. 202/1990**

CORAM:- M. L. UWAI, S. KAWU, A. B. WALI,  
E. O. OGWUEGBU, S. U. MOHAMMED, JJSC

CHIEF KALU IGWE & ORS ..... APPELLANTS  
AND  
CHIEF OKUWA KALU & ORS ..... RESPONDENTS

***APPEALS***

*-Appeal on decision in consolidated suits - Appellant need not file two notices of appeal.*

***INTERLOCUTORY  
INJUNCTIONS***

*-Application for - granted where necessary to preserve the res pending appeal.*

***REMEDIES***

*-Interlocutory injunction to preserve Res-special circumstance must be shown.*

**FACTS**

The Appellants were plaintiffs in consolidated Suits Nos. HU/24/74 and HU/43/74. The Respondents were the Defendants. In a judgment delivered in the consolidated suits by the Umuahia High Court, the plaintiffs' claim for title, trespass

and injunction (HU/24/74) was dismissed while judgment was given to the Defendants for title, N64,800.00 special damages for trespass and injunction (HU/43/74).

The plaintiffs appealed to the Court of Appeal Port Harcourt Division against the decision of the High Court. They also filed a notice in the Court of Appeal praying for stay of execution of the judgment for special damages awarded the Respondents in these suits and interim injunction restraining the Respondents from alienating the land, subject matter of these suits or erecting permanent structures or wasting the land in any way pending the determination of the appeal against the judgment.

The Court of Appeal granted the stay of execution for special damages and dismissed the prayer for interim injunction pending the determination of the suit alleging that the Appellants did not lodge any appeal in Hu/24/74 nor filed counter claim. Serious averments in the Appellants' affidavits that the Respondents were fast altering the character of the land in dispute were not controverted. In a further appeal to the Supreme Court by the Appellants.

**HELD** (unanimously allowing the appeal)

1. The Plaintiffs/Appellants appealed against the whole decision of the High Court in the two consolidated Suits (HU/24/74 & HU/43/74) (P. 40)

2. The Court of Appeal misdirected itself when it held that the Appellants did not appeal against the dismissal of Suit No. HU/24/74 brought by them. It was the whole decision in the consolidated suits given by the learned trial Judge that the Appellants appealed against which if allowed would decree judgment in their favour and the judgment in No. HU/43/74 will be set aside. There is no rule of Law or practice requiring an aggrieved party in consolidated suits to file two notices of appeal. (p. 43)

3. The alteration of character of the land the subject matter of litigation is a special circumstance and the court below ought to have granted the prayer for interlocutory injunction. The primary duty of the court having custody of property, the subject matter of litigation is to preserve the res for delivery to persons who ultimately establish their title. (P. 48)

4. Appeals on the exercise of discretion, as in this case, can be entertained where such exercise by the court below is deemed not to be according to common sense and according to justice or there is any miscarriage of justice in the exercise of such discretion. Injustice will arise if the Court of Appeal's discretion is allowed to stand. (p. 47-48)

5. Since special circumstances to warrant the preservation of the res pending appeal exist, the application for interlocutory injunction is granted. (P. 48)

**REPRESENTATION**

Chief G.C.M Onyiuke. SAN, U. Obiagwu- Ikedimu For the  
5 Appelants

R. Nnannah-Kalu (holding the brief of Chief. K.K Ogba) For  
the Respondents

10 **CASES REFERRED TO**

1. Vaswani Trading Co. V. Savalakh (1972) 12 SC 17,  
15 (1972) ALL NLR 922
2. The Zamora (1916) A. C. 77
3. Odusote V. Odusote (1971) NMLR 228
4. Solanke V. Ajibola (1969) 1 NMLR 253
- 20 5. Ifediora & Ors. V. Ume & Ors. (1988) 2 NMLR (pt. 74)

25 **LEAD JUDGMENT**  
BY OGWUEGBU JSC

This is an interlocutory appeal against the ruling of the  
Court of Appeal, Port Harcourt Division delivered on 6th  
30 June, 1990.

The appellants herein were plaintiffs in consolidated  
suit Nos. HU/24/74 and HU/43/74 and the respondents were  
35 the defendants. Judgment was delivered in the consolidated  
suits by the Umuahia High Court in the then Imo State but  
now Abia State on 23rd June, 1988. The plaintiff's claim for  
title, trespass and injunction (HU/24/74) was dismissed

while judgment was given for the defendants for title. N64,800.00 special damages for trespass and injunction (HU/43/74).

The plaintiffs appealed to the Court of Appeal Port Harcourt Division against the decision of the High Court. They also filed a motion on notice in the Court of Appeal praying for the following orders:-

*"(a) Stay of execution of the judgment for special damages awarded the respondents in these suits:*

*(b) Interim injunction restraining the respondents from alienating the land the subject matter of these suits or setting up or erecting any permanent buildings or structures or in any way damaging or wasting same pending the determination of the appeal against the judgment in these suits dated 23.6.88:'*

In a reserved ruling dated 6th June, 1990, the Court of Appeal granted the stay of execution of the judgment for special damages and dismissed the prayer for interlocutory injunction pending the determination of the appeal.

The plaintiffs being dissatisfied with the ruling, brought this appeal. The plaintiffs/appellants filed three original grounds of appeal along with their notice of appeal. The first two grounds of appeal were struck out hence they filed three additional grounds of appeal with the leave of this court granted on 27th April, 1992. The appellants filed their brief of argument on 13th December, 1991 and the same was served on the defendants/respondents. The respondents filed no brief of argument despite the fact that they were granted an en-

largement of time to do so.

Two questions were submitted for determination in the appeal by the appellants:

5            (1) Whether the Court of Appeal was right in holding  
that the appellants have not appealed against the dis  
missal of Suit No. HU/24/74 in which they (the appel  
lants) were plaintiffs and consequently would not have  
10          a declaration of title in their favour if the appeal were  
allowed;

15            (ii) Whether there were not such special circumstances  
as would warrant the preservation of the res and the  
grant of an order of interlocutory injunction pending  
the determination of the appeal."

20          The first issue is covered by the first two additional  
grounds of appeal and the second issue is covered by the  
remaining original ground of appeal and the third additional  
ground of appeal.

25          When the appeal came up for hearing on 18th Janu-  
ary, 1993, Mr. R. Nnanna- Kalu appeared for the respondents.  
He informed the court that he was holding Chief K.K. Ogba's  
brief and that Chief K.K. Ogba was to be led by Chief F.R.A.  
30 Williams (S.A.N.). He further told the Court that Chief F.R.A.  
Williams (S.A.N.) informed him that morning that he had not  
filed the respondents' brief of argument. He therefore applied  
for adjournment. There was no application for enlargement  
35 of time to file the respondents' brief. The application for ad-  
journment was refused and the Court proceeded to hear the  
appeal on the appellants' brief of argument.

Chief Onyiuke (S.A.N.) relied on the appellants' written brief on 13/12/91. He made oral submissions as well. Arguing issue one, he submitted that the appellants were plain- 5 tiffs in the consolidated suits. They were plaintiffs in Suit No. HU/24/74 filed by them and defendants in Suit No. HU/43/74 filed by the defendants. He stated that the High Court dismissed the plaintiffs' claim in Suit No. HU/24/74 and allowed 10 the defendants' cross action against the plaintiffs in Suit No. HU/43/74. He further said that in the notice of appeal, the plaintiffs appealed against the whole decision of the learned trial Judge and the relief which they sought is that judgment 15 be entered in their favour.

In the said notice of appeal, it was stated in the head- 20 ing that the suits in respect of which the appeal was lodged were Suit Nos. HU/24/74 and HU/43/74.

The plaintiffs in the notice of motion for interlocutory 25 injunction which gave rise to this appeal also stated that the suit numbers in the High Court were Suit Nos. HU/24/74 and HU/43/74.

The learned senior counsel further submitted that in spite of the foregoing, the learned Justices of the Court of Appeal in their ruling on the motion for interlocutory injunc- 35 tion held that the plaintiffs/applicants/appellants did not appeal against the dismissal of Suit No. HU/24/74.

Learned senior counsel referred to page 99 lines 15-25 where the Court of Appeal stated thus-

5 "In the present appeal, the defendants (applicants) who are the people of Etitama had their action dismissed in Suit No. HU/24/74 against which they have lodged no  
10 appeal and Suit No. HU/43/74. They filed no counter claim. If their appeal is allowed in the present case, they will not have a declaration in their  
favour: \_\_\_\_\_

15 (italics for emphasis)

It was submitted on behalf of the appellants that the true position is that the appellants were plaintiffs in HU/24/74  
20 and they appealed against the dismissal of that suit.

My answer to issue one is that the plaintiffs/appellants appealed against the whole decision of the High Court of  
25 Umuahia in the two consolidated suits (HU/24/74 and HU/43/74). The heading of the notice of appeal filed in the Court of Appeal reads:-

30 "IN THE COURT OF APPEAL  
HOLDEN AT ENUGU  
SUITS NO. HU/24/74 AND HU/43/74  
(CONSOLIDATED)."

35 In paragraph two of the notice of appeal it was also stated:-

"Part of the decision of the lower court complained of:



"The whole"

In paragraph four of the notice of appeal it was stated as follows:-

"Reliefs sought from the Court of Appeal: 5

(a) Allowing this appeal:

(b) Setting aside the judgment dated 23:6:88 against the plaintiffs. 10

(c) Judgment in favour of the plaintiffs:' \_\_\_\_\_

(italics is for emphasis only) 15

From the time the suits were consolidated, the plaintiffs/appellants in all the papers they filed had set out the two suits as consolidated. This is borne out by the notice of appeal filed against the judgment of the High Court, and the motion on notice for interlocutory injunction in the Court of Appeal which gave rise to the present appeal. 20

In their said notice of appeal, the plaintiffs appealed against the whole decision of Njiribeako, J. sitting at Umuahia High Court and dated 23:6:88. The decision is that in the consolidated suits wherein the plaintiffs' claim in HU/24/74 was dismissed and that of the defendants in HU/43/74 was allowed. 25 30

The relief the plaintiffs sought from the Court of Appeal was for that court to allow their appeal against the whole decision of Njiribeako. J. set it aside, uphold their claim in HU/24/74 and dismiss the defendants claim in Suit No. HU/43/74. 35

The above are very elementary statements which are very clear and plain. I am therefore unable to see how the Court of Appeal in their ruling came to the conclusion that the plaintiffs did not appeal against the dismissal of Suit No. HU/24/74 and that the plaintiffs did not counter-claim so that at the end of the day, they would not have had the land in dispute declared as their land.

10 The plaintiffs/appellants in Suit No.HU/24/74 claimed:  
 (1) Declaration of title.....  
 (2) N100.00 general damages for trespass and  
 15 (3) Perpetual injunction.

The defendants in HU/43/74 claimed:-  
 (1) Declaration of title.  
 20 (2) N20,000.00 general damages for trespass; and  
 (3) Perpetual injunction.

As stated above, both suits were consolidated.  
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At page two paragraphs 2 of the judgment of the learned trial Judge he said:  
 "From the pleadings of the parties in both suits, the  
 30 seven parcels of the land claimed by Etitama Nkporo people in Suit No. HU/24/74 form one continuous stretch of farm land and cover exactly same area as the two parcels of land claimed by Amaeke Abiriba people in Suit No. HU/43/74:  
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Reading the claims of the parties and the statement of the learned trial Judge. Suit Nos. HU/24/74 and HU/43/74 are cross actions in respect of the same parcels of land.

The reliefs sought by each party are the same except for the differences in the amount claimed as damages for trespass. How come the counter-claim which the Court of Appeal held was not filed by the appellants?

The Court of Appeal must have come to this conclusion when it erroneously described the plaintiffs as the defendants in its ruling.

The Court of Appeal misdirected itself when it held that the appellants did not appeal against the dismissal of Suit No. HU/24/74 brought by them. It was the whole decision in the consolidated suits given by the learned trial Judge that the plaintiffs appealed against which if allowed would decree judgment in their favour and the decision in suit No. HU/43/74 will be set aside. There is no rule of law or practice requiring an aggrieved party in consolidated suits to file two notices of appeal if that is what the Court of Appeal meant in their ruling. The Court of Appeal was therefore clearly in error when it held that the appellants did not appeal against the dismissal of Suit No. HU/24/74 in which they were plaintiffs.

On issue two, the learned senior counsel contended that the Court of Appeal erred in their interpretation of what constituted special or exceptional circumstances and in their application of this to the facts of the appellants' application. He cited the case of *Vaswani v. Savalakh* (1972) 12 S.C. 77 at 82-83 where the Supreme Court said:

*"When it is stated that the circumstances or conditions for granting a stay should be special or strong we take it as involving a consideration of some collateral circumstances and perhaps in some cases inherent mat*

*ters which may, unless the order for stay is granted, destroy the subject matter of the proceedings and foist upon the Court, especially the Court of Appeal a situation of complete helplessness or render nugatory any order or orders of the Court of Appeal, or paralyse, in one way or the other the exercise by the litigant of his constitutional right of appeal or generally, provide a situation in which whatever happens to the case, and in particular even if the appellant succeeds in the Court of Appeal, there could be no return to the status quo."*

The learned senior counsel submitted that once any of the above circumstances stated above by the Supreme Court had been shown in the affidavit of the appellants, it amounted to special or exceptional circumstance.

He said that "it is incontrovertible that once the respondents radically change the character of the land in dispute, this will provide a situation in which whatever happens to the case and in particular even if the appellant succeeds in the Court of Appeal, there could be no return to the status quo."

It was further contended that the land had been used before the institution of the actions as agricultural land and an important motorable road passed through it; that the respondents asserted in open court that they intended to build houses and factories on the land.

He submitted that building factories, houses and industrial buildings on the land which was formerly agricultural would amount to radical and irrevocable alteration of the character of the land.

We were urged to allow the appeal and make an order of interlocutory injunction restraining the respondents from alienating the land the subject matter of the suits on appeal in the Court of Appeal or setting up or erecting any permanent structure or wasting the same pending the determination of the appeal against the judgment in the consolidated suits dated 23:6:88.

The plaintiffs/applicants filed an affidavit, a further affidavit and a second further affidavit in support of their application for stay of execution and interlocutory injunction. The defendants/respondents filed a counter-affidavit and another counter-affidavit of one Chukwuemeka Onuoha in support of the affidavit of Okuwa Kalu. The counter-affidavits dwelt more on the prayer for stay of execution of the damages awarded and little or nothing was said to controvert the averments of the appellants in their various affidavits in respect of the prayer for injunction.

For example, in paragraphs 14, 17, 19 and 20 of the affidavit Chief Uka Anya Uwom deposed as follows:

*"14. That our solicitor A.U. Onukwue Esq. has informed us and we believe him that there are substantial points of law to be raised on the appeal against special damages....."*

*17. That the defendants have started to destroy our untarred road built by us about 1936 from Etiti-ama to Umuahia/Ohafia road by digging for stones, sand and gravels on the said road particularly at the Ekike land area.*

18. *That fresh survey beacons bearing the name of one 'CHIEF OKAMS' have now been planted on the land in dispute, particularly at Ugwu Ugbagha land.*

19. *The whole land in dispute is for farming and we depend on the farming and economic crops and trees thereon for their (sic) livelihood.*

20. *That the respondents are planning to destroy the economic trees like palm trees thereon in the name of industrialisation. "*

In their second further affidavit, the appellants deposed as follows in paragraphs 3, 5 and 6:-

"3. *That while this motion is pending we visited the land in dispute early in July this year and noticed that the respondents and their agents or grantees had started to erect a building on the land in dispute.*

5. *That despite the said letter they intensified the building operations, and they have now up to roofing stage erected a massive industrial building thereon.*

6. *That the said building was set up at a great speed and the respondents intend to set up other buildings on the land in dispute, and will not stop unless restrained by court. "*

Little or no attempt was made by the respondents to controvert the above averment' and yet the Court of Appeal stated that the permanent structures are improvements on the land which would revert to the appellants if their appeal succeeds. That was in the face of the averments that the land has been used by the appellants is arable land and they depend on the farm crops and economic trees on this land for their livelihood.

The Court of Appeal also found no special or exceptional circumstances from the above averments of the applicants to warrant the grant of their application. I agree with the learned senior advocate for the appellants that if the respondents are allowed to continue erecting buildings and factories on the land in dispute, surely, the character of the land will be radically and irrevocably altered and even if their appeal succeeds, there can be no return to the status quo. By the same token, unless the order for stay is granted, the subject matter of the proceedings in this case, the farm land will be destroyed and the appeal will be rendered nugatory if they succeed. See *Vaswani Trading Co. v. Savalakh and Company* (1972) All N.L.R.922.

The appellants in the court below adduced enough affidavit evidence that the character of the land would be radically changed unless an injunction was granted. The respondents did not counter these averments in any way. The alteration of the character of the land the subject of litigation is a special circumstances and the court below ought to have granted the prayer for interlocutory injunction. The primary duty of the court having custody of property the subject matter of litigation is to preserve the res for delivery to persons who ultimately establish their title. See *The Zamora* (1916) A.C. 77.

Appeals on the exercise of discretion as in this case can be entertained where such exercise by the court below is deemed not to be according to commonsense and according to justice or if there is any miscarriage of justice in the exercise of such discretion. See *Oduote v. Oduote* (1971) N.M.L.R.

228. Solanke v. Ajibola (1969) 1 N.M.L.R. 253 and Ifediorah & ors v. Ume and ors (1988) 2 N.W.L.R.(Pt.74) 5 .

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Injustice will arise if the discretion exercised by the Court of Appeal is allowed to stand. I will therefore answer the second question for determination by agreeing with the appellants' senior counsel that there were special circumstances to warrant the preservation of the res pending appeal.

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For the foregoing reasons. I allow the appeal and set aside the ruling of the court below dated 6/6/90 with costs assessed at N1,000,00 in favour of the appellants.

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In the result, the application for interlocutory injunction is granted. The defendants/respondents, their agents and or servants are hereby restrained from alienating the land the subject matter of the consolidated suits, setting up or erecting any permanent buildings or structures or in any way damaging or wasting same pending the determination of the appeal against the judgment in the suits dated 23/6/88.

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**UWAIS JSC**

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I have had the advantage of reading in draft the judgment read by my learned brother Ogwuegbu, J.S.C.. I agree will the reasonings and conclusions therein. I too will, therefore, allow the appeal and grant the application made to the Court of Appeal for interim injunction in the terms stated in the said judgment, with N1,000,00 costs to the appellants.

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**KAWU JSC**

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I have had the advantage of reading, in draft, the lead judgment of my learned brother, Ogwuegbu, J.S.C. which has just been delivered and I am in complete agreement with him that this appeal has merit and it should be allowed. For all the reasons contained in the said judgment, which I fully adopt as mine, I too will allow the appeal and set aside the ruling of the Court of Appeal delivered on 6/6/90. I also grant the appellants' application for interlocutory injunction and in this regard I abide by the order made in the lead judgment. I award costs assessed at N1,000,00 in favour of the appellants.

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**UWAIS JSC** (Pronouncement)

My learned brother, the late Mohammed, JSC who took part in the hearing of this appeal as a member of the panel and the conference which the panel held immediately thereafter, sadly died in a motor accident on Tuesday, the 9th day of February, 1993.

In accordance with the provisions of section 258 subsection (2) of the Constitution of the Federal Republic of Nigeria, 1979, I hereby pronounce that he was of the opinion that this appeal should succeed and, that it should be allowed with N1,000,00 costs to the appellants.

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**WALI JSC**

I have read before now, the judgment of my learned brother, Ogwuegbu J.S.C., and I agree with his reasoning and conclusions. I shall also for those same reasons stated, which I hereby adopt as mine, allow the appeal. The appeal succeeds and it is allowed. The ruling of the Court of Appeal dated 6th June, 1990 is set aside and the application for interlocutory injunction pending the determination of the appeal against the judgment of the High Court dated 23rd June. 1988 now before the Court of Appeal is granted. The appellants are awarded N1,000,00 costs against the respondents.

Appeal allowed.