

**SUPREME COURT OF NIGERIA**  
17TH JUNE, 1994. SC. 67/1987  
**CORAM:- S. M. A. BELGORE, A. B. WALL,**  
**M. E. OGUNDARE, Y. O. ADIO, A. L. IGUH, JJSC**

RASAKIA. SALU ..... APPELLANT  
AND  
MADAM TOWURO EGEIBON ..... RESPONDENT

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**APPEALS** - *Adjournment refused by trial court - Where there is no good cause for the refusal - Whether an appellate court is under a duty to review the ruling.*

**CONSTITUTIONAL LAW** - *Breach of fundamental right guaranteed by s. 33(1) of the Constitution - By refusal of adjournment - Can be raised at any stage or on appeal*

**JUDGMENTS** - *Violation of principles of natural justice in any decision - Proceedings and judgment are rendered null and void thereby - When re-trial Order is deemed proper.*

**PRACTICE & PROCEDURE** - *Adjournment - Justice to both parties and avoidance of undue delay - Are to be uppermost in considering application for adjournment.*

**PRACTICE & PROCEDURE** - *Adjournment - Is a matter of discretion - Appellate court not to interfere - Save in the interest of justice.*

**PRACTICE & PROCEDURE** - *Adjournment - Discretion for the grant or refusal thereof is to be judiciously exercised- Whether refusal of adjournment that resulted in denial of fair hearing could be judicious.*

**PRACTICES & PROCEDURE**- *Refusal of application for adjournment - When miscarriage of justice is occasioned thereby - Powers of the appellate court*

**FACTS**

The Appellant and Respondent who have common boundaries bought their respective parcels of land from same Vendor. They had a controversy as to the actual boundary and dimension of each party's parcel of land. This

caused the Appellant to institute an action against the Respondent before the Ogun State High Court, Sagamu, claiming declaration of title, perpetual injunction and damages for trespass. Pleadings were duly filed and exchanged. The Appellant secured an adjournment to enable him call two more witnesses. But on the adjourned date, he suddenly closed his case without calling the proposed witnesses. Respondent's counsel sought for an adjournment to enable Respondent who was not in court, commence her defence.

The trial court refused the adjournment which was not opposed by the Appellant. But it granted adjournment to enable Respondent's counsel address the court. Judgment was given in favour of the Appellant. Respondent's appeal to the Court of Appeal was allowed and an order of trial de novo before another judge was made. Being dissatisfied, Appellant has appealed to the Supreme Court. The apex court had to determine inter alia, whether Court of Appeal had jurisdiction to make pronouncements on trial court's ruling that refused adjournment to Respondent, there being no competent appeal against the ruling. And whether the Respondent was given a fair trial.

**HELD** (Unanimously Dismissing the appeal)

***When refusal of adjournment can be raised on appeal***

1. If what really happened was far more than a mere refusal of an application for an adjournment in the sense that it resulted in a denial of the fundamental right of fair hearing guaranteed by section 33(1) of the Constitution, then the respondent could competently raise it in the Court of Appeal. This is because a breach or an infringement of a fundamental right guaranteed by the provisions of the Constitution of the Federal Republic of Nigeria, 1979 can be raised or canvassed at any stage of the proceedings or on appeal. (P.77 L.24)

***Discretionary power of adjournment - When appellate court should interfere***

2. A court is not bound to grant an adjournment as the question whether to grant adjournment is a matter of discretion and it depends on the facts and circumstances of each particular case. For that reason, where a trial Judge has exercised a discretion over a matter, an appellate court should not interfere on the ground that it might have exercised the discretion differently if it were in a position to do so. However, an appellate court is entitled to interfere with the exercise of discretion of a trial court if the appellate court is satisfied that it is in the interest of justice to do so. (P.78 L.39)

***Adjournment - Uppermost considerations***

3. Where an application for an adjournment is made to a court, the court

should bear in mind the requirement that justice should be done to both parties and that it is also in the interest of justice that the hearing of a case should not be unduly delayed. It should grant it if a refusal of the application is most likely to defeat the rights of the parties altogether or be an injustice to one or the other of them, unless there is a good or sufficient cause for such refusal, otherwise an appellate court will not only have power but will be under a duty to review the ruling refusing the application. In the present case, it did not appear that, in the circumstances, there was good or sufficient cause for the refusal of the application. (P.79 L.16)

***Non judicious refusal of adjournment***

4. The grant or refusal of an application for an adjournment involves an exercise of judicial discretion and being a judicial discretion it should not be exercised arbitrarily, and should be seen to have been exercised judicially and judiciously. A discretion which was said to have been exercised in refusing the application for an adjournment resulting in denial of fair hearing and/or fair trial to the respondent could not reasonably be said to have been exercised judicially or judiciously. (P.80 L.22)

***Refusal of adjournment - When a miscarriage of justice is occasioned***

5. The refusal of the application of the learned counsel for the respondent for an adjournment occasioned a miscarriage of justice. It is within the competence of an appellate court to review the exercise of discretion by a lower court where such exercise is deemed not to be according to common sense and according to justice or if there is any miscarriage of justice in the exercise of such discretion. (P.81 L.33)

***Violation of principles of natural justice in any decision***

6. If the principles of natural justice are violated in respect of any decision, it is immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision. In effect, the proceedings in this case before the learned trial Judge and his judgment thereon are null and void. In the circumstance, the proper order to make is one affirming the order of the court below for a retrial of this case before another Judge of the High Court of Ogun State. (P.82 L.33)

**NOTABLE POINTS OF INTEREST****ADIO JSC*****1. Meaning of “fair hearing”***

The expression: “*fair hearing*” means the trial of a case or conduct of proceedings according to all relevant rules for ensuring justice. See *Ariori v. Elemo* (1983) 1 S.C.N.L.R. 1 at P. 24. (P.77 L.9).

***2. Adjournments - Whether further hearing must go on at all costs***

A case may, with the concurrence of both parties, be fixed for further hearing on a particular date. That could not reasonably mean that further hearing must, at all costs and under any circumstances, go on. The parties or the court may have genuine and sufficient reasons for seeking for an adjournment or adjourning the further hearing of the case, as the case may be. (P.79 L.28)

***3. Declaration of title - Cannot be granted solely on the basis of admission in pleadings***

On the question of certain averments in the appellant’s pleading being admitted by the pleading of the respondent, it is sufficient to say that a declaration of title to a parcel of land cannot be granted solely on the basis of admissions in pleadings. (P.81 L.37)

***4. Whether one can give oral evidence of document made by another***

As for the survey plan tendered by the appellant, the short answer to it is that the appellant was not the maker of the document and could not give oral evidence about its contents. (P.82 L.2)

***5. Failure to establish boundaries - Proper Order to make***

Ordinarily if a plaintiff claiming that he is entitled to statutory right of occupancy in relation to a parcel of land fails to establish by evidence the boundaries of the land, the proper order to make is one dismissing his claim. (P.82 L. 18)

**BELGORE JSC*****6. When not to refuse an adjournment***

As the granting of an adjournment is dictated by circumstance of each case, an adjournment should not be refused if it is the only just way of having a matter decided on its merit. A case terminated before its merit is fully known, may in many instances defeat the end of justice as the parties may thus be denied the right to put before the court the whole evidence available. (P.83 L.9)

**WALIJC**

**7. Refusal of unopposed adjournment - Denial of fair hearing**

The issue of refusing a party an adjournment to call in his witnesses where such request was not opposed to by the other side, is so fundamental to just  
 5 decision of a case that the learned trial judge ought not to have arbitrarily refused it. It is, the circumstance of this case a clear case of denial to a fair hearing and in violation of Section 33(1) of the 1979 Constitution. (P.84 L.34)

**OGUNDARE.JSC**

10 **8. No appeal against interlocutory decision - Propriety of considering the issue**

Under the rules, therefore, the lower court was perfectly justified in considering the propriety or otherwise of the refusal of an adjournment to enable the defendant to present her case notwithstanding that there was no appeal against  
 15 that interlocutory decision. (P.88 L.39)

**9. When refusal of adjournment by the court would be justified**

“Where the requirements of fair hearing outweigh the necessity for a speedy trial a judge or court should not hesitate to grant an application for an  
 20 adjournment. Where however a party indulge in dilatory tactics, it could not be said that that party is aiming at a fair hearing; rather, that party is using the due process to defeat justice being done to the opposing party. In such a case a judge or court should have enough courage not to lend weight to such act of filibustering and should be firm in refusing unnecessary applica-  
 25 tion for adjournment. After a review of the surrounding circumstances of this case, I have come to the conclusion that the learned trial Judge did not exercise his discretion judicially and judiciously clearly here.” (P.89 L.25)

**IGUH.JSC**

30 **10. When refusal of adjournment offends audi alteram partem**

“It seems to me plain that this refusal on the part of the learned trial judge to exercise his discretion in favour of the adjournment applied for following the sudden and unexpected closure of the plaintiff’s case without calling the two witnesses the plaintiff’s counsel had indicated would be taken on the  
 35 material date offends the doctrine of audi alteram partem and amounts to a deprivation of the right of the defendant to obtain substantial justice in the suit.” (P. 95 L.3)

**11. Injustice occasioned by refusal of an adjournment sought for good case**

*"I conclude by stressing that the refusal to grant an adjournment which, as in the present case, was appropriately sought for good cause and on a cogent and weighty ground constitutes a substantial injustice and a determination made after such arbitrary refusal wherein a party is forcibly shut out from taking part in the proceedings without just cause is completely erroneous on point of law and must not be allowed to stand."* (P.96 L. 1) 5

### **REPRESENTATION**

O. Ayanlaja Esq. with Dr. O Ajayi and Mrs. R. Seriki for the Appellant  
A. Sulaimon Esq. for the Respondent

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### **CASES REFERRED TO**

- Ariori v. Elemo (1983) 1 S.C.N.L.R. 1 at 24  
Sofekun v. Akinyemi (1980) 5 - 7 S.C.1  
Awoyale v. Ogunbiyi (1985) 2 N.W.L.R. (Pt. 10) 861  
Odusota v. Odusota (1971) 1 N.M.L.R. 228 15  
Nigerian Ports Authority v. Construzioni G.F. Cogegar SPA (1974) 12 S.C. 81 at P. 91.  
Cekay Traders Ltd. v. General Motors Ltd. (1992) 2 N.W.L.R. (Pt. 222) 132  
Baba v. N.C.A.T.A.C. (1991) 5 N.W.L.R. (Pt. 192) 388  
Udo v. The State (1988) 3 N.W.L.R. (Pt. 82) 316 20  
Tsaku v. The State (1986) 1 N.W.L.R. (Pt. 17) 516  
Bello v. Eweka (1981) 1 S.C. 101 at p. 102  
Motunwase v. Sorungbe (1988) 4 N.W.L.R. (Pt. 92) 90  
Imah v. Okogbe (1993) 9 N.W.L.R. (Pt. 316) 159  
Adigun v. Attorney-General of Oyo State, (1987) 1 N.W.L.R. (Pt. 53) 678 25  
Evans v. Bertlam (1937) AC. 43  
The State v. Gali (1974) 5SC 67, 73 - 74  
Solanke v. Adjibola (1967) 1NMLR 253  
Omadide v. Adajero (1976) 12 SC. 87  
Okoiko v. Esedalue (1974) 3 SC. 15 30  
Maxwell v. Keun (1928) 1 K.B. 645 C.A.  
Awani v. Erejuwa II (1976) 11 SC. 307 at 315  
Dick v. Filler (1943) K.B. 497  
Priddle v. Fisher and Sons (1968) 3 All E .R 506  
Rose v. Humbles (1972) 1 All E.R. 314 35

### **STATUTES & RULES REFERRED TO**

- Constitution of the Federal Republic of Nigeria 1979 s.33(1)  
Ogun State High Court (Civil Procedure) Rules 0.26 r. 10(1), 0.28 r. 11(3)

**LEAD JUDGMENT BY ADIO JSC**

In the High Court of Justice of Ogun State of Nigeria, Sagamu Judicial Division, the appellant instituted an action against the respondent for the following reliefs:-

- “1. A declaration that the plaintiff is entitled to statutory right of occupancy in respect of a piece or parcel of land at 22, Sode Street, Sagamu.
2. Perpetual injunction restraining the defendant her agents and servants from committing further acts of trespass on the said property.
3. N5,000.00 (Five thousand Naira) damages for trespass committed by the defendant on the plaintiff’s said land.”

Pleadings were duly filed and exchanged. The averments in the pleadings filed by the parties showed that the parties were adjacent neighbors, who acquired their respective pieces of land at different times from the same vendor. Each party surveyed his/her own parcel of land and had a survey plan. The dispute related to the extent or size of the parcel of land acquired by each party. The allegation of the appellant was that the respondent trespassed on his land by building a wall fence which encroached on his own land.

The hearing of the case commenced on the 21st of February, 1984, when the appellant and one of his witnesses testified. After the evidence of the 1st witness for the appellant on that day, the learned counsel for the appellant asked for an adjournment, so as to enable him call appellant’s surveyor and the appellant’s vendor after which he would close his (appellant’s) case. The learned trial Judge granted the application and adjourned further hearing of the case to the 16th day of April, 1984. When the case came up for further hearing before the learned trial Judge on the 16th day of April, 1984, the learned counsel for the appellant abandoned his intention to call appellant’s surveyor and the appellant’s vendor of the land in dispute and, contrary to expectation, closed the appellant’s case.

The learned counsel for the respondent was then requested by the learned trial Judge to open the case for the respondent. The learned counsel for the respondent informed the court that the respondent and his witnesses were not in the court and asked for an adjournment to enable him open the case of the respondent. The learned counsel for the appellant did not oppose the application for an adjournment. The learned trial Judge refused the application and closed the case of the appellant and the case of the respondent. His reason was, inter alia, that the impression or undertaking given on the 21st February, 1984, by the learned counsel for both parties was that each party

would prosecute his/her case to completion on the 16th day of April, 1984. So far, the appellant had not led evidence on the dimensions of the parcel of land which he bought from his vendor who was also the vendor of the land bought by the respondent.

The learned trial Judge thought that there were certain admissions made by the respondent in her pleading and that in any case, there was evidence before him which made the proof of the extent of the appellant's land unnecessary. He, therefore, granted the first and the second reliefs claimed by the appellant and also awarded N2,000.00 damages to the appellant.

Dissatisfied with the judgment of the learned trial Judge, the respondent appealed against it to the Court of Appeal which allowed the appeal and set aside the judgment of the learned trial Judge. The court below remitted the case to the High Court for a re-hearing de novo before another court of equal jurisdiction in Ogun State. Costs of N200.00 were awarded in favour of the respondent. Dissatisfied with the judgment, the appellant has appealed to this court. In accordance with the rules of this court, the parties duly filed and exchanged briefs. The appellant formulated three issues for determination while the respondent formulated four issues for determination. The four issues formulated by the respondent adequately covered the second and the third issues formulated by the appellant. In my view, the first issue formulated by the appellant and the four issues formulated by the respondent, which were based on the grounds of appeal, are sufficient for the determination of this appeal.

These are as follows:-

(1) *Whether the Court of Appeal had jurisdiction to hear, consider and make pronouncements on the learned Judge's ruling which refused the respondent's application for adjournment in one of the proceedings that led to the final judgment of 17/7/84, there being no competent appeal against the ruling.*

(2) *Whether the defendant was given a fair trial.*

(3) *Whether the Court of Appeal was right in holding that the High Court did not exercise its discretion judicially by refusing to grant the defendant an adjournment and forcibly closing her case without giving her an opportunity of proving her case.*

(4) *Whether such failure by the learned trial Judge has occasioned a miscarriage of justice.*

(5) *Whether on the printed evidence and particularly the findings of Uche Omo, J.C.A., as he then was, at page 163, the proper order should not have been a dismissal of the plaintiff's claim."*



The contention of the appellant in relation to the question raised under the first issue above was that the respondent could no longer raise the issue of her not being granted an adjournment by the learned trial Judge because the ruling of the learned trial Judge being on an interlocutory matter the respondent had failed to appeal against the ruling within the time stipulated by law. For that reason, it was further contended that the Court of Appeal had no jurisdiction to entertain an appeal in respect of this aspect of the matter. In the case of the respondent, reference was made to the provisions of section 33(1) of the Constitution of the Federal Republic of Nigeria, 1979 which guarantee a fair hearing and it was argued that the circumstances were such that the refusal by the learned trial Judge to grant the adjournment requested for by the respondent's counsel was a breach of the fundamental right guaranteed by section 33(1) of the Constitution and that the issue could be raised notwithstanding the fact that the respondent did not appeal against the ruling of the learned trial Judge within the time prescribed by law for appealing against an interlocutory decision. It was the argument for the respondent that the decision denying her a right to a fair hearing in the case was a final decision which denial could be raised in the appeal against the judgment of the learned trial Judge.

I have already stated the circumstances in which the application for an adjournment by the learned counsel for the respondent was refused and the respondent's case closed. It was the appellant's counsel who, on the 21st February, 1984 applied for an adjournment to enable him to call the surveyor, who helped the appellant to draw the survey plan of the land in dispute, and the appellant's vendor. The application was granted by the learned trial Judge and further hearing was adjourned to 16th April, 1984, to enable the appellant to do so. When the matter came up for further hearing on the 16th April, 1984, the appellant abandoned his intention to call his surveyor and his vendor and, contrary to the expectation of the learned trial Judge and the respondent, the appellant's counsel closed his case. When the learned counsel for the respondent saw the sudden or surprising development, he applied for an adjournment because the respondent and his witnesses were not in the court. The learned trial Judge called on respondent's counsel to open the respondent's case and when he was, for obvious reasons, unable to do so, the learned trial Judge closed the respondent's case. In effect, the respondent was not allowed to put forward her defence, if any to the appellant's claim despite the fact that the appellant's counsel indicated that he did not oppose the application for an adjournment. In any case, after closing the respondent's case further hearing was adjourned to a future date. As, rightly argued for the

respondent, what was involved was much more than a mere refusal of an application for an adjournment. It involved the respondent not being given any chance to present her defence which resulted in her being completely denied the opportunity of a fair hearing under section 33(1) of the Constitution of the Federal Republic of Nigeria, 1979, which provides as follows:-

*“33(1) In the determination of his civil rights and obligations including any question or determination by or against any government or authority a person shall be entitled to a fair hearing within a reasonable time by a court or tribunal established in such a manner as to secure its independence and impartiality.”*

The expression: “fair hearing” means trial of a case or conduct of proceedings according to all relevant rules for ensuring justice. See *Ariori v. Elemo* (1983) 1 SCNLR. 1 at pp. 24. The question here is whether there was anything which made the refusal of an application for an adjournment by the learned counsel for the respondent appear or look like a denial of fair hearing. The answer is certainly in the affirmative having regard to the fact that the appellant had himself been granted an adjournment on the 21st February, 1984, to enable the appellant to call his surveyor and his vendor as witness; the sudden closing of the appellant’s case which was contrary to expectation; the readiness or willingness of the learned counsel for the appellant not to oppose the application for adjournment; the adjournment of the further hearing of the case to a future date immediately after the refusal of the application for adjournment; and the result of the refusal of the application for adjournment being that the respondent had no opportunity of presenting her defence, if any, to the appellant’s claim.

If what really happened was far more than a mere refusal of an application for an adjournment in the sense that it resulted in a denial of the fundamental right of fair hearing guaranteed by section 33(1) of the Constitution, then the respondent could competently raise it in the Court of Appeal. This is because a breach or an infringement of a fundamental right guaranteed by the provisions of the Constitution of the Federal Republic of Nigeria, 1979 can be raised or canvassed at any stage of the proceedings or on appeal. See *Sofekun v. Akinyemi & ors.* (1980) 5-7 SC. 1. (1981) 2 NCLR 135. The answer to the question raised under the first issue above is in the affirmative.

The question raised under the second issue was whether the respondent was given a fair trial. Some of the views expressed by me in relation to the question raised under the first issue are also relevant here. Before setting out what those views were and saying something more on this aspect of the matter, it is necessary to state what the court below said on the point. The court below stated, *inter alia*, as follows:-

“The court must balance its discretionary power to grant or refuse an adjournment with its duty to endeavour to give a party to the case the opportunity of obtaining substantial justice by his being granted a fair hearing on its merits, provided always that no injustice is thereby caused to the other  
5 party. In this case as the other party did not object to the adjournment sought and has not complained of any injustice, none can be said to have been caused to him. Where the court below erred in its balancing exercise, an appeal court is at liberty to intervene. See the case of *Demuren v. Asuni* (1967) 1 All NLR.94.”

10      The argument in the appellant’s brief was that order 26 rule 10(1) of the High Court (Civil Procedure) Rules, 1977 of Ogun State conferred wide powers on the High Court in relation to an adjournment of a case. It was submitted that if a judicial discretion had been exercised bonafide uninfluenced by irrelevant consideration and not arbitrarily or illegally exercised by  
15 the lower court, an appellate court will not ordinarily interfere even if it holds a different view from that of the trial court and *Awoyale v. Ogunbiyi* (No.1), (1985) 2 NWLR (Pt.10) 861 was cited. It was pointed out that the learned trial Judge made a note that it was with the concurrence of the learned counsel for both parties that the further hearing of the case was adjourned to 16th April,  
20 1984 and the attention of this court was drawn to the fact that the respondent was absent in the court on that day despite the fact that further hearing of the case was in her presence adjourned to 16th April, 1984. It was submitted by the learned counsel for the appellant that the fact that the learned counsel for appellant did not oppose the application did not matter. The learned trial  
25 Judge did not in advance tie his hands and he was right when he called upon the learned counsel for the respondent to proceed with the defence of the respondent. It was argued for the respondent that if the learned trial Judge granted indulgence to the appellant by adjourning further hearing of the case to 16th April, 1984, to enable the appellant to call his surveyor and his vendor,  
30 similar indulgence should have been granted to the respondent when the learned counsel for the respondent asked for an adjournment on the 16th April, 1984, to enable the respondent present her defence, in the interest of justice, especially as the learned counsel for the appellant did not oppose the application and no injustice would have been caused to the appellant. It was  
35 also pointed out that after refusing the application for an adjournment made by the learned counsel for the respondent, the learned trial Judge immediately thereafter “for other reasons of doing justice between the parties in this case” adjourned further hearing to 16th May, 1984, for the address of both counsel.

A court is not bound to grant an adjournment as the question whether to grant an adjournment is a matter of discretion and it depends on the facts and circumstances of each particular case. See *Oduote v. Oduote* (1971) 1 NMLR 228; (1971) 1 All NLR 219 and *Nigeria Ports Authority v. Construzioni G. F Cogefar SPA.*, (1974) 12 SC 81 at pp. 91. For that reason, where a trial Judge has exercised a discretion over a matter, an appellate court should not interfere on the ground that it might have exercised the discretion differently if it were in a position to do so. However, an appellate court is entitled to interfere with the exercise of discretion of a trial court if the appellate court is satisfied that it is in the interest of justice to do so. See *Ceekay Traders Ltd., v. General Motors Ltd.*, (1992) 2 NWLR (Pt. 222) 132. The terms “fair trial” and “fair hearing” mean the same thing. See Abdullahi 42 Nigerian Weekly Law Reports 8 August 1994 (Adio, J.S.C.) *Baba v. NCATC & anor.* (1991) 5 NWLR (Pt. 192) 388. I have already, in this judgment, come to the conclusion that the refusal of the application of the learned counsel for the respondent for an adjournment resulted in the respondent being denied a fair hearing guaranteed by section 33(1) of the Constitution. For that reason, it can reasonably be said that the respondent was not given a fair trial. Where an application for an adjournment is made to a court, the court should bear in mind the requirement that justice should be done to both parties and that it is also in the interest of justice that the hearing of a case should not be unduly delayed. It should grant it if a refusal of the application is most likely to defeat the rights of the parties altogether or be an injustice to one or the other of them, unless there is a good or sufficient cause for such refusal, otherwise an appellate court will not only have power but will be under a duty to review the ruling refusing the application. In the present case, it did not appear that, in the circumstances, there was good or sufficient cause for the refusal of the application. The fact that 16th April, 1984, was fixed for further hearing of the case with the concurrence of both parties, could not, in the circumstances of this case, be regarded as a good cause. A case may, with the concurrence of both parties be fixed for further hearing on a particular date. That could not reasonably mean that further hearing must, at all costs and under any circumstances, go on. The parties or the court may have genuine and sufficient reasons for seeking for an adjournment or adjourning the further hearing of the case, as the case may be. To contend that the further hearing must go on in such circumstance is to put shackles on the undoubted discretion which the court has in future in the matter. See *Tondo v. Ifedioranma*, (unreported) CA/J/47/84 delivered on 20th March, 1987. The answer to the question raised under the second issue is in the affirmative.

The question raised under the third issue is whether the Court of

Appeal was right in holding that the High Court did not exercise its discretion judicially by refusing to grant the defendant an adjournment and forcibly closing her case without giving her an opportunity of proving her case. After reviewing and evaluating the evidence and the legal authorities on the various issues involved in this appeal, the court below came to the conclusion that the learned trial Judge did not exercise his discretion judicially and judiciously. The court below stated, inter alia, as follows:-

*"In view of the refusal of the learned trial Judge to exercise his discretion of granting the adjournment and his arbitrary closure of the defendant's case, which is tantamount to deprivation of the right of the appellant to obtain substantial justice, I have come to the conclusion that the discretion has not been exercised judicially and judiciously. For the above reasons, I will allow the appeal."*

The submission in the appellant's brief was that by virtue of Order 28 rule 11(3) of the High Court (Civil Procedure) Rules, formerly Order 26 rule 6(3) of the High Court (Civil Procedure) Rules of Ogun State the trial Judge's exercise of his discretion in this matter was judicial, judicious and constitutional. The contention of the respondents was that the discretion of a Judge to grant or refuse an application for an adjournment must be exercised judicially and judiciously and that one more adjournment granted by the learned trial Judge could not have, in the circumstances of this case, caused any harm especially as the application was not opposed by the learned counsel for the appellant. The grant or refusal of an application for an adjournment involves an exercise of judicial discretion and being a judicial discretion it should not be exercised arbitrarily, and should be seem to have been exercised judicially and judiciously. See *Udo v. The State* (1988) 3 NWLR (Pt. 82) 316; and *Tasaku v. The State*, (1986) 1 NWLR (Pt.17) 516, discretion which was said to have been exercised in refusing the application for an adjournment resulting in denial of fair hearing and/or fair trial to the respondent could not reasonably be said to have been exercised judicially or judiciously. The answer to the question raised under the third issue is in the affirmative.

The question raised under the fourth issue above was whether the failure of the learned trial Judge to grant the respondent an adjournment had occasioned a miscarriage of justice. As rightly stated by the court below, the learned trial Judge, by refusing to grant an adjournment and peremptorily decreeing that the case be deemed closed had effectively shut out the respondent altogether from presenting her case for the consideration of the court. The result was that for the purpose of determining the case, the only evidence

before the learned trial Judge was the evidence led by the appellant. The appellant eventually won and the learned trial Judge entered judgment for him. The averments in the pleading filed by the respondent must have established a prima facie defence to the appellant's claim otherwise instead of engaging in the arduous task of leading evidence to support the averments in the statement of claim, the appellant would have urged the court to enter judgment for him on the pleadings as the respondent's pleading did not disclose any defence to his (appellant's) claim. Whether the respondent could have been able to lead evidence in support of the averments in her pleadings and thus successfully resist the appellant's claim, the court could not say since the court itself made it impossible for the respondent to present her defence, if any, and for what it was worth. I, therefore, have no difficulty in coming to the conclusion that the refusal of the application of the learned counsel for the respondent for an adjournment occasioned a miscarriage of justice. It is within the competence of an appellate court to review the exercise of discretion by a lower court where such exercise is deemed not to be according to common sense and according to justice or if there is any miscarriage of justice in the exercise of such discretion. See *Odusote's case* (supra).

The question raised under the fifth issue was whether on the printed evidence and particularly the findings of *Uche Omo, J.C.A.*, as he then was, at page 163 (of the record) the proper order should not have been dismissal of the appellant's claim. The court below, after allowing the appeal, made an order remitting the case for re-hearing *de novo* before another court of equal jurisdiction in Ogun state. The argument in the appellant's brief was that the main ground for allowing the appeal was the refusal of the respondent's application for adjournment. The contention of the learned counsel for the appellant was that there was no competent appeal against the ruling of the learned trial Judge on the point. For that reason, the Court of Appeal had no jurisdiction to entertain the appeal. Alternatively, it was argued that the respondent's pleading showed that the respondent admitted some averments, particularly the boundaries of the land in dispute, in the appellant's pleading which could warrant judgment being given for the appellant. Finally, the appellant tendered the survey plan showing the land in dispute. The respondent's contention was that it was the appellant that was claiming a statutory right of occupancy to the land in dispute. If he failed to prove the boundaries of the land in dispute, the proper order to make was to dismiss his claim.

My view was that the appeal before the Court of Appeal was competent and the Court of Appeal had jurisdiction to hear and determine it. On the question of certain averments in the appellants pleading being admitted by

the pleading of the respondent, it is sufficient to say that a declaration of title to a parcel of land cannot be granted solely on the basis of admissions in pleadings. See *Bello v. Eweka*, (1981) 1 S.C 101 at pp. 102; and *Motunwase v. Sorunbe* (1988) 5 NWLR (Pt. 92) 190. As for the survey plan tendered by the appellant, the short answer to it is that the appellant was not the maker of the document and could not give oral evidence about its contents. As rightly pointed out by the learned trial Judge himself, none of the parties (appellant and respondent) led any oral evidence in relation to the boundaries of the land in dispute. The appellant who, on the 21st February, 1984, sought and obtained an adjournment to the 16th April, 1984, to enable him call his surveyor and his vendor did not call any of them on that day. Instead of doing so, he closed his case. The situation, in the case of the respondent was that he was not given an opportunity to put forward any defence to the appellant's claim. The following was the observation of the learned trial Judge on the point. He said, *inter alia* as follows:-

15      *"Curiously however, neither plaintiff who offered evidence nor defendant who opposed him tendered any viva voce evidence to specifically show the exact delineation of the boundaries of the land which each of them bought from such their common vendor."*

Ordinarily if a plaintiff claiming that he is entitled to statutory right of occupancy in relation to parcel of land fails to establish by evidence the boundaries of the land, the proper order to make is one dismissing his claim. See *Imah v. Okogbe*, (1993) 9 NWLR (Pt.316) 159. To some extent, there was, therefore, substance in the submission of the learned counsel for the respondent. However, it should be remembered that it has earlier been found in this judgment that the appellant was denied a fair hearing a fundamental right guaranteed by section 33(1) of the 1979 Constitution. It also has to be remembered that the denial of a fair hearing was a breach of one of the rules of natural justice, that is, the requirement that a party must be given a fair hearing. The consequence of a breach of the rule of natural justice of fair hearing is that the proceedings in the case are null and void. See *Adigun v. A-G of Oyo State* (1987) 1 NWLR. (Pt.53) 678. If a principle of natural justice is violated, it does not matter whether if the proper thing had been done the decision would have been the same; the proceedings will still be null and void. In other words, if the principles of natural justice are violated in respects of any decision, it is immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision. See *Adigun's case*, (*supra*). In effect, the proceedings in this case before the learned trial Judge and his judgment thereon are null and void. In the circumstance, the proper order to make is one affirming the order of the court below

for a retrial of this case before another Judge of the High Court of Ogun State.

The appeal fails and it is hereby dismissed. The judgment of the Court of Appeal and its order remitting the case for re-hearing de novo before another court of equal jurisdiction in Ogun State together with the order for costs are hereby affirmed. The respondent is hereby awarded N1,000.00 costs to be paid by the appellant.

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### BELGORE.JSC

I agree with the judgment of my learned brother Adio, J.S.C. and I also dismiss this appeal. As the granting of an argument is dictated by circumstance of each case, an adjournment should not be refused if it is the only just way of having a matter decided on its merit. A case terminated before its merit is fully known may in many instances defeat the end of justice as the parties may thus be denied the right to put before the court the whole evidence available. Ceekay Brothers Ltd. v. General Motors Ltd. (1992) 2 NWLR (Pt. 222) 132. Odusote v. Odusote (1971) 1 NMLR 228.

It is although a discretion to grant an adjournment, the court must none the less keep in mind what is the best way to do full justice in the case.

The Court of Appeal was therefore right to allow the appeal and remit the case for retrial. I therefore do dismiss the appeal with N1,000.00 costs to the respondent.

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### WALI.JSC

I have read in advance a copy of the lead judgment of my learned brother Adio J.S.C and I entirely agree with his reasoning and conclusion for dismissing this appeal.

One of the main issues strenuously argued in the appeal is the interference by the Court of Appeal with the exercise of the trial court's discretion in refusing adjournment to the respondent/defendant to call her witnesses after the close of the appellant's/plaintiff's case.

The record shows that the plaintiff opened his case on 21st February, 1984 when the evidence of two of his witnesses was taken down, and at the end of which learned counsel appearing on his behalf, Mr. Adekoya asked for an adjournment "*to call his surveyor and his vendor to testify as to what size of the land was sold to the plaintiff.*"

The application was not objected to by Mr. Otesenya learned coun-

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sel for the defendant. The learned trial Judge thereafter adjourned the case to 16th April, 1984 for hearing with a note of advice to the parties that they should endeavour to “*settle the matter amicably so as not to waste any more money and time since they bought from the same common vendor*”.

5      On 16th April 1984, the plaintiff’s counsel changed his mind and abandoned calling any more witnesses and closed the plaintiff’s case. It was then that Mr. Otesanya learned counsel of the defendant, applied for an adjournment to call evidence i.e. his witnesses for the defence. The application was not opposed by Mr. Adekoya.

10      The learned trial Judge in rather an unusual manner remarked thus:-  
“*It was made abundantly manifest at the last adjourned date that no further requests for an adjournment to prolong this case will be entertained, since this case were both sides truly ready, could have been fully tried and concluded on the 21/2/84. Application for an adjournment is re-*  
15 *fused. Case for the defendant to commence.*”

Learned counsel told the court that he was handicapped by the absence of the defendant who was to give evidence and lay foundation for his case.

The learned trial Judge declared the defendant’s case closed and then called upon learned counsel to address him.

20      Learned counsel for the defendant told the court “he has not prepared for such an eventuality and asks for an adjournment”. The learned trial judge this time acceded to the request and remarked:

“*The court will be inclined to grant an adjournment at this stage for other reasons of doing justice between the parties in this case. The case is*  
25 *adjourned to the 16/5/84 for the addresses of both counsel.*”

I have gone through the proceedings recorded by the learned trial Judge on 21-12-84 but cannot see where the learned Judge impressed upon counsel that he was giving them last adjournment. What was recorded is an advice to learned counsel to try and settle the matter amicably so as not to  
30 waste any more time and money since they bought their respective portions of land from a common vendor. This in my view, is not tantamount to saying that he was giving the parties last adjournment. He however, on the same day refused the defendant an adjournment to call his witnesses, but granted him adjournment to get ready to address him.

35      The issue of refusing a party to call in his witness where such request was not opposed to by the other side, is so fundamental to just decision of a case that the learned trial Judge ought not to have arbitrarily refused it. It is, in the circumstances of this case a clear case of denial to a fair hearing and in violation of section 33(1) of the 1979 Constitution.

Although the question of adjournment of a case is at the court's discretion, such a discretion must be judiciously and judicially exercised. An adjournment for the defendant to present his witnesses in the prevailing circumstances in the case particularly when the request was not opposed to by the other party, would not have caused any harm. It made no sense for the court to refuse an unopposed request for an adjournment to present the case for the defendant while on the same date, an adjournment was granted for the learned counsel's final addresses. This is not a judicious exercise of discretion envisaged in the court's inherent power. In this stance the court will not be seen to hold an even balance. Where the court failed to exercise its discretion judiciously in an application for an adjournment, the Court of Appeal has a duty in the interest of justice to interfere to correct the injustice. See *Odusote v. Odusote* (1971) 1 All NLR 221 and *Evans v. Bartlam* (1937) AC.473. 5 10

It is for these and the other more elaborate reasons contained in the lead judgment of my learned brother Adio, J.S.C that I also hereby dismiss this appeal and affirm the order of a retrial made by the Court of Appeal. The respondent is awarded N1,000.00 costs in this appeal against the appellant. 15

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#### OGUNDARE JSC

I have had the advantage of reading in draft the judgment of my learned brother Adio JSC just delivered. I agree entirely with him that this appeal is lacking in merit and for the reasons given by him in the said judgment which, reasons I hereby adopt as mine, I too dismiss the appeal. I need, however, to comment briefly on the issue of the grant of an adjournment by a trial court. 20

The grant of an application for an adjournment is a matter of discretion for the court seized of such an application. It is settled law that an appellate court will not interfere with the exercise of its discretion unless it is shown that the discretion was not judicially and judiciously exercised such as where the judge exercising the discretion has acted under a mistake of law or in disregard of principle or under a misapprehension of the facts or has taken into account irrelevant matters or on the ground that injustice could arise. See *Awani v. Erejuwan* (1976) 11 S.C. 307,315, *The State v. Gali* (1974) 5 SC. 67,73-74 where this court Per Fatayi-Williams JSC (as he then was) recognised the power of the appellate court, indeed duty, to look at the reasons given for the exercise of the discretion and to examine the manner in which the discretion has been exercised. See also *Solanke v. Ajibola* (1969) 1 NMLR 253; *Omadide v. Adajero* (1976) 12 SC. 87. In *Okoiko v. Esedalue* (1974) 3 SC 15 this court per Elias CJN cautioned that although a Court of Appeal is capable of reviewing a trial Judge's exercise of discretion but it ought to be very slow to interfere on 25 30 35

such a question as an adjournment of a trial. Bearing in mind this general law

I now turn to the facts of the case before us.

Trial commenced on the 21st of February, 1984 when the plaintiff gave  
 5 evidence and called one witness. After the two had given evidence, learned  
 counsel for the plaintiff (who is now appellant before us) Mr. Adekoya, sought  
 for an adjournment to call two more witnesses, that is, the plaintiff's surveyor  
 and the vendor who sold the land in dispute to him. Mr. Otesanya learned  
 counsel for the defendant (now respondent) did not object. The following  
 10 appears in the record for that day:

*"Court Note:*

*Court calls out both parties and advised them to try and settle this  
 matter amicably so as not to waste (sic) any more money and time since they  
 bought from a common vendor.*

15 *Court:*

*On the concurrence of both counsel, the further trial of this case to  
 conclusion by both sides is hereby adjourned to the 16th day of April, 1984  
 at 10 a.m."*

On 16th April, 1984 when the matter came up again Mr. Adekoya who  
 20 had on the 21st of February asked for an adjournment to enable him to call the  
 surveyor and the vendor suddenly announced that he was closing the case  
 for the plaintiff. The following note was made by the trial Judge.

*"Court Note:*

*Mr. Otesanya when called upon to open the case for the defendant says that  
 25 defendant 'E2'80" is absent, but he does not know the reason for such her  
 absence. Asks for an adjournment to call evidence for the defendant.*

*Mr. Adekoya does not oppose but asks for costs"*

The learned trial Judge in a short ruling observed:

*"It was made abundantly manifest at the last adjourned date that  
 30 no further requests for an adjournment to prolong this case will be enter-  
 tained, since this case were both sides truly ready, could have been fully  
 tried and concluded on the 21/2/84. Application for an adjournment is re-  
 fused. Case for defendant to commence."*

Consequent on this ruling, the following court note appears on the record:

35 *"Court Note: Mr. Otesanya says that the absence of defendant has  
 handicapped him from offering any evidence. Also none of defendant's wit-  
 nesses are (sic) also absent (sic) and yet there are not less than 2 such wit-  
 nesses to call for her case.*

Court; Case for the defendant is deemed closed without any evi-  
 dence being offered. This is a rather old case and the evidence needed to

establish the truth of what each party brought from their admitted common vendor is patent, clear and easily locatable within the reach of either plaintiff or defendant.

Court Note:

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Both counsel to now address the court.

Mr. Otesanya says that he has not prepared for such an eventuality and asks for an adjournment.

Mr. Adekoya says that he is ready for an address.

Court: The court will incline to grant an adjournment at this stage for other reasons of doing justice between the parties in this case. 10

The case is adjourned to the 16/5/84 for the addresses of both counsel. The court specifically will urge both counsel to address it on the issue of proven boundaries of each party at the time of purchase and of the party who purchased first of the two (2) as far as evidence has so disclosed both issues. Also whether this action should in the line of available evidence be non suited or dismissed. 15

As could be seen from the above court notes, the learned trial Judge granted Mr. Otesanya's second application for adjournment and further hearing was adjourned to 16/5/84 for address of counsel. On the latter date counsel for both parties addressed the court and the trial Judge adjourned for judgment which he delivered on 13/7/84. In his judgment, the learned trial Judge related the events leading to his "first closure or automatic closure" of the defendant's case. It is interesting to quote what the learned Judge had to say in his judgment: 20

*"This case has constantly aroused my interest in rather unusual ways. Yet it is in the normal course of the litigation in this court not an unusual one. The three main reliefs sought by plaintiff herein are the usual ones for declaration of entitlement to statutory right of occupancy, perpetual injunctions against defendant and her agents and or servant to restrain them from further acts of trespass on the disputed property and of course damages for such trespass on the piece of land claimed to be plaintiff's. That land in dispute is said to lie at No. 22 Sode street, Sagamu.* 25

*The first unusual feature which aroused the court's interest was that when the continued trial of the case was resumed on the 16th day of April, 1984, it was expected that plaintiff's case that was already then part heard as well as that for the defendant yet to open would both be concluded to finality on the resumed trial scheduled for that 16th April, 1984. That understanding was sequel to the impression and undertaking given by both* 35

*counsel at the earlier trial of the 21st day of February, 1984. That impression being so indelible in the court's mind, it formed part of the order of court made on that day as follows:-*

“On the concurrence of both counsels, the further trial of this case  
5 to conclusion by both sides is hereby adjourned to the 16th day of April, 1984 at 10.00 am.”

The evidence yet to be tendered by plaintiff relates to the dimensions of the actual land he bought and when he did. But regrettably counsel to plaintiff who prayed for the adjournment since the 21st day of February,  
10 1984, to the resumed date of 16th day of April, 1984, to enable him call one more witness for the plaintiff dramatically closed plaintiff's case rather than call any such witness.

Mr. Otesanya, of learned counsel for the defendant on the other hand could not proceed with any part of the defendant's case owing to the  
15 absence of defendant herself from court and or any of her witnesses which absence learned counsel could not explain or justify. Inevitably, these combined uncertainties and or failings led not only to the refusal of an application for an adjournment on defendant's behalf but also led to a forced closure or automatic closure of defendant's case (albeit in the negative and  
20 much against the solicitations of her counsel to the court).”

On the defendant's appeal to the Court of Appeal the main issue arising for determination was as to the fairness of the trial in the court below. That court held that the trial was unfair and ordered a retrial. On plaintiff's appeal to this court, it is contended (a) that there being no appeal against the  
25 interlocutory decision of the trial court refusing adjournment on 16/4/84, the court below was wrong to entertain any complaint which in effect was an attack on that decision and (b) that the court below in holding that the trial was unfair was interfering with the exercise of the trial court's discretion to grant or refuse an application for an adjournment.

On (a) my learned brother had adequately dealt with this issue. It is  
30 my view that the unfairness of a trial court, like in issue of jurisdiction could be taken up on appeal and the appellate court would be entitled to look into all the circumstances of the trial in order to determine whether the trial was fairly conducted. A party is entitled under the constitution to a fair trial or hearing.  
35 Reasons given in the lead judgment apart, there is also the provision of Order 3 rule 22 of the Court of Appeal Rules which states:

“No interlocutory judgment or order from which there has been no appeal shall operate so as to bar or prejudice the court from giving such decision upon the appeal as may seem just.”

Under the rules, therefore, the lower court was perfectly justified in considering the propriety or otherwise of the refusal of an adjournment to enable the defendant to present her case notwithstanding that there was no appeal against that interlocutory decision.

On (b), on the authorities earlier cited by me, the court below had 5 power, indeed the duty, to examine the circumstances leading to the exercise of the trial Judge's discretion to refuse an adjournment. As this court warned in *Okoiko v. Esedalue* (supra) an appellate court should be very slow to interfere on such a question as an adjournment of a trial. The general saying is that justice delayed is justice denied and section 33(1) of the 1979 Constitution 10 gives to every person the right to have his civil rights and obligation determined by a court after a fair hearing and within reasonable time. For clarity the sub-section reads:

*"33-(1) In the determination of his civil rights and obligations, including any question or determination by or against any government or 15 authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality."*

If, therefore, a party indulges in asking for incessant and unreasonable adjournments a trial court should not allow him to use the due process of 20 law to defeat the ends of justice. That court, that is, a trial court, ought to weigh the reasons given for the application for adjournment and the surrounding circumstances. A Judge must balance the requirements of fair hearing with the requirements for hearing to be within a reasonable time. By using the word reasonable in section 33(1) the framers of the constitution have 25 given enough wide discretion to enable a court to conduct this balancing act. Where the requirements of fair hearing outweigh the necessity for a speedy trial a Judge or court should not hesitate to grant an application for an adjournment. Where however a party indulges in dilatory tactics, it could not be said that party is aiming at a fair hearing rather, that party is using the due 30 process to defeat justice being done to the opposing party. In such a case a Judge or court should have enough courage not to lend weight to such act of filibustering and should be firm in refusing unnecessary application for adjournment. After a review of the surrounding circumstances of this case, I have come to the conclusion that the learned trial Judge did not exercise his 35 discretion judicially and judiciously clearly here. The ends of justice require that the application for adjournment to enable the defendant to present her case ought to have been granted, for the following reasons:-

(1) At an earlier hearing the plaintiff gave evidence and called a wit-

ness at the end of which he asked for and obtained an adjournment to enable him call more witnesses. The learned trial Judge acceded to the plaintiff's request which was not opposed and granted the adjournment. On the adjourned date, plaintiff's counsel without calling the remaining two witnesses  
5 in respect of whom he had earlier obtained adjournment at the previous hearing and without giving reasons for no longer calling them proceeded to close plaintiff's case. Obviously, the court and the defence must have been taken by surprise at the turn of events. The learned trial Judge in his judgment expressed surprise at the turn of events when he said that counsel for the  
10 plaintiff dramatically closed plaintiff's case. It was in this circumstance that defence asked for an adjournment to enable him present the defence, the defendant being absent from court that day. It was not shown that it was the habit of the defendant to absent himself from court. Plaintiff's counsel did not oppose the application. This is not to say, however, that counsel could by  
15 consent frustrate the constitutional requirements of "fair hearing within a reasonable time" but in the factual situation arising in this case one would expect that the learned trial Judge would grant the application. After refusing the application and "forcibly" closing the defendant's case and calling on counsel to address him on the case, he proceeded to grant defence counsel's  
20 application for adjournment to address him on a later date. I do not think that the learned trial Judge, with due respect to him, acted wisely in the circumstances to refuse the 1st application for adjournment.

(2) The learned trial Judge had on 21/2/84 advised the parties to settle the matter amicably. On 16/4/84, that, is, next adjourned date, he did not  
25 even care to find out whether any efforts and, if so, what results had been made to settle the matter amicably between the parties. None of the counsel reported to him of the efforts, if any, made neither did he ask. Surely having set in motion the process of reconciliation by the advice given by him, one would expect the learned trial Judge to ask questions in respect thereto. There is  
30 nothing on record to show that he did so.

All things considered, therefore, the court below acted properly in interfering with the exercise of the learned Judge's discretion in refusing to the defendant an adjournment to enable her present her case.

I will now touch briefly on issue 3 in the appellant's brief which reads:  
35 "*Whether or not the Court of Appeal was right and correct to have ordered a retrial of the whole case giving the state of pleadings and evidence, particularly when nothing useful will be gained from such retrial.*"

I think the plaintiff was lucky indeed to have got another trial. My learned brother Adio J.S.C has rightly observed in his judgment that a decla-

ration would not be granted on admissions in pleadings only. But this apart, the learned trial Judge in his judgment observed as follows:

*“To appreciate the other exciting aspect of the case, this court would copiously refer to the final able submissions of both counsel and then relate them to the issues joined on the pleadings of both parties before it disentangles them in turn by reference to the evidence available in the case.”* 5

After setting out the submissions of learned counsel and the evidence of the plaintiff the learned trial Judge went on to observe:

*“Curiously however neither plaintiff who offered evidence nor defendant who opposed him tendered any viva voce evidence to specifically show the exact delineation of the boundaries of the land which each of them bought from such their common vendor.* 10

*This case on the facts distinguished itself from the other normal run of cases which establish the proposition that where a defendant admits ownership of a land in dispute with a plaintiff, the legal duty to prove adverse possession to that of plaintiff and or better title to his rests on that defendant. This is because in this case the singular dispute was not on whether the parties differ as to the original ownership of the disputed land or that the sale to either was void or voidable and or whether either is not in possession of his land or not. But the crucial distinction here is the disputing of the actual demarcation line which separates the two adjoining lands of the warring parties, so as to determine in truth and in fact where the exact possible demarcation line between both adjoining landowners should really be. Here is where the utmost excitement of the court over this case now begins.* 15 20 25

*To acknowledge the resounding authorities of Kodinlinye v. Odu (1935) 2 WACA 336 and its precursor authority on the same issue in Ekpo v. Ita 11 NLR 68 that it is for the plaintiff who seeks declaration of title to offer prolific evidence in proof of such a disputed fact coupled with positive acts of user so numerous over a length of time to indicate ownership is not so much to belabour those authorities in this instance but to openly acknowledge them. Such acknowledgement has however on the state of facts and pleading in this case and the issue in dispute appear to become one of a clash or better still the survival of the fitter of two rules of law as to pleadings and evidence respectively. Such is the tricky edge to which excitement has been taken in this case. Which rule is then to be so as to prevail and become applied herein?* 30 35

*The law of evidence confirms that whoever asserts must prove. In this case it is plaintiff who asserts both the purchase of a particular piece of land and its area. In this instance plaintiff did not have to do much by way of*



proof. He described the location of the land in his pleading as being at No. 22 Sode Street, Sobo Offin, Sagamu and also related it to a survey plan No. AK.3421/OG which he tendered as exhibit 'B' in this trial while his purchase receipt is exhibit 'A'. Unhappily none of plaintiff or defendant called their  
5 common vendor to testify to at least clear the air not only as to their inter-  
vention in the dispute between plaintiff and defendant but as to how the  
boundary or demarcation line has settled their grievance once and for all by  
the way or manner it was restated or reestablished categorically to justify  
10 claims as the exact size and demarcation point of the land of each disputant  
as adjoining land-owners from a common vendor. " (Underlinings are mine)

It is to be observed that from the passage above the learned trial Judge obviously was of the view, and in this, I agree with him, that it was necessary for the parties common vendor to testify as to the exact boundaries of the  
15 respective pieces of land he sold to each party. The plaintiff who had the  
primary duty to prove the boundaries of the land he was claiming did not do  
so notwithstanding that he sought and obtained an adjournment to enable  
him call his surveyor and the common vendor. In view of my affirmation of the  
order of retrial made by the court below, I would not say much more so as not  
20 to prejudice the retrial. It is however, sufficient to say that I am at a loss to  
understand how the learned trial Judge came to the final conclusion giving  
judgment to the plaintiff in the absence of the evidence of a witness he himself  
considered vital.

In conclusion, I dismiss this appeal and affirm the judgment of the  
25 court below. I abide by the order for costs made in the lead judgment.

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### IGUH JSC

I have had the privilege of reading in draft the lead judgment just delivered by my brother, Adio, JSC and I entirely agree that this appeal is  
30 totally devoid of substance and should be dismissed.

No words of mine are really needed to emphasize the reluctance of an appellate court to interfere with a discretionary order of a trial court. But it must be stressed that judicial discretions must at all times be exercised judi-  
cially and judiciously and in the best interest of a just and equitable determi-  
35 nation of a case between the parties. In the exercise of a proper and judicial  
discretion, no court ought to make such an order as would defeat the rights of  
a party and destroy them altogether, unless of course the circumstances of the  
case justify this course of action and the court is satisfied that such a party  
has been guilty of such conduct that justice can only properly be done to the

other party by coming to that conclusion. Where, however, it is established that a judicial discretion has not been judiciously exercised or, if there is a definite miscarriage of justice in the exercise of such discretion, it is within the competence of an appellate court, indeed it is its duty to have such an exercise of discretion reviewed and set aside. See Maxwell v. Keun (1928) 1 K.B. 645 C A, Awani v. Erejuwa II (1976) 11 SC. 307 at 315, Ookoiko v. Esedalue (1974) 3 SC.15 (1992) 2 NWLR (Pt. 222) 132 and Oduote v. Oduote (1971) All NLR 221.

Now turning more specifically to the issue of the grant or refusal of an application for adjournment which has arisen for consideration in this appeal, there can be no doubt that this involves an exercise of the court's discretionary jurisdiction. The court has an inherent jurisdiction to adjourn the hearing of any suit, cause or matter on a proper or cogent ground on such terms as it thinks just in order to do substantial justice between the parties. See Hinckley and South Leicestershire P.B.S. v. Freeman (1941) Ch 32. The adjournment of proceedings whether under the Rules of court or under the inherent jurisdiction of the court is a judicial act which like other judicial acts, may be reviewed on appeal but as it is a matter of discretion vested in the court, an appellate court ought ordinarily to be slow to interfere, and very seldom does so. If however it appears that the result of an order refusing an adjournment will be to defeat the rights of the applicant altogether, and to do that which the appellate court is satisfied would be an injustice to one or the other of the parties, the appellate court has the power and will not hesitate to review the order, and it is its duty to do so. See Re Yates Settlement Trusts (1954) 1 WLR 564 Dick v. Piller (1943) K.B. 497 and Priddle v. Fisher and sons (1968) 3 All E.R. 506.

It is desirable at this stage to state the facts of this case in so far as the issue of the defendant's application for an adjournment before the trial court in this case is concerned. In doing so; I shall adopt the facts as ably set out in the judgment of the Court of Appeal which are as follows:-

"After pleadings had been exchanged, the action was eventually fixed for trial by the learned trial Judge and the trial commenced on the 21st day of February, 1984. On the said day, the plaintiff and one of his witnesses (P.W.1) gave evidence in support of the plaintiff's case. After their evidence, the plaintiff's counsel requested for an adjournment which was granted to the 16th day of April, 1984 so as to enable the plaintiff to call his surveyor and the vendor before closing his case.

At the resumption of the case on the 16th day of April, 1984, the

learned counsel for the plaintiff abandoned his intention to call further, witnesses and unexpectedly declared the case for the plaintiff closed. The record does not show that the counsel for the plaintiff actually gave any reason for the closure of the plaintiff's case.

5            The learned trial Judge then called upon the counsel for the defendant to open his case. In response, the learned counsel for the defendant informed the court that the defendant was absent and there were no other witnesses available to give evidence. He gave no reason for the absence of the defendant or her witnesses. He thereupon requested for an adjournment so as to  
10          enable him to open the case for the defendant. Learned counsel for the plaintiff did not oppose the application for adjournment but asked for costs.

The learned trial Judge refused his request.

He stated thus:-

15          *"It was made abundantly manifest at the last adjourned date that no further requests for an adjournment to prolong this case will be entertained since this case were both sides ready, (sic) could have been fully tried and concluded on 21st day of February, 1984. Application for adjournment is refused, case for defendant to commence."*

20          Having refused to order for adjournment, the court further clamped down on the parties by forcibly declaring the defendant case closed.

The learned Judge said:-

25          *"Case for the defendant is deemed closed without any evidence being offered. This is a rather old case and the evidence needed to establish the truth of what each party bought from their admitted common vendor is patent, clear and easily locatable within the reach of either plaintiff or defendant."*

30          It is worthy of note that the learned trial Judge after he had forcibly closed the defendant's case without any evidence from her part or from her witnesses invited learned counsel to address him. Learned defendant's counsel indicated that he was not prepared for such an eventuality and asked for an adjournment which this time, was curiously granted "for other reasons of doing justice between the parties in this case." On the 16th May, 1984, the learned trial Judge delivered his judgment in the suit and granted the plaintiff all the reliefs he claimed.

35          I have closely studied the record of proceedings in this appeal and have come to the definite conclusion that although the question of the adjournment of a case is at the discretion of the court, the learned trial Judge in the present case was clearly in error in all the circumstances of the case by refusing to grant the adjournment applied for by the defence. The application

was refused inspite of the fact that learned counsel for the plaintiff did not oppose the adjournment and there is nothing on record to suggest that it was made male fide or without justification. It seems to me plain that this refusal on the part of the learned trial Judge to exercise his discretion in favour of the adjournment applied for following the sudden and unexpected closure of the plaintiff's case without calling the two witnesses the plaintiff's counsel had indicated would be taken on the material date offends the doctrine of audi alteram partem and amounts to a deprivation of the right of the defendant to obtain substantial justice in the suit.

In the case of *Evans v. Bartlam* (1937) A.C. 473, Lord Wright, in considering the question of the exercise of discretion in granting an application for adjournment had this to say-

*"A Judge's order fixing the date of trial or refusing to grant an adjournment is a typical exercise of purely discretionary powers, and would be interfered with by the Court of Appeal only in exceptional cases, yet it may be reviewed by the Court of Appeal. Thus in Maxwell v. Keun (1928) 1 K.B. 645, the Court of Appeal reversed the trial Judge's order refusing to the plaintiff an adjournment. That was a pure matter of discretion on the facts. Atkin, J. said (at pp.653) "I quite agree the Court of Appeal ought to be very slow indeed to interfere with the discretion of the learned Judge on such a question as an adjournment of a trial, and it very seldom does so; but, on the other hand, if it appears that the result of the order made is to defeat the rights of the parties altogether, and to do that which the Court of Appeal is satisfied would be an injustice to one other of the parties, then the court has power to review such an order, and it is, to my mind, its duty to do so."*

I entirely endorse the above views of the noble Lord which in my view represent the correct position of the law. I also agree with the court below that the learned trial Judge by refusing to grant an adjournment and peremptorily decreeing that the case be deemed closed effectively shut out the defendant from defending the plaintiff's action without any just cause for so doing.

It seems to me right to point out that there was no suggestion that the plaintiff would in anyway be prejudiced by the adjournment applied for by the defendant. On the contrary, learned plaintiff's counsel, quite rightly in my view, did not oppose the adjournment. I am of the firm view that the court below was on firm ground when it allowed the defendant's appeal in the suit and remitted the case for trial de novo before another court of competent jurisdiction.

I conclude by stressing that the refusal to grant an adjournment which, as in the present case, was appropriately sought for good cause and on cogent and weighty ground constitutes a substantial injustice and a determination made after such arbitrary refusal wherein a party is forcibly shut out from  
5 taking part in the proceedings without just cause is completely erroneous on point of law and must not be allowed to stand. See *Rose v. Humbles* (1972) 1 All E.R. 314. In my judgment the court below was right interfering with this arbitrary and wrong exercise of discretion by the learned trial Judge in refusing the defendant an adjournment to enable her present her case before the  
10 court.

It is for the foregoing and fuller reasons contained in the lead judgment of my learned brother, Adio, JSC, that I agree that this appeal lacks merit and must be dismissed. I hereby dismiss it and abide by the consequential orders including the order as to costs contained in the lead judgment.  
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