

SUPREME COURT OF NIGERIA
7TH OCTOBER 1994. SC. 232/1992
CORAM:- S. M. A. BELGORE, A. B. WALL, M. E.
OGUNDARE, E. O. OGWUEGBU, S. U. ONU, JJSC.

OKOROAFOR MBADINUJU & 3 OTHERS

(for themselves and on behalf of
Umuohachom Family of Umuezeawala)

..... PLAINTIFFS/
APPELLANTS

AND

CHUKWUNYERE EZUKA & 5

OTHERS (For themselves and on
behalf of Umuatuokwu Umuonuzo
Family of Umudioha)

..... DEFENDANTS/
RESPONDENTS

ACTIONS - *Death of defendant - Land matter against the defendant - Whether the action died with the defendant.*

ACTIONS - *Personal action - Title to the land in dispute - Whether the claim is strictly personal to the deceased defendant.*

PRACTICE & PROCEDURE - *Motion for extension of time - Where not served on the defendant - Whether trial court has jurisdiction to proceed and strike out the parties' motions.*

PRACTICE & PROCEDURE - *Hearing notice - Service thereof - No proof that the parties were served - Whether the order striking out the parties's motions in their absence - Is a nullity.*

PRACTICE & PROCEDURE - *Proceedings of court - On a particular date - When declared a nullity.*

FACTS

The plaintiffs filed an action against the defendant before the High court of Anambra State claiming a declaration that they are customary owners of the land in dispute among other remedies. Plaintiffs sought to establish that the defendant who was their customary tenant has forfeited his rights to the

said property for challenging and denying the plaintiffs' title to the said land. The case had a very winding history. Apart from series of interlocutory applications that featured, the plaintiffs' case plus motion for extension of time and the defendant's motion for judgment were struck out by the trial court on a date both parties were not in court without any proof that hearing notice was served on them. It was also clear that the plaintiffs' motion was not yet served on the defendant as at the date the two motions were struck out. The defendant who claimed the land in dispute belonged to his family died after filing his statement of defence. The present defendants applied and were allowed to be substituted for the deceased.

The trial court gave judgment for the plaintiffs. The defendants appeal to the Court of Appeal was upheld. The court below held that since there was no clear proof on the trial court's record as to how the Struck out motions and plaintiffs' claim were relisted, the trial court had no jurisdiction to proceed with the hearing of the case. It also held that the plaintiffs' claim against the deceased defendant was personal and therefore died with the deceased. Being aggrieved the plaintiffs have now appealed to the Supreme Court to determine inter alia, whether the trial court had the jurisdiction when it struck out the plaintiffs' claim on 13/2/78. Plaintiffs/appellants contended that the proceedings of the said 13/2/78 were a nullity.

HELD (Unanimously allowing the appeal per lead judgment of **OGUNDARE JSC**)

Healing notice - Service thereof

1. There is nothing on record to show whether the parties and/or their counsel were served with hearing notice for 13/2/78. Neither is there anything on record to show that the parties were served with hearing notice that the main suit itself would be put on the court's list for that day. In the absence of such proofs, it will be difficult to conclude the parties knew of the proceedings for that day. The two motions were struck out because parties were absent. Why was the defence counsel, who was present, not called upon to move the defendants' motion to dismiss for want of prosecution? Why was it necessary to strike that one out too? Surely for the trial Judge to strike out the two motions before him without first ensuring that the parties were served with hearing notices for 13/2/78, his order is a nullity. (P. 146 L. 10)

Effect of failure to Serve motion

2. It is apparent from the proceedings of 21/2/78 that even as at that day

plaintiffs' motion for extension of time had not been served on the defendant. In my respectful view, the trial court had no jurisdiction to hear the two motions before it on 13/2/78 and to strike them out before each was served. (P. 147 LI 6)

Proceedings declared a nullity

3. In conclusion for the reasons I have given I declare the proceedings of 13/2/78 a nullity. Those of 21/2/78 were accordingly regular. I, therefore, resolve Questions 1- 4 in favour of the Plaintiffs/Appellants. (P.147L35)

Actions - Death of Defendant

4. In the affidavit in support of their subsequent application for leave to defend the action in a representative capacity, the 3rd defendant not only repeated the above facts but added in paragraph 9 thereof that

"9. The land in dispute is our family land"

From the original pleadings of the plaintiffs and Ewuru, title to the land in dispute was clearly in issue. In the light of the above averments and deposition, will it be correct to say that the action instituted against Ewuru died with him, as held by the court below? With profound respect to the learned Justices of the court below, I think they are wrong. In Eyesan V. Sanusi (1984) 1 SC NLR 353; (1984) NSCC 271 this Court held that in a case where title to the land in dispute was in question, the action does not die with the defendant. (P. 152 LI 8)

Whether claim is strictly personal

5. It is, in my respectful view, erroneous to say that the plaintiffs' action against Ewuru was one strictly personal to the latter, involving as it were, title in the land in dispute which plaintiffs claimed as belonging to their families and Ewuru retorted that it belonged to his family. I, therefore, resolve Question 5 in plaintiffs' favour. (P. 154 L4)

NOTABLE POINTS *Of* INTEREST

OGUNDARE.JSC

1. Treating a date fixed for mention as one for hearing

It has been held by this Court that it is wrong for a judge to treat a date fixed for mention of a case as one for hearing; any judgment entered contrary to this amounts to a nullity (P. 143 L23)

2. Effect of respondents 'failure to appeal against part of judgment

As there is no appeal by the defendants against that part of the judgment of the Court of Appeal which, by inference, did not find merit in the other issues canvassed before that Court by the defendants, it follows that the judgment of the trial High Court stands and it is hereby restored by me. (P. 154 L. 11)

3. Proceeding against executor of deceased defendant

If a sole defendant dies and the cause of action is one that survives against him, the plaintiff may obtain an order to continue the proceedings as against the executor or administrator of the deceased defendant. Such executor may apply to be substituted or added as a defendant (P. 157 L.8)

4. Survival, of action against deceased defendant

In the case which is the subject of this appeal, the pleadings, the affidavit in support of the application for substitution and the evidence make it clear that the action is one which survives against Udeoha Ewuru for the benefit of Umuatuokwu and Umuonuzo families in Ihiala whom the respondents represent. An action where title to land is in issue is one of the causes of action which survives the death of either of the parties. The legal maxim has no application in this case. (P. 157 L.28)

A party cannot approbate and reprobate

5. It is an act of deceit for the respondents to approbate and reprobate. Having voluntarily sought to be substituted for the deceased sole defendant, contested the action and failed, they cannot be heard to say that the proper parties were not before the court. They are bound by the decision and are estopped from denying the effect of the judgment. (P. 157 L.35)

REPRESENTATTON

Chief U.N. Udechukwu for the Appellants.

A.O. Mogboh SAN, with A. Okafor for the Respondents.

CASES REFERRED TO

Obimonure v. Erinoshio (1966) All NLR 245 (Reprint)

Craig v. Kansen (1943) KB 256

Scott-Emuakpor v. Ukavbe (1975) NSCC 435

Kano v. B.M.P.C. Ltd. (1978) 9-10 SC 51

- Olubusola Stores v. Standard Bank (Nig) Ltd (1975) NSCC 137
 Aladegbemi v. Fasanmade (1988) 3 NWLR 12
 Eyesan v. Sanusi (1984) 1 SCNLR 353
 Inua v. Nta (1961) All NLR 600 (Reprint)
 5 Green v. Green (1987) 3 NWLR (Pt.61) 480
 Hon. P.C. Onuoha v. R.B.K. Okafor (1983) 2 SCNLR 294

CASES REFERRED TO

Hon. P.C. Onuoha v. R.B.K. Okafor (1983) 2 SCNLR 294

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LEAD JUDGMENT BY OGUNDARE JSC

By a writ of summons issued in June 1977, the plaintiffs claimed from
 15 one Udeoha Ewuru:

(a) *A declaration that the plaintiffs are the customary owners of that portion of the said ALAOJI now in the possession of the defendant, the annual value of which is N10.00 (ten Naira).*

(b) *A declaration that by the custom of Ihiala people the defendant
 20 has forfeited his rights, use, enjoyment and or possession of the said portion of land to the plaintiffs.*

(c) *N100.00 general damages for trespass.*

(d) *Injunction perpetually restraining the defendant, his servants, agents and or workers from ever going into the said portion of land."*

25 Pleadings were ordered on 18/7/77 and the plaintiffs were given 120 days within which to file their Statement of Claim and plan. By motion dated 12th day of January, 1978 and filed that same day and fixed for hearing on 1st day of February, 1978 the plaintiffs prayed the court for extension of time within which to file their Statement of Claim and plan. The defendant, Ewuru,
 30 through his counsel, also by motion dated 14th day of January, 1978, prayed the court below for "*an order giving judgment against the plaintiffs in default of filing their Statement of Claim in compliance with the order of court dated 18/7/77*" and the motion was fixed for 1st February, 1978 for hearing. There is no indication in the record as to what happened on 1st February 1978.
 35 The record of appeal however, shows that on 13/2/78 the case was called. The following note appears on the record:

*"Parties absent: Counsel absent. Mr. Eyisi now appears for defendant.
 Court: Both motions are struck out: Consequently plaintiff's case is also*

struck out. No order as to costs."

On 21st February 1978, the record of appeal also shows, that the case came up before the court and the following note appears for that day:

"Parties present except defendant/respondent no proof of service.

Mr. Onyekwelu for plaintiffs/applicants,

Mr. Eyisi for defendant/respondent, says that they are not opposing motion for extension of time to file Statement of Claim and plan and also says that they are withdrawing motion for judgment in default. Asks for consolidated costs of N50.00 for both motions. Mr. Onyekwelu for plaintiff/applicant says that defendant filed their motion for judgment in default.

Court: Plaintiff/applicant is given extension of 30 days from date to file his Statement of Claim and plan with costs of the application assessed and fixed at N10.00 to defendant/respondent. In respect of motion in default of judgment filed by the defendant, as there is no proof of service of motion by plaintiff for extension of time on defendants to file Statement of Claim and plan, defendants will also be entitled to costs of N10.50."

Thereafter the plaintiffs filed their Statement of Claim and plan on 3/3/78. The defendant also filed his Statement of Defence on 6/7/78. Subsequent to the filing of pleadings, the defendant died. By a motion dated 8/6/81, 20 Chukwunyere Ezuka, Mbatugosi Okwerogu, Solomon Asika, Venantious Udeora, Maduka Obi and Nnabenyi Ohaego prayed the court for an order to be substituted for Udeoha Ewuru the deceased defendant. The application was granted on 4/3/83, the plaintiffs not having opposed it. Series of inter-locutory applications followed but the significant one is the application of the new defendants dated 28/6/83 praying for an order of court that the new six defendants be allowed to prosecute the case on behalf of their families, that is, Umuatuokwu and Umuonuzo families. The application was granted on 30/6/83. Subsequent to this the defendants with leave of court filed an amended Statement of Defence. The case finally proceeded to trial on the plaintiff's 30 amended Statement of Claim and the defendants' further amended Statement of Defence.

At the trial evidence was led on both sides in support of their respective claims and the learned trial Judge after addresses by counsel, in a reserved judgment, found for the plaintiffs and entered judgment in their favour 35 in the following terms:

"(a) A declaration that the plaintiffs of Umuohachom are entitled to customary rights of occupancy of the portion of Ala Oji land verged pink on the plaintiffs' plan No. AN/GA 2248/77 tendered as Exhibit' A' in this suit.

(b) *A declaration that the Area of Ala Oji verged, green on the plaintiffs' said plan Exhibit 'A' less the area of Eke Okohia verged violet was granted to Udeoha Ewuru as customary tenant.*

(c) *Forfeiture to the plaintiffs of the customary tenancy of the said Udeoha Ewuru of the portion of Ala Oji verged green on the plaintiffs' said plan Exhibit 'A' for challenging and denying the title of the plaintiffs to the said land.*

(d) *N100 general damages for trespass to the contiguous portions of the plaintiffs' said Ala Oji verged pink and blue respectively on the said plan Exhibit 'A'.*

(e) *A perpetual injunction restraining the defendants their servants, agents and privies from further entry into or cultivation of the plaintiffs' land Ala Oji verged green and pink respectively on the said plan Exhibit 'A'. The defendants being dissatisfied with the judgment appealed to the Court of Appeal upon eight grounds of appeal, one of which, because of its importance to the appeal now before us, I shall state hereunder. Ground 4 read:*

"4. The learned trial Judge erred in law in substituting the defendants for the dead sole defendant despite the plaintiffs' pleadings and non-compliance with section 2 and 3 of the Administration (Real Estate) Law.

PARTICULARS OF ERROR:

(a) *The plaintiffs pleaded in paragraph 21 of the Statement of Claim that they had no transaction whatsoever with the defendants.*

(b) *The defendants have no letters of Administration and have not been shown by evidence to be personal or legal representatives of the dead sole defendant.*

(c) *From the pleadings and evidence led the cause of action against the original sole defendant- Ewuru does not subsist after his death.*

(d) *Ewuru was never sued nor defended the action in a representative capacity."*

Leave was sought and obtained to argue additional grounds of appeal, one of which read:

"9. The learned trial Judge erred in law and acted without jurisdiction in entertaining further proceedings and hearing of the case after the same was struck out on 13th February, 1978. (p. 15)

PARTICULARS OF ERROR:

(a) *The plaintiffs/respondent's application for extension of time and the whole of plaintiffs' case were struck out on 13th February, 1978.*

(b) *The plaintiffs did not apply to the court to relist their case and their motion.*

(c) *There was no order made by the court to replace the case on the*

cause list.”

In the defendants/appellants’ Brief in that court, six issues were set out as calling for determination, that is, to say:

- “1. Was there a valid trial or judgment in this suit?
2. Did the learned trial Judge adopt the proper approach to the issue of traditional history and onus of proof in this case. Has his approach adversely affected his consideration of the entire case and consequently his final judgment?
3. Did the learned trial Judge properly direct himself as to the pleadings and admissible evidence of grant? Was there any proof of a grant as pleaded or at all?
4. What is the effect of the land Use Act on the appellants’ long physical presence on the land in dispute?
5. Did the plaintiffs prove any title over the land in dispute?
6. Was failure of 4th defendants to give evidence fatal to the appellants’ case?”

The plaintiffs/respondents in their Brief in that court formulated the following five questions as calling for determination:

- “(a) Was the act of the trial court in suo motu striking out the suit on 13th February, 1978, valid? (b) Did the said act vitiate the subsequent proceedings and judgment of the trial court?
- (c) Were the proceedings and/or judgment of the court below adversely affected by the legal maxim *actio personalis moritur cum persona*, and, if so, to what extent?
- (d) Did the court below properly evaluate the evidence before it as provided by law?
- (e) Were the findings of the court below upon which it based its decision supported by the evidence before it?”

After counsel had proffered oral argument at the hearing of the appeal, the Court of Appeal in a reserved judgment allowed the appeal, set aside the judgment of the learned trial Judge and struck out plaintiffs’ claim. In the lead judgment of Awogu J.C.A. with which Oguntade and Akintan J.J.C.A concurred, the learned Justices of Appeal observed:

“Although counsel argued in respect of all the issues raised, it became clear that the first issue which questioned the legality of the proceedings would determine the fate of the appeal.”

After stating what happened in court on the 13th and 21st of February, 1979, went on to say:-

“The question which Chief Mogboh, S.A.N., for the appellants raised,

was that there was no evidence on the record that the learned Judge set aside suo motu his order striking out the motions and suit made 8 days earlier nor was there evidence of an application to relist the suit and motion. Yet, 8 days later, the same motions were entertained and extension of time granted. As the issue appeared to be fundamental, we made an order for
5 the production of the record book of the Nnewi High Court Vol.3,338 of 1978 where the proceedings were recorded by the learned Judge. Following the production, counsel and the court were satisfied that the record agreed with page 15 of the record of appeal. Chief Mogboh, S.A.N., referred us to his brief and to the procedure to be adopted where suits are struck out.
10 He said that no such procedure was adopted and the events of 8 days later cannot be deemed to have been regular. He submitted that the case has been struck out and all the proceedings terminating in the judgment of Aneke, J. on 13th November, 1987 were a nullity.

Anyamene S.A.N., in reply, pointed out that the motions were fixed for 1/2/78
15 and there was no record on how they came to be taken on 13/2/78. He submitted that if they were taken on a date not fixed for them, the proceedings of that day would be null and void and this court should so treat the proceedings. This being so, he submitted, the court should deem as regular (sic) the proceedings of 13/2/78 (sic) when the order of extension was made.
20 On the order of 13/2/78 the "consequently plaintiffs case is also struck out," he submitted that it was an order made without jurisdiction. He said that the moment the learned Judge struck out the motions, he became functus officio and his striking out of the case was an exercise in futility. He referred to S.52 of the Evidence (sic) cited in support *Ohayagbona v. Obazee* (1972) 5 S.C.
25 247 at 254-5; *Olubusola Stores v. SBN Ltd.* (1975) 4 S.C. 51. He submitted that the court can suo motu extend time for the filing of the Statement of Claim and cited in support *U.B.A. v. Dike Nworah* (1978) 11-12 S.C. 1. He urged the court to hold that the proceedings at page 15 of the record were in order.

30 Chief Mogboh S.A.N. pointed out that the learned Judge was not functus officio on 13/2/78 as a suit was generally listed with the motion relating to it. In *Ohayagbona* (supra), he said that the learned Judge became functus officio in respect of orders he made after his final judgment. Both counsel also argued the other issues raised in the briefs."

35 In deciding the question raised, the learned Justice observed:

"Although the motions fixed for 1/2/78 were taken on 13/2/78, they would appear to have been regularly taken, although there was no evidence as to who adjourned them to that date. Had they been taken prior to 1/2/78, however, the position might have been different (See *Olubusola Stores v.*

Standard Bank (1975) 4 S.C. 51 at 56. Indeed, Eyisi for the defendant, appeared to have been aware of the fixture on 13/2/78 and was present in court. On the contention that the court should have stopped after striking out the motions and was thereafter functus officio when it said 'consequently plaintiffs' case is struck out'. It is clear that the learned Judge made the consequential order at the same time as he struck out the motions. It is therefore difficult to understand the contention that the case itself was not before him on that day. This court (Ibadan Division) has held that it was sufficient that the matter was brought before the Judge in the course of some other matter, namely arguing a motion, and that the Judge had every right to take judicial notice of the fact that the appellants had not filed their Statement of Claim within the prescribed time (See Adediji v.Akintaro (1991) 8 NWLR (Pt.208) 208 at 221. In other words, the learned Judge had jurisdiction when he' struck out the claim of the respondent on 13/2/78. According to the applicable Rules of Court: Order 41 rules 1 and 2:

'1. Where a cause on the cause list has been called and neither party appears, the court shall unless it sees good reason to the contrary, strike the cause out of the cause list.

2. If the plaintiff does not appear, the court shall unless it sees good reason to the contrary, strike out the cause (except as to any counter-claim by the defendant) and make such order as to costs in favour of any defendant appearing as seem just.' There are of course provisions which do not call for consideration here. Then follows Rule 6 of Order 41, which states as follows:

'6 Any cause struck out may be, by leave of court, be replaced on the cause list on such terms as the court may seem fit.'

The plaintiffs made no application to relist the cause. The motions which were struck out cannot be re-listed if the cause struck out was not relisted. The motions should in fact be re-filed only after the relistment of the case. Although Aneke J. took over the trial from Nwokedi J., there was no hearing de novo. Thus the case had been struck out when Aneke J. continued and completed the hearing. The trial was therefore a nullity. Accordingly the case remains struck out as of 13/2/78, and the proceedings of 21/2/78 and thereafter were a nullity. This ground of appeal therefore succeeds."

The court below considered the other issue raised in the appeal before it. This is what Awogu J.C.A. said in the lead judgment:

"I have also examined the other grounds of appeal and issues raised for determination I find merit in one of them, to wit:-

'whether there was any justiciable dispute between the parties. '

The appellants framed it as-

‘whether the plaintiffs proved any title over the land in dispute.’

The respondents put it thus:

*‘were the proceedings and/or judgment of the court below adversely
5 affected by the legal maxim actio personalis moritur cum personam and if so
to what extent.’*

*The plaintiffs sued only Udeoha Ewuru as the sole defendant. Plead-
ings were exchanged. In the statement of claim filed on 3rd May, 1978 para-
graph 2 stated that the defendant was sued in his personal capacity. Three of
10 the reliefs sought against him were as follows:-*

*(a) A declaration that the defendant was at all material times to
this case a customary tenant of the plaintiffs over the land verged green
inclusive of the portion verged blue in the said plan.*

*(c) A declaration that by the custom of Ihiala people, the defendant
15 automatically forfeited his customary tenancy and occupancy over the said
portion verged green the moment he denied plaintiffs’ right to his homage
over the said portion of the land or the moment he claimed ownership of the
land by compensation or otherwise.*

*(d) An order of court condemning the defendant to forfeiture of his
20 customary right of use and enjoyment and/or possession of the said portion
verged green.”*

*“The defendant did not bring an application to defend the action
on behalf of any group, although he claimed to be the present head or
Okpala of Umuatuokwu and Umuonuzo families. After filing his defence, the
25 sole defendant died. This should have been the end of the action against him,
since by the nature of the claim it was not such as would have survived him.”*

He concluded this part of his judgment in these words:

*“Anyamene S.A.N. for the respondents contends that since the sub-
30 stituted defendants defended the action in a representative capacity and
claimed title to the land in dispute, they thereby changed the character of
the personal action against the deceased as sole defendant and so the ac-
tion survived against them, and the reliefs claimed were properly granted
against them. I do not agree. If an action dies with a person, there is no way
35 it can be revived. It is only if the action survives a deceased that such action
can be revived by the conducts of the defendants. What is more, the defen-
dants were under the impression that Udeoha Ewuru was defending the
action as their Okpala. Were this a trial by a customary court, a representa-
tive capacity may thereby be implied; not in an action by a High Court*

where such a defendant did not apply to represent any group and the plaintiffs were sure that he sued him in a personal capacity. Thus, while the plaintiffs proved that they were the owners of the land, they led no evidence of trespass or of a grant forfeitable under the customary law against the defendants. The learned Judge should have struck out the claim following the death of the sole defendant. The facts that the defendants brought themselves into the case via the back door does not make the claim justiciable." 5

Being dissatisfied with this judgment the plaintiffs have now appealed to this court upon four grounds and in their Brief of argument set out the following issues as calling for determination:-

"(i) *Whether the Court of Appeal was right when it held that although the motions fixed for 1st February, 1978 were taken on 13th February, 1978 they would appear to have been regularly taken although there was no evidence as to who adjourned them to that date.*" 10

(ii) *Whether the Court of Appeal was right when it held that the learned Judge at the High Court had the jurisdiction when he struck out the claim of the respondents on the 13th of February, 1978.* 15

(iii) *Whether the Court of Appeal was right when it held that the proceedings of the 21st of February, 1978 and thereafter were a nullity by reason of the suit having been struck out on the 13th of February, 1978.*

(iv) *Whether the defendants can raise this objection so late in the day after participating in the proceedings up to judgment.* 20

(v) *Whether the Court of Appeal was right when it held that the defendants were not proper parties to the suit and that the plaintiffs' claim ought to have been struck out on that ground."*

The defendants in their own Brief formulated two issues to wit: 25

"(1) *Can there be a valid trial and judgment where the suit had been struck out and not relisted before further proceedings commenced.*

(2) *Having regard to the appellant's pleadings, did the action survive Udeoha Ewuru?"* 30

Having regard to the judgment appealed against and the grounds of appeal, I prefer the issues as formulated in the plaintiffs' brief. I shall however, take the first four issues together.

Issues 1 -4:

I have stated earlier in this judgment the reasoning of the court below, per Awogu J.C.A, leading to its decision that the trial of the suit in the High Court was a nullity. Chief Udechukwu, for the plaintiffs, has argued in his Brief that the proceedings of the 13th February, 1978 were a nullity and that, therefore the order of striking-out of the suit made on that day was null and void and the proceedings of 21/2/78 were valid. Chief Mogboh S.A.N., for the

defendants has argued to the contrary. A determination of the issues raised revolves around the validity or otherwise of the proceedings of 13/2/78.

As the record of appeal shows, the two motions for extension of time to file plaintiffs' statement of claim and plan to dismiss the suit for want of prosecution respectively were fixed for 1st February for hearing. There is
5 nothing on record to show whether or not the motions came up that the day and whether they were adjourned and why. All we now know is that the two motions came before the court on 13/2/78. This is confirmed by the court's record book which the court below called for and examined. The parties and their counsel were absent in court when the motions were called although the
10 defence counsel subsequently put in appearance. There is nothing on record to show whether the parties and/or their counsel were served with hearing notice for 13/2/78. Neither is there anything on record to show that the parties were served with hearing notice that the main suit itself would be put on the court's list for that day. In the absence of such proofs, it will be difficult to
15 conclude the parties knew of the proceedings for that day. The two motions were struck out because parties were absent. Why was the defence counsel, who was present, not called upon to move the defendants' motion to dismiss for want of prosecution? Why was it necessary to strike that one out too? Surely for the trial Judge to strike out the two motions before without him first
20 ensuring that the parties were served with hearing notices for 13/2/78, his order is a nullity.- See *Obimonure v. Erinoshio & Anor.* (1966) All NLR (Reprint) where the dictum of Lord Greene M.R. in *Craig v. Kanssen* (1943) KB 256-263 was cited with approval. Lord Greene had in the latter case said:

25 *"Those cases appear to me to establish that a person who is affected by an order which can properly be described as a nullity is entitled ex debito justitiae to have it set aside. So far as procedure is concerned it seems to me that the court in its inherent jurisdiction can set aside its own order, and that it is not necessary to appeal from it. I say nothing on the question*
30 *whether or not an appeal from the order, assuming it to be made in proper time, would be competent. The question, therefore, which we have to decide is whether the admitted failure to serve on the defendant the summons on which the order of January 18, 1940, was based was a mere irregularity, or whether it gives the defendant the right to have the order set aside. In my*
35 *opinion, it is beyond question that failure to serve process where service of process is required goes to the root of our conceptions of the proper procedure in litigation. Apart from proper ex parte proceedings, the idea that an order can validly be made against a man who has had no notification of any intention to apply for it has never been adopted in this country. It cannot be*

maintained that an order which has been made in those circumstances is to be treated as a mere irregularity and not as something which is affected by a fundamental vice."

See also: *Scott-Emuakpor v. Ukavhe* (1975) NSCC 435, 438 where Bello, J.S.C. (as he then was) observed:

"Where notice of any proceeding is required, failure to notify any party is a fundamental omission which entitles the party not served and against whom any order is made in his absence to have the order set aside on the ground that a condition precedent to the exercise of jurisdiction for the making of the order has not been fulfilled See Marion Obimonure v. Ojumoola Erinoshio and Anor. (1966) 1 All NLR 250. As neither the appellant nor his counsel was notified of the proceedings of 1st September, 1972, the learned Judge, in our view ought to have exercised his discretion under order 26 rule 8 of the High Court (Civil Procedure) Rules, Cap. 44, Laws of Western Region of Nigeria 1959, which apply in the Mid- Western State, in favour of the appellant."

It is apparent from the proceedings of 21/21/78 that even as at that day plaintiffs' motion for extension of time had not been served on the defendant. In my respectful view, the trial court had no jurisdiction to hear the two motions before it on 13/2/78 and to strike them out before each was served.

In the case of the main suit, it could not have been listed for 13/21/78 for hearing since pleadings have not been filed. At best, it could only have been for mention. Even then, there is nothing to indicate that the parties were aware that the case was to come up that day. It has been held by this court that it is wrong for a Judge to treat a date fixed for mention of a case as one for hearing; any judgment entered contrary to this amounts to a nullity -See: *Kana v. B.M.P.C. Ltd. (1978) 9 & 10 S.C. 51* at 56; See also *Olubusola Stores v. Standard Bank Nigeria Ltd. (1975) NSCC 137, (1975) 4 SC 51.*

The court below, per Awogu, J.C.A. had relied on Order 41 rules 1, 2 and 6 of the applicable Rules of Court as jurisdiction for its decision. With respect to the learned Justices of Appeal, the issue is not whether the trial Judge could strike out a case for non-appearance of parties but whether he could do so without first ensuring (1) that the parties had notice of hearing for the particular day and (2) that the case was not on the cause list for the day for mention.

In conclusion for the reasons I have given I declare the proceedings of 13/2/78 a nullity. Those of 21/2/78 were accordingly regular. I, therefore resolve question 1-4 in favour of the plaintiffs/appellants.

It may be argued that the plaintiffs did not seek to have the proceedings of 13/2/78 declared a nullity before now. This may be true but if it is open

to a party in subsequent proceeding to plead that the decision of a lower court was given without jurisdiction and therefore a nullity notwithstanding that no proceeding had been taken to set the decision aside - See: Aladegbemi v. Fasanmade (1988) 3 NWLR (Pt.81) 129 how much more when the party aggrieved contends in the appeal stage of the same proceedings, as in this case, 5 that the decision of the trial Judge was given without jurisdiction. I think the plaintiffs can so contend in this case.

Question 5:

I have earlier in this judgment stated the claims against Ewuru, the original defendant who was sued in his personal capacity.
10 In their original statement of claim the plaintiffs pleaded thus:-

“3. *The land in dispute is situate on an area of land called’ ALAOJI’ which parcel of land lies at Umuezeawala-Ihiala within the jurisdiction of this honourable court and is verged green in the plaintiffs licensed survey plan No. AN/GA2248/77 of 3rd December, 1977 attached to this statement of*
15 *claim and will be founded upon at the trial of this case.*

4. The plaintiffs belong to the family of Umuohachom in Umuezeawala village in Ihiala aforesaid which name they derived from their common ancestor called OHACHOM from whom they inherited a larger extent of land called Alaoji.

20 *5. The posterity of Ohachom granted some portions of the said Alaoji in parts to EJELIHI of Umudioha village-Ihiala Umuele Melike of Okohia village-Ihiala and a third portion of Okaronwunne Melike of Okohia vil-*
lage. These portions of land were granted to them subject to payment of
25 *homage or tribute to Umuochachom (the grantors, in accordance to the*
native law and custom of Ihiala people. The homage or tribute consists of
eight yams, kolanuts and drink being brought to Umuohachom in any year
that the grantees otherwise known as customary tenants wanted to utilise
the land for farming. If they did not want to use the land granted them as such
30 *tenants, they necessarily paid no homage. It is the custom of Ihiala people*
too that the tenants would not (sic) the land for any year they did not pay
homage. Use of the land without paying homage accordingly, is contrary to
Ihiala custom and incurs such tenants penalties including forfeiture of their
tenancy over the land concerned.

35 *6. The Okpala of Umuochachom family for the time being succeeded to the headship of the family and received homages from all their customary tenants including the defendant. The persons to whom such homages were paid in recent times by all their customary tenants including the defendant were, UKATU, IZUNDU, OBI UMUNNA and CHARLES ONUKWULU all of*

Umuochachom. Ukatu Izundu died on or about December 1969. Charles Onukwulu is still alive and the first plaintiff on record. x x x

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9. *Ohachom had four male children as follows in their order of seniority;*

(i) *Dimnatum (from whom the 2nd plaintiff on record descended)*

(ii) *Isu (from whom the 1st plaintiff descended).*

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(iii) *Umuole (from whom the 3rd plaintiff descended). The said Umuole begat one Izundu who in turn begat Ukatu and Nwabugwu (referred to as Ukatu Izundu and Nwabugwu Izundu respectively)*

(iv) *Emecheta (from whom the 4th plaintiff descended).*

10. *One Dioha begat Ejelihi, Atuokwu and Onuzo. Atuokwu then begat Ewuru who in turn begat the defendant on record.*

11. *The said Nwabugwu Izundu of Ohachom family married the daughter of Equru (called Nne-George) who was the defendant's sister. This Nwabugwu Izundu became therefore the brother in-law of the defendant.*

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12. *The portion of land granted to Ejelihi has been referred to already in paragraph 5 above. Ejelihi farmed his own portion with his two younger brothers (Atuokwu and Onuzo aforesaid). In time the three brothers (Ejelihi, Atuokwu and Onuzo) started to quarrel over their own family land known as 'OKPULO OHAGWA.' The contest was between Ejelihi of the one part, Atuokwu and Onuzo of the other part. Ejelihi won the fight at the Achala native court sitting at Ihiala and then exclusively enjoyed ownership and possession of Okpulo Ohagwa. The then owner in possession of that land (Okpulo Ohagwa) was one Ohagwa who later died childless. The defendant then turned to Nwabugwu Izundu who married his sister (Nne George) already referred to at paragraph 9 (nine) above, for assistance by asking him to help to dispossess Ejelihi of that portion of Alaoji which he enjoyed as customary tenant from Umuohachom. (At this time Ohachom had since died).*

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13. *Nwabugwu Izundu then called the attention of Ukatu Izundu (the Okpala and family head of Umuochachom) to the request. Ukatu Izundu in turn summoned the whole four sub-families of Umuochachom already referred to at paragraph 9 above. They assured him of their support.*

14. *Having got assurances of their assistance from his brothers-in-law (the Umuochachoms) in particular through Nwabugwu Izundu, the defendant then sued the issues of Ejelihi at the said Achala native court over that portion of Alaoji. Seeing that he had no chances of success. Ejelihi then announced in court that he was not ready to contest the matter and surrendered his customary tenancy to his grantors. The customary tenancy was*

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surrendered in the customary way by Ejelihi bringing a parcel of sand from that portion of Alaoji he held as such tenant and handing it over in the court, in the presence of all, to Umuohachom. Following this, the defendant re-approached Umuochachom through his brother-in-law (Nwabugwu Izundu) for the use and enjoyment of the land. The land was then granted him as a customary tenant subject to the usual homage.

15. The defendant all along paid the homage during the Okpalaship of Ukatu Izundu and Obi Umunna in that order. He also paid homage to Charles Onukwulu, but on or about 1973 to 1974, the defendant and his people (Ugbonnabo and Mbatugosi) came to Charles Onukwulu with some drinks promising to pay the necessary homage. The plaintiffs and their people took the drinks. The defendant came then to say that he would pay the homage after cultivating the said land in dispute. The plaintiffs refused insisting on the time honoured custom of homage before cultivation. The defendant did not cultivate the land within the said period. All these happened before the matter was looked into by Chief Oluoha. Since from that time (1973/74) the defendant has stopped paying homage accordingly.

16. The defendant about three years ago without first paying the homage farmed some portions of the land verged brown. The plaintiffs resisted the move and he gave up farming it without paying the due homage, until this 1977 when he repeated his bold action of farming on the said land without first paying homage to the plaintiffs.

17. Sometime before May 1977, it was noticed that the disputed land was partitioned for farming by the defendant and his relatives. The plaintiffs' people (Umuohachom) reported the matter to the local ruler for Ihiala (chief Oluoha) who looked into the matter in the presence of all present, including the plaintiffs, the defendant and his relatives (the descendants of Atuokwu and Onuzo) admitted that the Umuochachoms were the radical owners of the land in dispute, but that the plaintiffs' ancestors paid it over to the defendant's people as compensation for the death of one woman called AGARAMA who was alleged adulterously conceived by one OGUERIWU UTUGBA.

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22. By the custom of Ihiala people, a customary tenant permanently forfeits his tenancy and quits or is caused to quit the land over which he denies such tenancy or claims ownership of."

In his statement of defence filed on 6/7/79, Ewuru averred as follows:

"2. The defendant is not in a position to admit or deny paragraphs 1 and 2 of the Statement of Claim. He is the present head or Okpala of UMUATUOKWU and UMUONUZO families.

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5. In further answer thereto, the defendant says that the land in dispute was originally owned by his ancestor called ILOGBUEWU alias 'DIOHA'. The said ancestors married three wives namely:

(1) NSASI, the mother of Ekwegbara.

(2) AKUDUCHE who had two male issues called ATUOKWU and ONUZO and

(3) Omayi whose only son was EJELIHI. 10

7. As the first son ILOGBUEWU alias 'DIOHA' Ekwegbara inherited the homestead of the defendant's ancestors, not within the area in dispute. Atuokwu and Onuzo inherited their present homestead and Alaoji. And Ejelihi inherited the area where his descendants, Umuejelihi, now live. The defendant is one of the descendants of Atuokwu. 15

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8. In further answer thereto the defendant says that the plaintiffs who are members of Umuezeawala village had never had any transaction with him or any member of his family over any land including the land in dispute. The defendant's fore-fathers exercised maximum acts of ownership and possession over ALAOJI from time immemorial to the knowledge of the plaintiffs' fore-fathers without any quarrel or hindrance. 20

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12. In answer to paragraph 16 of the Statement of Claim the defendants say that members of Umuatuokwu and Umuonuzo exercise acts of ownership over ALAOJI which is at all the times a farm-land from time beyond human memory by doing shifting cultivation over it. The defendants deny completely the allegation of the plaintiffs as contained in paragraph 16 of the Statement of Claim and will put the plaintiffs to strict proof of same. 25

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17. In answer to paragraph 22 of the Statement of Claim the defendant says that he and/or his relatives were never the customary tenants of the plaintiffs and that as such this custom does not apply in the present action." 30

The present defendants became parties to the suit on the death of Ewuru at their request. In the affidavit in support of their application for substitution, the 3rd defendant deposed as follows:

"2. That I swear to this affidavit with the authority knowledge and consent of the other applicants for myself and on their behalf.

3. *That the named 1st defendant in this action was the Okpala or head of our main family.*

4. *That the above named 1st defendant is now dead.*

5 *by our ancestor called ILOGBUEWU sometimes known as DIOHA.*

6. *That I am with the other defendants interested in the outcome of this suit being brothers of the 1st defendant now deceased.*

7. *That I am desirous with the other applicants to be substituted as the defendants now that Udeoha Ewuru is dead.*

10 8. *That the said 1st defendant was formerly defending this action as the head or Okpala of Umuatuokwu and Umuonuzo families."*

In the affidavit in support of their subsequent application for leave to defend the action in a representative capacity, the 3rd defendant not only repeated the above facts but added in paragraph 9 thereof that

15 "9. *The land in dispute is our family land"*

From the original pleadings of the plaintiffs and Ewuru, title to the land in dispute was clearly in issue.

In the light of the above averments and deposition, will it be correct to say that the action instituted against Ewuru died with him, as held by the court below? With profound respect to the learned Justices of the court below, I think they are wrong. In *Eyesan v. Sanusi* (1984) 1 SCNLR 353; (1984) NSCC 27 this court held that in a case where title to the land in dispute was in question, the action does not die with the defendant. Obaseki, J.S.C. said, at page 366 (page 283 of the 2nd report) of the report:

25 "*Since the defendant is now dead, that portion of the land in dispute which he claimed definitely becomes part of the assets of his estate. The maxim actio personalis moritur cum persona in this case, therefore, can have no application whatever to nullify the action appeal proceedings and the learned Justices of the Court of Appeal were in error when they held that the*

30 *maxim was applicable and could be invoked to defeat the action and therefore created a bar to substitution of the respondents to carry on the proceedings. The action survives against the estate of Y.O. Sanusi (deceased).*

The learned Justice of the Supreme Court went on at page 367 (or page 281 of the 2nd report):

35 "*If the cause of action is one that survives the death of either party, appointment of a person or persons to carry on the proceeding in place of the deceased party is a necessary function of the court either of 1st instance or of appeal on application by the personal representative of the deceased or the beneficiaries of the estate or on application by represented parties or on*

application by the other party so that the proceedings can be brought to a close. *Tesi Opebiyi v. Shitu Oshoboja & anor.* (1976) 9-10 S.C. 195)" See also *Inua v. Nta & anor.* (1961) All NLR 600 (Reprint) per Idigbe J. (as he then was).

Awogu J.C.A. who read the lead judgment of the court below, with respect, misconstrued paragraphs 20 and 21 of the plaintiffs' amended statement of claim which reads:-

"20. *Udeoha Ewuru died in 1981 and under the customary law of Ihiala the licence granted to him to use and enjoy the land verged green on the plaintiffs' plan ceased. Such licence is not heritable but if the licensee's son wishes to continue cultivating the land he has to seek an extension of the licence to him. The 4th defendant, a son of the original grantee, has not sought such extension.*

21. *The plaintiffs have never had any transaction with the present defendants touching or concerning the land in dispute. The plaintiffs do not know when and how each of the defendants trespassed into the land in dispute. It was long after the death of Udeoha Ewuru that the 1st, 2nd, 3rd, 5th, 6th and 7th defendants applied to be joined in the suit as defendants and after the plaintiffs had applied for substitution of Udeoha Ewuru by his son, the 4th defendant to enable the plaintiff's proceeds with the hearing of the suit.*"

Paragraph 20 pleaded the effect of the customary law of Ihiala on Ewuru's customary tenancy following his death. This averment, which represents plaintiffs' case, does not negate the fact that both parties laid claim to title to the land. Paragraph 21 is no more than the factual situation that it was to Ewuru alone that the plaintiffs granted customary tenancy. The plaintiff's case against the defendants who are Ewuru's relations, lies in the averments in paragraphs 19 and 24 of the amended statement of claim; these read:

"19. *Under the native law and custom of Ihiala a licensee or customary tenant granted land for cultivation forfeits his tenure immediately he challenges or denies the title of the grant (sic). The plaintiffs contend that Udeoha Ewuru forfeited his customary tenancy of the land verged green on the plaintiff's plan when he challenged the plaintiff's title to the land by cultivating the same with his relations without paying the customary tribute.*

24. *Udeoha Ewuru died in 1981 and under the customary law of Ihiala the licence granted to him to use and enjoy the land verged green on the plaintiffs' plan ceased. Such licence is not heritable but if the licensee's son wishes to continue cultivating the land he has to seek an extension of the*

licence to him. The 4th defendant, a son of the original grantee, has not sought such extension."

(Italics are mine)

It is, in my respectful view, erroneous to say that the plaintiffs' action
5 against Ewuru was one strictly personal to the latter, involving as it were, title in the land in dispute which plaintiffs claimed as belonging to their families and Ewuru retorted that it belonged to his family. I therefore, resolve Question 5 in plaintiffs' favour.

In the net result, the two planks on which the judgment of the court
10 below rests having collapsed, this appeal succeeds and it is allowed by me. I set aside the judgment of that court. As there is no appeal by the defendants against that part of the judgment of the Court of Appeal which by inference, did not find merit in the other issues canvassed before that court by the defendants, it follows that the judgment of the trial High Court stands and it is
15 hereby restored by me.

I award to the plaintiffs N1,000.00 costs of this appeal and N750.00 costs in the court below.

BELGORE JSC

20 I had the privilege of reading in advance the judgment of my learned brother, Ogundare, J.S.C. and I am in full agreement with his reasoning and conclusions. For the same reasons that I adopt as mine, I allow this appeal and set aside the judgment of the court below, the two planks on which it was based having collapsed. I make the same consequential orders as in the lead
25 judgment.

WALI JSC

I have had the privilege of a preview of the lead judgment of my learned brother, Ogundare J.S.C, just read. My learned brother has in his
30 judgment dealt adequately with the issues raised and contested in the appeal.

It is in the light of those reasons ably stated by my learned brother that I do hereby also allow the appeal and endorse the consequential order contained in his lead judgment.

OGWUEGBU JSC

I have had the privilege of a preview in draft of the lead judgment just delivered by my learned brother, Ogundare, J.S.C. I agree with the reasoning and conclusions reached on the issues raised.

I wish however, to express my opinion on issue five identified in the appellants' brief of argument. This issue complains against the finding of the court below that the defendants were not proper parties to the suit and that the plaintiffs' claim ought to have been struck out.

In paragraphs 19, 20, 21 and 24 of their amended statement of claim, the plaintiffs averred:-

"19. Under the native law and custom of Ihiala a licensee or customary tenant granted land for cultivation forfeits his tenancy immediately he challenges or denied the title of the grantor. The plaintiffs contend that Udeoha Ewuru forfeited his customary tenancy of the land verged green on the plaintiffs' plan when he challenged the plaintiffs' title to the land by cultivating the same with his relations without paying the customary tribute.

20. Udeoha Ewuru died in 1981 and under the customary law of Ihiala the licence granted to him to use and enjoy the land verged green on the plaintiffs' plan ceased. Such licence is not heritable but if the licensee's son wishes to continue cultivating the land he has to seek an extension of the licence to him. The 4th defendant, a son of the original grantee, has not sought such extension.

21. The plaintiffs have never had any transaction with the present defendants touching or concerning the land in dispute. The plaintiffs do not know when and how each of the defendants trespassed into the land in dispute. It was long after the death of Udeoha Ewuru that the 1st, 2nd, 3rd, 5th 6th and 7th defendants applied to be joined in the suit as defendants and after the plaintiffs had applied for substitution of Udeoha Ewuru by his son, the 4th defendant to enable the plaintiffs proceeds with the hearing of the case.

24. The defendants will persist in their acts of entry into and cultivation of the land in dispute and false claims to ownership therefore unless restrained by order of court."

The amended statement of claim was filed on 13:12:84.

In paragraphs 10 and 11 of their further amended statement of defence, the defendants averred:-

"10. The defendants deny paragraph (sic) 10-16 of the Amended Statement of claim, and will put the plaintiffs to the strictest proof of the

allegations therein contained. The defendants in further answer, aver that Udeoha Ewuru never approached the plaintiffs nor paid any tribute to enable him farm on the land.

11. *The defendants, further state that, they as a kindred group farm communually on the land in dispute as of right. Udeoha Ewuru like his father and grand father before him went to the land in dispute to farm alongside their kinsmen as of right. Udeoha Ewuru could not therefore have gone as an individual to ask for farming land."*

Again, by a motion on notice dated 8:6:81, the defendants on record applied for an order of court to be substituted in the action for Udeoha Ewuru who had then died. On 28:6:83, the same defendants brought another application on notice for an order to substitute them in the action as defendants in order to prosecute the same on behalf of their families.

In paragraphs 3 to 8 of the affidavit deposed to by one Solomon Asika (4th defendant -applicant), in the earlier application, he averred as follows:-

"3. That the named 1st defendant in this action was the Okpala or head of the family.

4. That the above named 1st defendant is now dead.

5. That the land in dispute is (sic) known as Ala-Oji was originally owned by our ancestor called ILOEGBUEWU sometimes known as DIOHA.

6. That I am with the other defendants interested in the outcome of this suit being brothers to the 1st defendant now deceased.

7. That I am desirous with the other applicants to be substituted as the defendants now that Udeoha Ewuru is dead.

8. That the said 1st defendant was formerly defending this action as the head or Okpala of UMUALUOKWU and UMUONUZO families."

Both applications were granted by the learned trial Judge.

In paragraph one of the original statement of defence filed by Udeoha Ewuru (deceased) when he was the sole defendant, he averred that:

30 *"1.....The defendant is not in a position to admit or deny paragraphs 1 and 2 of the Statement of Claim. He is the present head or Okpala of UMUALUOKWU and UMUONUZO families. Save and except that the defendant admits that the land in dispute is called ALA OJI the defendant denies the rest of paragraphs 3 and 8 of the Statement of Claim....."*

From the above averments and or depositions, it is abundantly clear that both parties claimed title to a parcel of land called ALA OJI and joined issues on it. The court below relying on paragraphs 20 and 21 of the amended statement of claim held that the learned trial Judge should have struck out the

action because, after filing the statement of defence, the sole defendant died and by the nature of the claim, the action was not the type that would have survived him. It allowed the appeal on this ground among others.

The court below must have relied on the maxim of the law, “Actio personalis moritur cum persona”. The maxim was strictly applied at Common Law but today in England the effect has been reduced by the Law Reform (Miscellaneous Provisions) Act, 1934. That Act however did not apply to the then Eastern Region of Nigeria.

If a sole defendant dies and the cause of action is one that survives against him, the plaintiff may obtain an order to continue the proceedings as against the executor or administrator of the deceased defendant. Such executor may apply to be substituted or added as a defendant. See *Duke v. Davis* (1893) 2 Q.B. 260.

The defendants/respondents who turned round on appeal to contend that they are not proper parties to the action brought their application to be substituted for Udeoha Ewuru under order XXXVI Rule 1 of the High Court Rules of the then Eastern Nigeria Cap. 61, Laws of Eastern Nigeria, 1963. They were duly substituted.

Rules 1(1) and 2 of the said order provide:-

“1(1) Where after the institution of a suit any change or transmission of interest or liability occurs in relation to any party to the suit, or any party to the suit dies or becomes incapable of carrying on the suit, or the suit in any other way becomes defective or incapable of being carried on, any person interested may obtain from the court any order requisite for curing the defect, or enabling or compelling proper parties to carry on the proceedings.”

2. The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives.”

In the case which is the subject of this appeal, the pleadings, the affidavit in support of the application for substitution and the evidence make it clear that the action is one which survives against Udeoha Ewuru for the benefit of Umuatuokwu and Umuonuzo families in Ihiala whom the respondents represent. An action where title to land is in issue is one of the causes of action which survive the death of either of the parties. The legal maxim has no application in this case.

It is an act of deceit for the respondent to approbate and reprobate. Having voluntarily sought to be substituted for the deceased sole defendant, contested the action and failed, they cannot be heard to say that the proper parties were not before the court. They are bound by the decision and are estopped from denying the effect of the judgment.

The court below was therefore in error to hold that the action against the sole defendant died with him.

For the above reasons and all the reasons stated by my learned brother Ogundare, J.S.C., I hereby allow the appeal and set aside the decision of the court below. The judgment of the learned trial Judge Aneke, J. is hereby restored. I endorse the order as to costs contained in the lead judgment.

ONU JSC

I have had the privilege to read in draft the judgment of my learned brother Ogundare, J.S.C. just read and I am in entire agreement with him that the appeal succeeds and ought to be allowed.

I wish to add a few comments of mine in expatiation by firstly considering issue (v) alone first.

Clearly, the defendant/respondents did not in the first place bring themselves into the instant case via the back door and their claim to defend it in the trial court, in my view, was justiciable. They were wide awake when they did so voluntarily; nor further still were they dragged into it. They therefore had a standing to defend the suit for which they sought and were duly and properly joined as parties (defendants) to the suit. See *Green v. Green* (1987) 3 NWLR (Pt.61) 480 and *Thomas v. Olufosoye* (1986) 1 NWLR (Pt. 18) 669. As Obaseki, J.S.C. had occasion to point out in *Hon. P.C. Onuoha v. R.B.K. Okafor & ors.* (1983) 2 SCNLR 244 at 263.

“The touchstone of justiciability of a controversy is injury to legally protected right. In deciding whether a claim is justiciable a court must determine whether the duty asserted can be judicially identified and its breach judicially determined and whether the protection of the right asserted can be judicially moulded.”

Now, the plaintiffs/appellants in their amended statement of claim had averred in paragraphs 19 and 20 inter alia thus:

“19. Under the native law and custom of Ihiala a licensee or customary tenant granted land for cultivation forfeits his tenure immediately he challenges or denies the title of the grantor. The plaintiffs contended that Edeoha Ewuru forfeited his customary tenancy of the land verged green on the plaintiff’s plan when he challenged the plaintiffs’ title to the land by cultivating the same with his relations without paying the customary tribute.

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24. Udeoha Ewuru died in 1981 and under the customary law of Ihiala the

licence granted to him to use and enjoy the land verged green on the plaintiffs' plan ceased. Such licence is not heritable but if the licensee's son wishes to continue cultivating the land he had to seek an extension of the licence to him. The 4th defendant, a son of the original grantee, has not sought extension."

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In his statement of defence, Udeoha Ewuru, whose death necessitated the application by the defendants/respondents to be substituted in his place, pleaded in paragraphs 2, 5, 6, 12 and 17 among others, as follows:-

"2. The defendant is not in a position to admit or deny paragraphs 1 and 2 of the Statement of Claim. He is the present head or Okpala of Umuatokwu and Umuonuzo families. (Italics is mine)

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5. In further answer thereto, the defendant says that the land in dispute was originally owned by his ancestor called ILOGBUEWU alias 'DIOHA'. The said ancestors married three wives namely;

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(1) NSASI, the mother of Ekwegbara

(2) AKUDUCHE who had two male issues called ATUOKWU AND ONUZO and

(3) OMayI whose only son was EJELIHI.

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6. As the first son of ILOGBUEWU alias 'DIOHA' Ekwegbara inherited the homestead of the defendant's ancestor, not within the area in dispute. Atuokwu and Onuzo inherited their present 'homestead and ALAOJI. And Ejelihi inherited the area where his descendants Umuejelihi, now live. The defendant is one of the descendants of Atuokwu.

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12. In answer to paragraph 16 of the Statement of Claim the defendants say that members of Umuatokwu and Umuonuzo exercise acts of ownership over ALAOJI which is at all the times a farmland from time beyond human memory by doing shifting cultivation over it. The defendants deny completely the allegation of the plaintiffs as contained in paragraph 16 of the Statement of Claim and will put the plaintiffs to strict proof of same.

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17. In answer to paragraph 22 of the Statement of Claim the defendant says that he and/or his relatives were never the customary tenants of the plaintiffs and that as such this custom does not apply in the present action."

The custom pleaded in reply at paragraph 17 above is that pleaded by the plaintiffs/ appellants in paragraph 22 of their Statement of Claim wherein they averred that:-

22. By the custom Ihiala people, a customary tenant permanently forfeits his tenancy and quits or caused to quit the land over which he denies such tenancy or claims ownership of.”

The defendants/respondents in support of their application for substitution in the affidavit of the 3rd defendant/respondent sworn to on their 5 behalf and which was duly granted by the trial court without a contest, deposed as follows:-

“2. *That I swear to this affidavit with the authority knowledge and consent of the other applicants for myself on their behalf.*

3 *That the named 1st defendant in this action was the Okpara or*
10 *head of our main family.*

4. *That the above-named 1st defendant is now dead.*

5. *That the land in dispute known as Ala-Oji was originally owned by our ancestor called ILOGBUEWU sometimes known as DIOHA.*

6. *That I am with the other defendants interested in the outcome of*
15 *this suit being brothers of the 1st defendant now deceased.*

7. *That I am desirous with the other applicants to be substituted as the defendants now that Udeoha Ewuru is dead.*

8. *That the said 1st defendant was formerly defending this action as the head or Okpara of Umuatuokwu and Umuonuzo families.*

20 9. *The land in dispute is our family land.”* (Italics is mine)

From the foregoing, the genesis of the joinder in the action giving rise to this appeal may be summarised as follows:-

After the death of the original defendant, Udeoha Ewuru, the present defendants/respondents brought a motion which they asked the trial High 25 Court to be allowed to defend the suit since the original defendant was defending the action as the head or Okpala of Umuatuokwu and Umuonuzo families and that the land in dispute is their family land. The court granted their application as prayed and they proceeded to file an amended statement of defence in which, like the original defendant, they set up a defence of owner- 30 ship. The plaintiffs/appellants in turn filed an amended statement of claim wherein at paragraph 2 they averred that the defendants/respondents are now sued in a representative capacity.

The defendants/respondents for their part further amended their statement of defence and later further amended it. The case went to trial and 35 when the judgment of the trial court went against them, they now made a complete round-about-turn, repudiating the proceedings in which they had actively participated. They smartly alleged irregularities which, as I shall seek to highlight shortly in my consideration of issues (i)-(iv), they positively procured and condoned throughout the trial. In other words they were appealing

against orders made at their own instance and even though in what amounted to a pyrrhic victory at the Court of Appeal, that decision has been faulted since in the circumstances, this court cannot sustain it, in the circumstances the respondents are estopped from denying the appellants the right to succeed when they (respondents) acquiesced in the procedure adopted. See the decision of this court in *Eyesan v. Sanusi* (1984) 1 SCNLR 353; (1984) NSCC 271; *Opebiyi v. Shittu Oshoboja & anor* (1976) 9-10 S.C. 195. But contrast these with the case of in *Re Aluko* (No. 1) (1992) 2 NWLR (Pt.223) 376 CA, wherein it was decided that, if a cause of action is that of a defamation, the maxim ‘action personalis moritur um persona’ (a personal action dies with the person) applies i.e. where either party to an action of libel or slander dies before verdict, the action abates. See *Inua v. Nta & anor.* (1961) All NLR 600 (Reprint) SCNLR where Idigbe, J. as he then was held, inter alia, that an action for trespass to land is not such a strictly personal cause of action as to abate on the death of the deceased plaintiff, since a trespass to lands committed during the deceased life time is an injury to the estate of the deceased and the cause of action therefore survives his estate. 5 10 15

I wish to add in passing that had the proceedings ended in the defendants/ respondents’ favour in the trial court they would definitely have taken the benefit without complaining. The court below was therefore wrong to hold that the respondents were not proper parties to the suit and appellants’ claim ought not to have been struck out on that score. Issue V is accordingly answered in the negative. 20

In finally considering issues (i), (ii), (iii) and (iv) together, in as much it appears clear from the record of appeal that there is nothing to show that the two motions for extension of time to file the plaintiffs/appellants statement of claim and plan and the defendants/respondents’ to dismiss the suit for want of prosecution which were heard on 13th instead of 1st February, 1978, the trial court, with due respect, had no jurisdiction to deal with the main suit which was not before it as no hearing notice had issued for its hearing for that day. 25 30

Indeed, I take the firm view hat the trial court could not go beyond the motions to strike out the suit. Further, the court having struck out the motion for judgment in default along with the plaintiffs/appellants’ motion for extension of time which was not yet served, there was no basis to strike out the suit itself. In effect, what I am saying is that there was no basis to strike out the suit which was pending but definitely not before the court. I therefore share learned counsel for appellant’s view that accordingly, the order striking out the suit was a nullity and must remain so for all purposes. See *Obirnonure v. Erinosh* 35

& anor. (1966) All NLR 245 (Reprint), where this court referred to with approval the case of Craig v. Kanssen (1943) K.B. 256 at 262-263; (1943) 1 All ER 108 at 113 (per Lord Green, M.R) Brett, J.S.C. in ERINOSHO (supra) said at page 252 of the Report that:-

5 “Where service of process is required, failure to serve is a fundamental vice, and the person affected by the order but not served with the process is entitled *ex debito justitiae* to have the order set aside as a nullity”
Such an order of nullity becomes a necessity because due service of process is a condition sine qua non to the hearing of any suit if the principle of audi alteram partem is to have any value. See also Sken Consult (Nig.)Ltd & anor.v.Godwin Sekondy
10 Ukey (1981) 1 S.C. 6 at 26 and Scott-Ernuakpor v. Ukavbe (1975) NSCC 435.

From what transpired in the trial court in its proceedings of 21/2/78 in the case in hand, it is clear that even as at that day, the plaintiffs/appellants’ motion for extension of time had not been served on the defendants/respondents. That being so, I take the firm view that the trial court had no jurisdiction
15 to hear the two motions it adjudicated upon on 13/2/78. A fortiori, the court below was wrong when it held that the proceedings of 21/2/78 were a nullity by reason of the suit having been struck out on 13/2/78.

By the same token, the defendants/respondents were late in the day
20 to raise this objection after their participation in the proceedings up to judgment. They are taken to have acquiesced therein See Kaiyaoja v. Lasisi Egunla (1974) 12 S.C. 55 at 68-69. In respect of the suit, there having been no indication from the record that it was fixed for hearing, moreso that pleadings had not as at the time been completed and no date fixed for its hearing, it could
25 have at best been adjourned to 13/2/78 for mention. As has been decided by this court in Kano v. Bauchi Meat Products Co. Ltd (1978) 9 - 10 S.C. 51 at 56 following Olubusola Stores Ltd v. Standard Bank Nigeria Ltd. (1975) NSCC 137, (1975) 4 SC 51 and New Nigerian Newspaper Ltd. & anor v. Oteh (1992) 4 NWLR (Pt. 237) 626, it is wrong for a Judge to treat a date which is for the
30 mention of a case as a hearing date and any judgment consequently obtained in disregard of this amounts to a nullity.

For these reasons and the fuller ones contained in the lead judgment of my learned brother Ogundare, J.S.C. with which I fully agree, I allow this appeal, set aside the decision of the court below and restore the trial court’s
35 decision. I make the same consequential orders inclusive of those as to costs