

SUPREME COURT OF NIGERIA
 16TH MAY, 1995. SC 98/1993
CORAM:- M.L. UWAI, A.B. WALI, I.L. KUTIGI,
U. MOHAMMED, A.I. IGUH, JJSC.

EGHOLOGBIN OKETIE & OTHERS PLAINTIFFS/APPELLANTS
 (For themselves and on behalf of Gbolokposo people)

AND

AMBROSE OLUGHOR & OTHERS DEFENDANTS/RESPONDENTS

IN RE: I. OSIBAKORO D. OTUEDON

2. PETER E. EGUEYE APPLICANTS

APPEALS - *Forgery - Allegation that receipts proving filing of notice appeal were forged - Whether proved beyond reasonable doubt.*

APPEALS - *Competency of appeal - Death of appellants in a representative action - Where Notice of Appeal was filed before the death - Whether the appeal is competent.*

APPEALS - *Application to substitute deceased appellants - In a representative action - Whether to be granted*

EVIDENCE - *Affidavits - Resolution of conflict therein - When resorting to oral evidence will be unnecessary.*

EVIDENCE - *Crime allegation in civil proceedings - Burden of proving the crime - Must be discharged beyond reasonable doubt.*

FACTS

The Applicants were authorised by the Gbolokposo people to be substituted for the deceased appellants in their representative action. Upon the filing of this application for substitution, the 1st and 2nd Respondents oppose vehemently, contending that there was no valid Notice of Appeal filed at court of Appeal Benin city. The Respondents alleged that receipts tendency the Applicants in proof of pendency of a valid Notice of Appeal were forged. But this allegation was not proved beyond reasonable doubt.

The Applicants initially presented five prayers before the Supreme Court. But four of the prayers were subsequently withdrawn and struck out

accordingly. The Supreme Court now has to determine whether there is a valid tending Notice of Appeal towards granting the said application for the applicants to substitute the deceased appellants.

HELD (Unanimously granting the application per lead judgment of **IGUH JSC**)

Affidavits - Resolution of conflict therein

1. Turning now to the issue in controversy, it is a well established principle of law that when a court is faced with affidavits which are irreconcilably in conflict, the court in order to resolve such conflict properly should first hear evidence from the deponents and their witnesses, if any. A close Examination of the arguments presented on behalf of the parties reveals -ever that the issue in dispute can quite easily be resolved on grounds of without the necessity of resorting to hearing oral evidence. (p. 1072 C)

Crime allegation - In civil proceedings

2. The applicants in the present proceedings are accused by the 1st and 2nd respondents with the Criminal offence of forgery of the two receipts Exhibits PE3 and PE4 against which the Notice of Appeal in issue was filed. The burden of proving that the applicants have been guilty of this offence of is clearly on the 1st and 2nd respondents who assert the affirmative. As I have already observed, they must, to succeed, establish their allegation all reasonable doubt as required in criminal law notwithstanding the fact that the commission of the offence has arisen in a civil proceeding. (p. 1072 H)

Allegation that receipts were forged

3. In the circumstance, I entertain no doubt that the 1st and 2nd respondents woefully failed to establish beyond reasonable doubt any forgery of the two receipts in issue as was submitted on their behalf I agree with Chief Ajayi S. A. N. that no circumstantial evidence can undermine the concrete evidence of the receipts. Exhibits PE3 and PE4 against which the Notice of Appeal of 14th February, 1990 was filed I also accept the submission of Mr. Sofola S.A.N. that no forgery of the receipts was established by the 1st and 2nd as required by law. I uphold the submission of the applicants that there was a valid and competent Notice of Appeal filed in the cause on the 14th February, 1990 against the temporary receipt. Exhibit PE3, which was replaced the following day with the official receipt No. S 160336, Exhibit PE4. (p. 1074 B)

Competency of appeal

4. In conclusion, I have already observed that this action was instituted by the plaintiffs against the defendants/respondents in a representative capacity.

The suit was filed by the named plaintiffs for themselves and on behalf of the Gbolokposo community who duly authorised them so to do. It is not in dispute that the three named plaintiffs are now dead. The 2nd and 3rd plaintiff died between 1975 and 1983 but the 1st plaintiff only died on the 3rd August. The Notice of Appeal in these proceedings was filed in the court below on the 14th February, 1990. It is therefore clear that before the death of the last surviving plaintiff on the 3rd August, 1993, the said Notice of Appeal had been properly and validly filed on the 14th February, 1990. Consequently there is a competent and pending appeal before this court in the cause. (1074 D)

Application to substitute deceased appellants

5. It cannot be disputed that where in a suit filed by the plaintiffs in a representative capacity, all the named plaintiffs die, any of the unnamed represented may apply to the court to be substituted for the deceased plaintiffs to enable the prosecution of the suit or the appeal therefrom. The applicants are not only members of the Gbolokposo community represented by the deceased plaintiffs, they have also been appointed by Gbolokposo community to be substituted for the deceased plaintiffs and to prosecute their pending appeal on behalf of the community. It seems to me therefore that this is a proper case in which the applicants may be substituted for the deceased named plaintiffs. (p. 1074 G)

NOTABLE POINTS OF INTEREST

IGUHJSC

1. Representative action defined

In a representative action, both the named plaintiffs and/or defendants as the case may be and those they represent are parties to the action although I representative plaintiffs and/or defendants are dominus litis until the suit is determined. And so, for the purpose of initiating any process in the representative action, such process must be by and in the name of the named plaintiffs or defendants so long as their mandate from those they represent remains acceptable and uncountermanded. Put differently, when an action is instituted in a representative capacity and/or against persons in a representative capacity, such an action is not only by or against the named plaintiffs or defendants but are also by and against those the named parties represent who are not stated nomine. Those represented, so long as the named parties are in court, are also deemed present at the trial of the action, through their representatives. (p. 1068 C)

2. Representative action - Right to appeal where a party is deceased

The right to appeal may survive a deceased party to a cause or matter but such right must be exercised by a living person or persons. A Notice of Appeal is filed on behalf of or in the name of a dead person is clearly incompetent and

should be struck out. Where, however, all the named parties in a representative action die, the action, provided it is maintainable, subsists on behalf of and/or against those they represent but who has not been mentioned in the proceedings nomine. I think that I shall add that the above legal position applies whether or not the representative action is pending before the trial or an appellate court. Such an action or appeal, as the case may be, provided it is still maintainable, will still subsist on death of the parties but may not be prosecuted or continued with until a living person or persons, as the case may be, have been substituted for the named deceased parties to carry on the representative action. (p. 1068 H)

3. Notice of appeal is the foundation of a proper appeal

The Notice of Appeal against any decision or judgment complained of is, without doubt, the foundation of a proper appeal. Thus where a Notice of Appeal is incompetent or null and void, there can be no valid appeal pending before the appellate court. And where an order of court is made granting the appellants extension of time within which to appeal and leave to appeal when there was in fact no living or existing appellants or indeed, respondents to the application, such an order will be null and void and of no effect whatever. Consequently there will, in such a situation, be no valid appeal pending before the appellate court in respect of which an applicant in a motion for substitution can be validly substituted for the deceased appellants or respondents, all of whom had died. (p. 1069 D)

4. Notice of appeal on behalf of a dead litigant

A notice of Appeal which is filed on behalf of or in the name of a dead appellant after his death is incompetent and null and void and the court cannot be asked to amend such a notice by substituting a living person or persons in the dead litigants. It is not a mere procedural defect or irregularity that an appeal has been filed in the name of a dead person. It is a radical and fundamental error which borders on the issue of jurisdiction. Accordingly there must be a competent and pending appeal before one party may be substituted for another and in the absence of a pending appeal or suit, the issue of substitution becomes an exercise in futility as *ex nihilo nihil fit*. (p. 1069F)

5. Court to always make relevant endorsement on filed documents

There can be no doubt, as was rightly observed by learned counsel for the 4th and 7th respondents, that what has raised the unnecessary dust in this matter is traceable to the indolence on the part of the staff of the Court of Appeal, Benin. It was their duty to endorse on the relevant Notice of Appeal, the official receipt number and date of its filing. This basic duty they failed to perform. It cannot be over-emphasized that the long established practice is for appropriate court officials to endorse on documents filed in Court s the receipt

numbers against which they were filed together with the date of such filing. These endorsements ought to be made at the time of filing of such documents to ensure that suspicions of fraud or irregular filing such as have arise in the present application are eliminated. It is hoped that this basic but essential procedural requirement shall in future be strictly complied with by all court Registries. (p. 1071 H)

B

6. Crime in civil or criminal proceedings to be proved beyond reasonable doubt

The law is well settled that if the commission of a crime by a party to any proceeding is directly in issue in any proceeding, civil or criminal, it must be proved beyond reasonable doubt. See Section 137 of the Evidence Act. In other words, although the preponderance of probability may constitute, sufficient ground for a verdict in civil proceedings, this general rule is subject to the statutory proposition in section 137(1) of the Evidence Act otherwise a person who alleges he was assaulted might fail to prove the assault in al criminal prosecution and yet be able to establish the same in a civil proceeding. The assault being directly in issue must be proved beyond reasonable doubt whether in a civil or a criminal case. (p. 1072 F)

D

KUTIGIJSC

7. Application for leave - Need to specify the affected grounds

When counsel asks for leave, he should be in a position to tell the court the grounds of appeal on which leave is sought and the ones on which no leave is sought. So that when the court grants leave it will be limited to those specific grounds of appeal only. (p. 1076 F)

E

REPRESENTATION

Chief G. O. K. Ajayi SAN with A. Adesokan and F. O. Desalu (Miss) for appellants/applicants.

Dr. Mudiaga Odje SAN with M.A. Toyin Keshinro for 1st and 2nd defendants/respondents.

G Kehinde Sofola SAN with A. Madariola, Miss H.S. Umar for 4th & 7th defendants/respondent.

CASES REFERRED TO

Ezenwosu v. Ngonadi (1988) 3 N.W.L.R. (part 81) 163

H Opebiyi v. Oshoboja (1976) 9-10 S.C. 195 at 200

Okonji v. Njokanma (1989) 4 N.W.L.R (Part 114) 161 at 169 - 170

Atanda v. Olanrewaju (1988) 4 N.W.L.R. (Part 89) 394,

Ede v. Nwidenyi (1988) 5 N.W.L.R. (Part 93) 189

Market and Co. Ltd. v. Knight S.S.C. Co. Ltd (1910) 2 K.B. 1021 at 1039

Barker v. Allanson (1937) 1 K.B. 463 at 475

Nzom v. Jinadu (1987) 1 N.W.L.R. 533

Tukur v. Government of Gongola State (1988) 1 N.W.L.R. (Part 68) 39

Odofin v. Agu (1992) 3 N.W.L.R. (Part 229) 350

Lazard Bros v. Midland Bank (1932) 1 K.B. 617 at 624 C.A.

Falobi v. Falobi (1976) 9 and 10 S.C.I

Akinsete v. Akindutere (1966) 1 All N.L.R. 147

Eboli v. Oki (1974) 1 S.C. 179 at 189

Olu-Ibukun v. Olu-Ibukun (1974) 2 S.C. 41 at 48

Uku v. Okumagba (1974) 3 S.C. 35 at 56.

Okwuarume v. Obabokor (1966) N.M.L.R. 47

Anyah v. A.N. N. Ltd (1992) 6 N.W.L.R. (Part 247) 319 at 333

STATUTES & RULES REFERRED

Evidence Act s. 137(1)

Supreme Court Rules 1985 0.8 r.9

LEAD JUDGMENT BY IGUH JSC

By an application dated and filed on the 20th day of October, 1994, the applicants, Osibakoro D. Otuedon and Peter O. Egueye, applied to this court C owing orders:-

“(1) substituting the Applicants for the named Plaintiffs/Appellants to prosecute this appeal for themselves and on behalf of the Gbolokposo people.

(2) For a fresh hearing of the application dated 14th day of May, 1993.

(3) dispensing with:-

(i) The filing of a fresh Notice of Appeal herein;

(ii) The compilation of a fresh Record of Appeal;

(iii) The filing of a fresh Appellants’ brief.

(4) treating the Notice of Appeal dated the 18th February, 1994 and filed in the Court of Appeal, Benin City as a properly filed Notice of Appeal for the purpose of this Appeal.

(5) treating the Appellants’ brief already filed herein as properly filed and served with effect from the date of the order to be made herein.

AND for such further order or other order or orders as this Honourable Court may deem fit to make in the circumstance.”

This application is supported by a 15 paragraph affidavit sworn to by the second applicant who described himself as the Secretary to the Gbolokposo community. A further affidavit in support of the application sworn to on the 28th October, 1994, exhibited a resolution by the Gbolokposo community authorizing the applicants to replace the named plaintiffs on record and to prosecute their appeal on behalf of the community. The named plaintiffs/appellants had, for themselves and on behalf of the Gbolokposo people in the Government Area of Delta State, instituted an action against the defendants/respondents for title to the “piece or parcel of land at Gbolokposo/Gbomro Village” within jurisdic-

tion, payment of all compensation in respect of the said land and injunction.

B Learned counsel for the applicants, A. Adesokan Esq. in moving this application relied on all the facts deposed to in the affidavits in support of the motion. He indicated that the three appellants on record were all dead. He explained that the 2nd and 3rd plaintiffs/appellants died between 1975 and 1983 but that the 1st plaintiff only died on the 3rd day of August, 1993. He stressed that the named plaintiffs had been prosecuting this action for themselves and as representatives of the Gbolokposo community and that it ~ in this action remains notwithstanding the death of the named plaintiff on record. He pointed out that before the death of the last surviving plaintiff, the appellants had filed C an application dated the 14th May, 1993 in this court for:-

D “(i) *An order extending the time within which to apply to this Honourable Court for leave to appeal against the decision of the court of Appeal, Benin Division dated 20th November, 1989 on questions of fact and of mixed law and fact.*

(ii) *An order granting leave to appeal against the decision of the Court of Appeal, Benin Division dated 28th November, 1989 on questions of fact and of mixed law and fact.*

E (iii) *An order extending the time within which to appeal against the decision of the Court of Appeal, Benin Division on questions of fact and of mixed law and fact.”*

F This application was granted on the 31st January, 1994, pursuant to which the appellants filed a Notice of Appeal in the Court of Appeal, Benin City on 8th February, 1994. The appellants filed their brief of argument on the June, 1994 and the same was duly served on the respondents. He contended that much expense and trouble would be saved if an order is made which would make it unnecessary to file fresh Notice of Appeal and appellants’ brief. Learned counsel indicated that it was necessary to reargue the appellants’ application dated the 14th May, 1993 in view of the death of the last of plaintiffs/appellants’ representatives on the 3rd August, 1993 that is to before the said application G was argued and granted by this Court on the 31st January, 1994.

H Asked whether the applicants can now apply for all the prayers they seek in view of the invalidity of the proceedings and orders of this Court made on the 31st January, 1994 in the matter of the application dated the 14th May, 1993 as all the applicants had died before the said orders were purportedly made learned counsel indicated, quite rightly in my view, that he was no more pressing for the 2nd -5th prayers in his motion paper. He drew attention to the distinction between an action in personam as against an action in a representative capacity and argued that this is a proper case for the substitution of the deceased plaintiffs with the applicants. In this regard he relied on the decision of this

court in Clement Ezenwosu v. Peter Ngonadi (1988) 3 N.W.L.R (Part 81) 163. He therefore urged the court to grant the first prayer of his application to enable the applicants prosecute their appeal for them on behalf of the Gbolokposo Community. He emphasized that after the death of the 2nd and 3rd plaintiffs but before the death of the 1st plaintiff on the 3rd August, 1993, the appellants had on the 14th February, 1990 filed their Notice of Appeal against the decision of the Court of Appeal, Benin City delivered on the 28th day of November, 1989. B well within time as prescribed by law. He said he was relying heavily on this Notice of Appeal which, he stressed, was filed on the 14th February, 1990. He submitted that the appeal in this case was validly pending in this court before the death of the last surviving plaintiff on the said 3rd August, 1993 and he urged the court to grant the order for substitution as prayed.

Learned counsel for the 1st and 2nd defendants/respondents, Dr. Mudiaga Odje, S.A.N., in his reply submitted that this application is totally misconceived because of the invalidity of the proceedings and orders of this court made on the 31st January, 1994 at a time when there was no surviving plaintiffs/applicants. He referred to the case of Tesi Opebiyi v. Shittu Oshoboja and Another (1976) 9-10 S.C. 195 at 200-201 and Obi Okonji and others v. George Njokanma and others (1989) 4 N.W.L.R (Part 114) 161 at 169-170 and argued that there must be a competent and valid pending appeal before the appellants can be substituted with the applicants. He contented that the only Notice of Appeal in the cause was filed on the 18th February, 1994. This was as a result of the order for leave granted in error by this court on the 31st January, 1994 for extension of time within which to appeal and leave to appeal in favour of non-existent plaintiffs/appellants, all of whom had died Appeal was filed after the death of the sole surviving 1st plaintiff filed any Notice of Appeal on the 14th February, 1990 before his death on the 3rd August, 1993. Learned Senior Advocate therefore argued that there is no valid appeal pending before this court in this case. He submitted that the plaintiffs are yet struggling to obtain leave to come on appeal before this. He referred to the ruling of the Court of Appeal on the 12th March, 1990 at pages 545-546 of the record of appeal refusing the 1st appellant leave to appeal and submitted that the alleged Notice of Appeal dated 14th February, 1990 at page 537 of the record of Appeal is incompetent. G Alternatively he stressed that the applicants should produce the original receipt against which the alleged Notice of Appeal dated 14th February, 1990 at page 537 of the record of Appeal was filed in proof of their assertion. He urged the court to dismiss this applications as unmeritorious.

Learned counsel for the 4th to 7th respondents, Kehinde Sofola Esq., S.A.N, in his own reply submitted that in an action being prosecuted in a representative capacity, both the named and the unnamed parties are naturally interested in the action. Accordingly where the named parties die, any of the unnamed parties may apply to the court for substitution after which the prosecution of the case or appeal may be continued with. He, too, relied on the

decision in Obi Okonji and others v. George Njokanma and others, at 166 and 169. It was his submission that in-as-much as the claim is prosecuted in a representative capacity, the application for substitution proper in all the circumstances of this case.

B With regard to the applicants' prayers 2 to 5, learned Senior submitted that these are incompetent as there was no appellant on behalf the application was filed. He therefore urged the court to refuse prayers.

C I have given all the issues canvassed in this application a most consideration and it seem to me that the first point that must be stressed is it is indisputable the plaintiffs instituted this action against the defendant/respondents in a representative capacity. The suit was filed by the named plaintiffs for themselves and on behalf of the Gbolokposo community who duly authorised them so to do.

The second point that must be made is that in a representative action, **both** the named plaintiffs and/or defendants as the case may be and those D represent are parties to the action although the named representative plaintiffs and/or defendants are dominus litis until the suit is determined. And so, **for** the purpose of initiating any process in the representative action, such process must be by and in the name of the named plaintiffs or defendants so their mandate from those they represent remains acceptable and uncountermanded. See Atanda v. Olanrewaju (1988) 4 N.W.L.R. (Part 39) 394, Ede v. Nwidenyi. In E Re Ugadu (1988) 5 N.W.L.R. (part 93) 189 and Okkonji v. George Njokanma (1989) 4 N.W.L.R. (Part 114) 161 at 169. Put differently, when an action is instituted in a representative capacity against persons in a representative capacity, such an action is not only against the named plaintiffs or defendants but are also by and against the named parties represent who are not stated nomine. Those F representative so long as the named parties are in court, are also deemed, present at the trial of the action, through their representatives. See Re Gellatty & Medicine Hat Land Co. Ltd. (1908) 2 Ch. 652 at 659, Markt and Co. Ltd. v. Knight S.S. Co, Ltd. (1910) 2 K.B. 1021 at 1039 and Barker v. Allanson (1937) 1 K.B. 463 at 475. They were present by representation and would be bound in G law by whatever decision the court would give for or against their representative. I will now consider the position of deceased parties to a suit.

H It seems to me a matter of common sense that apart from the legal rights administrators, executors or the personal representatives of a deceased person, a dead person ceases to have any legal personality from the moment of death and as such can neither sue nor be used either personally or in representative capacity. Where, however, the cause of action survives the death of a party, such action is not terminated by death. This principle also applies to an appeal. See Nzom v. Jinadu (1987) 1 N.W.L.R. 533 and Clement Ezenwosu v. Peter Ngonadi (1988) 3 N.W.L.R. (part 81) 163. The right to appeal may survive a deceased party to a cause or matter but such right must be exercised by a living

person or persons. A Notice of Appeal which is filed on behalf of or in the name of a dead person is clearly incompetent and should be struck out. Where, however, all the named parties in a representative action die, the action, provided it is still maintainable, subsists on behalf of and/or against those they represent but who have not been mentioned in the proceeding nominee. I think I should add that the above legal position applies whether or not the representative action is pending before the trial or an appellate court. Such an action or appeal, as the case may be, provided it is still maintainable, will still subsist on the death of the parties but may not be prosecuted or continued with until a living person or persons, as the case may be, have been substituted for the named deceased parties to carry on the representative action. See too Obi Okonji and others v. George Njokanma (1989) 4 N.W.L.R (Part 114) 161 and Tesi Opebiyi v. Shittu Oshoboja and Another (1992) 9-10 S.C. 195 at 200 - 201. I will now examine, as contended by learned counsel, whether or not there is a valid pending appeal before this court in this cause or matter.

The above issue is of vital importance in this application as the Notice of Appeal against any decision or judgment complained of is, without doubt, the foundation of a proper appeal. See Tukur v. Government of Gongola State I N W L.R. (Part 68) 39 and Peter Odojin and Another v. Chief Agu and Another (1992) 3 N.W.L.R. (Part 229) 350 at 368. Thus where a Notice of Appeal is incompetent or null and void, there can be no valid appeal pending before the appellate court. And where an order of court is made granting the appellants extension of time within which to appeal and leave to appeal when there was in fact no living or existing appellants or indeed, respondents to the application, such an order will be null and void and of no effect whatever. See Lazard Bro. v. Midland Bank (1932) 1 K.B. 617 at 624 CA. Consequently there will, in such a situation, be no valid appeal pending before the appellate court in respect of which an applicant in a motion for substitution can be validly substituted for the deceased appellants or respondents, all of whom had die.

A Notice of Appeal which is filed on behalf of or in the name of a dead appellant after his death is incompetent and null and void and the court cannot I'll to amend such a notice by substituting a living person or persons in place of the dead litigants. See Clement Ezenwosu v. Peter Ngonadi, supra. It is not a mere procedural defect or irregularity that an appeal has been filed in name of a dead person. It is a radical and fundamental error which borders on the issue of jurisdiction. Accordingly there must be a competent and pending appeal before one party may be substituted for another and in the absence of a pending appeal or suit, the issue of substitution becomes an exercise in futility as ex nihilo nihil fit. See Tesi Opebiye v. Shittu Oshoboja, supra.

In the present case, learned counsel for the 1st and 2nd respondents submitted that the notice and grounds of appeal from the judgment of the Court of Appeal were only filed on the 18th February, 1994. This, he claimed, was in purported compliance with the invalid order of this court made on the 31st

January, 1994 granting the deceased plaintiffs/appellants extension of the within which to appeal and leave to appeal. Learned applicants' counsel on the other hand contended that the appellants' application for extension within which to appeal and for leave to appeal was filed *ex abundancia cautela*. He stated that this was because there was at all material times a competent and valid
 B pending appeal before this court which was duly filed in the Court below on the 14th February, 1990 before the death of the last surviving plaintiff/appellant.

Pursuant to the directive of this court, learned counsel for the applicants by his letter of the 30th November, 1994 forwarded two documents
 C to this court. These are-
 (i) Temporary receipt dated the 14th February, 1990 issued by the Court of Appeal, Benin City being payment for Notice and Grounds of Appeal again the decision of the Court of Appeal in question and
 (ii) Original Federal Government Revenue Collector's Receipt No.s150336 dated
 D 15th February, 1990 and issued by the Court of Appeal, Benin City in replacement of the said temporary receipt.

Following the production of these two receipts, copies of which were duly served on learned counsel for the respondents, the parties were invited for further addresses. Learned counsel were directed to address the court on the issue of whether there was a valid appeal filed by the appellants on the 14th
 E February, 1990 as per the two receipts Exhibits PE3 and PE4 or whether the said documents as suggested by the 1st and 2nd respondents, are forgeries in which case there would be no appeal pending in the cause.

Learned leading counsel for the applicants, Chief G.O.K. Ajayi, S.A.N. who came into the matter at this stage, in a short address relied on averments
 F in the applicant's further affidavit sworn to on the 8th 1995 to the effect that Notice of Appeal against the decision of the Court Appeal delivered on the 28th November, 1989 was duly filed on the 14th February, 1990, that a temporary receipt, Exhibit PE3 was issued for the said filing and that the same was replaced the following day by a Federal Government official receipt, Exhibit PE4. He
 G submitted that the onus rested on the 1st and 2nd respondents to establish their allegation that the said receipts of the 14th and 15 February, 1990 are forgeries. He pointed out he would have thought a clear statement from the Court of Appeal, Benin on the authenticity or otherwise of the two receipts would settle the matter one way or the other. He submitted that in the absence of any such
 H evidence from the Court of Appeal, this court must hold that the 1st and 2nd respondents failed to establish the alleged forgeries. He argued that there is evidence the Notice of Appeal in issue was filed as per the relevant receipts, Exhibits PE3 and PE4, and he urged the court to uphold the applicants' contention on the matter.

Learned counsel for the 1st and 2nd respondents, Dr. Mudiaga Odje, S. A. N. in his reply drew attention to the counter-affidavit of the 1st and 2nd respondent in which it is averred that both the temporary receipt and the original Revenue Collector's Receipt dated the 14th and 15th February, 1990 respectively are neither true nor genuine. He buttressed his argument by reference to Exhibit A04 which is a letter of the 26th February, 1992 written by the Deputy Chief Registrar, Court of Appeal, Benin City to the Chief Registrar of the Court to the effect inter alia that the record of appeal was inadvertently forwarded to this Court and that no valid appeal was pending as alleged. On the question of onus, he submitted that Exhibit A04 goes a long way at establishing that no appeal was in fact filed by the applicants in the lower court as alleged by the applicants. He argued that if there was an appeal pending, the applicants would not have filed their application for leave to appeal which this court struck out on the 20th November, 1991 on the ground that it was incompetent as no brief in support thereof was filed. He contended that it is reasonable to conclude that the applicants had filed no appeal.

Learned counsel for the 4th and 7th respondents, Mr. Kehinde Sofola, S.A.N. in his address stressed that what has created the entire problem in this matter is the laziness of the staff of the Court of Appeal, Benin by failing to endorse on the 'Notice of Appeal the receipt number and date of filing. In this view there must have been a Notice of Appeal before the court filed by the applicants on the 14th February, 1990. He referred to Exhibit A04, heavily relied on by the 1st and 2nd respondents, and pointed out that the Deputy Chief Registrar, Court of Appeal, Benin based his observation on whether or not a competent appeal was pending in that court on what the 1st and 2nd respondents told him. He was frankly of the view that forgery of the receipts had not been established beyond reasonable doubt as required by law.

Chief Ajayi in his reply pointed out that the order of this court dated the 20th November, 1991, relied on by Deputy Chief Registrar, Court of Appeal, Benin in coming to the conclusion that there was not a valid appeal pending in the matter as per his letter, letter, Exhibit A04 had nothing to do with the filing of Notice of Appeal in the case. He stated that some of the grounds of appeal in the applicants' Notice of Appeal filed on the 14th February, 1990 contained questions of fact and of mixed law and fact. It was his view that in order not to hike any chances, he decided to obtain an order for leave to appeal against the said judgment of the Court of Appeal. He explained that the said application for leave was filed ex abundanti cautela and did not derogate from the Notice of Appeal which was duly filed on the 14th February, 1990. He argued that no circumstantial evidence can undermine the concrete evidence of the two receipts against which the said Notice of Appeal was filed.

There can be no doubt, as was rightly observed by learned counsel

for the 4th and 7th respondents, that what has raised the unnecessary dust **In** matter is traceable to the indolence on the part of the staff of the Appeal, Benin. It was their duty to endorse on the relevant Notice of the official receipt number and date of its filing. This basic duty they to perform.

B It cannot be over-emphasized that the long established practice is for appropriate court officials to endorse on documents filed in Court Registration the receipt numbers against which they were filed together with the date of such filing. These endorsements ought to be made at the time of filing of documents to ensure that suspicions of fraud or irregular filing such as haven arisen in the present application are eliminated. It is hoped that this basic essential procedural requirement shall in future be strictly complied **with** all court Registries.

Turning now to the issue in controversy, it is a well established principle law that when a court is faced with affidavits which are irreconcilably , conflict, the court in order to resolve such conflict properly should first oral evidence from the deponents and their witnesses, if any. See Joseph Falobi v. Elizabeth Falobi (1976) 9 and 10 S.C.1., Akinsete v. Akindutere (1996) 1 All N.W.L.R 147, Eboli and others v. Oki and others (1974) 1 S.C.179 at 189, Olu-Ibukun (1974) 2 S.C.41 at 48 and Uku and others v. Okumagba & 3others (1974) 3 S.C.35 at 56. A close examination of the arguments presented on behalf of the parties reveals however that the issue in dispute can quite easily be resolved on grounds of law without the necessary of resorting to hearing oral evidence. I will according examine the dispute between the parties against the background of the law.

F The law is well settled that if the commission of a crime by a party to any proceeding is directly in issue in any proceeding civil or criminal, it must be proved beyond reasonable doubt. See Section 137 of the Evidence Act. In other words, although the preponderance of probability may constitute sufficient ground for a verdict in civil proceeding, this general rule is subject of the statutory proposition in section 137(1) of the Evidence Act otherwise a person who alleges he was assaulted might fail to prove the assault in a criminal prosecution and yet be able to establish the same in a civil proceeding. The assault being directly in issue must be proved beyond reasonable doubt whether in a civil or a criminal case. See Okwarume v. Obabokor (1966) N.M.L.R. 47, Benson Ikoku v. Enoch Oli (1962) All N.L.R. 194, Nwobodo v. Onoh (1984) 1 S.C.N.L.R 1 and Anyah v. A.N.N.Ltd, (1992) 6 N.W.L.R (Part 247) 319 at 333.

H The applicants in the present proceedings are accused by the 1st and 2nd respondents with the criminal offence of forgery of the two receipts Exhibits PE3 and PE4 against which the Notice of Appeal in issue was filed. The burden of proving that the applicants have been guilty of this offence of forgery is

clearing on the 1st and 2nd respondents who assert the affirmative. As I have already observed, they must, to succeed, establish their allegation beyond all reasonable doubt as required in criminal law notwithstanding the fact that the commission of the offence has arisen in a civil proceeding.

Learned counsel for the 1st and 2nd respondents relied heavily on the letter Exhibit A03 in proof of the allegation of forgery in issue. I think it will be necessary reproduce this letter as follows:-

“The Chief Registrar,
Supreme Court,
Lagos.

Sir,

CA/B/295/86
EGHOLOGBIMOLETIE & 2 ORS
AND
AMBROSE OLUGHOR & ANOR

With reference to our letter No. CA/B/295/86/T.1.1 dated 9th December, 1991, we have just been informed and discovered that Ten certified true copies of the Record of proceedings and the following documents:

- (a) The file used by the lower Court.
- (b) The file used by this Honourable Court.
- (c) The Exhibits as contained in the Index of the reference have been forwarded to the court inadvertently.

As a result, you have given the matter Supreme Court No. SC. 17/1992 when there is no valid appeal pending in the matter.

This fact was revealed when the order of the Supreme Court dated 20th day November, 1991 was shown to us by the Defendants/Respondents. A photocopy of the said order is hereby attached for your perusal.

In the light, of the above, you may cancel the matter from the Cause List, if the information given above is the true position. You should also allow us to withdraw the said records or leave them in abeyance.

Yours faithfully,
(Sgd.)

S.F. OGUNBODEDE
DEPUTY CHIEF REGISTRAR

In the first place, it is crystal clear that the deputy Chief Registrar, Court Appeal, Benin based his conclusion that there was not a valid appeal pending in the cause on what the 1st and 2nd respondents told him. In the second place, the order of the 20th November, 1991 relied upon by the said Deputy Chief Registrar for his decision had nothing whatsoever to do with whether or not a Notice of Appeal was filed on the 14th February, 1990 against the two receipts in question.

That order concerns the appellants' application for leave to appeal which was struck out on the 20th November, 1991 as incompetent. It was the application filed by the appellants ex abundania cautela as aforesaid upon the view of their learned counsel that some grounds of appeal filed raised questions of fact and mixed law and fact and therefore required the leave of court to be argued. In the third place, it to me that the suggestion in the said letter of the Deputy Chief Registrar, Court of Appeal, Benin to the effect that there was no valid appeal pending in cause is entirely speculative and equivocal. This is borne out by the paragraph thereof where it requested the Chief Registrar of the Supreme to cancel the matter from the Cause List "if the information given above is the true position" in the circumstance, I entertain no doubt that the 1st and respondents have woefully failed to establish beyond reasonable doubt forgery of the two receipts in issue as was submitted on their behalf. I with Chief Ajayi S.A.N. that no circumstantial evidence can undermine concrete evidence of the receipts, Exhibits PE3 and PE4 against which Notice of Appeal of the 14th February, 1990 was filed. I also accept submission of Mr. Sofola S. A. N. that no forgery of the receipts was establish by the 1st and 2nd respondents as required by law I uphold the submission of the applicants that there was a valid and competent Notice of Appeal in the cause on the 14th February, 1990 against the temporary receipt, Ex PE3, which was replaced the following day with the official receipt No.s160336, Exhibit PE4.

In conclusion, I have already observed that this action was instituted by the plaintiffs against the defendants/respondents in a representative capacity. The suit was filed by the named plaintiffs for themselves and on behalf of Gbolokposo community who duly authorised them so to do. It is not in dispute that all the three named plaintiffs are now dead. The 2nd and 3rd plaintiff died between 1975 and 1983 but the 1st plaintiff only died on the 3rd August 1993. The Notice of Appeal in these proceedings was filed in the court below on the 14th February, 1990. It is therefore clear that before the death last surviving plaintiff on the 3rd August, 1993, the said Notice of Appeal been properly and validly filed on the 14th February, 1990. Consequently there is a competent and pending appeal before this court in the cause.

It cannot be disputed that where in a suit filed by the plaintiffs in a representative capacity, all the named plaintiffs die, any of the un parties represented may apply to the court to be substituted for the deceased plaintiffs to enable the prosecution of the suit or the appeal therefrom. See Okonji and others v. George Njokanma and other, supra. The applicants are not only members of the Gbolokposo community represented by the deceased plaintiffs, they have also been appointed by the Gbolokposo community to be substituted for the deceased plaintiffs and to prosecute pending appeal on behalf of the community. It seems to me therefore that this is a proper case in which the applicants may be substituted for the deceased named plaintiffs.

Prayer (1) of this application accordingly succeeds and the applicants,

1. Osibakoro D. Otuedon
2. Peter O.Egueye

are hereby submitted for the deceased plaintiffs to prosecute this appeal for themselves and on behalf of the Gbolokposo community. The 2nd – 5th prayers having been withdrawn are hereby struck out.

There will be no order as to costs.

B

UWAIS JSC

I have had the opportunity of reading in draft the ruling read by my learned brother Iguh, J.S.C. I entirely agree with the ruling. However, I wish to draw attention to Order 8 rule 9 (2) of the Supreme Court Rules, 1985 which reads- (2) *If it is necessary to add or substitute a new party for the deceased. an ton shall, subject to the provisions of Rule II of this Order, to be made in that behalf to the court below or to the Court either by any existing party to the appeal or by any person who wishes to be added or substituted.*”

One of the occasions, when it will be necessary to substitute a party to an appeal, is when the death occurs of a party to the case in the capacity of either appellant or respondent as the case may be, who has sued or been sued either on his own or on behalf of others. See *Okonji v. Njokanma* (1989)4 N.W.L.R. (Part 114) 161 where this Court (Eso, Uwais, Oputa, Agbaje and Craig, () made the following observation on pages 166H - 167 as per Eso, J.S.C.-

When an action is instituted in a representative capacity and or against person in representative capacity that action is not only by or against the l parties. They are also by or against those the named parties represent. Those are not stated nomine. Indeed they may be one or two or more, indeed they be legion. And so, if all the named parties died the action still subsists on behalf or against those they represent but who have not been stated nominee.

As it is an action on trial, it is also when the matter is on appeal. The appeal, as the, case may be, subsists but the action on the appeal, again, as the case may be cannot be prosecuted until a living person has been substituted for the named dead party.

Having found that the appeal is not null and void but valid and the action in the case was brought in a representative capacity, I have no hesitation in granting the application for the applicants herein to be substituted for the deceased plaintiffs. Accordingly the application succeeds and it is hereby granted as prayed with no order as to costs.

WALI JSC

I have had the privilege of seeing and reading in advance, the lead

Ruling of my learned brother, Iguh, JSC with which I entirely agree and hereby the reasoning leading to it as mine.

Having nothing more useful to add, I shall also grant this application and make the following order:

That the names of

I. Osibakoro D. Otuedon and

B 2. Peter O. Egueye

are hereby substituted for the deceased plaintiffs to prosecute I pending appeal for themselves and on behalf of Gbolokposo Community Prayers 2 to 5 of the application which were withdrawn, are hereby struck out. I make no order as to costs.

C

KUTIGIJSC

The record of appeal clearly shows that the Court of Appeal delivered its judgment on the 28th day of November 1989. The Notice of Appeal dated t 14th day of February, 1990 which appears on pages 537 - 544 also shows that it was actually filed and a fee of N33.00 charged- (see page 544 thereof). But the date of filing same was not shown or indicated on page 544. It therefore not clear whether or not the Notice of Appeal was filed within months as provided for by the law. The record again shows on pages 545-546 that relying on this Notice of Appeal, the appellants moved the Court Appeal to grant them leave to appeal to the Supreme Court on 12th Mar 1990. The application was struck out as being out of time and therefore incompetent. The Notice of Appeal contained ten (10) grounds of appeal all labelled either “error in law” or “misdirection in law” with various particulars of error. Appellants’ counsel must have known that any or all could easily be a ground or grounds of mixed law and facts or facts alone, which would therefore require leave. But there is nowhere in the record where it was indicated or stated by counsel at the hearing which of the ten grounds were grounds of law and for which no leave was required or which were mixed law and facts or facts alone and for which leave was required. This is not fair. When counsel asks for leave, he should be in a position to tell the court the grounds of appeal on which leave is sought and the ones on which no leave is sought. So that when the court grants leave it will be limited to those specific grounds of appeal only. In this case when the Court of Appeal struck out the application for leave to appeal as incompetent on 12/3/90, the presumption was that there was no valid appeal pending.

The appellant sometime later applied to this Court for extension of time to seek leave to appeal, leave to appeal and for extension of time to appeal. The proposed Notice of Appeal was the same as the Notice of Appeal filed in the Court of Appeal. The application was granted to appeal on all the grounds of appeal on 31st January, 1994 and the Notice of Appeal was filed on 18th February 1994.

The respondents now say that the appellants had all died before the

Notice of Appeal was filed on 18/2/94 and consequently the leave granted by this court on 31/1/94 was null and void. The appellants on the other hand say that they had filed the appeal in the Court of Appeal on 15/2/90 when the last surviving appellant was still alive.

The question now is - was a valid Notice of Appeal filed in the Court of Appeal on 14/2/90 when the same court is on record as having struck out appellants' motion for leave to appeal on 12/3/90 as stated above? The appellants have now produced before us Government Revenue Receipt to the effect that the Notice of Appeal dated 14/2/90 was actually paid for and filed on the same date 14/2/90. But the point is that neither in the Court of Appeal nor in this Court did the appellants indicate that any of the ten (10) grounds of appeal was a ground of law alone. The Notice of Appeal filed in the Court of Appeal on 14/2/90 would appear therefore to be incompetent since no leave was obtained before or after filing it (see BOWAJI v. ADEDIWURA (1976) 6 SC.143, AMUDIPE v. ARIJODI (1978) 9 - 10 SC. 27). The argument of counsel that the application for leave in this Court was filed ex abundantia which did not derogate from the Notice of Appeal filed on 14/2/90 is to me therefore inconsequential. I am sure counsel did not expect the court decide behind them and without hearing them that any of the grounds of appeal was or is a ground of law. The appellants having sought for leave for the entire ten grounds of appeal both in this Court and in the Court below, the presumption is that they were all grounds of mixed law and facts or facts alone. This Court has stated times out of number that labelling or christening a ground of appeal as a ground of law does not automatically make it one. Each ground of appeal has to be looked into carefully to determine what category it belongs and counsel are entitled to be heard thereon and before a decision is taken. I am however, prepared to lean' in favour of inclusion in this case rather than of exclusion and allow the appellants into court. The primary consideration here is the desire to do substantial justice between the parties I would undue reliance on technicalities.

It is for above reasons and for the fuller reasons outlined in the ruling F lily learned brother Iguh J.S.C. that I agree, albeit reluctantly, to grant the consideration. I subscribe to the orders made in the said ruling. I will also strike out the motion by the defendants/applicants seeking to strike out the appellant appeal since it has already been overtaken by the grant of the appellants' application above.

MOHAMMED JSC

I entirely agree with my learned brother, Iguh, JSC., that by 14th February, 1990, when the Notice of Appeal in this Suit was filed by the applicants the 1st plaintiff was still alive. He died on 3rd August, 1993. Therefore the Notice of Appeal was competent because at the time it was filed one of the appellants was still alive.

My learned brother has covered all the salient issues raised in this appeal, in his judgment and I have nothing more to add.