

**SUPREME COURT OF NIGERIA**  
 18TH JULY, 1995. SC. 12/1992  
**CORAM:- M.L. UWAIS, LL. KUTIGI, U. MOHAMMED,**  
**S.U. ONU, Y.O. ADIO, JJSC**

ABILAWON AYISA ..... 5TH DEFENDANT/APPELLANT  
 AND  
 OLAOYE AKANJI & 2 OTHERS  
 (For themselves and on behalf of ..... PLAINTIFFS/RESPONDENTS  
 all three Male Ruling Houses)

THE GOVERNOR OF OYO  
 STATE & 2 OTHERS ..... RESPONDENTS

---

**CONSTITUTIONAL LAW**- Fair hearing - Failure to allow defendant or his counsel to address the court - Whether a violation of hearing - To warrant declaring the trial a nullity.

**PRACTICE & PROCEDURE** - Nullity - Proceeding that is declared a nullity - Cannot be revived.

**PRACTICE & PROCEDURE** - Retrial - Circumstances under which I will be ordered - By an appellate court.

**FACTS**

The appellant is a member of one of the ruling houses in the Ado-Iwaye community in Oyo State. When the chieftaincy stool of the community fell vacant, the state government set up a board of inquiry to determine a mode of succession to the title. This led to the promulgation of a chieftaincy declaration for the community. As a candidate was about to be put forward for the stool, the 1st to 3rd plaintiffs/respondents went to court challenging the validity of the chieftaincy declaration. The trial court granted judgment to the plaintiffs.

Aggrieved, the appellant went on appeal alleging procedural irregularities, absence of a final address by his counsel and generally raising issues of fair hearing. The court of Appeal, Ibadan division allowed the ordering that the case be sent back to the trial court for a retrial. The appellant still dissatisfied with this decision, has appealed to the Supreme Court urging that the plaintiffs' case be dismissed and putting forth one issue for determination.

**ISSUE FOR DETERMINATION**

*“Whether on the facts of the case as found by the Court of Appeal, and on the court’s decision that all the reliefs claimed by the Respondents as Plaintiffs were unsustainable; it is in the interest of justice that the case be tried de novo or that the Plaintiffs’ claim BE DISMISSED. “*

**HELD** (Unanimously dismissing the appeal per lead judgment of **ONU JSC**)  
***Proceeding that is declared a nullity***

1. Once an act is declared to be a nullity following the detection of a fundamental vice as happened here, it is with due respect null and void and it is as if that act has never taken place before. It would appear to me clear that if indeed, as the court below concluded, the entire proceedings amounted to a nullity, which in effect means that what does not exist in law cannot be resuscitated, reinstated or revived, the Appellant was making a mountain out of a molehill when he placed too much emphasis on the obiter dictum of the court below, as hereinbefore underlined, to wit: that, “But for the order of nullity just made I would have dismissed the entire claim of the Plaintiffs, “ which amounted to a statement that is not the decision of the court below. (p. 1634 A)

***Circumstances under which retrial will be ordered***

2. From the above excerpt, one is left in no doubt that retrial should not be ordered by the lower court where the case has failed in toto and where no substantial irregularity is shown on the record or shown to court. Therein lies the distinguishing factor of the above case and the one in hand in which there is glaring irregularity that goes to the root of the case and was correctly, in my view, declared a nullity by the court below. (p. 1636 E)

***Fair hearing***

3. The sum total of all I have been saying is that the court below was right to have declared the proceedings in the instant case a nullity and to order a trial de novo. The interest of justice can only be served if the Appellant is allowed, pursuant to the provisions of the Constitution of the Federal Republic of Nigeria 1979 vide Section 33(1) which makes fair hearing mandatory and not directory, to have his defence in the trial Court heard on the merits and that can only be best carried out by a trial de novo. Affording a plaintiffs or defendant’s counsel the right to address the court is fundamental unless the counsel waives his right. Since the Appellants’ counsel made a vociferous and scathing attack on the procedure adopted by the trial Judge in the instant case, the court below had no option than to declare the proceedings a nullity.

**1624    AYISA V. AKANJI (1995) 7 KLR 1622; (1995) 7 NWLR**

And this, it rightly did, and also correctly, in my judgment, followed it up by ordering a retrial. (p. 1639 D)

**REPRESENTATION**

L.O. Fagbemi Esq., with S.S. Akiuyele for the Appellant  
Alhaji B.O. Ishola for the 1st to 3rd Plaintiffs/Respondents  
H.F. Sule Esq., Chief Legal Officer, for the 4th and 5th Respondents  
Iyiola Oladokun Esq., for the 6th Respondent

**CASES REFERRED TO**

Adelaja v. Fanoiki (1990)2 NWLR (Part 131) 137  
Chinweze v. Masi (1989) 1 NWLR (Part 97) 254  
Momodu v. Momoh (1991)1 NWLR (Part 169) 6608  
Adelaja v. Fanoiki (1990)2 NWLR (Part 131) 137 at 148  
Oduyoye v. Oshodi (1973)1 W.S.C.A. Atuyeye -v- Ashamu (1987) S.C.NJ Vol. 1 page 72 at page 87  
Adewunmi v. Adeuja (1975)2 W.S.C.A. 103 at 133-134.  
Macfoy v. U.A.C. (1962)A.C. 152 at 160  
Adigun v. A.G. Oyo State (1987) 1 N.W.L.R. (Part 53) 678  
Skenconsult (Nig.) Ltd. & Anor. v. Godwin Sekondi Ukey (1981)1 S.C. 6 at 9  
Awote v. Owodunni & Ors. (No. 2) (1987) 2 NWLR (Part 57) 366; (1987) 5 S. C. 1 at 8  
Okeowo v. Migliore (1979) II S. C. 138  
Sanusi v. Ameyogun (1992) 4 NWLR (Part 237) at 556.  
Ayoola v. Adebayo (1969)1 ALL NLR. 159 at 162  
Niger Construction Company Limited v. Okugbeni (1987) 11/12 S.C 113; (1987) 4 NWLR (Part 67) 787.  
Peter Nemi & ors. v. The State (1994)10 SCNJ. 1 at pages 32-35  
Otogbolu v. Okeluwa (1981) 6-7 S.C. 99  
Nwangu v. Okonkwo (1987) 3 NWLR (Part 60) 314 at 321  
Nwuzoke v. The State (1988) 2 SCNJ 344 at 346  
Adimora v. Ajufo (1988)1 NSCC.1005 at 1016,

**STATUTES REFERRED TO**

EVIDENCE Act, 1990, ss 134, 135  
Court of Appeal Act, 1976, s.16  
Supreme Court Act (Cap 424 Laws of the Federation 1990) s. 22

**LEAD JUDGMENT BY ONUJSC**

The appeal herein, emanating from the Court of Appeal, Ibadan is one involving a chieftaincy dispute originating from Iseyin Local Government of Oyo State. It is sequel to that court (hereinafter referred to as the Court below) on 9th July, 1990, upholding the appeal of the 5th defendant/appellant (hereinafter in the rest of this judgment called appellant) against the decision of the High Court of Oyo State presided over by Ibidapo-Obe, J., dated 2nd October, 1987 which was declared a nullity and was sent back for retrial de novo before another Judge of the said High Court.

The action was first commenced in the Oyo State High Court sitting at Oyo by a Writ dated 18th July, 1986 and filed on 22nd July, 1986. In it, the 1st to 3rd plaintiffs/respondents for themselves and on behalf of all three Male Ruling Houses, challenged the appointment of the appellant (then the 5th of nine defendants with the Governor of Oyo State, now 4th respondent, the Attorney General of Oyo State, now 5th respondent and Mr. O. O. Akinloye, Secretary Iseyin Local Government, now a passive 6th respondent respectively) as the Alado of Ado-Awaye in Iseyin Local Government Area of Oyo State, as follows:-

*“1. Declaration that under the traditional Customs, usages and practices of Ado Awaye, only male lines are recognised for the purposes of considering, selecting appointing and installing Alado of Ado Awaye.*

*2. Declaration that there are Three Ruling Houses based on male lines namely: (i) Oyinlola (ii) Akindele and (iii) Adeniyi for the Alado of Ado-Awaye Chieftaincy in Iseyin Local Government Area of Oyo State.*

*3. Declaration that Alado of Ado-Awaye Chieftaincy Declaration approved by the Military Governor of Oyo State on the 28th May, 1986 were contrary to Ado-Awaye Traditional Practices, Customary Law and Usages and the Chiefs Law Cap. 21, Laws of Oyo State, 1978 and therefore should be set aside.*

*4. Declaration that Maku, Olaogun and Olusosun Ruling Houses Incorporated into the said Chieftaincy Declaration belong to the female line, already eliminated and unrecognised by the generality of the people of Ado-Awaye.*

*5. An Order removing the names of the following purported Ruling Houses i.e. (i) Maku (ii) Olaogun and (iii) Olusosun for the Alado of Ado-Awaye Chieftaincy stool in the Iseyin Local Government Area of Oyo State from the Approved and Registered Declaration in respect of succession to the Obaship of Ado-Awaye.*

6. *Alternatively, Plaintiffs ask for an order breaking the Oladunni Ruling House into Three to embrace Oyinlola, Akindele and Adeniyi Ruling Houses.*

B 7. *An Order setting aside any selection already done or likely to be done, any appointment already made or is likely to be made, any approval already given and/or likely to be given, and/or any installation already performed of any Alado of Ado-Awaye from the female line, particularly from Maku Ruling House or from Olaogun or Olusosun Ruling House by the 1st, 2nd and 3rd and 4th Defendants.*

C 8. *An injunction restraining the 1st, 2nd, 3rd, 4th and 5th defendants and their servants, agents and privies from taking any or further steps towards approving, effecting or causing the approval of Maku Ruling House and/or the kingmakers approving for installation any candidate for the vacant stool of Alado of Ado-Awaye from the said Maku Ruling House”.*

D But first, I wish to review the facts of the case, which may be summarised briefly as follows:-

E The appellant, Abilawon Ayisa is a member of the Maku Ruling House of Alado of the Ado-Awaye Chieftaincy. With the late Oba Lakisokun Ayisa I, Alado of Ado-Awaye joining his ancestors on February 25, 1983, the stool of Alado of Ado-Awaye naturally became vacant. Be it noted that the Chieftaincy stool of Alado-Awaye is a recognised Chieftaincy under the Chieftaincy Law of Oyo State of 1978 but which had hitherto no Chieftaincy Declaration under the Chiefs Law of 1959 to guide the Government of Oyo State in nominating and approving candidates to fill that stool consequent upon a vacancy.

F As a result of this lacuna and to prevent any further chaos in the filling of the vacant stool of Alado of Ado-Awaye, the Oyo State Government in response to the representations made by some people including Princes who petitioned it and requested for a Chieftaincy Declaration, it set up an inquiry. At the end of it all, Chieftaincy declaration for the Alado of Ado-Awaye Chieftaincy (Exhibit 17) was promulgated and duly registered in 1986, G barely 3 years after the stool became vacant.

H In place of the three former Ruling Houses of Oyinlola, Akindele and Adeniyi, there were now created in the new Declaration (Exhibit 17) four Ruling Houses, to wit: Olaogun, Olusosun, Oladunni and Maku, with the latter earmarked to commence the rotation accordingly. As it (Maku Ruling House) was about presenting its candidate, the 1st to 3rd plaintiffs/respondents on behalf of the three erstwhile Ruling Houses, filed the suit giving rise to the appeal herein, challenging Exhibit 17 and questioning its mode of making during an interregnum instead of during the lifetime of a reigning chief. They in addition asked for other reliefs as hereinbefore set out.

The case proceeded to trial after the exchange of pleadings which were amended with the Amended Statement of Claim being further amended with leave of court. Both parties adduced evidence through witnesses, but at the close of the case for the defence which in fact began and ended on the 14th day of July, 1987, with the calling of two witnesses, namely, one Abel Abiodun Akintaru as DW1 and Folarin Abilawon, son to the appellant as DW2, the following vital notes, to which I shall advert later in this judgment, were made by the learned trial Judge. B

The case for the 5th defendant. All counsel for the parties agree to address on 22/7/87.

Court:- Since all Counsel agree to address during vacation as they would not like this case to be taken de novo, case adjourned to 22/7/87 for the Legal address. “ C

For no apparent cause and for an unexplained reason, the trial court sat on a date not communicated to the defendant. Curiously enough, too, nothing appeared in the court’s record on 22/7/87 - the date fixed for address. Rather. In the absence of both Plaintiffs and defendants as well as their counsel, on 29th September, 1987, the next date when the case came up again, the learned trial Judge made the following illuminating notes:” D

*Parties are absent.*

*Parties not represented by Counsel.*

*Court-It appears parties are not on Notice. Case adjourned to 2/10/87 for the address and the judgment later in the day. Hearing Notice to issue to parties today.” E*

What then finally happened on Friday, the 2nd of October, 1987, when the learned trial Judge proceeded to deliver its judgment upon receiving the address of learned counsel for the Plaintiffs alone in the absence of the defendants and their counsel, may be graphically recapitulated hereunder thus: F

*“Parties are present except the defendants. Alhaji B. O. Ishola appears for the Plaintiffs. Prince Dosu Gbadegesin appears for the 4th defendant. Others are absent despite due Notice from Court. Prince Dosu Gbadegesin - says he has no legal address to assist Court. G*

*Ishola now addresses.”*

The learned trial Judge in his said judgment, which he delivered there and then, granted to the plaintiffs/respondents all but their reliefs 4 and 5. H

Aggrieved by that decision only the appellant appealed to the court below premised upon a Notice and Grounds of Appeal containing nine grounds. From the grounds, five issues were distilled for the consideration of the court

below, wherein only the grounds as opposed to the issues as provided by the rules of court, were canvassed. The first ground of appeal was that learned trial Judge erred in law by denying the appellant his right to fair hearing when he did not give his counsel the opportunity to address the court in the case before giving judgment. The court below, after a most careful and painstaking consideration of the briefs and arguments proffered by counsel on both sides, allowed the appeal on 9th July, 1990 on all but ground 6 thereof which complained about the non-joinder of Maku, Olaogun and Olusosun Ruling Houses.

The writer of the lead judgment (Ogwuegbu, J.C.A., as he then was, concurred in by Sulu-Gambari and Akpabio, J.J.C.A), laying emphasis in his consideration of ground one, held, *inter alia*, thus:

*"I am in agreement with the learned counsel for the appellant that the failure of the learned trial judge to afford the appellant's counsel an opportunity of being heard in address is a violation of the appellant's right to a fair hearing which is guaranteed in Section 33(1) of the Constitution. It is not a mere irregularity. It strikes at the root of the proceedings. Consequently, the entire proceedings is a nullity. Ground one of the grounds of appeal succeeds."*

The learned Justice then went ahead to conclude his judgment by saying, among other things, that -

*"In the result, all the grounds of appeal succeed except ground six. The appeal is allowed. As a result of the conclusion reached by me on ground One of the grounds of appeal. I hereby declare the proceedings of the court below a nullity. The decision of the court below and all the consequential orders made by the learned trial Judge are hereby set aside. But for the order of nullity just made, I would have dismissed the entire claim of the plaintiffs. It is hereby ordered that the case be sent back to the High Court of Oyo State holden at Oyo for hearing de novo by another Judge of the said High Court."* (The Italics above is mine for emphasis).

The appellant being dissatisfied with the order for trial de novo has further appealed to this court contending that plaintiffs/respondents' case ought to have been dismissed in toto.

By leave of this Court, an order was made for extension of time within which to appeal against the judgment of the court below, for extension of time within which to apply for leave to appeal on grounds other than grounds of law against the judgment of the court below dated 9th July, 1990 and leave to appeal on question of law from the said judgment. Pursuant to the grant of the said application, a Notice of Appeal containing only one ground of appeal was filed on 23rd December, 1991, i.e., within the forty-five days allowed to the

appellant's counsel. The appellant thereafter filed a brief of argument dated 2nd March, 1993 and filed on 4th March, 1993, wherein the lone issue identified for our determination by him reads:

*"Whether on the facts of the case as found by the Court of Appeal, and on the court's decision that all the reliefs claimed by the respondents as plaintiffs were unsustainable; it is in the interest of justice that the case be tried de novo or that the Plaintiffs' claim be dismissed."*

The plaintiffs/respondents' application for filing their brief out of time dated 2nd September, 1994 and filed on 5/10/94 was granted as prayed on 22nd February, 1995, while the learned Chief Legal Officer on behalf of the 4th and 5th respondents, neither sought nor obtained this court's leave to file the two respondents' brief until the date set for the hearing of this appeal, to wit: 18/4/95.

Learned counsel for the 6th respondent filed no brief of argument. He also at the hearing of this appeal, while remaining passive, urged nothing orally in support thereof, as against the other learned counsel who expatiated orally on their briefs respectively.

Before considering the lone issue formulated on behalf of the appellant, however, I deem it pertinent to comment on how learned counsel for the plaintiffs/respondents and learned Chief Legal Officer for the 4th and 5th respondents, in their response, submitted four and two issues respectively in their briefs. I hasten to point out that the approach adopted by these learned counsel is to say the least palpably wrong, moreso that appellant's only issue is distilled from one ground of appeal. It is now well settled, following several years of brief writing in this Court, that issues for determination must of necessity pursuant to the rules of courts, be limited by, circumscribed and fall within the scope of the grounds of appeal filed, Since they must perforce arise from the grounds of appeal and cannot raise issues outside their contemplation - See *Adelaja v. Fanoiki* (1990) 2 NWLR (Pt. 131) 137 at 148. *Chinweze v. Masi* (1989) 1 NWLR (Pt. 97) 254 and *Momoh v. Momoh* (1991) NWLR (Pt. 169) 608, they must not be so prolix and proliferate as to be more in number than the grounds on which they are based. See *Agu v. Ikewibe* (1991) 3 NWLR (Pt. 180) 385 at 401, This was what exactly happened in the instant case and it is for this reason that I regard the multiple issues submitted at the instance of the plaintiffs/ respondents as well as for the 4th and 5th Respondents respectively, as being of no avail. They are accordingly discountenanced in my consideration of this appeal. I shall henceforth stick to appellant's lone issue formulated from his one ground of appeal.

#### **ISSUE:**



In what I consider as a rather circuitous argument of the above lone issue but which, in my view turns within narrow limits learned counsel for the appellant made the following written submission, The gravamen of the case of the Plaintiffs/Respondents, he submitted, are that:-

(i) Their Houses, namely Oyinlola, Akindele and Adeniyi are the only three Ruling Houses from the male line in Ado-Awaye and therefore exclusively entitled to the stool of Alado of Ado-Awaye.

(ii) The House of the appellant along with two other Houses, i.e., Maku, Olaogun and Olusosun Houses are from the female line and are therefore not entitled to the stool of Alado of Ado-Awaye.

(iii) Under the established tradition, custom and usage of Ado-Awaye, only Ruling Houses from the male line are entitled to the stool of Alado of Ado-Awaye.

He then submitted that the onus of proof was squarely on the plaintiffs/respondents who were making the claims to lead evidence to prove the same vide Sections 134 and 135 of the Evidence Act. The court below, it is therefore contended, upheld the judgment of the trial court to the effect inter alia that -

(1) The plaintiffs/respondents had not adduced evidence to show that there are only 3 Ruling Houses from the male line entitled to the stool of Alado of Ado-Awaye.

(2) The Ruling Houses including that of the appellant i.e., Maku, Olaogun and Olusosun are not from the female line, or at least have not been shown to be from the female line.

(3) The plaintiffs/respondents failed to prove any traditional practices, customs and usages contained in the Chiefs Law 1978.

(4) The learned trial Judge had rightly refused to grant the 4th and 5th reliefs in the plaintiffs'/respondents' claims based on these findings on the evidence before it.

Hence, it is further argued, the court below upheld these findings of fact and after reviewing and re-evaluating the evidence on the record held that:-

*"The bottom was knocked off the plaintiffs' case and the entire claim should have been dismissed."*

The court below, it is pointed out, upheld grounds 2, 3, 4, 8 and 9 of the appellants' grounds of appeal, while similarly upholding his grounds 5 and 7 when it stated that

*"The plaintiffs/respondents failed to prove any traditional practices, custom and usages or any contained in the Chiefs Law of 1978"*

With regard to ground 1 of appellant's grounds of appeal which complained that appellant as defendant in the trial court was denied a right of

address. It is maintained that the court below while upholding that ground, also held that the denial amounted to a miscarriage of justice which rendered the trial a nullity, concluding that:

*“In the result, all the grounds of appeal succeed except ground 6. The appeal is allowed and all the consequential orders made are hereby set aside.”* B

Surprisingly in the next breath it is pointed out that but for the order of nullity made in respect of ground one, it would have dismissed the plaintiffs/respondents’ claim. The order having been made, it is maintained, the court below proceeded to send the case back to the High Court for trial de novo. This order of retrial, it is then contended is the main and only complaint of the appellant in this appeal. The position of the appellant, it is argued, is that having made the above findings. The plaintiffs/respondents’ claims became unsustainable in every respect and that the basis of those claims having failed in toto or that with the bottom thereof knocked off, the court should, on the balance of justice between the parties, have dismissed their claims. The appellant demonstrated this by a reference to paragraph 4 of the Notice of Appeal at Page 157 of the record, where the reliefs he was seeking from the court below were:- C D

*“(a) To set aside the judgment of the lower court in so far as it granted reliefs to the Plaintiffs;* E

*(b) To dismiss the plaintiffs case in its entirety (Italics for emphasis).*

The above prayers are also repeated in the conclusion of the appellant’s brief at paragraph 9 thereof at Pages 175 to 176 of the record. A host of cases were thereafter cited to us to illustrate laid down principles by this Court as guide namely, as to when and when not to order a retrial. In addition, it is submitted. In the instant case, as the lower court on its merits found that the plaintiffs/respondents did not deserve the judgment which they got from the trial court. The court below should have had no difficulty in acceding to what the appellant in his Notice of Appeal aforesaid, had asked for by dismissing the plaintiffs/respondents’ case in its entirety. F G

Oral submission of learned counsel for the appellant in expatiation was along the same lines as in his written brief and there is no need, in my opinion, reviewing it here.

Learned counsel for the plaintiffs/respondents in his brief after referring us to the purports of Paragraphs 4.25 and 4.26 of the appellants’ brief, urged that it is very important to correct the wrong assertion made. That in the H

first place, it was the appellant who in his Summary of Arguments No. 1 at Page 175 asserted, .....:the failure of the learned trial Judge to take the address of the appellant's Counsel was a fundamental vice which vitiates the judgment. Similarly, the appellant, it is contended, canvassed vigorously that the entire proceedings should be declared a nullity by the court below. It is next argued that from the foregoing it was the appellant who prayed the Court below in his ground of appeal and issue raised, that the entire proceedings should be declared a nullity, adding that curiously enough, it is the same appellant who now calls on the Supreme Court not to declare the proceedings a nullity. It is therefore queried whether the action of the appellant was not tantamount to an abuse of the process of court, moreso that he took active part in the retrial in the Oyo High Court No. 1 before he suddenly became aware that he should rush to this Court now on appeal after waiting for almost three years from 9th July, 1990 to 1993

The case of Atuyeye v. Ashamu (1987) S.C.N.J. Vol. 1 Page 72 at Page 87: (1987)1 NWLR (Pt.49) 267, was called in aid thereof, pointing out that going through the five issues raised by the appellant, one will see that these issues, particularly issues 2, 3 and 5 which deal with the credibility of witnesses, the court below could not do otherwise than to order a retrial before another High Court Judge if the said court is to do substantial justice both to the appellant and the respondents before it, notwithstanding that the whole proceedings are a nullity. And since issues supersede the grounds of appeal, it is argued, it is erroneous submission to say that the appellant succeeded on all the grounds. It is therefore contended that from the foregoing points, the appellant cannot approbate and reprobate at the same time, adding that what appellant is trying to do is to query the court below for using its discretion judicially and judiciously. Learned Counsel further argued that there is certainly no way by which the Court of Appeal can do substantial justice to both parties without ordering a retrial.

Learned counsel in his oral submission to us on April 18, 1995 argued in similar vein and urged us to dismiss the appeal.

For his part, learned Chief Legal Officer, who at the hearing of this appeal relied on his brief and rested his case thereon, made points similar to those made by learned counsel for the plaintiffs/respondents. I deem it unnecessary to review them here. I need only remark in passing as I had pointed out hereinbefore. That learned counsel for 6th respondent having filed no brief, he was not heard in oral argument vide Order 6 Rule 8(5) Supreme Court Rules.

Now, it is clear and beyond dispute that in Paragraph 4 of his Notice

of Appeal at Page 157 of the Record, the appellant indicated the reliefs he was seeking from the court below as follows:

*“(a) To set aside the Judgment of the lower court in so far as it granted any reliefs to the Plaintiffs.*

*(b) To dismiss the Plaintiffs’ case in its entirety.”*

See also Pages 175 - 176 of the Record where the appellant’s brief repeated these reliefs in bold and clear languages. B

Equally clear is the submission of the appellant at Paragraphs 4.2, 4.3 and 4.4 of his brief upon which he relied in the court below to the effect that

*“4.2 It is in these circumstances that the appellant submits following the Supreme Court decision in Obodo v. Olomu (1987) 3 N.W.L.R. (Pt. 59) at Page 111 that it is not a mere irregularity to deny a party’s counsel the opportunity of addressing the Court, but a defect in proceedings which strikes at the right of the party to fair hearing which renders the proceedings a nullity. See also:*

*(i) Oduyoye v. Oshodi (1973) 1 W.A.C.A*

*(ii) Adewunmi v. Adeuja (1975) 2 W.A.C.A. 103 at 133 - 134.*

*4.3 Alternatively, the appellant submits that the proceedings of the 29th July, 1987 during vacation is a nullity not being based on the consent of the parties following the principle in Macfoy v. U.A.C. (1962) A.C. 152 at 160 the subsequent proceedings of 2nd October is also a nullity.*

*4.4. The appellant urges the Court of Appeal to allow the appeal on this ground.”*

From the foregoing, it can be seen that the appellant made a very powerful and forceful submission to convince the court below to exercise its discretion in his favour to declare the entire proceedings in respect of ground one of the grounds of appeal, a nullity. It is an undoubted and established principle of law as demonstrated by this court in Adigun v. A. G. Oyo State (1987) 1 N.W.L.R. (Pt. 53) 678, that an appellate court in the exercise of its jurisdiction is not restricted to considering the appeal before it as formulated by the parties: it can also consider and has inherent powers to consider the grant of dismissal of the parties’ case as if it is a court of first instance vide Section 22 of the Supreme Court Act, Cap. 424. The court below (per Ogwuegbu. J.C.A., as he then was) cannot therefore be said to have erred when it acceded to appellant’s request in its judgment thus:

*“In the result, all the grounds of appeal succeed except ground six. The appeal is allowed. As a result of the conclusion reached by me on ground one of the grounds of appeal. I hereby declare the proceedings of the court below a nullity. The decision of the court below and all the consequential*

1634 Ayisa v. Akanji (1995) 7 KLR Onu JSC  
*Orders made by the learned trial Judge are hereby set aside. But for the order of nullity just made. I would have dismissed the entire claim of the plaintiffs.* (Italics is mine for comments anon).

Once an act is declared to be a nullity following the detection of a fundamental vice as happened here it is with due respect null and void and it is as if that act has never taken place before. See Sken consult (Nig.) Ltd. & Anor.v. Godwin Sekondi Ukey (1981) 1 S.C. 6 at 9, a case in which this court cited with approval the case of Macfoy v. U.A.C. Ltd. (1962) A.C. 152, a Privy Council decision where Lord Denning said inter alia as follows:

*"If an act is void, then it is in law a Nullity. It is not only bad but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have it declared to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."*

It would appear to me clear that if indeed, as the court below concluded, the entire proceedings amounted to a nullity, which in effect means that what does not exist in law cannot be resuscitated, re-instated or revived, the appellant was making a mountain out of a molehill when he placed too much emphasis on the obiter dictum of the court below, as hereinbefore Italicized, to wit: that, *"But for the order of nullity just made I would have dismissed the entire claim of the Plaintiffs"* which amounted to a statement that is not the decision of the court below. In other words, the writer of the judgment (Ogwuegbu, J.C.A., as he then was) was expressing an intention were the whole proceedings not to be a nullity. To him, there is a difference between positivism which deals with what is, as distinct from what ought to be. To exemplify that the court below was doing no more than acceding to the grant of the relief the appellant sought from it by declaring the whole proceedings in the instant case a nullity, it proceeded to hold that an order of trial de novo by another Judge should be the most reasonable, valid and logical conclusion to arrive at. That this is the only order the court below made or ought to make, is reflected in its drawn up order at Pages 226 to 227 especially at Page 227 of the Record. That drawn up Order states in its main body thus:

*"Signed:*  
*J. H. Omololu-Thomas*  
*(Justice, Court of Appeal)*  
*(Presiding)*

DATED MONDAY THE 9TH DAY OF JULY, 1990

*Upon reading the record of appeal herein and after hearing M. Esan Esquire (with him, A. Adeniyi Esquire) of counsel for the appellant, J. O. Fakayode Deputy Director of Civil Litigation, Oyo State for the 1st - 3rd*

Ayisa v. Akanji (1995) 7 KLR Onu JSC 1635  
*defendants/respondents. A. Adegbola Esquire of counsel for the 4th defendant/respondent, and B. O. Ishola Esquire of counsel for the 1st - 3rd plaintiffs/respondents.*

*IT IS ORDERED:-*

- 1. that the appeal be and is hereby allowed;*
- 2. that the proceedings of the Court below be and is hereby declared a nullity. B*
- 3. that the decision of the court below and all the consequential orders made by the learned trial Judge be and are hereby set aside;*
- 4. that the case be and is hereby sent back to the High Court of Oyo State holden at Oyo for hearing de novo by another judge of the said High Court; and C*
- 5. that costs assessed at three hundred naira (N300.00) be and is hereby awarded to the appellant.*

*A. A. Ahmed*

*Deputy Chief Registrar”*

From the foregoing, the appellant cannot be seen to be blowing hot and cold or approbating and reprobating in asking for the judgment of the trial court to be declared a nullity and at the same time urging the court below to dismiss the same. It would be otherwise, in my view, if the appellant had abandoned or declined to canvass his first ground of appeal at the hearing of his appeal in the court below, concentrated mainly on evaluation of evidence and stuck to the reliefs he ultimately asked for in his brief without saying something about the nullity of the proceedings. D E

In which case, the court below could have considered the whole case on its merits and arrived at a different conclusion. Moreover, it has to be borne in mind that it is the duty of all courts below as stated by this Court, to pronounce on all issues raised or brought to their notice by the parties, and not to restrict themselves to one or more of the issues which in their opinion disposes the case. That done, it was as well, in my opinion, that the court below in the instant case surmised on what consequential order it would have made - that is that of dismissing the plaintiffs/ respondents' suit in toto on the merits, had the decision arrived at not been a nullity. This rule of practice or direction is only reasonable because of the obvious danger of a higher court disagreeing on appeal with the view held by the trial court on the point (more consonant with the assessment of damages which would be payable to a party in case that party had won on the claims before the court, even though the judge or tribunal was dismissing the plaintiff's case vide *Kareem v. Ogunde* (1972) 1 S.C. 109 at 189 and *Bello v Diocesan Synod of Lagos & Ors.* (1973) 3 F G H

S.C. 103 at 117).

With regard to the order of retrial made by the court below in the instant case, it is true that this court has spelt out in several cases what guidelines lower courts must adopt before ordering same. Thus, in *Awote v. Owodunni & Sons* (1987) 2 NWLR (Pt. 57) 367; (1987) 5 S.C. 1 at 8, this court was of the opinion that where a court of trial fails to advert its mind to and treat all issues in controversy fully and there is insufficient material before the Appeal Court for the resolution of the matter, the proper order is one of retrial. On the other hand, this court has held in many cases including *Okeowo v. Migliore* (1979) 11 S.C. 138, inter alia, that in certain cases complete justice may be achieved between the parties if a retrial is not ordered and the case is determined on its merits followed by an order of dismissal in toto. See also *Sanusi v. Ameyogun* (1992) 4 NWLR (Pt. 237) 527 at 556. Indeed, this court went further to approve of the dictum of Coker JSC in *Ayoola v. Adebayo* (1969) 1 All NLR. 159 at 162, wherein he handed down the following warning-

*“An order for retrial inevitably implies that one of the parties usually the plaintiff is being given another opportunity to relitigate the same matter and certainly before deciding to make such an order, we think that the other party is not thereby being wronged to such an extent that there would be miscarriage of justice but we must and do point out that an order for retrial is not appropriate where it is manifest that the Plaintiff’s case has failed in toto and that no irregularity of a substantial nature is apparent on the records or shown to the Court.”*

From the above exert, one is left in no doubt that retrial should not be ordered by the lower court where the case has failed in toto and where no substantial irregularity is shown on the record or shown to court. Therein lies the distinguishing factor of the above case and the one in hand in which there is glaring irregularity that goes to the root of the case and was correctly in my view declared a nullity by the court below. The best examples of cases similar to the instant one decided by this Court are best illustrated in *Obodo v. Olomu* (supra) and *Niger Construction Company Limited v. Okugbeni* (1987) 11/12 S.C.N.J. 113; (1987) 4 NWLR (Pt. 67) 787. In the former case the facts may be briefly stated as follows:-

The appellant sued the respondents in the Warri High Court claiming damages for trespass and an injunction, Both sides called witnesses and closed their case. The trial Judge ordered the parties to send written addresses to him and adjourned the case for judgment. Only the defence counsel sent a written address to the judge. No copy of it was served on the plaintiff’s counsel. In delivering his judgment on the 2nd of August, 1983, the trial Judge reviewed the facts and dwelt at length on the submissions contained in the

defence counsel's written address, which submissions he agreed with and dismissed the plaintiffs' claims. The plaintiff appealed to the Court of Appeal where he complained about the failure of the trial court to hear oral addresses and the failure to serve him a copy of the written address of the defence. The Court of Appeal fell into the same pitfall as did the trial court and erred further by speculating and holding that *"Without the addresses by both parties the decision arrived at by the learned trial judge would not have been different."* B

This court in allowing the appeal and ordering a trial de novo held that

*"1. When the right to address the court exists a party must not be denied that right. A denial may render the proceedings null if a miscarriage of justice is occasioned."* C

*2. Perhaps for the court's convenience such addresses may be in writing as the rules of court are not clear on this point, but a party must not be denied of the right to address by implication. Had the Court of Appeal adverted to the principle that the address was not meant for the court alone but also for the other side, it would have discovered fundamental error in the trial judge's approach. No date was given for the addresses to be submitted, no order was made for service of the defendants' address on the plaintiff and when the plaintiff was to file his reply address. The importance of addresses is shown by Section 258(1) of the 1979 Constitution."* D

*3. The trial judge was wrong in the manner he ordered for the written addresses and in deciding the case virtually on the defence counsel's address. Addresses form part of the case and failure to hear the address of one party however overwhelming the evidence seems to be one-sided: it vitiates the trial."* E

The learned Justice (Belgore, J.S.C.) further commented as follows:-

*"By holding that the decision could not have been different if all addresses were before the trial court, the Court of Appeal was attempting to read the mind of the trial Judge. He heard the evidence and saw the witnesses. The addresses might have thrown a new light on his view on the evidence. For the totality of a case heard entails not only the evidence but also the address. A party entitled to address the Court may waive that right but it must be shown that he has so waived his right."* F

In the latter case, (Okugbeni's case) (supra), however, the lone issue agitated at the instance of the defendant/appellant company on their appeal to the Supreme Court against the plaintiff/respondent who won in the Court of Appeal as well as in the trial court, was:-

*"Whether the learned Justices of the Court of Appeal, Benin City,*



were right in failing to appreciate the effect of the serious error of the learned trial judge who prejudged the case put forward by the appellant at the address state and thereby failed to weigh the case of the plaintiff/respondent, before making specific findings of fact prejudicial to the appellant's case.

B It was apparent in that case also that the Particulars of Error in Ground 1 of the Grounds of Appeal revealed what indeed was the objection of learned Counsel for the appellant, namely that:-

C “The learned trial Judge prejudged the case when he erroneously felt that it was no longer necessary to call on the respondent's counsel to address the Court after hearing address of appellant's counsel and thereby failed to consider or consider properly the case of the appellant.”

D Thus, the complaint there seemed to be that, at the close of the evidence on both sides, learned counsel for the appellant was allowed to, address the Court, that is to say, to sum up and comment generally on the entire case. Oputa, J.S.C., in his comment that he failed to see why the appellant who was given the extra latitude to address the Court should complain that his opponent was not offered the same opportunity and before he delved into his consideration of the lone issue which was inextricably concomitant with Ground 1 of the appellant's Grounds of Appeal, in dismissing the appeal, had this to say:-

E “Addresses are designed to assist the Court. When, as in this case, the facts are straightforward and in the main not in dispute, the trial judge would be free to dispense with final addresses. Cases are normally not decided on addresses but on credible evidence. No amount of brilliance in a final speech can make up for the lack of evidence that he had 2,246 matured F Dunlop Rubber Trees on his land; that these were all uprooted and destroyed by the defendant/Company; that each rubber tree costs N20.00. There was no rebuttal evidence from the defendant. It then became a question of simple arithmetic to multiply 2,246 by 20 to arrive at N44,920 as the amount of compensation due to the plaintiff for the loss of his rubber trees. G The learned trial Judge was very right in not calling upon the plaintiff to address him on such a simple issue of fact. In the absence of evidence showing two conflicting versions of an essential fact, the trial Court cannot be blamed if it accepted (even without a closing address) the only version H proved by the evidence. Not calling on the plaintiff to address the Court does not ipso facto mean that the learned trial Judge had prejudged the issues in controversy in the case. Ground 1 of the Grounds of Appeal therefore fails.” See also the case of Peter Nemi & Ors. v. The State (1994) 9 NWLR (Pt.366) 1; (1994) 10 SCNJ. 1 at Pages 32 - 35 where Bello, C.J.N., writing the lead

judgment, in an analogous situation but not having to do with addresses of counsel, adopted the principle enunciated by Oputa, J.S.C., in the above Civil case of Okugheni (supra) and after holding in respect of a defence counsel's right of reply in a criminal case, said among others that -

*"It can be seen from these sections that neither the accused nor his counsel had a right to the reply of the State Counsel delivered under Section 242. Accordingly, the absence of the defence counsel at the material time did not prejudice or adversely affect the right of the accused concerning the reply. However, although an accused person has, in strict law, no right of reply, if the prosecutor has introduced a new matter in his reply which was not covered by the address of the defence counsel, the rule of practice requires the trial court in the interest of justice and fairness to allow the accused, if he is not represented or his counsel to respond on the new matter. In my view, failure of a trial court under such circumstances to allow an accused or his counsel to respond will only vitiate the trial if the failure has actually caused a miscarriage of justice."*

The sum total of all I have been saying is that the court below was right to have declared the proceedings in the instant case a nullity and to order a trial de novo. The interest of justice can only be served if the appellant is allowed, pursuant to the provisions of the Constitution of the Federal Republic of Nigeria, 1979 vide Section 33(1) which makes fair hearing mandatory and not directory, to have his defence in the trial Court heard on the merits and that can only be best carried out by a trial de novo. Affording a plaintiff's or defendant's counsel the right to address the court is fundamental unless the counsel waives his right. Since the appellant's counsel made a vociferous and scathing attack on the procedure adopted by the trial Judge in the instant case, the court below had no option than to declare the proceedings a nullity. And this, it rightly did, and also correctly, in my judgment, followed it up by ordering a retrial. It did not base or found its decision on its finding to the effect among others that -

*"The learned trial Judge having refused to grant the 4th and 5th reliefs in the plaintiffs claim, the bottom was knocked off the plaintiffs' case and the entire claim should have been dismissed. Grounds 2, 3, 4, 8 and 9 of the grounds of appeal therefore succeed."*

Nor is part of the concluding portion of the judgment of the court below wherein the learned Justice of Appeal commented or surmised, after declaring the entire proceedings a nullity, that - *"But for the order of nullity just made, I would have dismissed the entire claim of the plaintiffs."*

The ratio decidendi of the case to me, it is more than obiter. It is

perhaps pertinent to say in conclusion firstly, that what indeed intrigues one about this appeal is that it is the self-same appellant who felt aggrieved by the decisions of the two courts below and has further appealed to this court on the ground that by his being denied the right to address the trial court, his fundamental right to fair hearing as enshrined in Section 33(1) of the Constitution of the Federal Republic of Nigeria, 1979 was thereby breached, that now contends that instead of the court below declaring the case a nullity (one of the reliefs - indeed the dominant relief, among others - he had himself sought and vigorously argued therein) and sending it back to the trial court for trial de novo: and further that it should instead be here and now resolved on the merits (also one of the reliefs he had asked for) for the plaintiffs/respondents' case to be dismissed in toto. This, he cannot be heard to say in this court as such an action would tantamount to his eating his cake and having it at the same time.

Secondly, the appellant in pursuit of his argument, as can clearly be observed, seems to have lost sight of the wide powers conferred on the court below by the provisions of Section 16 of the Court of Appeal Act, 1976 which postulate, inter alia, that -

*"16. The Court of Appeal may from time to time make any order necessary for determining the real question in controversy in the appeal and generally shall have full jurisdiction over the whole proceedings as if the proceedings had been instituted in the Court of Appeal as court of first instance and may re-hear the case in whole or in part or may remit it to the court below for the purpose of such re-hearing or may give such other directions as to the manner in which the court below shall deal with the case in accordance with the powers of that court, or in case of an appeal from the court below in that court's appellate jurisdiction, order the case to be re-heard by a court of competent jurisdiction."* (The italics above is mine for emphasis).

The Supreme Court is clothed with identical powers vide Section 22 of the Supreme Court Act 1960 (now Cap, 424 of Laws of the Federation of Nigeria, 1990). It is for these reasons that I hold that the decision of the court below is unassailable in the circumstances. Indeed, it consists of concurrent findings of fact of the two courts below which neither having been shown to be erroneous nor perverse or further still either legally or procedurally unsustainable, do not warrant my interference therewith. See the cases of Otogbolu v. Okeluwa (1981) 6 - 7 S.C. 99, Nwagwu v. Okonkwo (1987) 3 NWLR (Pt. 60) 314 at 321; Nwuzoke v. The State (1988) SCNJ 344; (1988) 1 NWLR (Pt. 72) 529 and Adimora v. Ajufo (1988) 1 NSCC 1005 at 1016; (1988) 3 NWLR (pt. 80) 1, to mention but a few. My answer to the lone issue canvassed by the appellant is

In the result, this appeal fails and it is dismissed by me with costs assessed at N1,000,00 in plaintiffs/respondents' favour and N1,000.00 in favour of 4th and 5th respondents jointly. There shall be no order as to costs in favour of the 6th respondent. The case is remitted to the High Court of Oyo State sitting at Oyo for hearing de novo before another High Court Judge.

B

---

**UWAIS JSC**

I have had the opportunity of reading in draft the judgment read by my learned brother Onu, J.S.C. I agree that the appeal has no merit. I too accordingly dismiss it and I adopt the order in the said judgment as mine.

C

---

**KUTIGI JSC**

I read in advance the judgment just delivered by my learned brother Onu, J.S.C. I agree with the conclusion therein that the appeal fails and is dismissed with costs. The Court of Appeal having properly considered Ground One of the Grounds of Appeal and having rightly in my view come to the conclusion (per Ogwuegbu J.C.A.) on Page 274 of the record thus -

D

*"I am in agreement with learned counsel for the appellant that the failure of the learned trial Judge to afford the appellant's counsel an opportunity of being heard in address is a violation of the appellant's right to a fair hearing which is guaranteed in Section 33(1) of the Constitution. It strikes at the root of the proceedings. Consequently, the entire proceeding is a nullity. Ground one of the Grounds of Appeal succeeds".*

E

It needed not to have proceeded to consider and make pronouncements on the remaining grounds 2 - 9 of the Grounds of Appeal which essentially went to the merit of the case and which pronouncements are now responsible for the confusion in the case. The court below was, however, perfectly right when it finally ordered that -

F

*"The case be sent back to the High Court of Oyo State holden at Oyo for hearing de novo by another Judge of the said High Court."*

G

I endorse the consequential orders contained in the lead judgment.

H

---

**MOHAMMED JSC**

I have had the advantage of reading the draft judgment written by my learned brother Onu JSC, in respect of this appeal I agree with his con

clusion that having declared the judgment of the lower court a nullity there is nothing one can build on that decision. The correct order after declaring the High Court’s judgment a nullity, is for a retrial de novo. The Court of Appeal is right therefore to so order. This appeal is dismissed.

B \_\_\_\_\_

**ADIO JSC**

I have had a preview of the judgment just delivered by my learned brother, Onu J.S.C. and I agree that the appeal fails. I too dismiss it and abide by the consequential orders including the orders for costs.

C \_\_\_\_\_

D \_\_\_\_\_

E \_\_\_\_\_

F \_\_\_\_\_

G \_\_\_\_\_

H \_\_\_\_\_