

**SUPREME COURT OF NIGERIA**  
27TH FEBRUARY, 1996. SC. 158/1989  
**CORAM:- M.L. UWAI CJN, M.E. OGUNDARE,**  
**E. O. OGWUEGBU, Y. O. ADIO, A. I. IGUH, JJSC.**

ABRAHAM OLABANJI & ANOR ..... APPELLANTS/RESPONDENTS  
AND  
1. SALAMI ADEOTI OMOKEWU (Deceased) ..... RESPONDENT  
2. SANMI SALAWU ODOFIN ..... RESPONDENT/APPLICANT  
S. D. ABEGUNDE II (Deceased) ..... RESPONDENT

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*JURISDICTION - Judgment - Supreme Court has an inherent jurisdiction - To set aside its judgment that is a nullity.*

*JURISDICTION - Supervisory jurisdiction - Of Supreme Court over Court of Appeal - Exercise thereof depends on the existence of an appeal.*

*PRACTICE & PROCEDURE - Defect in proceedings - Whether a non fundamental defect in proceedings - Would vitiate a judgment.*

**FACTS**

The plaintiffs/appellants/respondents sued the 1st, 2nd and 3rd defendants in the High Court of Kwara State claiming two declarations and an order of perpetual injunction against them. The matter proceeded to trial at which end, the court found for the plaintiffs granting all their reliefs.

Dissatisfied, the defendants appealed to the Court of Appeal. During the pendency of the appeal the 1st and 3rd defendants died. Their death was not brought to the notice of the court. The Court of Appeal allowed the appeal and dismissed the claims of the plaintiffs. The plaintiffs appealed to the Supreme Court, which in 1992, allowed the appeal and restored the trial court's judgment. This present application is by the 2nd defendant then respondent, in the 1992 Supreme Court decision, asking the Supreme Court to declare its 1992 judgment null and void and strike out the said appeal on the argument that the 1st and 3rd respondents in that appeal were dead when the judgment was given.

**HELD** (Unanimously dismissing the application per lead judgment of **OGUNDARE JSC**)

*Supreme Court has an Inherent jurisdiction*

1. It is settled law that a court (and that includes this court) has an inherent

jurisdiction to set aside its judgment or decision that is a nullity. I therefore, reject Plaintiffs contention that this court has no jurisdiction to entertain the application now before us. (p. 424 A)

*Defect in proceedings*

2. In view of my finding that the 1st defendant was not a party to the appeal before this court there was not such a fundamental defect in the proceedings in that appeal that would vitiate the judgment delivered by this court on July 17, 1992. Consequently, prayer (1) fails and it is refused. The authorities cited to us by learned counsel for the Applicant which I have read, do help him, they deal with cases where the deceased was already a party to appeal or proceedings. (p. 424 G)

*Supreme Court's supervisory jurisdiction*

3. Prayer (2) seeks an order of this court declaring the judgment of the court below in the matter null and void. The supervisory jurisdiction of this court over the court below is appellate - see: section 213(1) of the Constitution and, therefore, depends for its exercise on the existence of an appeal from a decision of that court. There is no appeal before us upon which the court could exercise its appellate jurisdiction. Coming by way of motion is not the method prescribed for lodging an appeal from the court below to this court - see Order 8 rule 2(1) of the Rules of this court. Prayer (2) is incompetent; it, therefore, fails. (p. 424 H)

REPRESENTATION

F. A. Olanrewaju for the 2nd Respondent/Applicant  
A. Williams (Mrs.) For the Appellants/Respondents

CASES REFERRED TO

Ezenwosu v. Ngonadi (1988) 3 NWLR 163  
Awoyegbe v. Ogbeide (1988) 1 NWLR 695  
Okoye v. Nwulu SC. 162/1989  
Ibero v. Obioha (1994) 2 KLR 71  
Skenconsult (Nig) Ltd. v. Ukey (1981) SC. 6  
Craig v. Kansen (1943) KB 256, 262-263 (1943) 1 All E.R 108, 113  
Obimonure v. Erinosho (1966) 1 All NLR 250

**LEAD JUDGMENT BY OGUNDARE JSC**

In the High Court of Kwara State in suit No. KWS/OM/92/84, the Plaintiffs who are the Respondents in the application now before us sued one

Salami Adeoti Omokewu and Suleman Durotoye Abegunde II (both of whom are now dead) and to others including Sanni Salawu Odofin Igbu for Ogbe), the present Applicant, claiming, as per paragraph 23 of their statement of claim.

(i) A declaration that the 1<sup>st</sup> plaintiff is the bonafide appointed AROMU OF OKORE.”

(ii) A declaration that the 1<sup>st</sup> defendant's appointment as AROMU OF OKORE by the 4th defendant is null and void;

(iii) A perpetual injunction restraining the 1st defendant from parading himself as AROMU OF OKORE;

(iv) An injunction restraining the 2nd, 3rd and 4th defendants from recognizing the 1st defendant as AROMU OF OKORE.

The action proceeded to trial at the conclusion of which the learned trial judge on February 17, 1988 found in favour of the Plaintiffs and granted them the reliefs sought.

The defendants by Notice of Appeal dated February 24, 1988 appealed to the Court of Appeal. During the pendency of the appeal on November 3, 1988, the 1st defendant Salami Adeoti Omokewu died. The fact of his death was, however, not brought to the attention of the Court of Appeal which Court on February 1, 1989 allowed the defendants' appeal to it and dismissed the Plaintiff's claims. The Plaintiffs, being dissatisfied with the judgment of the Court of Appeal appealed to this court. This court allowed the appeal on July 17, 1992, set aside the judgment of the Court of Appeal and restored the judgment of the trial High Court.

Now 3 years after the judgment in the original proceedings and presumably the only survivor of the three defendants that appealed to the Court of Appeal, brought this application seeking -

*“1. AN ORDER declaring the judgment of the Supreme Court in SC. 158/89 delivered on July 1992 as null and void and striking out the said appeal.*

*2. AN ORDER declaring the judgment of the Court of Appeal in CA/K/90/88 delivered on February 1, 1989 as null and void and striking out the said appeal.*

*3. SUCH FURTHER OR OTHER ORDER/S as this Honourable Court may deem fit to make in the circumstances.”*

and set out the following grounds upon which the application is predicated:

*“1. That at the time the said Court of Appeal judgment CA/K/90/88 was delivered on February 1, 1989 and the Supreme Court judgment SC. 158/89 was delivered on July 17, 1992, the 1st respondent who was the*

*necessary party to the said appeals had died.*

2. *That the death of the 1st respondent to the said appeals, which occurred on November 3, 1988 was never brought to the Notice or attention of the Court of Appeal or of the Supreme Court as required by law.*

3. *That any judgment deliver when a necessary party to the action B or appeal had died is null and void."*

The application is supported by an affidavit sworn to by the applicant. The penultimate paragraphs of the affidavit which form the synopsis of applicant's submissions before us, read;

*"6. That the 1st respondent at the Supreme Court, Salami Adeoti C Omokewu died on November 3, 1988 before the Court of Appeal delivered its judgment. Attached herewith and marked Exhibit 'A2' is a copy of the Medical Certificate of cause of death showing the date the 1st respondent died.*

*7. That the fact of the death of the 1st respondent, Salami Adeoti D Omokewu, was never brought to the attention of the Court of Appeal as well as the Supreme Court.*

*8. That the main contest is the matter as to entitlement to Aromu Chieftaincy title was between the 1st appellant and the deceased 1st respondent while the 2nd appellant and the 2nd and 3rd respondents were merely E nominal parties.*

*9. That I was informed by Ayo Olanrewaju of counsel, and I verily believed him that once a necessary to a case in the trial court or in the appeal court dies and he is not substituted by another party, where substitution is permitted by law, any judgment obtained becomes null and void.*

*10. That the above information was not available to me until very F recently.*

*11. That I verily believe that if the fact of the death of the 1st respondent was brought to the attention of the Court of Appeal, it would not have delivered its judgment and if the Supreme Court had known before delivering its judgment it would have declared the decision of the Court of Appeal G null and void and struck out the appeal in the Supreme Court."*

There is a counter-affidavit sworn to by the 1st Plaintiff/Appellant/Respondent. In it he deposed, inter alia, as hereunder:

*"9. Contrary to the facts deposed to in paragraphs 7, 8, 9, 10, 11 H and 12 of the Affidavit of the Applicant, I say:*

*(a) That Exhibit '02' and '03', the Notice of Appeal dated 6th February, 1989, and the Amended Notice of Appeal dated 20th February, 1991, filed on my behalf clearly showed that the 1st respondent, Salami Adeoti Omokewu was deceased. The said Exhibit '02' is copied on pages 224-226*

*of the Record of Proceedings filed herein.*

*(b) In a Motion dated 6th February, 1989, the 2nd Appellant and myself prayed the Court of Appeal, Kaduna, for any of execution of the judgment of the said court and the 2nd Appellant, Salami Ajiboye Olukotun swore to an Affidavit in support thereof that the 1st respondent, Salami Adeoti Omokewu died on 2nd November, 1988, among other facts stated. B Now show to me attached herewith and marked Exhibits '04A' and '04B' are the copies each of the said Motion and Affidavit in support of the application for stay of execution which are also copied on pages 227-229 of the Record of Proceedings herein.*

*(c) An order declaring the judgment of this Honourable Court null C and void will adversely affect me and prevent me from enjoying my rights and privileges as the bonafide Aromu of Omu Aran.*

*(d) The Applicant has brought the motion on notice dated 6th D October, 1995, in bad faith and the same should be dismissed by this Honourable Court”.*

At the hearing of the application, learned counsel for the Applicant submitted that the 1st defendant having died at the time the Court below delivered its judgment and at the time this court heard the Plaintiffs' appeal and the 1st defendant being a necessary party his death robbed both courts of jurisdiction and the judgments given by both were, therefore, a nullity. He E submitted further that both at common law and under other 8 rule 9(5) of the Rules of this court where a party to an appeal died the appeal abated. Learned counsel conceded that this Court was not aware of the death of the 1st defendant when it heard and decided the appeal before it. he relied in support of this submissions, on *Ezenwosu v. Ngonadi* (1988) 3 NWLR 163; *Awoyegbe vs. F Ogbeide* (1988) 1 NWLR 695 and *Okoye vs. Nwulu* – SC. 162/1989 of 16/1/95 (unreported).

Mrs. Williams for the Plaintiffs, submitted that the 1st Defendant was never a party to the appeal to this court and therefore, Order 8 rule 9(5) was inapplicable. Learned counsel, relying on section 215 of the Constitution G and *Obioha v. Ibero* (1994) 1 NWLR 503, 531, 532-535, further submitted that this court had no jurisdiction to entertain an appeal against its own decision. She also submitted that the Applicant had no locus standi to bring the application as he had not shown what he would suffer if the application was not entertained granted by the court. In her further address, Mrs. Williams sub- H mitted that the 2nd prayer was incompetent in that unless there was an appeal before it against the judgment of the Court of Appeal this court could not review the former's judgment.

True enough, this court has no jurisdiction to review its own judg

ment. To this extent I agree with Mrs. Williams. But this application does not seek review of the judgment of the court but seeks to have the judgment set aside on the ground that it is a nullity. It is settled law that a court (and that includes this court) has an inherent jurisdiction to set aside its judgment or decision that is a nullity - see: Skenconsult (Nig.) Ltd. v. Ukey (1981) SC.6; Craig v. Kansen (1943) KB 256, 262-263; (1943) 1 All E.R 108, 113; Obimonure vs. Erinoshio & Anor (1966) 1 All NLR 250; (1966) ANLR 245 (Reprint). I therefore, reject Plaintiff's contention that his court has no jurisdiction to entertain the application now before us. Obioha v. Ibero (supra) is just not apposite."

From the affidavit evidence before us, one fact stands out clear and, that is, that the 1st defendant had died before the court below gave its judgment in the appeal before it. therefore, he could not have been a party to the appeal the original, as well as the amended Notice of Appeal filed in respect of that appeal Order 8 rule 9(5) relied on by the Applicant and which states:

"9(5) *Where an appeal has been set down for hearing and the court is or becomes aware that a necessary party to the appeal is dead the appeal shall be struck off the hearing list.*"

is inapplicable to the facts here. On the other hand, if the 1st defendant had been made a party to the appeal to this court there was non-compliance by his counsel with sub rule (1) of the rule 9 which provides:

9(1) *It shall be the duty of counsel representing a party to an appeal to give immediate notice of the death of that party to the Registrar of the Court below or to the Registrar of the court (as the case may require) and to all other parties affected by the appeal as soon as he becomes aware of the fact.*"

It thus could not be said that the court was aware of his death as to enjoin it to strike out the appeal as required by sub rule (5) of rule 9. indeed it is admitted that the fact of his death was never brought to the attention of the court.

In view of my finding that the 1st defendant was not a party to the appeal before this court there was not such a fundamental defect in the proceedings in that appeal that would vitiate the judgment delivered by this court on July 17, 1992. Consequently, prayer (1) false and it is refused. The read, do not help him, they deal with cases where the deceased was already a party to the appeal or proceedings.

Prayer (2) seeks an order of this court declaring the judgment of the

court below in the matter null and void. The supervisory jurisdiction of this court over the court below is appellate - see: section 213(1) of the constitution and, therefore, depends for its exercise on the existence of an appeal from a decision of that court. There is no appeal before us upon motion is not the method prescribed for lodging an appeal from the court (2) is competent; it, therefore, fails. B

The two prayers having failed, this application is dismissed with 100.00 costs to the Appellants/Respondents.

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**UWAIS CJN**

I have had the opportunity of reading in draft the ruling read by my learned brother Ogundare, J.S.C. I entirely agree. According I too hereby dismiss the application with 100.00 costs to the Appellants/Respondents. C

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**OGWUEGBU JSC**

I have had the advantage of reading in advance the draft of the ruling just delivered by my learned brother, Ogundare, J.S.C. I agree with his reasoning and conclusion. I hereby adopt them as my own and will dismiss the application for those reasons. D E

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**ADIO JSC**

I have had the advantage of reading, in advance, the ruling just delivered by my learned brother, Ogundare J.S.C. I agree that the prayers in the application fail. I too dismiss the application and abide by the order for costs. F

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**IGUHJSC**

I have read, in draft, the lead ruling just delivered by my learned brother, Ogundare, J.S.C. and I agree that this application is devoid of merit and ought to be demised. G

I have nothing more to add.

I, too, dismiss the application with costs as assessed in the lead H ruling.