

SUPREME COURT OF NIGERIA
21ST DAY OF APRIL, 1997. SC. 10/1995
CORAM:-A.B. WALI, M.E. OGUNDARE, E.O. OGWUEGBU,
Y.O. ADIO, A. I. IGUH, JJSC

1. THE VESSEL "SAINT ROLAND"

2. OWNERS OF THE VESSEL "SAINT ROLAND"DEFENDANTS/
APPELLANTS

AND

ADEFEMI OSINLOYE

..... PLAINTIFF/RESPONDENT

ACTIONS - Discontinuance of action - Plaintiff has the right to discontinue his action - Without leave of court.

ACTIONS - Discontinuance of action O.47 r. 1 Fed. High Courts Rules - Right to discontinue without leave - Can be exercised before the hearing date.

ACTIONS - Abuse of court's process - Notice of discontinuance that is an abuse of process - Can be set aside by the Court.

ACTIONS - Discontinuance notice - Whether the Plaintiff has used the notice to enrich himself unjustly - Thereby abusing court's process.

ACTIONS - Discontinuance notice - Where found to be an abuse of process - Court can sustain in the notice - But on justiciable terms.

ACTIONS - Discontinuance notice - Though found to be an abuse of process - Is upheld with an order that the amount unjustly recovered - Be returned to the defendant by plaintiff's counsel.

LEGAL PRACTITIONERS -Arrangement between both parties' counsel - Were taken cognizance of by the Court in making an order - Cannot be said to be a mere private arrangement.

FACTS

The plaintiff/respondent caused a second hand Peugeot 505 saloon car to be delivered to the defendants/appellants for shipment from Germany to Lagos. The car got lost in transit. Plaintiff filed an action before the Federal High Court Lagos against the defendants claiming N200,000.00 as special and

general damages for conversion or for negligence resulting in the loss of the car. Pursuant to plaintiff's ex parte application, the trial judge ordered the immediate arrest and detention of the vessel "Saint Roland" then lying at the Tin Can Island Port Lagos. Defendants' counsel reached an agreement with the plaintiffs counsel unto delivering N200,000.00 bank draft to plaintiff's counsel pending a procurement of bank guarantee in the same sum. This arrangement led to an order by the trial Court releasing the detained vessel.

Defendants wrote plaintiff about the recovery of the car in question. Meanwhile plaintiff has cashed the draft in issue and refused to accept the subsequent bank guarantee. Upon hearing that the car has been recovered, plaintiff filed a notice of discontinuance of the action without returning the N200,000.00. The defendants vide a motion, sought to set aside the notice on the ground that leave of court was not obtained and it therefore was tantamount to abuse of court's process. Defendants' application failed at both the Federal High Court and Court of Appeal. They have further appealed to the Supreme Court raising 6 issues which the apex court narrowed down to 3.

ISSUES FOR DETERMINATION

1. Whether in all the circumstances of this case, the filing of the Notice of Discontinuance after the collection of N200,000.00 from the appellants as security in the suit and immediately after counsel for the respondent were advised that the respondent's car, the subject matter of the suit, had been located and was ready for collection at the Apapa Port without repaying the said payment of N200,000.00 made as security to the respondent's learned counsel amount to an abuse of process. Etc., see p. 806

HELD (Unanimously allowing the appeal per lead judgment of **IGUH.JSC**)
Plaintiff has right to discontinue action without leave

1. It is clear under the above rule that a plaintiff has an unqualified right to discontinue his action against a defendant or any of them without leave of the court before the date fixed for the hearing of the suit. The condition he must satisfy is to give notice in writing of the discontinuance to the registrar and to every defendant as to whom he desires to discontinue or withdraw. Such Notice of Discontinuance should, once filed, terminate the proceedings and the appropriate order to make by the court is that of striking out the suit.
 (p. 809 B)

When right to discontinue action without leave can be exercised

2. The provision of our rules on when a plaintiff has unqualified right to discontinue his action without leave of the court appears to me clear. This right, he may exercise, before the date fixed for the hearing of the suit. In the

present suit, the Notice in question was filed by the respondent before the date fixed for the hearing of the suit. In the face of the clear provisions of Order 43, Rule 1 of the Federal High Court (Civil Procedure) Rules, 1976, it will be a definite error to import the additional or implied term urged upon this court by learned counsel for the appellants by reading into them, a provision that leave is needed to discontinue an action before the date fixed for the hearing of the suit if payment of some money has been made to a defendant. The respondent, without doubt, was entitled as of right to discontinue his action without leave before the date fixed for the hearing notwithstanding payment of the said N200,000.00 to him by the appellants. (p. 810 F)

Actions - Abuse of court's process

In the second place, it is indisputable that there is ample jurisdiction in the courts to set aside or strike out any process of court, including a Notice of discontinuance, taken out or issued in abuse of process. Accordingly, where a notice discontinuance is an abuse of process, it may rightly be set aside or struck out by the court. See Castanho v. Brown and Root (U.K.) Ltd. and others (1981) 1 Lloyd's Law Rep. 113 (H.L.) at 118. The first question that now arises for consideration is whether the Notice of Discontinuance filed in the present suit was in fact an abuse of process. (p. 811 A)

Plaintiff's use of discontinuance notice to enrich himself

4. Additional to all the above, is the fact that it is a clear abuse of process to use the machinery of Notice of Discontinuance without leave to improve a plaintiff's position unjustly. See Castanho v. Brown and Root supra at 114-115. Similarly filing a Notice of Discontinuance immediately after obtaining substantial interim advantages or some unjust enrichment in a suit to the prejudice of the defendant constitutes an abuse of process. Such interim advantage may include securing unjustifiable substantial payments in the suit just before filing the Notice to the detriment of the defendant. In the present case, it seems to me from all the circumstances of the case that the respondent would appear to have used the machinery of Notice of discontinuance without leave to improve his position, indeed, to enrich himself unjustly. (p. 814 F)

Agreement between both counsel

5. It seems to me clear in all the circumstances that both counsel having heavily relied on this arrangement before the trial court and the trial court having taken full cognizance thereof and released the vessel on that basis, it cannot now be argued that the payment of the said N200,000.00 was a mere

private arrangement which the court did not act upon in arriving at its to release the vessel. In my view the conduct of the respondent, and/or counsel on his behalf in the entire matter is, to say the least, despicable and utterly unfortunate. I entertain no doubt that the filing of the Notice of Discontinuance in the suit constituted a definite abuse of process. (p. 815 G)

B

Discontinuance notice - Found to be an abuse of process

6. Accordingly it is my view that where a Notice of Discontinuance is pronounced an abuse of process, the court, although it has ample powers to set aside or strike out such Notice of Discontinuance, may nevertheless in its absolute discretion, having regard to all the circumstances, grant the plaintiff leave to discontinue the action on such terms and conditions as the justice of the case demands. Accordingly both the trial court and the court below were right by refusing to set aside the Notice of Discontinuance filed in the suit (p. 816D)

D

Discontinuance found to be an abuse of process - Is upheld on terms

7. In my view the logical course for the court below would have been to uphold the Notice of Discontinuance as valid and effective as it did. It should however have further ordered that the respondent forthwith returned the N200,000.00 paid to his counsel by the appellants' counsel. This would have met the justice and the equities of the case. This further order the court below declined to make and it is my view, with respect, that this was a gross error on its part. In consequence, therefore, the order of this court shall be that learned respondent's counsel shall within seven days hereof refund the said sum of N200,000.00 direct to the appellants' learned counsel. (p. 817 F)

REPRESENTATION

Dr. Eyimofe Atake, with Adewale Atake Esq., for the Appellants.

Professor A. B. Kasunmu, S. A.N. with O.M. Lewis (Miss) for the Respondent.

CASES REFERRED TO

Ijiwoye Bros. Ltd. v. N.P.F.M.B. (1990) 2 N.W.L.R (Part 134) 583 and

Abidogun v. Arowomokun (1990) 2 N.W.L.R (Part 158) 618

H Okafor v. The State(1997)N.M.L.R 189

Okorodudu v. Okorodudu (1977) 3 S.C. 21 at 28

Abidogun v. Arowomokun (1990) 6 N.W.L.R. (Part 1158) 61

Obieniu v. Orizu(1972)2 E.C.S.LR 606

Castanho v. Brown and Root (U. K.) Ltd (1981) 1 Lloyd's Rep. 103

RULES REFERRED TO

Federal High Court (Civil Procedure) Rules 1976 O. 43 r. 1

Supreme Court Rules of England 0.21 r. 2

BOOK REFERRED TO

Supreme Court Rules of (England) Practice 1991 vol. 1 paras. 21/2-5/2 p.385 B

LEAD JUDGMENT BY IGUH JSC

By a Writ of summons issued on the 21st day of January, 1992 in the Lagos Judicial Division of the Federal High Court of Nigeria, the plaintiff instituted an action against the defendant jointly and severally claiming as follows- C

"The plaintiff's claim against the defendants jointly and severally is for the sum of N200,000. 00 being special and general damages for conversion of the plaintiff's 505 Peugeot saloon car which was delivered to the defendants for shipment from Germany to Lagos on board the Vessel "SAINT D ROLAND" AND/OR

The sum of N200,000. 00 from the defendants jointly and severally for negligence resulting in the loss of the plaintiff's 505 Peugeot saloon car which was given to the defendants for shipment from Germany to Lagos on board the Vessel "SAINT ROLAND". E

Upon an application ex-parte filed on the same 21st January, 1992 by the plaintiff, kassim, J. on the 22nd January, 1992 ordered the immediate arrest and detention of the vessel, "SAINT ROLAND" then lying at the Tin Can Island Port of Lagos pending other orders from the court. The plaintiff was ordered F to give the usual undertaking as to damages. Pursuant to this order, the vessel was duly arrested and detained.

On the 29th June, 1992, the defendants, having retained the services of counsel, Dr. Eyimofe Atake, filed a motion ex-parte for the release of their vessel. It would appear that at this stage, both parties through their respective counsel, entered into discussions directed at releasing the defendants' vessel G from arrest and detention. This was in a bid to reduce substantial losses that were mounting as a result of the arrest and continued detention of the vessel, H M.V. "SAINT ROLAND".

At the end of these discussions both counsel for the parties on the 28th April, 1992 agreed in writing as follows-

"(i) That the defendants' counsel, the firm of Eyimofe Atake and Co. to the

802 The Vessel "St Roland" v. Osinloye (1997) 4 KLR Iguh JSC
chambers of Professor A. B. Kasunmu, counsel for the plaintiff, in trust for their
client, a Nigeria International Bank draft No. 070712 dated the 28th April,
1992 for the sum of N200,000.00 as security for any sum that may be adjudged
due and payable to their client by the Federal High Court

(ii) That the plaintiff's counsel undertook to return the before-
B mention draft to the defendants' counsel as soon as the later secured a bank
guarantee in the sum of the plaintiff's claim in court, namely, N200, 000.00,
and handed the same over to the plaintiff's counsel.

(iii) That the said draft was given to the plaintiff's counsel without
C prejudice to any defence that may be open or available to the M.V. "SAINT
ROLAND" or Law owners in respect of the plaintiff's claims."

This agreement was duly signed by both counsel for the parties.

As agreed, the plaintiff's counsel by their letter No. ABK/MOC/1485
D of the 29th April, 1992 addressed to the trial court indicated that they had
no objection to the release of the vessel M. V. "SAINT ROLAND" as the
defendants' learned counsel had given them a Bank Draft for N200,000.00
in lieu of the agreed Bank Guarantee. The plaintiffs counsel by their said letter
to the court further confirmed that it was expected they would return the said
E Bank Draft to the defendants' counsel on receipt of their Bank Guarantee in
the same sum of N200,000.00. This letter which was copied to the defendants'
counsel stated as follows –

"Our Ref: ABK/MOC/1485

29th April, 1992

F The Registrar,
Federal High Court,
No. 7, Oyinkan Abayomi Drive,
Ikoyi,

G LAGOS.

Dear Sir,

RE: SUIT NO. FHC/L/6/92

ADEFEMIOSINLOYE

- V-

H THE VESSEL 'SAINT ROLAND' & 1 OR

Above matter refers. We have been served with the Respondents Motion dated
29th April 1992 asking for the release of the above mentioned Vessel arrested
on the Honourable Court's order on Monday, 27th April 1992. We have no
objection to the Vessel being released as we have been given a Bank draft for

N200,000. 00 in lieu of a Bank Guarantee which is expected in the next 24 hours and we are expected to return the draft in place thereto. Our Miss Tosin Kasunmu is on instructions to attend Court at 12 noon but in view of Information that the Court would have risen before then we would be much obliged for any assistance to ensure that the Vessel is released as per the Respondent's application.

We are grateful for your usual assistance and hope you bring this to His Lordship's attention.

Yours faithfully,

L. A. ADENIJI, ESQ.,

SOLICITOR.

cc: The Respondents' Counsel,

Eyimofe Atake & Co.,

7th Floor Great Nigeria House,

47/57 Martins Street,

LAGOS.

The above letter was exhibited to the defendants aforementioned application of the 29th June, 1992 for the release of the vessel and was therein marked Exhibit EU'2'. It was on the basis of this letter and the before mentioned written agreement between the parties that the vessel was by the order of court released from detention to the defendants.

By their letter of the 13th May, 1992, the defendants' counsel duly forwarded the agreed Bank Guarantee in the sum of N200,000.00 to the plaintiff's counsel and requested a return of their bank Draft for N200,000.00 in accordance with their written understanding of the 28th April, 1992. The plaintiff's counsel as per their reply stated inter alia as follows-

"Our understanding with the undersigned was that you will furnish us with a Bank Guarantee within 48 hours of the delivery of this bank draft.

When did not receive your Bank guarantee within and after the limited period we decided to lodge this cheque and same has been cleared. In this circumstance we do not need the bank guarantee again which is returned herewith."

Counsel thereafter engaged in exchange of correspondence with the plaintiff's counsel maintaining his position and refusing to return the defendants' Bank Draft or its proceeds. This is inspite of many protests from the defendants' a Bank Guarantee as per their agreement of the 28th April, 1992.

By their letter of the 8th June, 1992, counsel for the defendants informed the plaintiff's counsel that Peugeot 505 car which was the subject matter of the action had been located in Lome, Togo and that it would be arriving in Lagos on the 8th June, 1992. This was quickly followed by another letter of the 16th June, 1992 from counsel to the defendants to the plaintiff's counsel advising

them that the said car had been discharged at the Apapa Port, ready for collection. The plaintiff's counsel, while still keeping the proceeds of the Bank Draft, quickly responded by filing a Notice of Discontinuance in the suit pursuant to the provision of Order 43, rule 1 of the Federal High Court (Civil Procedure) Rules, 1976. This was on the 17th June, 1992.

B On the 3rd day of July, 1992, Olomojobi, J. upon an application ex parte
by the defendants ordered that the Notice of Discontinuance filed in the suit
be set aside and that the plaintiff should pay the said Bank Draft valued
N200,000.00 or its equivalent into court pending the determination of the motion
on notice for the same reliefs fixed for hearing on the 6th July, 1992. This was
C followed by another application by the plaintiff's counsel for an order discharg-
ing the said ex parte order of the 3rd July, 1992 on the ground that the court lacked
jurisdiction to entertain it following the effective discontinuance of the main
suit. Both the defendants' application to set aside the Notice of Discontinuance
filed in the suit together with payment of the aforesaid Bank Draft or its-
D equivalent into court and that of the plaintiff to discharge the interim order made
on the 3rd July, 1992 were heard together.

At the conclusion of hearing, the learned trial Judge on the 22nd July,
1992 after a close appraisal of the averments in the affidavits in support of the
two applications and the submissions of learned counsel could not be per-
E suaded that the learned counsel for the plaintiff had acted rightly in lodging the
Bank Draft into the Bank without due regard to the subsisting valid agreement
between counsel. Nonetheless she declined to make any pronouncement on
whether the action of the plaintiff by keeping the defendants' N200,000.00 even
after he had discontinued his suit amounted to an abuse of process. She based
F her decision on whether or not to set aside the Notice of Discontinuance for the
purpose of which she affirmed its validity and struck out the plaintiff's action.

Dissatisfied with the said ruling, the defendants lodged an appeal
against the same to the Court of Appeal, Lagos Division which in a unanimous
decision dismissed the appeal on the 7th November, 1994. Aggrieved by this
G decision of the Court of Appeal, the defendants have further appealed to this
court. I shall hereinafter refer to the plaintiff and the defendant and the
defendants in this judgment as the respondent and appellants respectively
Altogether, six grounds of appeal were filed by the appellants against this
decision of the Court of Appeal were filed by the appellants against this decision
H of the Court of Appeal. It is unnecessary to reproduce them in this If judgment.
It suffices to state that the parties pursuant to the Rules of this court, filed and
exchanged their written briefs of argument.

The six issues distilled from the appellants' grounds of appeal set out
on their behalf for the determination of this appeal are as follows-

“(A) *Did the Plaintiff/Respondent not abuse the process of the court*

by filing a Notice of Discontinuance to the action under the provisions of Order 43, Rule 1 of the Federal High Court (Civil Procedure) Rules 1976? That is to say, is the attitude of the Plaintiff/Respondent not inconsistent with the practise to discontinue an action without leave of Court?

(B) Can a Plaintiff file a Notice of Discontinuance to an action after B
gaining substantial advantages in that same action to the detriment of the Defendant having used the machinery of the Court through its counsel to defraud the Defendant? In such a case should not the Court whose machinery has been abused and misused set aside the Notice of Discontinuance or at least set it aside on terms?

(C) Did the learned Justices of the Court of Appeal not err in law in failing to consider some of the relevant, Significant and pertinent grounds of appeal as stated in the Notice of Appeal, as argued in the Brief of Arguments and Oral Submissions before them in Grounds (iii), (iv), (v) and (vi): and as formulated in the issues stated below?:

(iii) It is necessary for a written agreement to be made with recourse D
to the Court in which the parties to the action appear before that Court takes cognizance of the terms and effect of the agreement? Would not the Court be wrong to hold that because the written agreement was not made with recourse to the Court it cannot take cognizance of or uphold its terms and conditions? E

(iv) Is the learned trial judge not wrong in failing to set aside the Notice of Discontinuance in the action after she had held that the Defendants can rely on the Commentary passage in Order 21, Rule 2 of the Supreme Court Practice of England which was clearly that a trial judge had powers to set aside a Notice of Discontinuance where the plaintiff abuses such right by filling such F
Notice after obtaining substantial advantages over the Defendant?

(v) Did the learned trial judge not misdirect herself in failing to set aside the Notice of Discontinuance ordering that the plaintiffs pay back to the Defendants the sum of N200, 000.00 having found out and held as a fact G
the truth in the points stated in the Particulars of Ground (v) of the Notice of Appeal?

(vi) Did the learned trial judge not misdirect herself when she in effect allowed the. Plaintiff obtain a "double compensation" in the sense that the effect of her Ruling meant that the Plaintiff could keep the recovered, used, old, dented, scratched, 1983 model 505 Peugeot motor car, the subject matter of H
the suit, as well as the proceeds of the Defendants' bank draft for N200,000.00 being the Plaintiff's claim in the suit, for special and general damages for the loss of the recovered car?"

The respondent in his own brief of argument submitted that there was only one issue that arises in this appeal for the determination of this court. This is –

“Whether the learned justices of the Court of Appeal were right in holding that the Respondent did not abuse the process of Court by discontinuing the case vide a Notice of Discontinuance filed in the Federal High Court”

I have closely examined the issues set out in the respective briefs of the parties and it is clear to me that they are amply covered by the under mentioned three issues, namely-

1. Whether in all the circumstances of this case, the filing of the Notice of Discontinuance after the collection of N200,000.00 from the appellants as security in the suit and immediately after counsel for the respondent were advised that the respondent’s car, the subject matter of the suit, had been located and was ready for collection at the Apapa Port without repaying the said payment of N200,000.00 made as security to the respondent’s learned counsel amount to an abuse of process.

2. Whether the Court of Appeal was right by failing to set aside the Notice of Discontinuance filed in the suit and consequently, striking out the suit.

3. Whether the Court of Appeal was right by failing to set any conditions upon which the Notice of Discontinuance should take effect which in all the circumstances of the present case was the refund of the N200,000.00 in issue to the appellants by the plaintiff/respondent.

The above three issues, in my opinion overlap each other and I propose in this judgment to consider them together.

At the oral hearing of the appeal before us, both learned counsel for the parties adopted their respective briefs of argument and proffered additional submissions in amplification thereof.

The main contention of the appellants centered on the issue of whether the Notice of Discontinuance filed in the suit ought to have been set aside on ground of abuse of process or whether, in the alternative, its validity should have been affirmed provided, in the interest of justice, the N200,000.00 in issue is refunded to the appellants by the respondent. Their learned counsel, Dr. Eyimofe Atake in a clear emotional and passionate address submitted with considerable force that the conduct of the respondent in the entire issue bordered on fraud. He pointed out that the respondent’s counsel having received the sum of N200,000.00 from the appellants as security for any amount that may be adjudged against the appellants by the trial court committed an abuse of process by discontinuing the action without repaying the said interim

payment. He stressed that when the bank guarantee was subsequently presented to the respondent's counsel, it was rejected. He pointed out that as soon as the subject matter of the suit, an old 505 Peugeot saloon car was located, the respondent's counsel was instructed to collect the car but he immediately responded by filing a Notice of Discontinuance in the suit and refused to refund the N200,000.00 paid to them in trust for their client as aforesaid. B Relying on the decisions of the House of Lords in Castanho v. Brown and Root (D. K) Ltd. and others (1981) 1 Lloyd's Rep. 113 and Fakih Brothers v. Moller (Copenhagen) Ltd. and Others (1994) 1 Lloyd's Rep. 103 at 109 learned counsel described the position as a gross abuse of the court's process and that both the learned trial judge and the court below ought to have set aside the Notice C of Discontinuance as an abuse of process or, alternatively, impose conditions in the exercise of their inherent jurisdiction on which such notice should take effect.

Learned counsel next submitted that Order 43 Rule 1 of the Federal High Court (Civil Procedure) Rules, 1976 which is in pari materia with Order 21 Rule 2 of the Supreme Court Rules of England is silent on what a court can do in cases where the object of filing a Notice of Discontinuance is the unjust enrichment of the plaintiff to the prejudice of the defendant. He therefore argued that reliance can be placed on the provisions of the said Order 21 Rule 2 of the English Supreme Court Rules and the commentaries thereunder. These commentaries, E as reported in the Supreme Court Practice, 1991, Vol. 1, Paragraphs 21/2-5/2 at page 385 indicate that if a plaintiff abuses his right by serving a Notice of Discontinuance in abuse of the process, the court will have power to set aside such Notice. He contended that the respondent's counsel by obtaining payment of N200,000.00 in respect of which it was agreed they would hold in F trust, and by discontinuing the suit hastily the moment they were advised that the respondent's car in issue had been found and that they should go and collect the same, did not act bona fide in their conduct. He argued that both the trial court and the court below were wrong not to have applied the provisions of the above English Supreme Court Rule with its commentaries in the present G case. He added that even if the commentaries were inapplicable, the Court of appeal had the inherent jurisdiction to order a refund of the N200,000.00 by the respondent while striking out the suit. He urged the court to allow the appeal by setting aside the Notice of Discontinuance all the circumstances of this case was filed in bad faith and in abuse of process. Alternatively, he urged the court H to impose the condition, in exercise of its inherent jurisdiction. That the respondent refunds his unjust enrichment of N200,000.00, a condition the courts below erroneously failed in the interest of Justice to impose while striking out the suit.

Learned counsel for the respondent, Professor A B. Kasunmu, SAN. in his reply submitted that the relevant provision of the Federal High Court (Civil Procedure) Rules, 1976 which governs discontinuance of suits is Order 43 rule 1. He contended that the courts below had no jurisdiction by reason of the Notice of Discontinuance to discharge the trial court's order at the 31st July, 1992. He relied on the decisions in Ijiwoye Bros. Ltd. v. N.P.F.MB. (1990) 2 N.W.LR (Part 134) 583 and Abidogun v. Arowomokun (1990) 2 N.W.LR (Part 158) 618 and submitted that the learned trial Judge was right in ordering the striking out of the suit. He referred to the decisions in Ajalyn Shoes Ltd. v. Akinwande (1991) 2 NWLR (part 174) 432 and Okafor v. The state (1967) N.M.LR. 189 and contended that no question of considering the Supreme Court Practice in England is called for in the present case as the provision for discontinuance without leave under the Supreme Court Practice in England is totally different from the provision in our own rules. He however agreed with the Court of Appeal that the jurisdiction of the court to set aside whatever that has been taken in abuse of its process is inherent and may even be exercised suo motu when the circumstances arise. He contended that a lot of sentiment had been expressed as legal arguments by the appellants on the question of the refund of N200,000.00 paid to the respondent. He pointed out that the appellants are at liberty to pursue their claim to the amount in issue independently and see how far they could go. He argued that the order for the release of the appellants' vessel was unconditional and was not made against any deposit of the N200,000.00. The agreement was made by the parties at the instance of the court and was therefore purely private. He urged the court to dismiss this appeal.

Alternatively learned counsel invited the court to allow the appeal, strike out the Notice of Discontinuance and allow the case to proceed to judgment. He claimed that the respondent had in fact paid the N200,000.00 in issue into this court pursuant to its order of the 29th January, 1996.

Dealing now with the issues for determination, it is preferable for a better appreciation thereof to set out the relevant Rule of Court under which the Notice of Discontinuance in the present case was file. Both parties are in agreement that this was pursuant to the provisions of Order 43 rule 1 of the Federal High court (Civil Procedure) rules, 1976 which state as follows –

"If before the date fixed for hearing, the plaintiff desires to discontinue any suit against all or any of the defendants, or to withdraw any part of his claim, he shall give notice in writing of discontinuance or withdrawal to the registrar, and to every defendant as to whom he desires to discontinue or withdraw. After the receipt of such notice such defendant shall not be entitled to any further costs with respect to the matter so discontinued or withdrawn

than those incurred up to the receipt of such notice, unless the Court otherwise orders, and such defendant may apply ex parte for an order against the plaintiff for the costs incurred before the receipt of such notice and of attending the Court to obtain the order. Such discontinuance or withdrawal shall not be a defence to any subsequent suit."

It is clear under the above rule that a plaintiff has an unqualified right to discontinue his action against a defendant or any of them without leave of the court before the date fixed for the bearing of the suit. The condition he must satisfy is to give notice in writing of the discontinuance to the registrar and to every defendant as to whom he desires to discontinue or withdraw. Such Notice of Discontinuance should, once filed, terminate the proceedings and the appropriate order to make by the court is that striking out the suit. See Okorodudu v. Okorodudu (1977) 3 S.C. 21 at 28, Abidogun v. Arowomokun (1990) 6 N.W.L.R. (Part 158) 61, Ijiwoye v. N.P.F.M.B. (1990) 2 N.W.L.R. (Part 134) 583. Learned appellants' counsel however argued that the purpose for which the respondent applied the provisions of Order 43, rule 1 of the Federal High Court (Civil Procedure) rules, 1976 is inconsistent with the practice of the discontinuance of an action without the leave of court. He claimed that this is because the respondent was not entitled to file such a Notice without leave after he had gained substantial material advantage and unjustly enriched himself in the suit to the detriment of the appellants. In this regard, learned counsel relied on the commentaries to Order 21, Rule 2 of the English rules of the Supreme Court Practice which make provision for discontinuance of actions without the leave of the court. He submitted that the aforesaid English rule is in pari materia with Order 43, Rule 1 of the Federal High Court (Civil Procedure) rules, 1976 which also deals with the discontinuance actions without the leave of the court.

Order 21, Rule 2 of the said English Rules of the Supreme Court provides as follows –

"2 (i) Subject to paragraph (2A), the Plaintiff in an action begun by Writ may, without the leave of the Court, discontinue the action, or withdraw any particular claim made by him therein, as against any or all of the Defendants at any time not later than 14 days after service of the defence on him or, if there are two or more Defendants, of the defence last served, by serving a Notice to that on the Defendant concerned."

There is no doubt that the provisions of Order 21, Rule 2 of the English rules of the Supreme Court and order 43, rule 1 of the Federal High Court (Civil Procedure) Rules, 1976 essentially regulate cases of discontinuance of actions without the leave of the Court. The main difference between them is that whereas our local Rule confers the right to the discontinuance of cause or matter on a

plaintiff without the leave of the court before the date fixed for the hearing of the cause, the English rules confer such right on a Plaintiff at any time not later than 14 days after service of the defence on him.

It is convenient at this stage to reproduce the commentaries on Order 21, Rule 2 of the English rules of the supreme court relied upon by the appellants' learned counsel. It is contained in the Supreme Court Practice, 1991 at Paragraph 211/2-5/2, as follows-

'Although the plaintiff has the unqualified right under R. 2(1) to discontinue his action without leave of the Court before the service of the defence on him and indeed 14 days after such service, yet if he abuses such right by serving a notice of discontinuance after obtaining substantial in the advantage in the action to the prejudice of the defendant e.g. by securing substantial payments and an admission of liability, or otherwise, he will be guilty abuse of the process of the court and the Court will then have power to set aside his notice of discontinuance, but nevertheless, the Court in its discretion may grant him leave to discontinue the action on term.....'
(underling supplied for emphasis)

The first point I ought to dispose of is the argument of learned counsel for the appellants that as the payment of the said N200,000.00 to the respondent appeared quite inconsistent with a right to discontinue the action without leave, the leave of the trial court was therefore needed for a valid discontinuance of the suit. This leave the respondent failed to obtain before filing his Notice of Discontinuance in the suit. He therefore urged the court to strike out the said Notice as invalid.

With the greatest respect to learned counsel, I cannot accept the above proposition as well founded. **The provision of our rules on when a plaintiff has unqualified, right to discontinue his action without leave of the Court appears to me clear. This right, he may exercise, before the date fixed for the hearing of the suit. In the present suit, the Notice in question was filed by the respondent before the date fixed for the hearing of the suit. In the face of the clear provisions of Order 43, Rule 1 of the Federal High Court (Civil Procedure) Rules, 1976, it will be a definite error to import the additional or implied term urged upon this court by learned counsel for the appellants by reading into them, a provision that leave is needed to discontinue an action before the date ruled for the hearing of the suit if payment of some money has been made to a defendant.** Our Rules did not so stipulate and I cannot accept that the Notice of Discontinuance in the present suit, although filed before the date fixed for the hearing of the case, must be struck out or set aside for want leave simply because some money had been paid by the appellants to the respondent as security for any sum that may be adjudged due and payable to the respondent by the Federal

High Court. The respondent, without doubt, was entitled as of right to discontinue his action without leave before the date ruled for the hearing notwithstanding payment of the said N200,000.00 to him by the appellants.

In the second place, it is indisputable that there is ample jurisdiction in the courts to set aside or strike out any process of court, including a Notice of Discontinuance, taken out or issued in abuse of process. Accordingly, where a Notice of discontinuance is an abuse of process, it may rightly be set aside or struck out by the court. See Castanbo v. Brown and Root (U.K) Ltd. and others (1981) 1 Lloyd's Law Rep. 113 (H.L.) at 118. The first question that now arises for consideration is whether the Notice of Discontinuance filed in the present suit was in fact an abuse of process.

In this regard, the learned trial Judge after a close consideration of the facts found as follows _

"Having gone through the motion papers, the supporting affidavit and all the exhibits attached thereto, and having listened to the submissions of the Counsel for both sides, the following facts emerged:

1. That a written agreement was prepared by the representative of the Defendants.

2. That the agreement stated inter alia, that the Learned Counsel for the Plaintiff would hold in trust for his client a bank draft for a sum of N200, 000.00 as security for any sum that may be adjudged due..... by the Federal High Court provided the bank draft is handed back as soon as the Defendants hand over a bank guarantee in the same amount.

3. That the terms of the agreement were accepted by the Learned Counsel to the Plaintiff.

4. That a bank draft for a sum of N200,000.00 was handed over to the Learned Counsel to the Plaintiff.

5. That there is no time limit stipulated in the agreement within which the Counsel for the Defendants should bring a bank guarantee to the Plaintiffs counsel in exchange for the bank draft.

6. That the Learned Counsel for the Defendants brought a Motion Ex parte for the release of the vessel "Saint Roland".

7. That the Plaintiffs Counsel did Write a letter dated 29/4/92 to this Court through its Registrar stating inter alia; that they have no objection to the vessel being released and went on to crave the assistance of the Court to see that the vessel was released as they had been given a bank draft for N200, 000. 00 in lieu of a bank guarantee which they are expected to return to the Defendants when a bank guarantee is presented.

8. That it is only in the letter referred to at paragraph 7 above than

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the learned counsel for the Plaintiff unilaterally inserted a time limit of 24 hours within which the Defendants were to bring a bank guarantee in exchange for a bank draft - exhibit EU'4' of the Defendants' affidavit and OA '2' of the Plaintiffs affidavit."

B I think I ought to stress that none of the above vital issues of facts which are amply supported by overwhelming evidence before the trial court was seriously challenged before us. Indeed, the court below made similar findings and I agree entirely with both courts on those issues.

The learned trial Judge then, and quite rightly, in my view, reasoned thus-

C *"From the findings overleaf, I do not see how I can be persuaded that the Learned Counsel for the Plaintiff had acted rightly in lodging the bank draft into the bank without due regard to the valid agreement which Was subsisting. The Order for the release of the vessel was made having taken cognizance of the existing agreement between the parties as evidenced by exhibit EU'4' and OA '2' respectively. But the fact still remains that the agreement entered into by the Counsel to the Plaintiff was still in existence When the bank draft was lodged into the bank contrary to the terms of the agreement. To the best of my knowledge, I do not think that the provisions of the agreement have been altered by both parties."*

E She concluded as follows-

F *"Going back to the agreement entered into by the Plaintiff and the representative of the Defendants, I hasten to say that it was made without recourse to this Court. I cannot therefore hold that the Plaintiff has used the machinery of this Court to gain an unmerited advantage over the Defendants. That being so, I will not make a pronouncement on that issue; rather, I will decide on the Notice of Discontinuance for the purpose of which I hereby Order that the case be struck out."*

G With profound respect to the learned trial Judge, I think it was in the above conclusion that she slipped into a serious error.

The Court of appeal, for its own part, committed, if I may say with great respect, exactly the same error when it concluded as follows-

H *"In these circumstances, the learned judge was quite right when she refused to hold that the respondent had used the machinery of the Court to gain an unmerited advantage over the respondents and in refusing to pronounce on whatever dispute might have arisen from an alleged breach of the private arrangements between counsel for the parties. I agree with her that no circumstance of abuse of the process of the Court has been disclosed. The case has been properly struck out."*

As I have already observed, it is clear that the Notice of Discontinuance filed by the respondent in this suit was validly and properly filed. But it is equally clear that the service of a Notice of Discontinuance, without leave, though it complies, as in the present case, with the Rules of court, can be an abuse of the process of the court. The question is whether in the circumstances of this case, the respondent's Notice of Discontinuance constituted an abuse of legal B process.

In considering whether or not the service of a Notice of Discontinuance was an 'abuse of process, it is necessary to have regard to the overall position as between the plaintiff and the defendants and what the plaintiff was attempting to achieve by serving the Notice. See Fakih Brothers v. A. P. Moller (Copenhagen) Ltd. and others (1994) 1 Lloyd's Law Rep. 103 at 109. What, then, is the overall position as between the appellants and the respondent? What was the respondent attempting to achieve by filing the Notice of Discontinuance in the suit? C

I have earlier on in this judgment fully set out the facts of this case and it is unnecessary to repeat them all over again. It suffices to state that the respondent's claim is for N200,000.00 damages for the alleged loss or conversion of his second hand Peugeot 505 saloon car. Following a written agreement between learned counsel for both parties, Dr. Atake, for the appellants, handed over Bank draft for N200,000.00 to the Chambers of Professor Kasunmi, counsel for the respondent in trust for their client as security for the satisfaction of whatever judgment the respondent may obtain in the suit. The respondent's counsel undertook to return the draft as soon as Dr. Atake secured a Bank guarantee in the same amount and delivered the same to them. The said agreement was exhibited in the defendants' application of the 29th June, 1992 for the release of their vessel and was therein marked Exhibit EU"2". It was on the basis of Exhibit EU"2" and the agreement between the parties that the trial court by consent ordered the release of the vessel "Saint Roland" to the defendants. When, however, the Bank guarantee was presented to the respondent's counsel, they rejected the same contrary to the express agreement between both counsel. D E F G

Soon afterwards, the respondent's car was located. The appellants' counsel on the 16th June 1992 wrote to the respondent's counsel notifying them of this happy development and requesting them to collect the car from the Apapa Port. What was the respondent's reaction to this apparently good news? This was quickly to file a Notice of Discontinuance in the suit the very next day. This notwithstanding, they still refused to return the appellants' N200,000.00 as agreed. One may now ask what the effect of filing the said Notice of Discontinuance entailed. H

I think it ought to be noted that a Notice of Discontinuance once duly

and validly filed cannot be recalled for the suit ceases to exist the moment it is effectively discontinued. See Obienu v. Orim and other (1972) 2 E.C.S.L.R 606. The facts that must be borne in mind in this case include the following –

B (1) *The unreliable attitude of the respondent to the various agreements between counsel for both parties with regard to the said N200,000.00 : bank draft paid his counsel in trust for him.*

(2) *Lodging the appellants' N200,000.00 bank draft into the bank by the respondent's counsel in disregard of the valid agreement between the parties.*

C (3) *The blatant refusal of the respondent's counsel to return the appellants' N200,000.00 even after the withdrawal of the suit, although the amount was only paid as security for the satisfaction of any judgment debt in favour of the respondent in the suit.*

D (4) *The fact that the Notice of Discontinuance was quickly filed the very next day after the respondent's counsel were advised that the car in issue had been located, discharged at the Apapa Port and ready for collection.*

E (5) *That the respondent refused to return the appellants' N200,000.00 paid to him as security as aforesaid and had held on to this amount even after discontinuing his action for over four years until it was ordered that the same be paid into this court.*

F (6) *That the general effect of filing the said Notice of Discontinuance was that the respondent or his counsel kept the said N200,000.00 of the appellants, blocked the appellants' bank account by a total of N400,000.00, having regard to the additional N200,000.00 Bank Guarantee of the appellants which the respondent refused to accept and that the appellant additionally had his Peugeot 505 Saloon car in issue which awaited his collection from the Apapa Port.*

G **Additional to all the above, is the fact that it is a clear abuse of process to use the machinery of Notice of Discontinuance without leave to improve a plaintiff's position unjustly. See Castanho v. Brown and Root, supra at 114-115. Similarly filing a Notice of Discontinuance immediately after obtaining substantial interim advantages or some unjust enrichment in suit to the H prejudice of the defendant constitutes an abuse of process. Such interim advantage may include securing unjustifiable substantial payment in the suit just before filing the Notice to the detriment of the defendant. In the present case, it seems to me from all the circumstances of the case that the respondent would appear to have used the machinery of Notice of discontinuance without**

leave to improve his position, indeed, to enrich himself unjustly.

Both the trial court and the court below were unable to make pronouncement on whether there was an abuse of process in this case as, according to them, the issue arose out of alleged breach of a private arrangement between counsel for the parties without recourse to the court. With profound respect, I cannot accept this proposition as well founded. Both courts clearly appreciated the seriousness of the issue involved and appeared to have deprecated the conduct of counsel for the respondent in the entire matter. Said the learned trial Judge –

“From the finding above, I do not see how I can be persuaded that the learned counsel for the plaintiff had acted rightly in lodging the bank draft into the bank without due regard to the valid agreement which was subsisting.....”

The Court of Appeal, for its own part, commented, and quite rightly, in my view, as follows –

“Normally, the plaintiff would have no right to hold on to whatever is given as security for satisfaction of a judgment after the action had been determined by discontinuance or by a dismissal.....”

But then, it took cover, if I may say with the greatest respect, in its view that the dispute arose from an alleged breach of private arrangement between counsel for the parties.

The N200,000.00 in issue was paid to the respondent’s counsel as security for the satisfaction of whatever judgment the respondent may obtain suit. It was paid by the appellants to the respondent’s counsel in of the application then pending before the trial court for the release of the Vessel “Saint Roland”. The agreement is Exhibit “EU.2” and it formed the main ground for the application. Both counsel before the court stressed on the payment in issue which was deposed to in the affidavit in support of the application. Indeed learned respondent’s counsel in their letter to the court pointed out that they were not opposing the application to release the vessel as they had received a bank draft for N200,000.00 as security for the satisfaction of any judgment the respondent may obtain against the appellants. The trial court in granting the application also made clear reference to the facts deposed to in the affidavit in support of the application which mainly consisted of payment said N200,000.00 as security as aforesaid. **It seems to me clear in all the circumstances that both counsel having heavily relied on this arrangement before the trial court and the trial court having taken full cognizance thereof and released the vessel on that basis, it cannot now be argued that the payment of the said N200,000.00 was a mere private arrangement which the court did not act upon in arriving at its decision to release the vessel. In my view, the conduct of the respondent,**

and/or counsel on his behalf is the entire matter is, to say the least, despicable

and utterly unfortunate. I entertain no doubt that the filing of the Notice of Discontinuance in the suit constituted a definite abuse of process.

Having decided that the Notice in issue is an abuse of process, I will
 B now return to the question whether it was mandatory on the part of the courts
 below to set the Notice of Discontinuance aside or strike it out. In this regard,
 the Court of Appeal put the matter as follows-

*"Although a notice of discontinuance leads eventually to the deter-
 mination of the suit, until the suit is struck out the Court has an inherent
 C jurisdiction to pronounce on whether or not such notice is an abuse of its
 process. I hold therefore that notwithstanding that a plaintiff may discontinue
 his suit without leave, where a notice of discontinuance is an abuse of the
 process of the Court, the Court has an inherent jurisdiction to set such notice
 aside or set the conditions on which the notice would be allowed take effect".*

D

I think the Court of Appeal is quite right in the above observations.
 In my opinion, it cannot be mandatory on the part of the courts to set aside a
 Notice of Discontinuance which constitutes an abuse of process. I think the
 courts must have some discretion one way or the other in the matter. **Accord-**
 E **ingly it is my view that where a Notice of Discontinuance is pronounced an**
abuse of process, the court, although it has ample powers to set aside or strike
out such Notice of Discontinuance, may nevertheless in its absolute discre-
tion, having regard to all the circumstances, grant the plaintiff leave to
discontinue the action on such terms and conditions as the justice of the case
 F **demand.** See the commentaries at Paragraph 21/2-5/2 on order 21, Rule 2 of the
 English Rules of the Supreme Court, *supra*, the provisions of which to some
 extent, in pari materia with the provisions of Order 43, Rule 1 of the Federal High
 Court (Civil Procedure) Rules, 1976. **Accordingly both the trial court and the**
 G **court below were right by refusing to set aside the Notice of Discontinuance**
filed in the suit. It remains however to consider whether in all the circumstances
 of the case, the court below was right by failing to set any conditions on which
 the Notice would take effect, such as refunding the said N200,000.00 to the
 appellants by the respondent.

In this regard, the first point that needs be made is that although a
 H Notice of Discontinuance terminates an action, it does not determine altogether
 the jurisdiction of the courts in the suit, and the court might after discontinu-
 ance, make such order as might be necessary to give effect to the rights acquired
 by the defendant during the, course of the proceedings. See Castanho v. Brown
and Root (U.K.) Ltd. and others. supra at 114. Secondly, on an application for

leave to discontinue with an action, the power to order repayment of any interim payments, had, if it existed, depends on the inherent jurisdiction of the courts to prevent an abuse of their own process. As I have already mentioned, nothing could be more clearly an abuse of process than for a plaintiff, having received interim payments, to discontinue the action without repaying them. Even in a situation where no leave is prescribed for the filing of a Notice of Discontinu- B
ance, it seems to me well settled that the court has inherent has inherent power to prevent a party from obtaining by the use of its process a collateral advantage which it would be unjust for him to retain. See Fakiti Brothers v. A P. Moller (Copenhagen) Ltd. and others (1994) 1 Lloyd's Law Rep. 103 at 109 and Castanbo v. Brown and Root (U.K.) Ltd. and others. C

The real question for consideration is whether in the circumstances particular case, justice would have demanded that discontinuance be allowed on terms that the appellants recovered the sum of N200,000.00 they paid to the respondent as security for the satisfaction of whatever judgment the respondent may obtain against the appellants in the suit. D

In this regard, it is common place that N200,000.00 was paid by the learned counsel for appellants to the learned counsel for the respondent as security for any sum that may be adjudged due to the respondent by the Federal High Court in the suit in question. The Notice of Discontinuance filed in the suit was in all the circumstances of the case an abuse of the process of the court. E
I have also held that the court has inherent power to prevent a plaintiff from obtaining by the use of its process a collateral advantage which it would be unjust for him to retain. The Notice of Discontinuance having been validly and effectively filed, the suit in issue ceased to exist with the result that no further security was either needed or necessary in respect of that F
suit. **In my view the logical course for the court below would have been to uphold the Notice of Discontinuance as valid and effective as it did. It should however have further have further ordered that the respondent forthwith returned the N200,000.00 paid to his counsel by the appellants' counsel. This would have met the justice and the equities of the case. This further order the court below G
declined to make and it is my view, with respect, that this was a gross error on its part.**

I think I ought finally to observe that this court by its order of the 29th January, 1996 directed that the N200,000.00 in issue be paid by the respondent Registrar of this court within seven days for lodgement with the Union Bank of Nigeria, PLC., 40 Marina, Lagos in an interest yielding account until the final determination of this appeal. Pursuant to that order, N200,000 00 was duly sent to the Chief Registrar of this court by the respondent's counsel for lodgement as aforesaid. Due, however, to some administrative lapses following the H

movement of this court from Lagos to Abuja, the said Bank draft was paid into the Bank as ordered and has now become stale. In consequence, therefore, the order of this court shall be that learned respondent's counsel shall within seven days hereof refund the said N1,000,000.00 direct to the appellants' learned counsel.

B In the final result, this appeal succeeds and it is hereby allowed. The judgement and orders of the Court of Appeal are hereby set aside and in their stead the following orders are substituted, namely-

(1) That the Notice of Discontinuance filed in the suit, is pronounced effective, valid and properly given.

C (ii) That the respondent's case is accordingly struck out.

(iii) That in the interest of justice and pursuant to the inherent jurisdiction of this court, learned respondent's counsel is hereby ordered to refund the said N200,000.00 direct to the learned counsel for the appellants within seven days hereof.

D (iv) There shall be costs to the appellants against the respondent which I assess and fix at N1,000,000.00 in this court, N3,000,00.00 in the court below and N700.00 in the trial court.

(v) Costs of N3,000.00 awarded against the appellants in the court below in favour of the respondent, if already paid, shall forthwith be refunded.

E _____

WALI JSC

I have had a preview of the lead judgment of my learned brother, Iguh, JSC and I entirely agree with the reasoning and conclusion for allowing the appeal. I adopt the same as mine.

F For these same reasons I also hereby allow the appeal and adopt the consequential orders contained in the lead judgment

OGUNDARE JSC

G I have been privileged to read in advance the judgement of my learned brother Iguh JSC just delivered, I agree entirely with his reasonings and the conclusion arrived at by him in the said judgment. I adopt his reasonings as mine.

H Following the issuance of the writ of summons in this case the plaintiff who is Respondent in this appeal filed an application before the trial court for an order for the immediate arrest and detention of the Vessel "SAINTROLAND". In the affidavit in support of the application the reason given for the order sought was as contained in paragraphs 10 and 11. The paragraphs read:

"10. That unless an ORDER of this Honourable Court; directing immediate arrest and detention of the said Vessel "SAINTROLAND" is made,

the Vessel will sail and there would be no SECURITY offered to the Plaintiff in satisfaction of the Plaintiff's claim, should the claim succeed.

11. That the two Defendants are foreign based entities without any asset within the jurisdiction of this Honourable Court."

It is clear from the paragraphs that the main reason for asking for the arrest and detention of ship was to provide a security for the satisfaction of plaintiffs claim B succeed, the defendant being foreign based and having no assets in his country. In making an order on the application the judge of the Federal High Court adjudged as follows:

"Order as prayed, it is hereby ordered that the Vessel "SAINTROLAND" now lying at tin Can Island Port, Lagos, Nigeria, be arrested and detained C pending other orders from this Court. The plaintiff is to give an undertaking as to damages and also to give another undertaking to indemnify the Admiralty Marshall."

In consequence the ship was arrested and detained. This was the position the 22nd of January 1992. Realizing the enormous loss being sustained by them in D consequence of the detention of the ship, the defendants through their legal Practitioner, arranged with Plaintiff's counsel for a Bank guarantee in the sum of two hundred thousand Naira (N200,000.00) to be given in place of the arrested ship as security in satisfaction of the plaintiff's claim should the claim succeed. An agreement was reached between the parties whereby a bank draft for E N200,000. 00 was given by the Defendant's counsel to Plaintiff's counsel pending the issuance of the bank guarantee in that amount, It is in the light of that agreement that the Court on the application of the Defendants and with the consent of the ordered the release of the ship.

With the above background which the learned trial Judge knew about F I find it strange indeed that she, as well as the Court below, could hold that the agreement between the parties leading to the release of the ship was made without recourse to the Court and that the Plaintiff could not be said to have used the machinery of the court to gain an unmerited advantage over the G defendants. Both Court below did not find that there was an abuse of the process of court in this case. With profound respect to the two Courts that conclusion cannot be right. The bank draft, as well as the bank guarantee, were issued in lieu of the detention of the ship "SAINTROLAND" which detention was ordered by the Court an was security for whatever sum might be adjudged H of the Plaintiff. If the Court was not satisfied that the security was adequate it would not have ordered the release of ship.

From all I have been saying there is a clear case of abuse of legal process in this matter. The two Courts below should not have struck out the case on the plaintiff's notice of discontinuance without imposing a term that

the sum of N200,000.00 which passed from the defendants to the Plaintiff be refunded immediately. Which the striking out of the case there would be no need for any security being offered and the one already offered should be refunded. That is not all, the undertaking as to damages given by the Plaintiff on the arrest and detention of the ship was also a matter left to be decided between the parties.

B I will say no more on this as it is not an issue before us.

The conclusion that I reach is that I too allow this appeal and abide by all the consequential orders, including the order as to costs, made by my learned brother Iguh JSC.

C OGWUEGBUJSC

I had the advantage of reading in draft the judgment just delivered by my learned brother Iguh, J.S.C. I agree entirely with his reasoning and conclusions.

It cannot be said that there was no abuse of the process of the court D in this case. The learned trial judge in her ruling made the following observations:

“From the findings overleaf, I do not see how I can be persuaded that the learned Counsel for the Plaintiff had acted rightly in lodging the bank draft into the bank without due regard to the valid agreement which was subsisting. The Order for the release of the vessel was made having cognizance of the existing agreement between the parties as evidenced by exhibit EU ‘4’ and OA ‘2’ respectively. But the fact still remains that the agreement entered into by the Counsel to the plaintiff was still in existence when the bank draft was lodged into the bank contrary to the forms of the agreement.....”

F *Going back to the agreement entered into by the plaintiff and the representa-*
tives of the Defendants, I hasten to say that it was made without recourse to
this court. I cannot therefore hold that the Plaintiff has used the machinery
of this Court to gain an unmerited advantage over the Defendants. That being
so, I will not make a pronouncement on that issue, rather; I will decide on the
G *Notice of Discontinuance.....”*

The Court of Appeal has these to say before dismissing the defendants' appeal:

“Even though the English rules relating to discontinuance of suits may differ from the Federal High Court rules in regard to discontinuance of suit, that is of no consequence, since the power of the court to redress an abuse of its process does not drive from the rules relating to discontinuance of suits but from a common inherent jurisdiction possessed by courts in England, and in Nigeria..... Normally, the plaintiff would have no right to hold on to whatever is given as security for satisfaction of a judgment other the action

had been determined by discontinuance or by a dismissed..... I agree with her that no circumstance of abuse of the process of the Court has been disclosed”

The courts below reasoned correctly in the excerpts from their judgments but shied away from drawing the inevitable conclusion following from the reasoning. It is not an abuse of the process of the court to discontinue an action per se, but it is so where the plaintiff has used the machinery of the court to gain an unmerited advantage over the defendants, namely, keeping the proceeds of the bank draft obtained from the defendants as security for any sum that may be adjudged due and payable to him. By filing the notice of discontinuance, the plaintiff terminated the proceedings and there is no resolution of the case in his favour to entitle him to keep the whole amount or any part of it.

An improper use of the machinery of the court was made in this case. The Court can, always in an appropriate case such as this, act under its inherent jurisdiction to protect itself from abuse of its own process. See Metropolitan Bank Ltd. & or. v. Pooley (1885) 10 App. Cas 210 and Onalaja v. Oshinubi 12 WAC.A.503.

The courts below ought to have imposed a condition that the sum of N200,000.00 be refunded to the defendants before the notice of discontinuance would take effect.

I will allow the appeal and set aside the judgment of the court below. I abide by the consequential orders including the order as to costs contained in judgment of my learned brother Iguh J. S. C.

ADIO JSC

I have had a preview of the judgment just read by my learned brother, Iguh J.S.C, and I agree with him that this appeal succeeds. I allow it.

My learned brother has made comprehensive summary of the facts and I need not repeat them. No doubt, the findings of fact made by the learned trial Judge were fully supported by evidence. Where the learned trial judge and the Court below erred was in their thinking or belief that they could not do anything about the N200,000.00 bank draft which the appellants gave to the respondent. The understanding between the parties, consequent upon the written agreement executed by both of them and the letter (Exhibit EU'2') was that if appellants presented a bank guarantee for the same sum 'of N200,000.00 to the respondent, the respondent would return the said bank draft to the appellants. It was on account of the arrangement, which seemed to be satisfactory to both parties, that the vessel in question in this case was released from detention by the Court.

In view of the aforesaid understanding mentioned above, when the appellants' learned counsel forwarded the said bank guarantee to the learned counsel for the respondent and requested for the return of the bank draft, the learned counsel for the respondent should have returned the bank draft to the learned counsel for the appellants. The assertion that as the bank guarantee was not received within the "limited period" the respondent lodged the bank draft with a bank cannot be sustained because there was no limitation of 48 hours or 24 hours in the agreement between the parties. In the circumstance, the appellants could properly comply with the requirement (presentation of bank guarantee) within a reasonable time.

All along, it did not appear that the lower Courts bore in mind what warranted the provision of the security by the appellants by way or means of bank guarantee. If they did, they would have frowned upon the discontinuation of the respondent's action while the respondent still retained the bank draft of N200,000.00. The giving of security by way of bank guarantee arose because the respondent wanted to ensure that there was money that could be used to pay any amount that might be adjudged against the appellants by learned trial judge. If, as it was in this case, the respondent discontinued his action, there could no longer be any question of the trial judge awarding any amount to the respondent. In the circumstance, there was no necessity again for a security such as a bank draft for the sum of N200,000.00 or a bank guarantee. The respondent could not properly retain the bank draft for sum of N200,000.00 and at the same time discontinue the action. It was, in the circumstance, a clear case of abuse of the Court's process. The pertinent question was not whether legally the respondent had the legal power to file a notice of discontinuance. The relevant question was whether he exercised that power in good faith, improperly, or in abuse of the Court's process. It was a misuse or an improper use of Court's process to retain the money deposited as security for any amount that might be awarded at the conclusion of the trial of an action when the respondent knew that he had discontinued the action. It was a misuse of judicial procedure intended to further the respondent's interest to the detriment of the appellants. See Okafor & Ors. v. Attorney General, Anambra State & Ors. (1991) 6 N.W.L.R (pt. 20) 659. Further, a Court should not allow itself through technicalities to be used for perpetrating injustice. See H.M.S.Ltd. v. First Bank Ltd., (1991) N.W.L.R (pt 167) 290.

It is for the foregoing reasons and the more detailed reasons given in the lead judgment of my learned brother, Iguh, J.S.C., that I agree that this appeal succeeds. I allow it I abide by the consequential orders, including the orders for costs.