

IN THE FEDERAL COURT OF APPEAL
HOLDEN AT LAGOS
20TH DAY OF JULY, 1978. FCA/L/158/1977

BEFORE THEIR LORDSHIPS

S. A. OGUNKEYE, D. O. COKER, R. O. OKAGBUE, JJCA

ALHAJI RAIMI EDUN PLAINTIFF/APPELLANT
(Substituted for Gbadamosi
Amodu Shonibare II)

AND

MUKANDAT ARAGE AKINLEYE DEFENDANTS/
(Substituted for Moses Enrinle for RESPONDENTS
himself, the Chiefs and people of Ojo
and 7 others)

ACTIONS - *Discontinuance of action - Notice of discontinuance filed after the date fixed for hearing - Plaintiff cannot discontinue as of right - But must obtain leave of court.*

COURTS - *Nullity of proceedings - Proceedings of a subsequent trial Judge - That sort to overrule previous order by another Judge - Is a nullity.*

COURTS - *Jurisdiction - Prior Order that case cannot be returned to the list without leave of court - Subsequent proceedings before another Judge without complying with the condition precedent - Renders the proceedings a nullity for want of jurisdiction.*

COURTS - *Judgments - Court setting aside its enrolled judgment - Is only possible where the judgment was given without jurisdiction.*

FACTS

This case was commenced in 1961 before a Lagos high court Judge against only one defendant for himself and the chiefs and people of Ojo in respect of the land in dispute. Along the line, the case meandered through a winding course with several other parties joined and the matter was handled by several Judges without hearing taking off. Sometime in July 1971, Dosunmu J. adjourned the case sine die and ordered that it shall not be put on the list save with the leave of court. In November 1972 the plaintiff and 1st defendant appeared before Beckley J. who gave judgment in accordance with the terms of settlement filed in the case. Non of the parties obtained leave to restore the case on the list as was ordered by Dosunmu J. In November 1972, the other two sets of defendants filed separate applications. One of the applications prayed that the plaintiff's claim be dismissed or alternatively that the case be set down for hearing in compliance with the order of Dosunmu J. Before the applications were heard, the plaintiff filed a Notice of Discontinuance.

The learned trial Judge in determining the application ordered that the consent judgment previously given by him be set aside and ordered that the action be set down for hearing. Being dissatisfied, the plaintiff has now appealed to the Court of Appeal relying on 9 grounds of appeal. Plaintiff argued that because the case was adjourned sine die by Dosunmu J., no hearing date was fixed at the time he filed his notice of discontinuance. The notice it was submitted, was as of right and the court had no discretion but to strike out the suit.

ISSUE FOR DETERMINATION

Whether the Notice of Discontinuance filed by the plaintiff was rightly discountenanced by the learned trial Judge and whether the trial court can set aside its own judgment after it has been drawn up and entered.

HELD (Unanimously dismissing the appeal per judgment delivered by COKER JCA)

Actions - Discontinuance of action

1. We are of the view that the trial judge was right in his decision that the

present case fell within sub-rule 2 of Order XLIV R. 1 and that leave was necessary before the case could be discontinued. The decisions of the Courts have been consistent that where notice to discontinue a case was filed "after the date fixed for hearing", the plaintiff cannot discontinue as of right, but must obtain leave of Court pursuant to sub-rule 2 of Rule 1. In such a case, the Court has a discretion to allow the withdrawal or discontinuance of the suit on such terms as to costs, and as to any subsequent suit or otherwise as to the Court may seem just.(p. 262C)

Courts - Nullity of proceedings

2. We are of the view that the contention of Mr. Sogbesan, that the proceedings before the Court on 20th November, 1972 was a nullity is well founded for the simple reason that the trial judge, Beckley J. could not have made any order which in effect was in defiance of or overruling or countermanding the order made by Dosumu J on 6th July, 1971. In Amanamba v. Okafor (1967) N.M.L.R. 118 it was held by the Supreme Court (per Onyeama, J.S.C.) at p. 119 that Betuel J. erred in treating an amendment made by Raynolds, J. as a nullity when it was made in the presence of the parties. See also Orewere v. Abiagbe (1973) 9 & 10 S.C. 1 at p. 5. The Supreme Court in Adeigbe & Ano. vs. Salami Kushimo & Ors. (1965) 1 ALL N.L.R. 248 at p. 251 distinguished between cases where the court made an order without jurisdiction and where there was irregularity in the proceedings resulting in an order which the court was competent to make. In the former, any order made without jurisdiction is a nullity. In the later case, the order is not a nullity. (p. 268 B)

Jurisdiction - Prior Order

3. We are of the view that the proceedings before Beckley J. including the consent judgment given by him was a nullity. This is so because of non-compliance with the condition precedent ordered by Dosumu J. on 6th July, 1971 that "the case shall not be put on the list except with the leave of court ..." No leave was sought before the case was placed on the court list. Beckley J. had no jurisdiction to set aside the order of Dosumu J. by listing the case without leave of court. We are of the view, that he

overlooked the order of Dosumu J. or his attention was not drawn to this order on the 20th November, 1971, when he gave the consent judgment, without first requiring the plaintiff to fulfil the condition precedent, as per the order of Dosumu J., who further said leave will not be granted unless B the court was satisfied that Plaintiff was ready to proceed with the case in all respect. Surely on the 20th November, 1971, there was still outstanding the case against the 2nd - 8th Defendants. The Plaintiff purported to terminate the proceedings against them only on the 12th January, 1973, long after the purported "Terms of Settlement". (p. 269 D)

Court setting aside its enrolled judgment

4. Chief Williams has contended that the court cannot set aside its judgment once the judgment has been enrolled. We are in full agreement that if D the Court had jurisdiction to enter the judgment it could not set it aside excepting in a fresh suit. But the position is different where as in this case the Court lacked jurisdiction to give the judgment. The purported judgment is null and void and in law does not exist.

E In Chief Kofi Forfie v. Barima Kwabana Seifah (1958) 1 ALL E.R. 289, Mr. L.M.D. Da Silva, delivering the opinion of Privy Council at p. 290 said:

"A Court had inherent power to set aside a judgment which it F had delivered without jurisdiction....

We are of the view that the consent judgment given by Beckley J. on 20th November, 1971, was incompetent and null and void, and therefore hold that he was right to set aside the purported judgment. (p. 269 H & 272 F)

G REPRESENTATION

Chief F. R. A Williams, with S. A. Oladipo-Williams for the Appellant. Mr. A. O. Shogbesan for the 6th and 7th Respondents.

H CASES REFERRED TO

- Soetan v. Total Nigeria Ltd (1972) 1 S.C. 86
- Okorodudu v. Okoromadu (1977) 3 S.C. 21
- Rodrigues v. The Public Trustee (1977) 4 S.C. 29

Craig v. Kanssen (1943) 1 ALL E.R. P. 113

Forfie v. Seifah (1958) 1 ALL E.R. 248

Adeigbe v. Kushimo (1965) 1 ALL N.L.R. 248

Obirnonuromi v. Erinosho (1966) 1 ALL N.L.R. 250

Amanamba v. Okafor (1967) N.M.L.R. 118

B

RULES REFERRED TO

Supreme Court Rules Order XLIV r. 1(1)

JUDGMENT OF THE COURT

(Delivered by D. O. Coker JCA)

C

There are two main questions which call for decision in this appeal; which was filed by the plaintiff, suing for himself, the Chiefs and people of Iba, in Badagry Division of Lagos State. The two questions arose from the Ruling of Beckley. J. On two applications, the first by the Odan Family Parapo (later described in the Record as Adu Family) represented by 2nd, 3rd, 4th and 5th Defendants, and the second by the Okokomaiko Community represented by 6th, 7th and 8th Defendants. The record however reveals that Defendants 2, 4, 6 and 7 died before the Ruling, which is the subject-matter of this appeal. For ease of reference the Odan (or Adu) Family will be described hereinafter as 1st Respondents and the Okokomaiko community as 2nd Respondents.

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The 1st Respondents, by Notice of Motion, prayed that the Court do order a dismissal of the Plaintiff suit for want of prosecution or in the alternative, that the case be set down for hearing. The application was filed on the 28th November, 1972. The 2nd Respondent, on the other hand, also by Notice of Motion filed on 1.12.72, prayed for the following orders, namely:

G

(1) To set aside a consent judgment given on the 20th November, 1972 in accordance with the terms of settlement executed between the plaintiff and 1st Defendant (the Iba people).

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(2) Re-listing the original claim for a declaration or title to an area of land, situate lying being near Iba Town, in Badagry Division of Lagos State.

(3) For interim injunctions against the Plaintiffs and Defendants.

Both applications were supported by affidavit evidence. The Plaintiff/Appellant, did not file any counter-affidavit on the facts in support of both applications. The facts were not disputed.

B At the conclusion of arguments by learned counsel for the parties, the learned trial judge made the following orders:

"(1) that the consent judgment given on 20th day of November, 1972 be and is hereby set aside.

C *"(2) I also order that this action be set down for hearing on 9th September, 1974 in Court No. 5 until the case is finally determined."*

It is from this ruling that the Plaintiff has, with leave of the learned trial judge, appealed to this Court.

D Nine grounds of appeal were by leave substituted for the original grounds in the Notice of Appeal. The reliefs sought in this court were similarly amended.

E At the hearing of the appeal however, Chief Williams did not deal with the grounds of appeal separately. He prefaced his argument by stating the facts generally as appearing germane to his argument. The main points of his argument may be summarized as follows:

F 1. The learned trial judge erred in law in discountenancing the Notice of Discontinuance filled by the Plaintiff against the 2nd - 5th Defendants (the Odan Family) and 6th - 8th Defendants (the Okokomaiko Community) in as much as the Plaintiff claimed no reliefs against them in the writ of summons and on the pleadings.

G 2. The trial Court erred in making an order which had the effect of forcing Plaintiff to proceed against the said Defendants, against whom no claims were made, and who, in any event, were unnecessary parties to the suit.

H 3. The consent judgment following the terms of settlement between plaintiff and the 1st Defendant, was no concern of the other Defendants (1st and 2nd Respondents) who were not parties to the agreement and who were therefore not bound by the judgment resulting from the Terms of Settlement. A non-consenting defendant cannot therefore ask the Court to set aside a consent judgment on appeal or in a substantive

suit.

4. The trial Court cannot set aside its own judgment after it has been drawn up and entered. The judgment is valid and can only be set aside on proper grounds either in a substantive suit or on appeal.

For a proper appreciation of the arguments it is necessary to give B brief background and account of the facts which led to the two applications.

The writ of summons was filed by Olujide Somolu, then legal practitioner, on the 3rd March, 1961, against only one defendant, Bello Ayilara, Olojo of Ojo, for himself and the Chiefs and people of Ojo. The parties appeared in court on 10th day of April, 1961 before Morgan, J. (as he then was) who ordered Statement of Claim and plan to be filed and also Statement of Defence. Mr. Olantewaju appeared for the Defendants. Thereafter, the case began to meander through a winding course of interminable applications. The suit came before Duffus, J, Madarikan, J (as he then was). The latter struck out the suit on 13th November, 1961. By the 16th November, 1961, K.A. Kotun, Solicitor, took over the conduct of Plaintiff's case. One application followed after another and eventually, a date was fixed for hearing and hearing actually commenced on 9th May, 1963 before Madarikan J. This was after pleadings had been filed, not on time but after each side had made applications for extending time. Hearing before Madarikan could not continue after the first hearing day following an application on the second day of hearing for an order to join some of applicants as co-plaintiffs. Before that date the odan Family had already been joined as 2nd to 5th Defendants. The case came before not less than six other judges thereafter, and approximately ten other counsel appeared, including late Odufoeora-Sita, Thomas and Bickersteth. Parties died in quick succession and substitutions were made. No further hearing started until the case eventually came before Dosunmu, J. on 6th July, 1971, when he made the following order:

"I am adjourning the hearing of this case sine die and it shall not be put on the list except with the leave of the Court and such leave will not be granted unless the Court is satisfied that the Plaintiff is ready to proceed with the case in all respects. The application of 6th to 8th

Defendants will be taken on 19th July, 1971."

Several other applications followed and the case was never heard even though the record of proceedings went over 500 pages and a period of over thirteen years elapsed since the suit was filed. The case has yet to be determined. However, on the 20th November, 1972, the plaintiff and 1st Defendant appeared in Court before Beckley, J. who recorded the proceedings as follows:-

"*Alhaji R. Edun Vs. M.A. Akinleye & ors. 1st defendant present. Plaintiff present. COURT: Terms of settlement filed in this case. It is read to the parties". "The parties agreed to the contents of the Terms of Settlement."*

JUDGMENT

"*I give judgment in accordance with the Terms of Settlement filed.*
(Sgd.) J.O. BECKLEY
JUDGE 20/11/72."

The Terms of Settlement appear at page 434 of the Record of Appeal, and according to the endorsement appearing thereon, it was filed on 26/10/72. It is not clear how the case came on the list of the Court. But there is no suggestion that any of the parties made any formal application to the Court for leave to restore the case on the list for hearing in accordance with the Order of Dosumu, J. of 6th July, 1971.

However, on the 28.11.72, the Odan Family (2nd - 5th Defendants) filed the 1st application for an order that Plaintiff's claim be dismissed or alternatively that the case be set down for hearing in compliance with the Order of Dosumu, J. of 6th July, 1971. The 2nd application by Okokomaiko Community (6 - 8 Defendants) was filed on 28-11-72.

Before the two applications were heard a document titled "Notice of Discontinuance", signed by chief F.R.A. Williams, Plaintiffs' Solicitor, was on 12/1/73, filed in Court. It thus became necessary for the Court to consider the effectiveness or otherwise of this "Notice of Discontinuance" on the two applications pending before it.

A. L. A. Balogun, who as counsel at the trial Court represented the Plaintiff, submitted that when the Notice of Discontinuance was filed in the trial Court no date has been fixed for hearing of the case. This was

because the case had been adjourned sine die by Dosumu, J. The case, he submitted, therefore fell within the provisions of Order XLIV R. 1 (1) of the Supreme Court (Civil Procedure) Rules, and therefore the Court had no discretion but to strike out the suit. He relied for his submissions on the decision of the Supreme Court in S.C. 266/69: Soetan v. Total Nigeria Ltd. (1972) 1 S.C. 86. In the case it was held that the trial Court was in error to have dismissed the suit after Notice of Discontinuance had been filed on the 12th March, 1969 which was before the return date of the writ, that is, 17th March, 1969. The Court held the Notice fell within the 1st part of sub-rule 1, and therefore entitled the plaintiff to discontinue his action as of right without leave. Before us, Chief William, although he conceded that before the Order of adjournment sine die by Dosumu, J. a date for hearing had previously been fixed, argued that the position of the case thereafter reverted to a position, as it were, where no date had been fixed for hearing. This was because when Notice of Discontinuance was filed on 12/1/73 no hearing date had been fixed for the case. Consequently, the plaintiff had the right to withdraw the suit against 2nd to 8th Defendants and the Court had no discretion but to strike out the suit and further, the learned trial judge had no power to request the plaintiff to proceed with the hearing of the suit.

The learned trial judge in his ruling said as follows:

"Subsection 1 of rule 1 of Order XLIV refers to procedure for the discontinuance of an action when a date for hearing has not been fixed. Subsection 2 of rule 1 applies to a case where the plaintiff desires to discontinue a suit or to withdraw any part of his claim or if a defendant desires to discontinue his counter-continuance or withdrawal may be allowed on such terms as to costs and as to any subsequent suit which the court may see just. This rule implies that the leave of the Court should be obtained where the case has been fixed for hearing. The record in this case reveals that this case has been fixed for hearing. The record in this case reveals that this case has been fixed for hearing several times but for one reason or the other it has not been heard, and because it has not been heard in my view, does not necessarily mean that it comes within Order XLIV rule 1, subsection 1. My view is that once a case has been

fixed for hearing, although not heard, subsection 2, rule 1 of order XLIV, Supreme Court (Civil Procedure) Rules, applies - (See Abasi Giwa versus John Holt & Co. 10 N.L.R. 77). In the present case it is my view that leave of the Court not having been sought for the discontinuance of the action it would be ignored at this stage. As I have pointed out in this judgment there is a counter-claim filed by the 6th - 8th Defendants and whatever the wording of the Notice of Discontinuance can be, it does not put an end to the action."

For the purpose of our decision, we are of the view that consideration of the purported counter-claim is irrelevant to the validity of the Notice. Nevertheless, **we are of the view that the trial judge was right in his decision that the present case fell within sub-rule 2 of Order XLIV R. 1 and that leave was necessary before the case could be discontinued.** The decisions of the Courts have been consistent that where notice to discontinue a case was filed "after the date fixed for hearing", the plaintiff cannot discontinue as of right, but must obtain leave of Court pursuant to sub-rule 2 of Rule 1. In such a case, the Court has a discretion to allow the withdrawal or discontinuance of the suit on such terms as to costs, and as to any subsequent suit or otherwise as to the Court may seem just. The decision of the Supreme Court in the recent case of Emmanuel Amoma Okorodudu & Ano. vs. Erastus M. Okoromadu & Ano. (1977) 3 S.C. 21 appears to have resolved any doubt which hitherto had existed about the true meaning of "the date fixed for hearing" appearing in sub-rule 1 of Order XLIV Rule 1. We cannot be better than to quote from the judgment of Bello, J.S.C.:

"The validity of the notice of discontinuance came for determination on 22nd July, 1974, which was the adjourned date for the hearing of the case. It is necessary at this stage to refer to the relevant provisions of Order 28 under which the notice was filed and determined. Order 28 Rule 1(1) and (2) which is in pari material with Order XLIV/R.1 of the Supreme Court (Civil Procedure) Rules of the Lagos State) is in these terms:

"(1) 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 shall otherwise order; and such defendant may apply *ex parte* 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. B C

(2) If in any other case the plaintiff desires to discontinue a suit or to withdraw any part of his claim, or if a defendant desires to discontinue his counter-claim, or withdraw any part thereof, such discontinuance of withdrawal may be allowed on such terms as to costs, and as to any subsequent suit and otherwise as to the court may seem just." D

"The learned counsel for the Defendants in the High Court contended that the notice purported to have been filed under rule 1(1) was invalid as it had been filed after the original dates, namely 3rd to 6th June, 1974, in which the case had been fixed for hearing. He urged the court to refuse the case if the Plaintiffs failed to proceed with the hearing." E

He submitted that the notice fell within the provisions of rule 1(2) and that the plaintiffs' claim should be dismissed. In reply the learned counsel for the plaintiffs, having conceded that the case was originally fixed for hearing on 3rd to 6th June 1974, submitted that as the case was not heard on the said dates the fresh dates fixed for hearing, to wit, 22nd to 24th July, were the "dates fixed for hearing" within the meaning of rule 1(1) and consequently since the notice was filed before the fresh dates the plaintiffs were entitled as of right to discontinue under rule 1(1). He indicated to the court below that rule 1(2) was inapplicable as there was no application thereunder before the court." F G H

"In his ruling the learned judge held that "the date fixed for hearing" 1(1) was 3rd to 6th June, 1974 and that the notice was filed after the

said date. He then proceeded to treat the notice of discontinuance as if it were an application for leave to discontinue under rule 1(2)."

"In the 1st ground of appeal the learned counsel for the appellants reiterated his argument in the court below that 22nd to 24th July, 1974 was the date fixed for hearing" within the meaning of rule 1(1) and the plaintiffs were entitled as of right to discontinue before 22nd July, 1974. We are unable to accept the contention of the learned counsel. The interpretation put upon the words "the date fixed for hearing" in rule 1(1) by the learned judge that 3rd to 6th June, 1974 were the date fixed for the hearing of the case and that 22nd to 24th July, 1974 were adjourned dates is correct within the context of the relevant High Court Civil Procedure Rules making general provisions for trial."

"It appears from the foregoing provisions of the rules that "the date fixed for hearing" a case is the date the case is fixed for hearing on the cause list after the close of pleadings and any subsequent date for hearing is an adjourned date."

By applying this test, we are of the view that the 9th and 10th May, 1963 was the hearing date fixed after the close of pleadings and any subsequent dates were adjourned dates for hearing, within the provisions of sub-rule 2 of R. 1.

The judgment went further to state that the proper Order to make was to strike out the Notice and call upon the plaintiffs to proceed with the case as pleaded. The learned judge would only have been right in dismissing the claims if the plaintiffs had declined to proceed. We may also refer to another recent decision of the Supreme Court on the same point. It is Olayinka Rodriques & Ors. v. The Public Trustee & Ors. (1977) 4 S.C. 29. Sir Udo Udoma, J.S.C. delivering the judgment of the Supreme Court said at p. 36:

"..... it is clear that the case now on appeal can only be treated as "any other case" and falls squarely for consideration within the ambit of the provisions of Order XLIV Rule 1(2) as set out above. That being so, leave of the court was necessary in order to be able to withdraw the suit from court. What therefore learned counsel for the appellants in the court below did was to apply for that leave to enable him to withdraw the

suit from court in accordance with the instructions given to him by the appellants.

In such circumstances withdrawal of the suit from court could never be nor could it ever have been conceived as of right or automatic. It was not for the learned counsel in the court below to appear to dictate to the court what order to make in consequence of his application for leave. That was a matter exclusively for the court in the due and deliberate exercise of its judicial discretion, which naturally and inevitably must entail the weighing of all the circumstances of the case in the interest of justice and the balancing of the interests of the parties involved, including the balance of convenience and disadvantages, which might be suffered by any of the parties concerned. It is after the court shall have given consideration to such matters that it can arrive at what is undeniably a difficult decision, which must appear reasonable in all the circumstances of a particular case. It is then the duty of the court on the principles stated above to decide whether:

- (i) to grant leave for the suit to be withdrawn simply on terms that the same be struck out subject to the payment of costs;*
- (ii) or to grant leave for the suit to be withdrawn subject to the imposition of certain conditions to be fulfilled before a fresh suit concerning the same subject matter and the same parties may be instituted in the court; or*
- (iii) to refuse such leave in which case the suit must be dismissed also on terms as to costs."*

See Fox v. Star & Co. (1898) 1 Q.B. 636. Where it was held that when leave was necessary, the court may refuse leave and judgment may be given for the defendant, and also Stahlschmidt v. Walford 4 Q.B.D. 217 at page 219 per Cockburn, C.J. and Mellor, J.

We are therefore of the view that the learned trial judge was right when he made an order that the action be set down for hearing. It would be left for learned counsel for the Plaintiff/Appellant to proceed with the case on that day and if he declined to do so, for the learned trial judge to make any order which in the circumstances he deemed fit, bearing in mind the guidelines enumerated in Olayinka Rodrigues case, supra.

The other point raised by learned counsel for Appellant is whether the learned trial judge was justified in law in setting aside the consent judgment given by him on the 20th day of November, 1972. It will be recalled that the consent judgment was pursuant to the Terms of settlement signed between counsel for the Plaintiff and that of the 1st Defendant. Before the trial court, counsel for the 6th -8th Defendants submitted, inter alia that: "The consent judgment is a nullity. It cannot stand. The proceedings of 20.11.72 were taken in (writing and) deliberate defiance of the order of Dosumu J. of 6th July, 1971." He submitted that the consent judgment being a nullity, the court had the power to set it aside, and it is unnecessary for the defendants to file a fresh suit or appeal before the court can do so. In support of his submission learned counsel cited the following cases: Craig v. Kanssen (1943) 1 ALL E.R. P. 113 which was cited with approval in the Privy Council case of Chief Kofi Forfie v. Barima Seifah (1958) 1 ALL E.R. 248 at p. 290, Adeigbe v. Kushimo (1965) 1 ALL N.L.R. 248 and Obirnonuromi v. Erinoshio (1966) 1 ALL N.L.R. 250 at page 251. Mr. A.L.A. Balogun, replied that the consent judgment was binding only on the contracting parties and not on the other defendants who were not parties and that Order XL R. 5 of the Supreme Court (Civil Procedure) rules was inapplicable, because the consent judgment although given in the absence of other defendants (excepting the 1st who consented to the Terms of settlement) was not a judgment against them. That the two consenting parties were not complaining about the judgment and that as the judgment had been enrolled, the judgment can only be set aside in a fresh suit. There were other submissions, made by counsel for the parties which we need not reiterate. We agree that the consent judgment was not given against the 1st and 2nd Respondents and the Order XL R. 5 is therefore inapplicable.

However, the learned trial judge, after reviewing the various submissions and the authorities stated in his ruling at p. 513:

"To my mind there have been many irregularities in the Terms of settlement as well as the proceedings in court on the 20th November, 1972, in which it appears that the court has been misled to giving judgment for the plaintiffs in accordance with the Terms of Settlement, and I

have therefore come to the Conclusion that the proceedings of the 20th November, 1972, are a complete nullity."

Chief Williams attacked this part of the Ruling by saying that the 2nd to 8th Defendants have no right to seek an order setting aside the consent judgment because it does not affect them. He referred to the submissions of the Respondents in the lower court, namely, B

(a) that the 6th - 8th Defendants alleged misrepresentation and concealment;

(b) that the judgment terminated behind the other defendants and that this could not be done in view of their counterclaim; C

(c) that the heading of the terms of settlement misled the court in giving judgment.

He argued that the order of misrepresentation can only be decided on appeal or in a substantive action. In support he cited the following cases: D

(1) MacCarthy v. Agard (1933) 2 Q.B. 417 at p. 423.

(2) Babajide v. Aisa (1966) 1 ALL N.L.R. 254 at p. 257 and 22 Halsbury's Laws 3rd Ed. para. 1972.

In this case, the order has been drawn up. As far as the 8th Defendant was concerned he has no locus standi and cannot sue or appeal from the consent judgment. E

Mr. Sogbesan replied that the significant point was the validity of the consent judgment, which was given in clear defiance of the order of Dosumu J, made on the 6th July, 1971. He submitted that no application was made to re-list the case after it had been adjourned sine die. He referred to paragraphs 8 and 9 of the affidavit at p. 448 of the record. The deponent in those paragraphs averred - F

"That no notices were served by the Court to the 6th to 8th Defendants giving notice of the hearing of this suit on the 20th of November, 1972." G

and that the first intimation of the judgment was when he heard drumming and dancing by the Plaintiff's supporters in the village in celebration of their victory and on inquiry he heard about the judgment. H

He submitted that the judgment was a nullity in the circumstances. In support, he cited the case of Marion Obimonure v. Erinoshio & Ano.

(1966) 1 ALL N.L.R. 250 and that the failure to notify the other defendants was fundamental and the other defendants are entitled ex debito justitia to have the judgment set aside as a nullity. Other cases cited are Mullins v. Mowell (1879) 11 Ch. D. 763 per Jassel, M.R. at p. 766. Kofie
 B Forfie v. Barmua Seifah (1958) 1 ALL E.R. 289 at p. 290. Hamp-Adams vs. Hall (1911) 2 K.B. 942 at p. 943.

We are of the view that the contention of Mr. Sogbesan, that the proceedings before the Court on 20th November, 1972 was a nullity is well founded for the simple reason that the trial judge,
 C **Beckley J. could not have made any order which in effect was in defiance of or overruling or countermanding the order made by Dosumu J on 6th July, 1971. In Amanamba v. Okafor (1967) N.M.L.R. 118 it was held by the Supreme Court (per Onyeama,**
 D **J.S.C.) at p. 119 that Betuel J. erred in treating an amendment made by Raynolds, J. as a nullity when it was made in the presence of the parties. See also Orewere v. Abiagbe (1973) 9 & 10 S.C. 1 at p. 5.**

E **The Supreme Court in Adeigbe & Ano. vs. Salami Kushimo & Ors. (1965) 1 ALL N.L.R. 248 at p. 251 distinguished between cases where the court made an order without jurisdiction and where there was irregularity in the proceedings resulting in an order which the**
 F **court was competent to make. In the former, any order made without jurisdiction is a nullity. In the later case, the order is not a nullity. Ademola, C.J.N. said:**

"There seems to be a confusion of thought between jurisdiction and regularity: between the competence of the court to hear the case and
 G *the propriety of a bench who had not heard all the evidence adjudicating on the case.*

This matter was aptly put in a judgment of this court in the appeal Gabriel
Madukolu v. Johnson Nkemdilim F.S.C. 344/1960 (unreported) decided
 H on the 12th day of November, 1962, where Bairamian F.J., put it thus:

"a court is competent when -

(1) It is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one

reason or another; and

(2) the subject matter of the case is within its jurisdiction, and there is no feature in the case which prevents the court from exercising its jurisdiction; and

(3) the case comes before the court initiated by due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction."

He continues:

"Any defect in competence is fatal, for the proceedings are a nullity however well conducted and decided: the defect is extrinsic to the adjudication. C

If the court is competent, the proceedings are not a nullity; but they may be attacked on the ground of irregularity in the conduct of the trial;" D

We are of the view that the proceedings before Beckley J. including the consent judgment given by him was a nullity. This is so because of non-compliance with the condition precedent ordered by Dosumu J. on 6th July, 1971 that "the case shall not be put on the list except with the leave of court ..." No leave was sought before the case was placed on the court list. Beckley J. had no jurisdiction to set aside the order of Dosumu J. by listing the case without leave of court. We are of the view, that he overlooked the order of Dosumu J. or his attention was not drawn to this order on the 20th November, 1971, when he gave the consent judgment, without first requiring the plaintiff to fulfil the condition precedent, as per the order of Dosumu J., who further said leave will not be granted unless the court was satisfied that Plaintiff was ready to proceed with the case in all respect. Surely on the 20th November, 1971, there was still outstanding the case against the 2nd - 8th Defendants. The Plaintiff purported to terminate the proceedings against them only on the 12th January, 1973, long after the purported "Terms of Settlement". F G H

Chief Williams has contended that the court cannot set aside its judgment once the judgment has been enrolled. We are in full

agreement that if the Court had jurisdiction to enter the judgment it could not set it aside excepting in a fresh suit. But the position is different where as in this case the Court lacked jurisdiction to give the judgment. The purported judgment is null and void and in law does not exist.

In Chief Kofi Forfie v. Barima Kwabana Seifah (1958) 1 ALL E.R. 289, Mr. L.M.D. Da Silva, delivering the opinion of Privy Council at p. 290 said:

"A Court had inherent power to set aside a judgment which it had delivered without jurisdiction. Lord Greene, M.R., in Craic v Kanssen (1) (1943) 1 ALL E.R. 108 at page 113, after referring to several decisions, had said:

"Those cases appear to me to establish that an order which can properly be described as a nullity is something which the person affected by it is entitled *ex debito justitiae* to have set aside. So far as the procedure for having it set aside is concerned, it seems to me that the court in its inherent jurisdiction can set aside its own order; and that an appeal from the order is not necessary."

"Their Lordships were of the same opinion. Assuming that the judge had no power on June 29, 1949, to review his judgment of May 10, 1949, he nevertheless had power to declare it a nullity and proceed to give a fresh judgment. This, in fact, he had done, and the only criticism of the proceedings of June 29 that could be made was that, on a question of procedure, he attributed the authority to do the thing he did to a source from which it did not flow. But, although the source named was, on the assumption made, incorrect, he undoubtedly had had power to do the thing he had done. No other error could be said to have been committed. Such an error did not, in their Lordships' opinion, vitiate the act done. It followed that the judgment of June 29, 1949, was not a nullity."

See also the judgment of the House of Lords in the case of Lizard Brothers & W. vs. Midland Bank (1933) A.C. 289 where the question arose whether an order nisi should not be set aside on the ground that the judgment was given against a non-existent defendant, since the Industrial Bank, had ceased to exist as a juristic person before the judgment. Lord

Wright said at p. 296:

"..... since it is clear law, scarcely needing any express authority that a judgment must be declared a nullity by the Court in the exercise of its inherent jurisdiction as soon as it appears to the Court that the person named as judgment debtor was at all material times at the date of the writ and subsequently non-existent" B

See also Tesi Opebiyi etc. v. Shittu Oshobaja & Ano. (1976) 1 S.C. 195 at p. 200.

There is a point which Chief Williams raised while prefacing his argument on the grounds of appeal. Although we do not consider the point relevant for our decision we feel it is necessary to comment upon it. It is the propriety of joinder of the two sets of Respondents who, on their respective applications, were joined as co-defendants. He submitted that it was wrong to have joined them as co-defendants. The Plaintiff was not making any claim against either of them on the writ of summons and on the pleadings. The claims to some portions of the land in dispute were adverse to that of the original Defendant and their present in the suit has the effect of confusing the issues and embarrass the plaintiff. He relied on the Supreme Court decision in Aromire v. Awoyemi (1972) 1 ALL N.L.R. 101 in support of his submission. In an obiter in that judgment, the Court observed that the joinder of 4th, 5th and 6th Defendants should not have been made as their interests were adverse to those of 1st, 2nd and 3rd Defendants. The decision is unlike that of the same Court in a latter case of Chief Awani & 3 Ors. v. Erejuwa II, Olu of Warri (1976) 11 S.C. 306 where the issue of joinder was a ground of appeal and extensively argued. The point regarding this joinder was never a ground of appeal raised in Aromire's case and was not argued by counsel. In the later case the propriety or otherwise to join the Applicants was the main point of contention in the appeal. The application in that case, as in the present one, was made under order 7 rule 10 (2) of the Western State High Court (Civil Procedure) Rules which were applicable to Bendel State at the material time. H

The trial judge had refused the application of the interveners. It would appear from the judgment of the Court that their interests were not identical with those of the existing defendants. The Supreme Court re-

versing the order of the trial judge held at p. 313 that the question which the trial court ought to address itself was "whether or not the applicants-appellants were making a bona fide claim of right or interest in the subject-matter of the suit, or to the extent of such right or interest if any, to enable him to decide whether or not the presence of applicants/appellants before the Court was necessary for the purpose of effectually and completely adjudicating upon and settling all the questions in controversy in regard to the subject-matter of the suit before him." Each of the two sets of Respondents, like the original Defendant, have filed a plan of some area of land which they claim as owners, and alleging to be within the land which the appellant claimed against the Plaintiff and 1st Defendant. From the records it is clear that each of the parties filed a plan of the land which is in dispute as far as it affects his or their interest. For the Plaintiff/Respondent, see p. 15 paragraph 2 of the Statement of claim. The 1st Defendant also filed a plan vide paragraph 5 of the Statement of Defence (p.22) and at page 27 of the record in paragraph 4 of the Statement of Defence is referred a plan of the Odan Family Parapo (2nd - 5th Defendants). At page 396 of the Record (the Affidavit of 8th Defendant - Abudu Aro) a plan of the Okokomaiko Community was attached and marked Exhibit A in paragraph 15. It is clear therefore that the land claimed by each of the disputing parties could easily be identified. As we have already stated, the appeal before us, in our view, does not turn on this point.

We are of the view that the consent judgment given by Beckley J. on 20th November, 1971, was incompetent and null and void, and therefore hold that he was right to set aside the purported judgment.

In the result, the appeal fails and is hereby dismissed. The Respondents are entitled to the costs of this appeal which will now be fixed.