

SUPREME COURT OF NIGERIA
18TH DECEMBER, 1998. SC. 233/1994
CORAM:- S. M. A. BELGORE, A. B. WALL, M. E. OGUNDARE,
U. MOHAMMED, S. U. ONU, JJSC.

MOHAMMED NDEJIKO

MOHAMMED & 4 ORS. PLAINTIFFS/APPELLANTS
AND

1. MOHAMMED HUSSEINI

2. ALHAJI SAADU KAWU DEFENDANTS/RESPONDENTS
(Emir of Lafiagi)

APPEALS - Concurrent findings - Of both the trial and appellate court
- Have not been shown to be wrong or perverse - To warrant interference
by the Supreme Court.

APPEALS - Notice of appeal - When the trial court granted the applica-
tion to set aside its default judgment - The notice of appeal pending
became impliedly abandoned.

JUDGMENTS - Default judgment - Judgment delivered in the absence
of filing a statement of defence - And nonappearance of defence counsel
- Is a default judgment.

JUDGMENTS - Setting aside - Power of court - Until the court pro-
nounced a judgment on merit or by consent - It retains the power to set it
aside - And the power is discretionary

JUDGMENTS - Default judgment - Application to set aside - Is prima
facie not an abuse of process - Where neither the appeal filed by the
applicant was entered nor was the order on the default judgment drawn
up.

PRACTICE & PROCEDURE - Default judgment - Oral application to

*proceed with the hearing of the case made and granted on the same date
- The proper thing was to adjourn the case to another date for proof -
And to put the other counsel on notice.*

FACTS

The plaintiffs/appellants in a representative capacity filed their writ of Summons in the High Court of Kwara State holden at Ilorin and claimed against the defendants/respondents for various declarations, an order and an injunction. The learned trial judge, on 15th of May, 1992 after extending time for the plaintiffs to file their statement of claim and deeming same as duly filed and served on the defendants reminded the defendants that they had 30 (thirty days) within which to file their statement of defence. The case was then adjourned sine die. The case came up before the court on 19th November, 1992 and only counsel for the plaintiffs was present. The learned trial judge recorded that he was satisfied, on the strength of Exhibits "A" to "A3" that the defendants had been served with the hearing notice to attend the proceedings on that day. Learned counsel for the plaintiffs then made an oral application to be permitted to prove the case for the plaintiffs. The application was granted. The learned counsel called two witnesses and closed his case. The learned trial judge on the following day, entered judgment for the plaintiffs as per their statement of claim. On the 24th of November, 1992, learned counsel for the defendants filed an appeal against the judgment. On 26th November, 1992 the defendants through their new firm of solicitors, filed an application on notice praying for: leave of the Honourable Court to set aside the judgment given on the 20th November, 1992 and; leave to grant an extension of time to the applicants to file the statement of defence attached and exhibited herewith.

In a considered ruling and after considering all the facts involved the learned trial judge granted the application as prayed, set aside his default judgment of 20th November, 1992. He then restored the case to the Cause List and granted the defendants leave to file their statement of defence subject to all costs awarded against them being paid within 21 days from the day of the ruling. Aggrieved, the plaintiffs lodged an

appeal to the Court of Appeal Kaduna which Court dismissed the appeal. Still aggrieved by the judgment of the Court of Appeal, the plaintiffs have now further appealed to the Supreme Court raising two issues.

ISSUES FOR DETERMINATION

"(i) Considering the circumstances of this case, whether the Court of Appeal was right in upholding the decision of the trial Judge setting aside the earlier judgment delivered by him on 20/11/92, particularly when the appeal filed by the appellants (now respondents) and the respondents' were/are subsisting and/or not withdrawn - GROUNDS 1, 2, 3 AND 5.

(ii) Whether it is compulsory or even necessary to serve hearing notices on a party who is already represented by counsel when such notice has been served on the said counsel - GROUND 4."

HELD (Dismissing the appeal per lead judgment of **WALI JSC**, **OGUNDARE JSC** Dissenting)

Judgment delivered in the absence of statement of defence

1. I have no hesitation in agreeing with both the trial court and the Court of Appeal that the judgment of Olagunju J. delivered on 20th November, 1992 is a default judgment as it was delivered in the absence of filing a statement of defence and non-appearance of defence counsel at the hearing. See U.T.C. Nig. Ltd. v. Pamotei (1989) 20 NSCC (pt. 1) 523 at 549, and Order 37 rule 9 of the Kwara State High Court [Civil Procedure] Rules, 1989. (p. 2666 D)

Judgments - Setting aside - Power of court

2. The principle is that unless and until the court pronounced a judgment on merit or by consent it retains the power to set aside its own default judgment.¹ The power to do so is discretionary which has to be exercised judiciously, guided by the following principles pronounced by this court in Williams & Ors. v. Hope - Rising & Voluntary Funds Society

¹ The Supreme Court in ACB PLC v. Losada Ltd. (1995) 7 KLR 1486 also pronounced on when a court is competent to set aside its own judgment

(1982) 1-2 SC 145:

"1. The reasons for the applicant's failure to appear at the hearing or trial of the case in which judgment was given in his absence; etc. (p. 2666 H)

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Oral application to proceed with hearing

3. It appears to me that the application to proceed with the hearing of the case and to prove same was made orally on 19th November, 1992 and granted on the same date. The respondents were not served with the hearing notice for the appellants to prove the case on that date. In my view, the proper thing for the trial court to do was to adjourn the case to another date for proof and to put the other counsel on notice of the new date, particularly when the previous time the parties appeared in court on 15th May, 1992, the case was adjourned sine die. The default judgment could have been set aside even on this ground. See Okafor & Ors. v. Attorney-General of Anambra State & Ors. (1991) 6 NWLR (pt. 220) 659 (p. 2675 A)

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Default judgment - Application to set aside

4. The inherent jurisdiction of a court is adjunct to powers conferred on it by the Rules, and in a proper case the court will exercise the power. An application to the court to set aside its default judgment is prima facie not an abuse of process, even where the applicant has filed a notice of appeal, provided that the appeal has not been entered in the appellate court. See Ogunremi v. Dada (1962) 1 All NLR (pt. 4) 663 at 668 and Okafor & Ors. v. Attorney-General of Anambra State & Ors. (supra), or an order to that effect has been drawn up: See Backelmann v. Nwachi (1965) 1 All NLR 112. In the present case, neither the appeal was entered in the Court of Appeal nor was the Court order on the default judgment drawn up prior to its being set aside by the trial court. The reasons and circumstances why the judgment was set aside was fully explained in the Ruling of the trial court which was justifiably affirmed by the Court of Appeal. (p. 2675 H)

Appeals - Notice of appeal

5. When the trial court granted the application to set aside the default judgment, the notice of appeal pending in that court became impliedly or constructively abandoned. (p. 2676 F)

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Appeals - Concurrent findings

6. There is concurrent findings of both the trial and the appellate courts which have not been shown to be wrong or perverse to warrant interference by this court. (p. 2676 H)

C

NOTABLE POINTS OF INTEREST

OGUNDARE JSC (Dissenting)

1. The power of appellate court over a pending appeal

Once an appeal is filed, the Court from which the appeal is lodged, whilst it has power to entertain some interlocutory applications in the appeal, such as granting a stay of execution or injunction pending appeal and this power it possesses concurrently with the appellate court - it cannot deal with the appeal in a manner inconsistent with the power of the appellate court over the appeal. For instance, the trial court cannot dismiss or strike out the appeal for failure on the part of the appellant to perform conditions of appeal or where the appellant has filed a notice of withdrawal of the appeal. All the trial court can do in such cases is for its registry to transmit to the appellate court, in this case the Court of Appeal, the certificate of non-compliance or the notice of withdrawal of appeal and the Court of Appeal, on receipt of such document, will call up the appeal for dismissal or striking-out see Order 3 rules 18 and 20 of the Court of Appeal Rules. And this is so notwithstanding that the appeal has not been entered in the Court of Appeal. When the appeal is entered the concurrent powers the trial High Court has with the Court of Appeal come to an end for the former and the latter becomes completely seized of the matter. (p. 2692 D)

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2. Election as to remedies

When a default judgment is given against a party, that party has a choice

of either accepting the judgment and abide by it or move the trial court to set it aside and hear the suit on its merit or appeal against it. The party is put to his election. And where the party has made his election; he loses the other remedy or remedies. Turning to the instant case, the Defendants having chosen to appeal to the Court of appeal against the judgment of 20/11/92 are estopped, during the pendency of the appeal, from resorting to the remedy afforded them by the rules of court. This estoppel affects the competence of the trial High Court to exercise its powers to set aside its own judgment given in default of pleadings or appearance. (p. 2693 B)

3. Feature which prevents the court from exercising its jurisdiction

Although the subject matter of the case, that is, the application to set aside a default judgment is within the jurisdiction of the trial court, there is a feature in the case, - the estoppel against the Defendants from resorting to that remedy after having chosen the alternative remedy of appeal which still subsists - which prevents the court from exercising its jurisdiction. Being incompetent, therefore, the proceedings and ruling of Olagunju J setting aside his judgment of 20/11/92, as well as the appeal to the Court below, are a nullity and I so declare. (p. 2694 G)

4. Prayer to set aside judgment in the circumstances of this case is an abuse of process

The conduct of the Defendants in appealing against the default judgment and, without first withdrawing that appeal, praying at the same time the trial court to set aside the default judgment amounts to an abuse of the court's process and the trial court in such a situation was under a duty to interfere to stop an abuse of its process - See Okoroduddu v. Okoromadu (1977) 3 SC. 21 (p. 2695 D)

H MOHAMMED.JSC

The issue of election was not raised

5. The issue of election as my Lord, Wali, had opined in his judgment was not raised by any of the parties. Even if such an issue had been

raised it is my respective view that the doctrine is inapplicable to this case. The doctrine had its origin from Scotch Law as observed by Lord Redesdale in Birmingham v. Kirwan (1805) 2 Sch. and Lef 444, 449. An appeal is not an alternative remedy to any proceeding in a court of law. It is a right given by statute and rule. It does not depend on the bounty of a judge. Therefore coming back to the case in hand, it is the right of the defendants/respondents to file an appeal against the default judgment of Olagunju J. So long as the appeal had not been entered in the Court of appeal, Olagunju J. could attend to any application brought before him in respect of the default judgment. Giving notice of appeal does not constitute the entering of the appeal in the Court of Appeal. Furthermore, until the learned trial judge agreed, through an application brought before him, to stay further proceedings in the case or until the Court of Appeal orders him to stay proceedings pending an appeal he commits no error in exercising his discretion to set aside his default judgment. The proceedings to set aside his default judgment is not an exercise outside his jurisdiction. (p. 2701 B)

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ONU JSC

6. No law compels an appellant to pursue his appeal

What, one may then ask, became of the appeal 'pending' in the court below in the instant case? The appellants have argued to the effect that once a Notice of Appeal had been filed, it was deemed to be pending in the court below as from 24/11/94. With due respect there is no law that compels an appellant to pursue his appeal. Rather, the law allows him to legally abandon it. The authority to adjudicate must of course not be left in abeyance and since the appeal has not been entered, the trial court and a fortiori the court below, were right in their application of Order 1 Rule 22 of the Court of Appeal rules. See Ezomo v. Attorney-General of Bendel State (supra). The fact that a Notice of Appeal is abandoned as in this case, it goes without saying that no further appeal subsists based upon that Notice. The point at issue is whether the respondents had notice that their case was fixed for hearing and they deliberately chose to slight the court or throw in the towel. The trial court having resolved the

matter in favour of the respondents the matter, in my view, ought to have ended there and my answer thereto is accordingly rendered in the affirmative. (p. 2712 C)

B REPRESENTATION

Chief W. Olanipekun, SAN with D. Olanipekun for the Appellants
M. A. Sanni SAN, Hon. Attorney-General & Commissioner of Justice
Kwara State with S. A. Mohammed Ag DCL for the Respondents

C CASES REFERRED TO

Williams v. Hope - Rising & Voluntary Funds Society (1982) 1-2 SC 145
Ogunremi v. Dada (1962) 1 All NLR (pt. 4) 663 at 668
Backelmann v. Nwachi (1965) 1 All NLR 112

D Missini v. Missini (1968) 1 All NLR 318, 321; (1968) ANLR 310;
Abina v. Tika Tore Press (1968) 1 All NLR 210, 213; (1968) ANLR 208
Okoroduddu v. Okoromadu (1977) 3 SC. 21
Shahimi v. Akinola (1993) 5 NWLR (part 294) 434 at 447

E Asiyanbi v. Adeniyi (1967) NSCC 81 at 85
Chukuka v. Ezulike (1986) 12 SC. 246 at page 254
Agbenyin v. Abo (1994) 7 NWLR 748 at 749

F STATUTES AND RULES REFERRED TO

Kwara State High Court (Civil Procedure) Rules, 1981 Orders 5 (7); 6;
27 (2) (8) (1) and (10); 32 (15); and 37 (9)
Supreme Court Rules 1985 (as amended) Order 6 (5) (1) and (2)
Constitution of the Federal Republic of Nigeria 1979, sections 219 and

G 220
Court of Appeal Rules, 1981, Orders 1 (22) and; 3(18) (1), (2) and (4)

LEAD JUDGMENT BY WALI JSC

H The plaintiffs, after obtaining leave of the court to prosecute their case in a representative capacity, filed their Writ of Summons in the High Court of Kwara State holden at Ilorin claiming the following reliefs against the defendants:-

"(1) A DECLARATION that the 1st defendant under the age long custom and tradition of Zambufu has no right whatsoever to ascend the throne as the Zhitsu of Zambufu.

(2) A DECLARATION that under the native law and custom relating to the selection and appointment of Zhitsu of Zambufu, the 1st defendant's family is not a ruling house in Zambufu. B

(3) A DECLARATION that the appointment and/or turbaning of the 1st defendant by the 2nd defendant on or about the 12th day of November, 1991 as the Zhitsu of Zambufu is illegal, null and void and of no effect whatsoever as same is against the age long custom and tradition of Zambufu relating to and in connection with the appointment of Zhitsu of Zambufu. C

(4) A DECLARATION that the 1st plaintiff is the duly selected and appointed Zhitsu of Zambufu by the majority of Zambufu traditional counsellors or Kingmakers in accordance with the custom and tradition of Zambufu relating to and in connection with the selection and appointment of Zhitsu of Zambufu. D

(5) AN ORDER commanding and/or directing the 2nd defendant to turban or install the 1st plaintiff as the duly selected and appointed Zhitsu of Zambufu by the majority of Zambufu traditional counsellors or Kingmakers. E

(6) A perpetual injunction restraining the:- F

i 1st defendant from parading or presenting himself as the Zhitsu of Zambufu;

ii. 2nd defendant, his servants, agents, privies or any person or persons howsoever from recognizing, dealing or relating with the 1st defendant as the Zhitsu of Zambufu." G

The 1st and 2nd defendants entered a conditional appearance on 29th November, 1991 and on 7th January, 1992 filed a Motion on Notice in which the following preliminary objection was raised:-

"for an order striking out the Writ of summons for non-compliance with the provisions of Order 5 Rule 7 of the High Court [Civil Procedure] Rules, 1989 which provides 'Writ' of Summons shall be printed on opaque foolscap size paper of good quality" H

In a considered Ruling delivered by Olagunju J, on 18th March, 1992, he overruled the preliminary objection when he stated thus:

B *"for the purpose of satisfying the requirement of Rule 7 of Order 5 of the Kwara State High Court [Civil Procedure] Rules, 1989 which provides that 'writs' of summons shall be printed on opaque foolscap - size paper of good quality it will be sufficient if the Writ is produced legibly by a typewriter or any other uniform mechanical process on a thick foolscaps - size paper a condition which I am satisfied that the present writ of summons amply satisfied."*

C The plaintiffs were granted extension of time to file their statement of claim on 15th May, 1995 and same was deemed duly filed and served on the defendants. On that date the court reminded the defendants that they had (30) thirty days within which to file Statement of D Defence.

The case was then adjourned sine die.

The case came up before the court on 19th November 1992. On this same date an application under Order 32 Rule 15 of the Kwara E State High Court [Civil Procedure] Rules 1989 was filed by the plaintiffs requiring the defendants to produce for their inspection and tendering the following documents referred to in the plaintiffs Statement of Claim:-

F *"(1) Letter dated 30th August, 1991 from the Traditional Counsellors of Zambufu to the 2nd defendant.*

(2) Letter dated 23rd August, 1991 to the 2nd defendant by the 1st plaintiff herein."

I take it, the tendering of the two documents referred to above would be on the date next fixed for the hearing of the case.

G Then on the same date, i.e. 19th November, 1992, the learned trial Judge, after recording the appearance of "R. I. Oturu for the plaintiffs, plaintiffs present, defendants absent; served through their counsel as per proof of service herein read as Exhibits 'A' - A3' ruled that:-

H *"I am satisfied on the strength of Exhibits 'A' to 'A3' that Hearing Notice of this proceedings were served on the defendants through their counsel as per Affidavit of service herein before marked Exhibits 'A' to 'A3'."*

After the preceding ruling, learned counsel for the plaintiffs applied orally under Order 39 Rule 7 of the Kwara State High Court [Civil Procedure] Rules, 1988, for leave of the court to prove his case since the defendants had failed to file statement of defence. The court granted the application. He called two witnesses at the end of which he addressed the court. Judgment was then reserved to 20th November, 1992. B

On 20th November, 1992 R. I. Otaru appeared for the plaintiffs while Wande Obatusin appeared for the defendants. The learned trial Judge delivered his judgment in which he granted all the reliefs prayed for by the plaintiffs in their Statement of Claim. On 24th November, 1992, learned counsel filed a Notice of Appeal against the default judgment, and that was barely four days after the judgment. He followed the Notice of Appeal by a Motion on Notice filed on the same 24th November, 1992 praying that the plaintiffs/Respondents be restrained from presenting the 1st plaintiff/respondent for turbaning or installation by the 2nd plaintiff/respondent as Zhitsu of Zambufu and restraining the 1st plaintiff/respondent from setting in progress the procedure of his appointment and installation as Zhitsu of Zambufu pending the determination of the appeal lodged against the default judgment. C D E

The on 26th November, 1992 the defendants through their new firm of Solicitors to wit: Saraa Chambers, 38 Ajikobi Road, Omoda, Ilorin, brought an application on Notice under Rule 9 of Order 37 of the Kwara State High Court [Civil Procedure] Rules, 1988 praying for - F

"1. Leave of the Honourable Court to set aside the judgment given on 20th November, 1992.

2. Leave to grant an extension of time to the applicants to file the statement of Defence attached and exhibited herewith AND for any order or further orders as this Honourable Court may deem fit to make in the circumstances." G

It was supported by a 16 paragraphs affidavit and the proposed statement of defence. H

On 30th November, 1992 the plaintiffs filed a Notice of preliminary objection to the defendants' application to set aside the judgment and extension of time to file a statement of defence.

On 4th December, 1998 when the preliminary objection came up for hearing, Alhaji Aliyu Salman SAN of Saraa Chambers appeared for the defendants/applicants while R. I. Otaru Esq., announced his appearance for the plaintiffs/respondents; and before Mr. Otaru started arguing his preliminary objection, a letter dated same 4th December, 1998 from the firm of Wande Obatusin & Co. was read in Open court in which Wande Obatusin & Co. informed the court that they had withdrawn from the case. Mr. Otaru took objection to the withdrawal and the appearance of Saraa Chambers in place of Wande Obatusin & Co. on grounds that there was yet no formal withdrawal by the latter and that a copy of the said letter was not sent to him for his comments.

The preliminary objection along with the objection against the appearance of Saraa Chambers were argued. On 2nd February, 1993 the learned trial judge delivered a considered ruling in which he overruled the preliminary objection against the application to set aside the default judgment as well as the objection against the appearance of Saraa Chambers.

Due to unavoidable circumstances as evidenced in the record of proceedings the Motions filed by the defendants/applicants were not argued until on 11th March, 1993.

Before that date, learned counsel for the plaintiffs/respondents had filed counter-affidavits in opposition to the defendants/applicants' Motion; and also filed a Notice on 3rd March, 1993 urging the Court of Appeal Kaduna to affirm the decision of the trial court on other grounds to wit -

"(1) That the Respondents herein having regard to the provisions of Order 27 Rule 8 (1) of the Kwara State High Court [Civil Procedure] Rules 1989 do not require the filing of a motion for judgment in default of defence as the respondents' reliefs relate to claims other than those specified under Order 27 Rules 2 and Order 6 of the said Rules of Court.

(2) That the respondents' claims being declaratory in nature, did not require the filing of a motion for judgment in default of defence."
As I said earlier, the defendants/applicants Motions were argued on 11th March, 1993 after which Ruling on same was reserved to 16th April,

1993.

In a considered ruling delivered by Olagunju J, he granted the applications as prayed, set aside his default judgment of 20th November, 1992 and granted the defendants/applicants' prayer "upon of all costs awarded against them being paid within 21 days from today, to file their Statement of Defence." B

Aggrieved by the decision of the learned trial judge referred to (supra) the plaintiffs lodged an appeal to the Court of Appeal, Kaduna. The notice of Appeal was dated 28th April, 1993 and filed in court on the same date. C

It is to be noted that before the appeal was entered in the Court of Appeal, Saraa Chambers and Co. had applied to the trial court for leave to withdraw its appearance for the defendants. Leave to withdraw from the case was granted to Saraa Chambers on 27th May, 1993 and from then it appeared from the later proceedings that the defendant's case was handled by the Attorney-General of Kwara State. D

Parties filed and exchanged briefs of arguments and after oral hearing of learned counsel in elaboration of their respective briefs, the Court of Appeal delivered its considered judgment on 30th September, 1994. Opene JCA prepared and delivered the lead judgment with which both Okunola and Mahmud Mohammed JJCA agreed. He dismissed the appeal and affirmed the Ruling of the trial court. E

Still aggrieved by the judgment of the Court of Appeal, the plaintiffs have now further appealed to this court. F

In compliance with rules 5(1) and (2) of Order 6 of Supreme Court Rules 1985 [as amended] parties filed and exchanged briefs of arguments. G

Henceforth the plaintiffs and the defendants will be referred to as the appellants and the respondents respectively.

In the brief filed by the appellants the following two issues have been raised for consideration by this court:- H

"(i) Considering the circumstances of this case, whether the Court of Appeal was right in upholding the decision of the trial Judge setting aside the earlier judgment delivered by him on 20/11/92, particularly

when the appeal filed by the appellants (now respondents) and the respondents' were/are subsisting and/or not withdrawn - *GROUND* 1, 2, 3 AND 5.

(ii) Whether it is compulsory or even necessary to serve hearing notices on a party who is already represented by counsel when such notice has been served on the said counsel - *GROUND* 4."

The Hon. Attorney-General of Kwara State filed respondent's brief for the 1st and 2nd respondents only and in which he raised the following two issues:-

"(1) Whether or not the trial Court had jurisdiction to set aside its own judgment given *IN DEFAULT* of defence and against which only notice of Appeal had been filed, but against which an Appeal had been entered? [*Ground* 1, 2, 3 and 5]

2. Whether considering the circumstances of this case the Court of Appeal was right to have upheld the setting aside of a Judgment delivered against the Respondents sought and obtained *IN DEFAULT OF* defence and appearance."

The issue formulated by the appellants have adequately covered the respondent's issues and so in deciding this appeal I shall adopt the appellants' Issues as framed in their brief.

The gravamen of complaint in this appeal is against the exercise of discretion by the learned trial Judge wherein he set aside the default judgment he entered in favour of the appellants against the respondents. It was the submission of learned Senior Counsel for the appellants that having delivered his judgment after the appellants had called evidence in proof of their case, the trial judge became functus officio to set aside his judgment; more so when the respondent had filed a Notice of Appeal against the judgment and the appellants in response to that had also filed notice of intention to contend that the judgment be affirmed on other grounds. Learned counsel drew the attention of the court to note that at the material time the application to set aside the judgment was considered and granted, both the appeal filed and the notice of intention to contend that the judgment be affirmed on other grounds were subsisting before the trial court having same not been withdrawn in accordance with the

Rules of the Court. He submitted that the only thing the trial judge could lawfully do in the given situation was to correct clerical or typographical errors, if any, in the judgment, but not to set it aside. Learned counsel further urged this court to note that at the time the judgment was set aside the order of the court had been drawn up and enrolled, hence the inherent jurisdiction of the court could not be used to set it aside. He cited in support, Asiyanbi & Ors. v. Adeniji [1967] NSCC 81 at 85; Ogbu v. Urum [1981] 4 SC 1 at 2; Chukwuka v. Ezuhike [1986] 12 SC 246; Agbenyi v. Abo [1994] 7 NWLR 748 at 749; Ogunbadejo v. Owoyemi [1993] 1 NWLR (pt. 271) 517 at 531 and L.C.C v. Ajayi (1970) 1 All NLR 291 at 269 - 297. Sections 219 & 220 of the 1979 Constitution were also cited and relied upon in support of the contention that the learned judge was wrong to set aside the default judgment.

On the question of withdrawal of the appeal learned counsel argued that in the given situation the Rules of the trial court did not provide for it, particularly when there is a notice of intention to contend that the judgment be confirmed on other grounds. He referred to order 3 Rule 18(1), (2) and (4) and Order 1 Rule 22 of the Court of Appeal Rules, 1981 and the decisions in Okafor v. Attorney-General of Anambra State (1991) 6 NWLR (pt. 200) 659 and Ogunremi v. Dada (1962) 1 All NLR (pt. 4) 663 at 668 and urged the court to answer Issue 1 in the negative.

On Issue 2 it was the submission of learned counsel for the appellant that where a party is represented by a counsel, there is no rule of practice or procedure which makes it mandatory for hearing notices to be served on parties and their counsel co-jointly and or simultaneously and that service on the counsel is tantamount to service on the party he represents. He submitted that in this case the effect of service of hearing notice on Wande Obatusin & Co. that the case was coming up on 19th November, 1992 for hearing was deemed in law to be a notification to the respondents that the case was coming up for hearing on that date. He cited the following cases in support - Ogunbiade v. Ogunbunmi (1967) 1 All NLR 306 at 309 and Shahimi v. Akinola (1993) 5 NWLR (pt. 294) 439 at 447 and list of others.

He finally submitted that the circumstances in the case did not

warrant the grant of the court's indulgence in the respondents' favour to set aside the judgment. He urged that Issue 2 also be answered in the negative and that the appeal be allowed.

In reply to submission on Issues 1 and 2 of the appellants' brief, learned counsel for the respondents submitted that the court is vested with the statutory as well as inherent power to set aside its own default judgment and in support he cited and relied on Order 37 rule 9 of the Kwara State High Court [Civil Procedure] Rules, 1989 and Sanusi v. Ayoola (1992) 11/12 SCNJ (pt. 11) 142 at 154. He said it was wrong of learned counsel for the appellants to limit the power of the court to set aside its judgment to the principles stated in that case. He submitted that learned counsel for the appellants was wrong in making the submission supra without taking into consideration the provisions of Order 37 rule 9 and Order 27 rule 10 of the Kwara State High Court [Civil Procedure] rules, 1989. Learned counsel further submitted that they were absent from court on 19th November, 1992 as they had no notice of hearing against that date.

As regards the filing of the notice of appeal against the default judgment by the respondents, learned counsel referred to the judgment of the Court of Appeal on the issue and the Supreme Court decision in Okafor & Ors v. Attorney-General Anambra State & Ors. (1991) 6 NWLR (pt. 200) 659, particularly at 671 paragraph E and contended that the appeal was yet to be entered in the Court of Appeal, hence the trial court had still jurisdiction to deal with the matter. He said once the trial court sets aside a default judgment, as in this case, the Notice of Appeal filed becomes obsolete and becomes abandoned constructively and by implication and the Notice of Contention to support the judgment on other grounds becomes of no effect. The decision in Ezomo v. Attorney-General Bendel State (1986) 4 NWLR (Pt. 36) 448 at 489 was cited and relied upon.

On the issue relating to why the default judgment was set aside, it was the submission of learned counsel for the respondents that both the trial court and the Court of Appeal were satisfied that the manner in which the firm of Solicitors of Wande Obatusin & Co. handled the

respondent's case left much to be desired, particularly when the appellants had conceded that the respondents were not personally served with the hearing notice leading to the default judgment. He urged the court to confirm the decisions of the trial court and the Court of Appeal being concurrent findings of fact which the appellants had failed to fault. B

The gravamen of complaint in this appeal is the confirmation by the Court of Appeal of the trial court's decision in which the latter set aside its ex-parte judgment handed out on 20th November, 1992. There is plethora of authorities both local and foreign that a judgment delivered in the circumstance in which the trial court delivered its own on 20th November, 1992 is a default judgment. See Sanyade v. Osagie (1965) NNLR 205 [a High Court judgment]; Grisby v. Jubwe 14 WACA 637 and U.T.C. Nig. Ltd. v. Pamotei (1989) 20 NSCC (pt. 1) 523 at 549. The judgment so entered remains valid until it is set aside by the trial court or on appeal. C D

In the present case, the learned trial judge delivered judgment in favour of the appellants after proving their case in default of statement of defence and explanation of the absence of learned counsel for the respondents on the date the case was fixed for hearing. On 20th November, 1992 the day the judgment was delivered learned counsel for the respondents was in court. Immediately thereafter, counsel for the respondents filed, on 24th November, 1992 a Notice of Appeal in the trial court against the judgment before they were disengaged by respondents. Then on 26th November, 1992 an application to set aside the judgment and to extend time to file statement of defence was filed by new firm of solicitors engaged by the respondents to wit Saraa Chambers & Co. This was the last day allowed by the Rules for the filing of such application. Against this application counsel for the appellants filed a notice of preliminary objection on 30th November, 1992 in which he raised the following grounds:- E F G

"(a) that the firm of Wande Obatusin & Co. have not formally withdrawn their appearance in this case.

(b) that Saraa Chambers cannot be heard in this case as a result of paragraph (a) above/supra."

The preliminary objection was argued on 4th December, 1992 and a considered Ruling was delivered by the trial judge in which he over-ruled the preliminary objection, on the face of Exhibit B - a letter written by Wande Obatusin & Co. and dated 4th December, 1992 notifying the court of their disengagement from the case and allowed Saraa Chambers to appear and represent the respondents.

Before the application to set aside the judgment was argued, learned counsel for the appellants filed, on 10th March, 1993, a Notice of Intention to contend that the judgment be affirmed on other grounds.

On 11th March, 1993 the application to set aside the default judgment as well as to extend the time to file statement of defence was argued. In a reserved Ruling delivered by the learned trial judge on 16th April, 1993, he granted the application, set aside the default judgment and granted to the respondents leave to file their statement of defence on condition that they paid all the costs awarded against them within 21 days from the date of the Ruling.

I have no hesitation in agreeing with both the trial court and the Court of Appeal that the judgment of Olagunju J. delivered on 20th November, 1992 is a default judgment as it was delivered in the absence of filing a statement of defence and non-appearance of defence counsel at the hearing. See U.T.C. Nig. Ltd. v. Pamotei (1989) 20 NSCC (pt. 1) 523 at 549, and Order 37 rule 9 of the Kwara State High Court [Civil Procedure] Rules, 1989 which provides thus-

"Any judgment obtained where one party does not appear at the trial may be set aside by the court upon such terms as may seem just, upon an application made within six days after the trial or within such longer period as the court may allow for good cause shown."

I take the words "within six days after the trial" to mean within six days of the delivery of the default judgment.

The next important issue is to decide whether the learned trial judge was right in setting aside his default judgment and allowing the respondents to file their statement of defence. **The principle is that unless and until the court pronounced a judgment on merit or by consent it retains the power to set aside its own default judgment.**

The power to do so is discretionary which has to be exercised judiciously, guided by the following principles pronounced by this court in Williams & Ors. v. Hope - Rising & Voluntary Funds Society (1982) 1-2 SC 145:

"1. The reasons for the applicant's failure to appear at the hearing or trial of the case in which judgment was given in his absence;

2. Whether there has been undue delay in making the application to set aside the judgment so as to prejudice the party in whose favour the judgment subsists;

3. Whether the party in whose favour the judgment subsists would be prejudiced or embarrassed upon an order for rehearing of the suit being made, so as to render such a course inequitable;

4. Whether the applicant's case is manifestly unsupportable; and

5. Whether the applicant's conduct throughout the proceedings, that is, from the service of the writ upon him to the date of judgment, has been such as to make his application worthy of a sympathetic consideration.

See also Idam Ugwu & Ors. v. Nwaji Aha & Ors. (1961) All NLR 438; Adebayo Doherty v. Ade Doherty (1964) NNLR 144 at 145; Momoh v. Gulf Insurance Corporation (1975) 1 NNLR 185 at 186; Khawam v. Elias (1960) 5 F.S.C. 224 and Evans v. Barlam (1937) 2 All ER 646 at 650.

In support of the application learned counsel for the respondents filed a 25 paragraph affidavit sworn to by one Ostin Robert Agon a legal practitioner working in Saraa Chambers and a proposed Statement of Defence. In paragraphs 4, 5, 6, 7, 11 and 12 it was deposed as follows:-

"4. That the applicants brought to me a copy of the judgment delivered by the Hon. Court on 20th November, 1992.

5. That the applicants confessed that they were not in Court on the day the plaintiffs testified and their counsel was also absent from the Court and I verily believe them.

6. That the applicants told me and I verily believe them that on 15th May, 1992 a favourable ruling was delivered on an interlocutory

13. The Defendants will put the Plaintiffs to the strictest proof of the inception and composition of the Zambufu Traditional Counselors or Kingmakers that the Plaintiffs claim in their Statement of Claim to have existed."

In a counter affidavit sworn to by Mohammed M. Mohammed, B the 1st plaintiff/appellant in opposition to the defendants/respondents motion, he deposed to the following facts for himself and the other plaintiffs/appellants:-

9. That on the same 15th May, 1992, one C. O. Abazu, Esq. C from the Chambers of Wande Obatusin & Co. represented the applicants herein when R. I. Otaru, Esq. of counsel moved the respondents' motion on notice to file the respondents' statement of claim out of time.

10. That this Honourable court granted the motion on notice to file the respondents' statement of claim out of time as duly filed and D served with the award of N25.00 costs in favour of the application.

11. That this Honourable Court on the same 15th May, 1992 reminded the applicants through their counsel of their duty to file their statement of defence within 30 days from 15th May, 1992 if they wished E to.

12. That the applicants did not file any statement of defence whereupon counsel applied for the setting down of case for hearing after the expiration of the time within which to do so. F

13. That the period of 30 days within which the applicants ought to have filed their statement of defence expired on the 16th day of June, 1992 beginning from the 15th May, 1992.

14. That this Honourable Court pursuant to the respondents' G counsel application to set down the case for hearing set same down for hearing vide hearing notices to all the counsel for the 19th day of November, 1992.

15. That neither the applicants nor their counsel appeared on 19th November, 1992 before this Honourable Court at the hearing of the H substantive case.

16. That neither the applicants nor their counsel gave any excuse for their nonappearance on 19th November, 1992 in spite of the

service of the hearing notice on them.

17. That this Honourable Court satisfied on the face of the affidavit of service of the hearing notice on the applicants through their counsel granted our counsel's prayer that we should prove our case.

B *18. That on the said 19th November, 1992, the respondent proved their case and judgment was delivered on 20th November, 1992.*

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C *21. That I know as a fact that the judgment of this Honourable Court delivered on 20th November, 1992 was not irregularly or fraudulently obtained by the respondents herein.*

22. That since the beginning of this case, the applicants have never been present in court.

D *23. That even on the 20th November, 1992, Wande Obatusin, Esq. was present when judgment was delivered and even strenuously argued the issue of costs.*

xx

E *25. That the applicants and their counsel knew when the case was fixed for hearing but chose to be absent.*

26. That the other respondents and I shall be greatly prejudiced or embarrassed if the judgment of this Honourable Court delivered on 20th November, 1992 is set aside."

F The learned trial judge, after listening to oral arguments presented by learned counsel on each side and the affidavit and the counter affidavits, delivered a considered Ruling on 16th April, 1993 in which he made the following findings:-

G *1. That it is beyond all peradventure that a judgment given against a defendant who failed to file his statement of defence or appear on the date set for hearing of the case, as in the proceedings under review, is a default judgment per excellence.*

H *2. The argument does not address itself to the provisions of rule 22 of Order 1 of the Court of Appeal Rules, 1981, which is mutually complementary to Order 3, rule 5, and which provides for the point when the jurisdiction of the trial court on a matter against which an appeal has been filed is excluded. In particular, it failed to address itself to the*

distinction between the phrase "deemed to have been brought" in rule 5 of Order 3 on which he hinges his argument and the corresponding phrases 'has been entered' in rule 22 of Order 1 of the same Rules. The two phrases are not synonymous and the phrase 'appeal has been entered' has been interpreted to imply a reference to a point during the processing of B an appeal when the record of appeal has been received by the Court of Appeal and entered in the Cause List: See Coker v. Adeyemo (1965) 1 ALL NLR. 120 at 123. That, in my view, is the point in time, when, within the purview of rule 22 of Order 1, the court became 'seized of the C whole of the proceedings' and the jurisdiction of the trial court on post judgment proceedings is finally ousted.

3. Equally misconceived is the proposition of law by the learned counsel that a High Court has the jurisdiction to set aside only a judgment that is a nullity or one which is obtained by fraud. The proposition D is not borne out by the cases cited by the learned counsel.

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Therefore, the discretion vested in this court by rule 9 of Order E 37, rule 10 of Order 27 and other kindred provisions of the rules of this court to set aside its judgment given in the circumstances therein described is not ousted by the fact that an appeal has been filed against such judgment nor does a judge become functus officio after rendering such a judgment. F

4. Secondly, judging by the time-lag between the judgment which was given on 20th November, 1992 and the filing of this application on 26th November, 1992, the 6th and last day of the time allowed for bringing the application going by the cross-application of rule 9 of Order 37 and sub-rule 1 (a) of Order 22 of the Rules of this Court, I am satisfied G that the applicants acted with despatch considering that there was a change of counsel during the interval.

5. Thirdly, apart from the respondents' lament that the reopening H of this case would stall the civic progress that has taken place in their community since the declaration of the 1st respondent as the Zhitsu of Zambufu an assessment that rests on the respondents' ipse dixit there is no evidence from where I can infer that any embarrassment or prejudice

However, If there is a pending appeal and the appellant fails to pursue it by seeing that the record of proceedings is sent to the Court of Appeal, this Court can strike out the appeal or even dismiss it under Order 6 rule 10 of the Court of Appeal rules.

3. The provisions of Order 12 rule 1 is very clear. Service of all court processes on a counsel is a good service on his client except where personal service is required. B

In the instant case, on 15th May, 1992 the learned trial Judge adjourned the case sine die and I think that this is where the problem in this case started because if the matter was adjourned to a definite date and the respondents and their counsel did not turn up and the appellants were asked to prove their case, the matter would have been different." C

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A counsel that is served with a Hearing Notice, who does not go to court on the Hearing date and who also does not bother to pass such an information to his client or writes to the court that he could not come to court, will not be said to be acting in the interest of his client. It will therefore be wrong to punish the respondents for the conduct of their counsel. D E

It is settled that a party should not be held responsible for the mistake of his counsel. See: Ibodo vs. Inarofia (1960) 5-7 S.C. 42; Nneji vs. Chukwu (1988) 3 NWLR (pt. 81) p. 184; Nwankwo vs. Nwankwo (1993) SCNJ (pt. 1) 84. F

The learned trial Judge in a well considered Ruling dealt very extensively with all the issues raised in this Matter and he held that the judgment was a default judgment and therefore a judgment obtained on technicalities and rightly observed that the law generally leans against technical justice as against judgment obtained on the merits. G

Finally, he held that he was satisfied that the respondents are entitled to the exercise in their favour of the discretion of the court and he thereupon set aside the judgment and ordered that the matter be restored to the Cause List. H

It is also settled that this Court will not disturb the decision of a lower court in the exercise of the court's discretion unless it was wrongly

exercised.

B *In the instant case, it has been shown that the respondents' counsel who was served with Hearing Notice did not come to court and that he also did not inform the respondents of the hearing date. I am therefore of the view that the learned trial Judge exercised his discretion rightly and that there is no cause to disturb his findings."*

After making the findings supra, the Court of Appeal dismissed the appeal.

C The question of setting aside a default judgment is a discretionary power inherent in the court that delivered it. In the present case the court has the additional statutory power conferred on it by the Rules which I have already alluded to.

D In the counter affidavit filed by the appellants in opposition to the application to set aside the default judgment, it was deposed in paragraphs 13 and 14 that pursuant to the appellants' application to set down the case for hearing in the absence of filing a statement of defence, the learned trial judge granted same and set down the case for hearing on E 19th November, 1992. I have searched through the records of proceedings compiled, but cannot trace such application. What I saw on this issue is recorded on page 112 of vol. 1 of the record of proceedings as follows:-

F *"Otaru: Having regard to the fact that the defendants have been duly served, I am applying under order 37 rule 7 of the Rules of this court for leave to prove the plaintiff's case. To this end I am calling 2 witnesses."*

G The learned trial judge in a short ruling granted the application having been satisfied that "Exhibits "A" - "A3" the Hearing Notice of this proceedings were served on the defendants through their counsel:-

H *"..... I am satisfied that prima facie they have no reasonable cause to be absent from the court this morning considering the fact that the hearing Notice was served on them since 15th July, 1992 as per affidavit of service Exhibit "A" - "A3"."*

Exhibits "A" - 'A3' have not been made part of the record. The record did not also contain a copy of the drawn up order following the

delivery of the judgment, which learned counsel for the appellants referred to. This apart, **it appears to me that the application to proceed with the hearing of the case and to prove same was made orally on 19th November, 1992 and granted on the same date. The respondents were not served with the hearing notice for the appellants to prove the case on that date. In my view, the proper thing for the trial court to do was to adjourn the case to another date for proof and to put the other counsel on notice of the new date, particularly when the previous time the parties appeared in court on 15th May, 1992, the case was adjourned sine die. The default judgment could have been set aside even on this ground. See Okafor & Ors. v. Attorney-General of Anambra State & Ors. (1991) 6 NWLR (pt. 220) 659 where the Court of Appeal set aside its own judgment on application by the defendants when it considered the appeal on the briefs filed by the parties ahead of the time fixed for the hearing of the appeal. On appeal against the Court of Appeal setting aside its own judgment delivered in the circumstance stated supra, this court dismissed the appeal and stated -**

"Where the Court of Appeal has adjourned hearing of an appeal to a particular date but delivers judgment before such hearing date fixed, even where briefs having been filed, such a judgment delivered is irregular having been given prematurely and is entitled to be set aside as an infringement of the constitutional right to fair hearing. In the instant case the judgment of the Court of Appeal delivered on 11th April, 1988 before the hearing date of 14th June, 1988 was irregular, having been given prematurely."

I have gone through the cases cited and relied upon by learned Senior Counsel for the appellants and have found none to be apposite or helpful to his case.

The inherent jurisdiction of a court is adjunct to powers conferred on it by the Rules, and in a proper case the court will exercise the power. An application to the court to set aside its default judgment is prima facie not an abuse of process, even where the applicant has filed a notice of appeal, provided that the appeal

has not been entered in the appellate court. See Ogunremi v. Dada (1962) 1 All NLR (pt. 4) 663 at 668 and Okafor & Ors. v. Attorney-General of Anambra State & Ors. (supra), or an order to that effect has been drawn up: See Backelmann v. Nwachi (1965) 1 All NLR 112.

In the present case, neither the appeal was entered in the Court of Appeal nor was the Court order on the default judgment drawn up prior to its being set aside by the trial court. The reasons and circumstances why the judgment was set aside was fully explained in the Ruling of the trial court which was justifiably affirmed by the Court of Appeal.

The question that the respondents had elected to proceed by way of an appeal against the default judgment did not arise as it was not made an issue before us; nor did we invite learned counsel to address us on it.

I shall therefore dismiss the appeal for the following summarized reasons:-

1. The fact that there was a notice of appeal filed in the trial court and pending, would not bar or render the trial court functus officio to hear the application as the appeal had not been entered in the Court of Appeal.

2. When the trial court granted the application to set aside the default judgment, the notice of appeal pending in that court became impliedly or constructively abandoned.

3. There was no drawn up order related to the default judgment.

4. It is not in all cases where a party is legally represented that his appearance in court is mandatory or services of the court processes on him. Each case will depend on its own facts and circumstances. In the present case learned counsel for the appellants would have been well advised if he had applied for an adjournment to enable fresh hearing notice be served on the respondents putting them on notice of a new date for hearing, in order to avoid the situation in which he found himself.

5. There is concurrent findings of both the trial and the appellate courts which have not been shown to be wrong or per-

verse to warrant interference by this court.

The appeal fails in toto and it is dismissed by me with N10,000.00 costs to the respondents.

B

BELGORE JSC

I have read in advance the judgment of my learned brother Wali, J.S.C., with which I am in full agreement. I also, for the reasons set out in the judgment, find no merit in this appeal and I dismiss it with N10,000.00 costs to respondents.

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OGUNDARE JSC (Dissenting)

The facts relating to this case are not in dispute. The Plaintiffs who are now Appellants before us, sued the Defendants (now Respondents) claiming various declarations, an order and an injunction. The Plaintiffs filed their statement of claim after obtaining an order extending the time so to do. The Defendants failed to file theirs within the period stipulated for doing so. Neither did they apply for extension of time to do so. The Plaintiffs subsequently moved the Court to have the case set down for hearing. The application was granted and a date, 19/11/92 was fixed for hearing. Hearing Notice to that effect was issued and served on the defendants through their counsel. On the hearing date neither the Defendants nor their counsel appeared in Court. The Plaintiffs led evidence in support of their claim and judgment was reserved to the following day, that is 20/11/92. On the latter date the Defendants were represented by counsel, the learned trial Judge delivered his judgment wherein he found for the Plaintiffs in terms of their claims. He entered judgment in their favour accordingly. Four days thereafter, that is 24/11/92 the Defendants, through their counsel filed a Notice of Appeal to the Court of Appeal and on the same date filed an application for orders of interim injunction against the Plaintiffs pending the determination of the appeal. Before this application could be heard, however, the Defendants on 26/11/92, filed yet another application praying the trial High Court for order

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(1) setting aside the judgment given on 20/11/92 and (2) granting an extension of time within which to file their statement of defence, a copy of which was exhibited to the motion papers. This application was filed on their behalf by a new counsel who swore to the affidavit in support of the motion. In the supporting affidavit of Ostin Robert Agon, Legal Practitioner, the deponent averred as follows:

"1. That I am a Legal Practitioner in the employment of Saraa Chambers, a legal firm handling the defence of this case on behalf of the applicants/defendants hereinafter called the applicants.

2. That I have the consent of the applicants to depose to this affidavit.

3. That the applicants briefed us to put up a defence and defend them in this suit.

4. That the applicants brought to me a copy of the judgment delivered by the Hon. Court on 20/11/92.

5. That the applicants confessed that they were not in Court on the day the Plaintiffs testified and their counsel was also absent from the Court and I verily believe them.

6. That the applicants told me and I verily believe them that on 15/5/92 a favourable ruling was delivered on an interlocutory injunction brought against them by the Respondents and a copy of the ruling was given to me.

7. That the Applicants told me and I verily believe them that they were not aware that a defence to their case was not filed.

8. That the applicants told me and I verily believe them that they were never aware that they were served with the hearing Notice through a counsel one Mr. O. Charles, a solicitor who is working with their counsel on 15/7/92 for the case slated for 19/11/92.

9. That the Applicants told me that they know that they have a good defence in this suit and a copy of the statement of Defence is attached herewith and marked as Exhibit 'A'.

10. That I told the Applicants of the need to seek leave of the Court for the discretion which the applicants want the Court to grant.

11. That the applicants told me and I verily believe them that

they have no means to know that a statement of Defence was not filed on their behalf after the ruling of the Court on the interlocutory injunction.

12. That the applicants told me and I verily believe them that they are prepared and willing to give an undertaking to defend their right diligently and quickly if the Court grants this application. B

13. That the applicant told me and I verily believe them that they are prepared to abide by any terms the Court gives.

14. That the applicants told me and I verily believe them that the respondents had been provoking the applicant to cause a breach of the peace in our town. C

15. That I believe the Respondents will not be prejudiced or embarrassed by this application."

It would be observed that there was no mention of the appeal lodged against the judgment of 20/11/92 and the application for interim injunctions pending the determination of the appeal subsequently filed thereafter. D

The Plaintiffs filed a preliminary objection to the motion to set aside the judgment on the ground that the previous counsel for the Defendants, Wande Obatusin had not withdrawn his appearance in the case as required by rules of Court before the new counsel came in. The learned trial Judge in a considered ruling over-ruled the preliminary objection. The defendants' motion to set aside the judgment of 20/11/92 and for extension of time was subsequently argued after the Plaintiffs had filed a counter affidavit. In their counter affidavit the 1st Plaintiff Muhammed deposed, inter alia, as follows: E F

"18. That on the said 19/11/92, the Respondent proved their case and judgment was delivered on 20/11/92. G

19. That on the 24/11/92, the applicants through their counsel Wande Obatusin, Esq., filed a Notice of appeal against the judgment of this Honourable Court delivered on 20/11/92.

20. That the said Notice of Appeal dated 23/11/92 and filed on 24/11/92 is contained in the records of this Honourable Court. H

21. That I know as a fact that the judgment of this Honourable Court delivered on 20/11/92 was not irregularly or fraudulently obtained

by the respondents herein.

22. *That since the beginning of this case, the applicants have never been present in court.*

B 23. *That even on the 20/11/92, Wande Obatusin, Esq. was present when judgment was delivered and even strenuously argued the issue of costs.*

24. *That this Honourable Court awarded N1,000.00 as costs against the applicants in favour of the respondents.*

C 25. *That the applicants and their counsel knew when the case was fixed for hearing but chose to be absent.*

26. *That the other respondents and I shall be greatly prejudiced or embarrassed if the judgment of this Honourable Court delivered on 20/11/92 is set aside."*

D In a further counter affidavit the 1st Plaintiff further deposed as follows:

"2. *That on the 3rd day of March, 1993, the bailiff of this Honourable Court - Alhaji Adisa served Adeleke Adeniyi, Esq. of counsel the Notice and Grounds of Appeal filed against the judgment of this Honourable Court delivered on the 20th day of November, 1992.*

E 3. *That the plaintiffs herein mandated and/or authorized any (sic) counsel in the Chambers of Wole Olanipekun & Co. to accept any court process on our behalf filed by the defendants/applicants in this case.*

F 4. *That on the same 3rd day of March, 1993, Roland Otaru, Esq. of counsel filed on our behalf a Notice of Intention that the judgment of this Honourable Court may be affirmed on all other grounds other than those relied upon by this Honourable Court. A copy of the Respondents' Notice is hereby attached and marked as exhibit 'A'."*

G The Defendants' motion was heard on 11/3/93, that is, after the Plaintiffs had filed their Respondents' Notice in respect of the appeal filed by the Defendants in a reserved Ruling given on 16/4/93. The learned H trial Judge after considering all the arguments advanced by both sides, granted the Defendants' application and ordered:

"The judgment of this court given on 20/11/92 is hereby set aside. The case is restored to the Cause List while the applicants are granted

leave to file their statement of defence upon the payment of all the costs awarded against them within 21 days from today."

He awarded costs of N500.00 against the Plaintiffs. After this ruling the new counsel for the Defendants brought an application before the trial Court seeking leave to withdraw from the case. The application was granted on 27/5/93.

The Plaintiffs appealed against the Ruling of 16/4/93 to the Court of Appeal. This appeal was dismissed on 30/9/94. Three issues were argued before the Court of Appeal, that is, to say:

"1. Whether having delivered his judgment on 20-11-92 and with the combined provisions of Section 219, 220 of the 1979 Constitution of the Federal Republic of Nigeria (as amended) and Order 3 Rule 5 of the Court of Appeal Rules, 1981 (as amended), the lower court became functus officio in respect of this suit.

ii. Whether the learned trial Judge was right in his application of the provisions of Order 1 Rule 22 of the Court of Appeal Rules, 1981 (as amended)?

iii. Whether it was necessary to serve any subsequent court process on the respondents personally when they had briefed a counsel who appeared for them?"

The Court of Appeal resolved all the issues against the Plaintiffs and dismissed their appeal. They have now, with leave of the Court of Appeal, appealed, to this Court upon five grounds of appeal. The parties filed and exchanged their respective Briefs of argument. In their Brief of argument the Plaintiffs set out the following issues as calling for determination in this appeal:

"(i) Considering the circumstances of this case, whether the Court of Appeal was right in upholding the decision of the trial Judge setting aside the earlier judgment delivered by him on 20/11/92, particularly when the appeal filed by the appellants (now respondents) and the respondents' were/are subsisting and/or not withdrawn - GROUNDS 1, 2, 3 AND 5.

(ii)) Whether it is compulsory or even necessary to serve hearing notices on a party who is already represented by counsel when such notice

has been served on the said counsel - GROUND 4."

The Defendants for their part set out the following two issues:

"1. Whether or not the trial Court had jurisdiction to set aside its own judgment given IN DEFAULT of defence and against which only Notice of Appeal had been filed, but against which no appeal had been entered. (Grounds 1, 2, 3 and 5)

2. Whether considering the circumstances of this case the Court of Appeal was right to have upheld the setting aside of a judgment delivered against the Respondents sought and obtained IN DEFAULT of defence and appearance. (Ground 4)"

I think the success or otherwise of this appeal revolves on the resolution of Issue (1) in both Briefs. For if it is resolved that the trial High Court was in error to entertain the Defendants' motion to set aside the judgment given on 20/11/92 by that Court the propriety of its so doing will no longer arise for consideration. I shall now proceed to consider Issue (1).

It is the contention of Chief Olanipekun, SAN, learned leading counsel for the Plaintiffs both in his brief and oral argument, that the learned trial Judge, having delivered a well considered judgment after the Plaintiffs had called evidence in proof of their case, he became functus officio in respect of this suit. He set out in his brief the circumstances under which a judgment could be set aside by the court giving same. These, according to learned Senior Advocate, are:

"(a) If the judgment was obtained by fraud;
(b) If the judgment is a complete nullity ab initio;
(c) If it is obvious on the face of the record that the court was misled. See United Bank of Africa Ltd. v. Majeed Taan & Ors. (1993) 4 NWLR (pt. 287) 368 at 378."

It is his contention that as the judgment of the trial court delivered in this case on 20/11/92 was not vitiated by any of the above factors, that court would have no jurisdiction to set it aside. Learned counsel relied on an array of cases in support of his submissions. He cited Commissioner of Lands, Mid-Western State of Nigeria v. Chief Francis Edo-Osagie and Ors. (1973) ANLR 620; Bakare v. Apena (1986) 4 NWLR 1; Minister of

Lagos Affairs Mines and Power & Anor. v. Chief Akin Olugbade & Ors. (1974) ANLR 748; ACB Ltd. v. Crestline Services (Nig.) Ltd. & Anor. (1991) 6 NWLR 301 at 312-313 C.A.

M. A. Sanni, SAN learned Attorney-General of Kwara State learned leading counsel for the Defendants, both in his brief and in oral argument, submitted that the judgment delivered on 20/11/92 was a default judgment and being a default judgment the trial court had jurisdiction to set it aside and that the Court in such circumstance was not functus officio. Learned Attorney-General relied on Sanusi v. Ayoola (1992) 11/12 SCNJ (pt. 11) 142, 154 where Karibi-Whyte JSC observed:

"It is true and well settled that a court has an inherent jurisdiction to set aside its own judgment where the conditions have been met by the applicant. These are where the judgment sought to be set aside was obtained on failure to comply with procedural rules - See Evans v. Bartlam (1937) A.C. 473."

He also relied on Order 37 rule 9 and Order 27 rule 10 of the High Court (Civil Procedure) Rules 1989 of Kwara State.

I think the learned Attorney-General is right in describing the judgment of 20/11/92 as a default judgment. In UTC Nig. Ltd. v. Pamotel (1989) 20 NSCC (part 1) 523, 549 this Court, per Karibi Whyte JSC, defined the expression "a default judgment" thus:

"The word" default which qualifies the noun 'judgment' as used in this appeal seems to me to mean a judgment obtained by a plaintiff in reliance on some omission on the part of the defendant in respect of something which he is directed to do by the rules. The word is used very widely to signify situations where a person has omitted to do what he is required to do having regard to the law governing his actions to the relations he occupies. In ordinary parlance it means not doing what is reasonable in the circumstances."

And at pages 558-559, the learned Justice of this Court differentiated this from a "judgment on the merits" when he said:

"A judgment on the merits is one based on legal rights as distinguished from mere matters of procedure or jurisdiction. A judgment on the merits is thus a decision that was rendered on the basis of the evi-

dence led by the parties in proof or disproof of the issues in controversy between them. Normally, a judgment based solely on some procedural error is not, as a general rule, considered as a judgment on the merits. A Judgment on the merits is therefore one arrived at, after considering the merits of the case - the essential issues, the substantive rights presented by the action, as contra-distinguished from mere questions of practice and procedure.

The above distinction is very clearly brought out by Bowen L.J. in Cropper v. Smith (1884) 26 Ch.D 700 at 710.

'I think it is a well established principle that the object of Courts is to decide the rights of the parties and not to punish them for mistakes they may make in the conduct of their cases by deciding otherwise than in accordance with their rights Courts do not exist for the sake of discipline but for the sake of deciding matters in controversy It was said by Mr. Barber in his very powerful speech to us - 'you are taking away an advantage from the plaintiffs who have got judgment below by making an amendment at the last moment.' In one sense we should be taking away an advantage from them, but only an advantage which they have obtained by a mistake of the other side, contrary to the true bearing of the law on their rights of the parties.

A judgment on the merits is thus one that takes cognizance of the true bearing of the law on the rights of the parties where pleadings have been filed, issues are settled on those pleadings and the rights of the parties are decided on the resolution of those issues. Where this happens, the ensuring judgment is on the merits. But where as in this case the judgment set aside by Longe, J. was obtained by and because of the failure of the Defendant to file its affidavit as prescribed by order 10 rule 3 Lagos High Court Rules, then ensuring judgment was one obtained because of the default of the Defendant to comply with said order 10 r. 3. In my humble view, such a judgment is certainly a judgment in default and by default. It is a default judgment and not a judgment on the merits of this case as pleaded in the plaintiff's Statement of Claim and the Defendant's Statement of Defence."

See also Cardoso v. Daniel & Ors. (1986) 2 NWLR 1 at p. 45 where

Opita JSC opined:

"A judgment is said to be on the merits when it is based on the legal rights of the parties as distinguished from mere matters of practice, procedure, jurisdiction or form. A judgment on the merits is therefore a judgment that determines, on an issue either of law or fact, which party B is right."

The judgment here was given in default of the defendants' pleadings. The fact that evidence was led for the Plaintiffs before the judgment was given would not rob it of the efficacy of being a default judgment. Every court of record has a discretionary power to set aside a judgment obtained in default of pleadings or of appearance - see: Banque Genevoise CC v. Spetsai (1962) 1 ALL NLR 496; (1962) ANLR 491; Williams v. Hope Rising (1982) 2 SC 145; Khawam v. Elias (1960) 5 FSC 224; Jammal Engineering Co. Ltd. v. Misr. (Nig.) Ltd. (1972) 4 SC 79. The principle is well stated by Lord Atkin in Evans v. Bartlam (1937) AC 473, 480 thus: D

"The principle obviously is that unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure." E

There are also the rules of the High Court of Kwara State. Order 27 rule 10 provides:

"The Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order." F

The Order deals with default of pleadings. Order 37 rule 9 also provides:

"Any judgment obtained where one party does not appear at the trial may be set aside by the Court upon such terms as may seem just, upon an application made within six days after the trial or within such longer period as the Court may allow for good cause shown." G

There are rules similar to the above in various rules of Courts in this jurisdiction which have come to be applied from time to time. See Sanusi v. Ayoola (supra). Surely, to hold, as submitted by Chief Olanipekun SAN, that once a judgment that is not on the merits but in default of pleadings or appearance is given and signed it cannot be set aside by the trial court, the above rules would be deprived of their efficacy and ren- H

dered ineffective.

The cases cited by learned leading counsel for the Plaintiffs are cases where final judgments on the merits have been entered and not cases of default judgments. They are, therefore, not apposite to the facts of the present case. The judgment of 20/11/92 was not given after a hearing on the merits as the defendants were not heard in their defence; they by their default in filing their statement of defence, robbed themselves of their being heard even if they were present in court at the hearing of 19/11/92.

If this were all there is to this appeal I would not have hesitated, like my learned brothers, to dismiss it and affirm the decisions of the two Courts below. But there was a complication which, as I shall shown presently, deprived the learned trial Judge of jurisdiction to act under Order 27 rule 10 or under his discretionary power to set aside the default judgment given in this case. And what was this complication?

Following the judgment of 20/11/92 against the Defendants, they on 24/11/92 lodged an appeal to the Court of Appeal against that judgment by filing a notice of appeal in the registry of the trial High Court as required by Order 3 rule 5 of the Court of Appeal Rules. Without withdrawing that appeal, the Defendants on 26/11/92, brought their application to have the judgment set aside by the trial court pursuant to Order 27 rule 10.

It is the contention of the Plaintiffs that as an appeal was pending at the time the Defendants' application to set judgment aside was filed, the trial Judge would have no jurisdiction to entertain the latter application. This is more so, they further contend, that they had filed a Respondents' Notice to have the judgment affirmed on other grounds pursuant to the Court of Appeal Rules.

In the Appellants' Brief Plaintiffs argue thus:

"It is, therefore, submitted that both the appeal filed by the respondents and the respondents' notice filed by the appellants herein at the court below are still subsisting. As regards their effect on this case, it is submitted that once there was a pending appeal on this case, the trial court could not have divested the Court of Appeal of jurisdiction in

respect thereof by re-adjudicating over the case all over. This is the irresistible and singular conclusion to be drawn in the face of the provisions of section 219 of the 1979 Constitution conferring exclusive jurisdiction on the Court of Appeal over appeals from the High Court among others.

It should be noted that one of the reliefs being claimed on page 151 of the Record vide the Notice of Appeal filed by the respondents herein is that the Court of Appeal should order a re-trial of the case before another Judge. It would appear as if the lower court did not take cognizance of the situation the learned trial Judge has placed himself before dismissing the appellants' appeal and ordering the case to be continued before the same court for trial."

It is the submission of the learned Attorney-General, for the Defendants, that as the appeal filed on 24/11/92 had not been entered in the Court of Appeal, the learned trial Judge had jurisdiction to entertain the motion to set aside the judgment of 20/11/92. He cites Order 1 rule 22 of the Court of Appeal rules and the cases of Okafor v. Attorney-General (1991) 7 SCNJ (pt. 11) 345, 351 and Ezomo v. Attorney-General Bendel State (1986) 4 NWLR 448, 489. The learned Attorney-General further argues in his Respondents' Brief thus:

"Furthermore, there is no law that compels an appellant to pursue his appeal rather the law allows him to abandon the appeal simply by refusing to pursue it. The Respondents were not therefore bound to pursue the Notice of Appeal now being referred to in this case (See pages 149-152). The appeal has not been pursued and has been legally abandoned. The authority to adjudicate must of course not be left in abeyance. It is therefore submitted that the case was still with the trial court because the appeal has 'not been entered' and the learned trial Judge and subsequently the court below, was therefore right in its application of Order 1 Rule 22 of the Court of Appeal Rules 22 of the Court of Appeal rules to this matter. See page 209 and page 309 of the Record.

We submit that similar situation exists in respect of Interlocutory applications like stay that could be made either at the trial Court or at the Court of Appeal. They are not to be entertained at appellate Court

until the appeal has been entered and the record have been transferred from the Lower Court to the Appellate Court concerned. Please refer to the case of Ezomo v. Attorney-General Bendel State (supra)"

The same arguments advanced before us by learned Senior Advocate, Chief Olanipekun were advanced by him in the two Courts below. The learned trial Judge recognized that an appeal was pending in the matter. He said:

"The appeal filed against that decision which, ex facie, is still subsisting is in pursuance of the applicants' rights under section 220 or 221 of the Constitution of the Federal Republic of Nigeria, 1979, and other laws and rules made to regulate the rights, notably, the Court of Appeal Act, No. 43 of 1976, and the Court of Appeal rules of 1981. Except on the point where the competence of this motion is in issue because of the pending appeal the present proceedings are not concerned with the appellate aspect of the matter."

He also recognized under what provisions the application to set aside was brought. Again, he said:

"The application to set aside the judgment of this court given on 20/11/92 which is the subject of this review is in pursuance of the applicants' right under rule 9 of Order 37 of the Kwara State High Court (Civil Procedure) rules, 1989, to which rule 10 of Order 27 empowers the court to set aside any judgment given because of the failure of the party to file his pleading while rule 9 of Order 37 which similarly empowers the court to set aside any judgment it gives because of the non-appearance in court of a litigant"

On his competence to entertain the motion before him, the learned Judge observed:

"Silken and attractive as the argument of the learned counsel appears to be and I am enamoured with his penetration and resilience the argument does not address itself to the provisions of rule 22 of Order I of the Court of Appeal rules, 1981, which is mutually complementary to Order 3, rule 5, and which provides for the point when the jurisdiction of the trial court on a matter against which an appeal has been filed is excluded. In particular, it failed to address itself to the distinction be-

tween the phrase 'deemed to have been brought' in rule 5 of Order 3 on which he hinges his argument and the corresponding phrase 'has been entered' in rule 22 of Order 1 of the same Rules. The two phrases are not synonymous and the phrase 'appeal has been entered' has been interpreted to imply a reference to a point during the processing of an appeal B when the record of appeal has been received by the Court of Appeal and entered in the Cause List: See Coker v. Adeyemo (1965) 1 All NLR. 120 123. That, in my view, is the point in time when, within the purview of rule 22 of Order 1, the court became 'seized of the whole of the proceedings' and the jurisdiction of the trial court on post-judgment proceedings C is finally ousted.

On this point, the argument of the learned counsel also runs counter to the *raison detre* of section 61 of the Kwara State High Court Law, Cap. 49, which empowers the court, among other things, to grant a D stay of execution of its judgment and to the wider power of the court under its inherent jurisdiction which enables it to do a sundry other things as the exigencies and justice of a particular case may require even after judgment has been entered: See sub-section 6 (6) (a) of the Constitution E of the Federal Republic of Nigeria, 1979, and Yonwuren v. Modern Signs (Nig.) Ltd., (1985) 16 NSCC. (part 1) 243, 273-274; and Adigun v. Attorney-General, Oyo State, (1987) 18 NSCC. (part 1) 545, 568-569.

This, in a way, may include the power of a court to put a rider on F its own judgment, especially where it is necessary to preserve property the subject of an action that has been dismissed, as exemplified by the Supreme Court in Shodeinde v. The Registered Trustees of the Ahmadiyya Movement-In-Islam, (1980) 1-2 SC. 163, 184-185. 219, etc., the rationale of which provided a guide for the Court of Appeal in Ike v. Ugboaja, G (1989) 2 NWLR. (part 103) 332, 335-336; and Egbuna v. Egbuna, (1989) 2 NWLR. (part 106) 773

He concluded thus:

"Therefore, the discretion vested in this court by rule 9 of Order H 37, rule 10 of Order 27 and other kindred provisions of the Rules of this court to set aside its judgment given in the circumstances therein described is not ousted by the fact that an appeal has been filed against

such judgment"

On appeal to the Court of Appeal, that court again recognized that a valid appeal was pending in the Court. Opene JCA, delivering the lead judgment of the Court, with which the other Justices that sat with him agreed, observed:

"Order 3 rule 5 of the Court of Appeal rules 1981 (as amended) reads:-

'An appeal shall be deemed to have been brought when the notice of appeal has been filed in the Registry of the Court below.'

In the instant case, the appeal was filed on 24-11-92 by the respondents against the judgment of the learned trial Judge delivered on 20-11-92 and none of the parties contests the fact that there is a valid appeal pending before this Court.

The question is, whether the learned trial Judge has the power to set aside its judgment while an appeal is pending before this Court?" Opene JCA remarked:

"It can be seen that the learned trial Judge in a well considered ruling applied the provisions of order 27 rule 10 and order 37 rule 9 of High Court of Kwara State (Civil Procedure) Rules which of course empowers (sic) him to set aside a default judgment and also the provisions of Order 1 rule 22 of Court of Appeal Rules 1981 as he found that even though there is a pending appeal but the Court of Appeal is not seized of the matter as it has not been entered in the Court of Appeal."

After setting out Order 1 rule 22 of the Court of Appeal Rules, the learned Justice of Appeal, observed:

"A search in the Registry of this Court and all the records before this Court show that the appeal has not been entered in this Court when the learned trial Judge delivered his ruling on 16-4-93.

None of the parties disputes this and in fact the argument of the learned Senior Advocate is that Order 1 rule 22 of Court of Appeal Rules does not envisage a situation which calls for the setting aside of a judgment already given because the record of proceedings has not been received by this court."

He set out the issue to be decided in these words:

"The issue has now been narrowed down to whether the learned trial Judge was right in invoking the provisions of Order 1 rule 22 of the Court of Appeal Rules in setting aside the judgment, that is, setting aside the judgment while an appeal is pending but has not been entered in this Court."

The learned Justice of Appeal observed, and quite rightly in my humble view, that -

"As regards the issue raised in both respondents' brief and the appellants' reply brief whether appellant can abandon his appeal, Order 3 rule 18(1) to rule 18(5) specify the mode and manner in which an appeal can be withdrawn but all the same, the issue of withdrawing or abandoning an appeal does not arise in this matter. There is a pending appeal which has not been entered in this court."

However, if there is a pending appeal and the appellant fails to pursue it by seeing that the record of proceedings is sent to the court of appeal, this Court can strike out the appeal or even dismiss it under Order 6 rule 10 of the Court of Appeal rules."

He came to this conclusion:

"Unlike the case under reference where the trial High Court is not competent to determine whether an appeal before it is valid or not, under order 37 rule 10 of High Court of Kwara State (Civil Procedure) Rules, the High Court has the jurisdiction to set aside a default judgment. This is the statutory power that the learned trial judge exercised and I must say that he rightly exercised it on (sic) the appeal has not been entered in this Court."

With profound respect to their Lordships of the Court below I cannot agree with the answer they gave to the question posed by them as the issue to be decided in the appeal before them. I agree entirely with Chief Olanipekun SAN when, in his brief, he argues:

"On the interpretation of Order 1 Rule 22 of the Court of Appeal Rules it is my respectful submission that contrary to the interpretation placed on this Order by the lower court, the provisions, at the very best, relate to interlocutory applications like stay of execution or injunction but can not be sued as a floodgate for a trial court to set aside

its own judgment on the pretext that the Court of Appeal is not yet seised of the matter when an appeal has already been filed. In my respectful submission, the true position of the law is that between the time an appeal is filed at the lower court but before the record is transmitted to the Court of Appeal, the lower court can entertain interlocutory applications but cannot re-open the case. But when the Record of Proceedings has been transmitted to the Appeal Court whereby the Appeal Court is seised of the matter, the lower court lacks every jurisdiction to take any proceeding, interlocutory or otherwise. This is exactly what this court was saying in the case of Okafor v. Attorney-General of Anambra State (1991) 6 NWLR (pt. 200) at 659 and Ogunremi v. Dada (1962) 1 ANLR (pt. 4) 663 at 668. Any other interpretation as done by the lower court would render nugatory the provisions of Order 3 Rule 5 of the Court of Appeal rules and Sections 219 and 220 of the 1979 Constitution."

Once an appeal is filed, the Court from which the appeal is lodged, whilst it has power to entertain some interlocutory applications in the appeal, such as granting a stay of execution or injunction pending appeal and this power it possesses concurrently with the appellate court - it cannot deal with the appeal in a manner inconsistent with the power of the appellate court over the appeal. For instance, the trial court cannot dismiss or strike out the appeal for failure on the part of the appellant to perform conditions of appeal or where the appellant has filed a notice of withdrawal of the appeal. All the trial court can do in such cases is for its registry to transmit to the appellate court, in this case the Court of Appeal, the certificate of non-compliance or the notice of withdrawal of appeal and the Court of Appeal, on receipt of such document, will call up the appeal for dismissal or striking-out see Order 3 rules 18 and 20 of the Court of Appeal Rules. And this is so notwithstanding that the appeal has not been entered in the Court of Appeal. When the appeal is entered the concurrent powers the trial High Court has with the Court of Appeal come to an end for the former and the latter becomes completely seised of the matter. From that time on, all interlocutory applications in the appeal can only be entertained by the Court of Appeal see Order 1 rule 22 of the Court of Appeal Rules. The power of the Court of appeal to

entertain interlocutory applications in the appeal is not dependent on the entering of the appeal in that Court. See: Missini v. Missini (1968) 1 All NLR 318, 321; (1968) ANLR 310; Abina v. Tika Tore Press (1968) 1 All NLR 210, 213; (1968) ANLR 208.

The power of the trial High Court under Order 27 rule 10 and Order 37 rule 9 to set aside a default judgment is not a power in an appeal; it is extrinsic to the appeal.

When a default judgment is given against a party, that party has a choice of either accepting the judgment and abide by it or move the trial court to set it aside and hear the suit on its merit or appeal against it. The party is put to his election. And where the party has made his election; he loses the other remedy or remedies. This is what the authors of Black's Law Dictionary (6th edition) at page 518 have to say under the title "Election of remedies":

"Election of remedies. The liberty of choosing (or then act of choosing) one out of several means afforded by law for the redress of an injury or one out of several available forms of action. An 'election of remedies' arises when one having two coexistent but inconsistent remedies chooses to exercise one, in which even he loses the right to thereafter exercise the other. Doctrine provides that if two or more remedies exist which are repugnant and inconsistent with one another, a party will be bound if he has chosen one of them. Melby v. Hawkins Pontiac, Inc. 13 Wash. App. 745, 537 p. 2d 807, 810." (underlining is mine)

This is based on the common law principle

"Which puts a man to his election (to give a few instances only) whether he will affirm a contract induced by fraud or avoid it, whether he will in certain cases waive a tort and claim as in contract, or whether, in a case of wrongful conversion, he will waive the tort and recover the proceeds in an action for money had and received. These cases mainly relate to alternative remedies in a court of justice."

per Viscount Maugham in Lissenden v. Bosah Ltd. (1940) 1 All ER 425 at page 429. Lord Atkin, in the case observed at page 436*

"In cases where the doctrine does apply, the person concerned has the choice of two rights, either of which he is at liberty to adopt, but

not both. Whether the doctrine does apply, in the person to whom the choice belongs irrevocably and with knowledge adopts the one, he cannot after wards assert the other." (underlinings are mine)

See also Young v. Bristol Aeroplane Co. (1946) 1 All ER 98; for further discussion on the common law principle. The principle has its root in the maxim: Allegans contraria non est audiendus. That is to day, he is not to be heard who alleges things contradictory to each other.

Turning to the instant case, the Defendants having chosen to appeal to the Court of appeal against the judgment of 20/11/92 are estopped, during the pendency of the appeal, from resorting to the remedy afforded them by the rules of court. This estoppel affects the competence of the trial High Court to exercise its powers to set aside its own judgment given in default of pleadings or appearance. A court is said to be 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

Any defect in competence is fatal, for the proceedings are a nullity however well conducted and decided: the defect is extrinsic to the adjudication." per Bairamian, FJ (as he then was) in Mactkolu v. Nkemdilim (1962) ANLR 585 at 589-590. It is condition (2) that is breached in this case. Although the subject matter of the case, that is, the application to set aside a default judgment is within the jurisdiction of the trial court, there is a feature in the case, - the estoppel against the Defendants from resorting to that remedy after having chosen the alternative remedy of appeal which still subsists - which prevents the court from exercising its jurisdiction. Being incompetent, therefore, the proceedings and ruling of Olagunju J setting aside his judgment of 20/11/92, as well as the appeal to

the Court below, are a nullity and I so declare.

Of course, the Defendant could have resiled from the position they took on 24/11/92 by withdrawing their appeal to the Court of Appeal in the manner provided by the Rules of the Court of Appeal and then file the application to set aside the judgment in the High Court. This is so because the effect of the withdrawal of the appeal is as if there was never an appeal filed by the Appellant - see; Nkanu v. The State (1980) 3-4SC 1 at p. 2. But this they did not do. We now have an anomalous, and indeed absurd, position which results from having the judgment of 20/11/92 set aside by Olagunju J. while the appeal against that judgment is, up to this day pending as it has not been withdrawn and dismissed by the Court of Appeal that is the only competent tribunal that has jurisdiction to do so.

The conduct of the Defendants in appealing against the default judgment and, without first withdrawing that appeal, praying at the same time the trial court to set aside the default judgment amounts to an abuse of the court's process and the trial court in such a situation was under a duty to interfere to stop an abuse of its process - See Okoroduddu v. Okoromadu (1977) 3 SC. 21 where this Court, per Bello JCS, as he then was, observed at pages 30-32:

"There is one aspect of this case which calls for comment. Bearing in mind that it has been the practice of this Court not to exercise its discretion to take points suo motu unless it thinks in the circumstances of the case that justice demands it: Odiase & Another v. Agho others (1972) 1 All NLR (pt. 1) 170, we think an abuse of judicial process calls for the exercise of our discretion.

In the notice of discontinuance it was stated that the plaintiffs wanted to discontinue Suit No. W/8/73, the subject matter of this appeal, because the suit 'was not properly constituted' and the plaintiffs had 'consequently instituted suit No. W/117/73 against the defendants'. During his argument at the hearing of the appeal before us the learned counsel for the appellants frankly stated that the plaintiffs found it necessary to discontinue with the hope that the case would be struck out and thereafter to proceed with suit No. W/117/73 because they had made several

applications to amend their pleadings which the learned judge had refused to grant.

It appears that the plaintiffs, having failed to secure amendments of their pleadings in Suit No. W/8/73, proceeded to achieve what they had failed to obtain by amendments by filing therein suit No. W/117/73 against the defendants while suit No. W/8/73 was still pending in that court. We consider the conduct of the plaintiffs in this regard as a flagrant abuse of judicial process of the court.

In addition to its inherent jurisdiction to stay proceedings which are clearly an abuse of its process, the court below has a duty under section 16 of the High Court Law, 1964, the Laws of the Midwestern State of Nigeria, 1964 to prevent multiplicity of proceedings between the same parties on the same subject matter. It seems that the learned judge did not stay Suit No. W/177/73 because, as shown by his ruling, he thought the dismissal of the claims in Suit No. W/8/73 would be a defence to the new suit. In view of our order remitting suit No. W/8/73 to the court below for hearing, we would follow the course taken in T. O. Oyegbola v. Esso West African Inc. (1966) 1 All NLR 170 and stay Suit No W/117/73 with direction that the stay shall not be removed until after suit No. W/8/73 has been determined."

It is to be noted that the point was taken suo motu by this Court in that case. The trial High Court should have stayed the proceedings in the motion to set aside the pending judgment before it until the appeal filed by the defendants to the court of Appeal had been disposed of. That was the course ordered to be taken by this Court in Okorodudu v. Okoromadu (supra)

I do not consider it necessary to go in-depth into Issue 2. It is sufficient to say that service of process on counsel is good service on his client. If counsel fails to bring the fact to the notice of his client this failure cannot affect the propriety of the service. It may be a good reason to extend the Court's indulgence to the client in a proper application or ground a cause of action against counsel. I make no definitive pronouncement on this issue.

It is for the reasons I give above that I have reluctantly come to

the conclusion that I cannot go along with my learned brothers in the order they make dismissing this appeal. If the appeal rests with me I would allow it, set aside the judgment of the Court below and declare the proceedings and ruling of Olagunju, J given on 16th April, 1993 setting aside his judgment of 20/11/92, a nullity. I would award N10,000.00 B costs of this appeal and N500.00 and N1,000 costs of the the proceedings in the High Court and Court of Appeal respectively in favour of the Plaintiffs.

C

MOHAMMED JSC

I entirely agree with the opinion of my learned brother, Wali, J.S.C. in the lead judgment, just read. I have had a preview of the judgment, in draft, before now. D

The main issue for the determination of this appeal is whether the trial court had jurisdiction to set aside its own judgment given in default of defence, particularly when the appeal filed by the appellants in the Court of Appeal (now respondents before this court) against the default judgment had not been withdrawn. E

The facts of this case have been given fully in the lead judgment of my learned brother, Wali, J.S.C. I will only repeat the facts in order to explain what I intend to emphasize in my contribution. F

The issue in question is the right of a court to set aside its judgment given in default of pleadings. There is no dispute over this right. Where a defendant fails to serve his defence within the period ordered by the court, as in the case in hand, then on a motion on notice by the plaintiff for judgment, the court may enter judgment for the plaintiff, G after or without taking evidence.

In this case, the learned trial judge, on 15th of May, 1992 after extending time for the plaintiffs/appellants to file their statement of claim and reminding the defendants/respondents that they had 30 days to file H their statement of defence the court adjourned the case sine die. On 19th November, 1992, the case was called and only counsel for the plaintiffs/appellants was present. The learned trial judge recorded that he was

satisfied, on the strength of Exhibits "A" to "A3" that the defendants/respondents had been served with the hearing notice to attend the proceedings on that day. Learned Counsel for the plaintiffs/appellants, Mr. Otaru, relying on the statement of the court that the defendants/respondents had been served applied to be permitted to prove the case for the plaintiffs. The learned trial judge agreed. Mr. Otaru called two witnesses and closed his case. The learned trial judge, on the following day, entered judgment for the plaintiffs/appellants as per their statement of claim. On the 24th of November, 1992, learned counsel for the defendants/respondents filed an appeal against the judgment. On 26th of November 1996, just six days after the delivery of the judgment a solicitor from Sara'a Chambers in Illorin filed a motion and prayed for the following orders.

D *"1. Leave of the Honourable Court to set aside the judgment given on the 20th November, 1992.*

E *"2. Leave to grant an extension of time to the applicants to file the statement of Defence attached and exhibited herewith AND for any order or further orders as this Honourable Court may deem fit to make in the circumstances."*

F The learned trial judge, in a well considered ruling agreed with the submission of new counsel for the defendants/respondents that the defendants/respondents had no notice of hearing on 19/11/92. In the result the learned trial judge after considering all the facts involved, in a well considered ruling exercised his discretion and set aside the judgment he delivered on 20/11/92. He then restored the case to the Cause List and granted the defendants/respondents leave to file their Statement of Defence.

G I have repeated the facts in a nutshell, because I want to emphasise that all the steps taken in the proceedings by the learned trial judge were within the provisions of the Kwara State High Court (Civil Procedure) Rules 1989. The judgment delivered by the learned trial judge is a judgment in default of pleadings. Under Order 27 Rule 10 of Kwara State High Court (Civil Procedure) Rules 1989 the learned trial judge had discretion to set it aside on the application brought before him if he was

satisfied that the party applying had a good defence to the action. In the case of: In Banque Genevoise De Commerce Et De Credit v. Cia. Mar. di Isola Spetsai (No.1) (1962) 1 All NLR. 496, a judgment had been obtained against the appellant in his absence in an admiralty action brought in the Lagos High Court for the sum of #380,627 plus costs totalling B #2,500 (pound sterling). Upon the refusal of the High Court to set aside the judgment on the application of the appellant, he then filed an appeal to the Supreme court.

In allowing the appeal and setting aside the judgment of the High Court, C Ademola C.J.F. (as he then was) said:

"The matter of setting aside a judgment obtained by default in my view, is one of the discretionary powers a judge may exercise, and provided the court is satisfied that the party applying satisfied the court that he has a good defence, the judge may rule that the case be re-listed D - See Evans v. Bartlam. I should be sorry to decide that a defendant as in this matter, who had heard of a summons against him, rather late, and was unable to enter appearance in good time, and had with great difficulty arrived in this country a few days after judgment was entered against E him should be deprived of the right of a re-hearing and putting a defence, which appears genuine on the face of it, before the court."

Now let me pause here and ask; "which error had the learned trial judge committed in exercising his discretion to set aside his judgment F which he gave in default of defence and when is a judge functus officio after delivering a judgment?" I will start with the last question. The Latin expression Functus officio simply means "task performed". Therefore applying it to the judiciary, it means that a judge cannot give a decision or make an order on a matter twice. In other words, once a G judge gives a decision or makes an order on a matter, he no longer has the competence or jurisdiction to give another decision or order on the same matter - see Emeka v. The Hon. President of Onitsha Customary Court and ors. (1995) 3 NWLR (part 381) 50. However it is important to H observe that a judge is functus officio if he gives judgment on the merits. A judgment in default is not a judgment "on the merits". See Oppenheim v. Mohammed (1922) 1 A.C. 482 and U.T.C. (Nig.) Ltd. v. Pamotei

2700 Mohammed v. Hussein (1998) 12 KLR Mohammed JSC
(1989) NSCC (part 1) at 558-559. In Evans v. Bartlam (1937) AC 480
Lord Atkin giving an opinion on the Power of a judge to set aside a
default judgment held:

"The Principle obviously is that unless and until the court has
B pronounced a judgment upon the merits or by consent, it is to have the
power to revoke the expression of its coercive power where that has only
been obtained by a failure to follow any of the rules of procedure."

I agree with the learned Attorney-General of Kwara State, M.A.
Sanni S.A.N. that it is not correct as the appellants counsel had submitted
C that a judgment could only be set aside:

- (a) When the judgment is obtained by fraud;
- (b) When the judgment is a complete nullity ab initio.
- (c) Where it is obvious on the face of the record that the court
D was misled.

It has been argued by the learned Senior Advocate for the appel-
lants that since the respondents' counsel, Wande Obatusin, had filed a
notice and grounds of appeal on 24/11/92 against the judgment of the trial
E court delivered on 20/11/92 the respondents' appeal is deemed to be pend-
ing in the court of Appeal from 24/11/92. With respect, this cannot be
correct. The decision of this court in the case of Ogunremi v. Dada
(1962) 1 A.N.L.R. (part 4) 633 at 688 is very clear on this point. It was
F held in that case that an appeal to this court is entered when the record of
appeal is received and entered in the cause list. The giving of notice of
appeal does not constitute the entering of the appeal.

There is no evidence, even through an affidavit, showing that
the appeal filed by learned counsel Wanda Obatusin, on behalf of the
G respondents, had been entered in the Court of Appeal. IN Ezomo v.
Attorney-General Bendel State (1986) 4 NWLR (part 36) 448 at 449
Karibi Whyte J.S.C. held as follows:

"Thus, there is the period between when the appeal is deemed
H brought i.e. Notice of Appeal is filed, and before the Record of Appeal is
forwarded to the Court of Appeal and the time after the record of appeal
is received in the Court of Appeal. It is well settled that until the appeal
is entered in the Court of Appeal, that court has no control over the

proceedings as between the parties."

The appeal filed by learned counsel Wande Obatusin had therefore not reached the Court of Appeal since it had not been entered there. At any time the respondents could file a notice of discontinuance before the Court of Appeal and that will be the end of that notice of appeal. B

The issue of election as my Lord, Wali, had opined in his judgment was not raised by any of the parties. Even if such an issue had been raised it is my respectful view that the doctrine is inapplicable to this case. The doctrine had its origin from Scotch Law as observed by Lord Redesdale in Birmingham v. Kirwan (1805) 2 Sch. and Lef 444, 449. C
Lord Cairns L.C. stated the matter thus:

"By the well 'settled doctrine which is termed in the Scotch law the 'doctrine of 'approve' and 'reprobate', and in our courts' 'more commonly the doctrine of 'election', where a deed or 'will professes to make a general disposition of property for the 'benefit of a person named in it, such person cannot accept 'a benefit under the instrument without at the same time 'conforming to all its provisions, and renouncing every right 'inconsistent with them.' In the light of these authorities it seems that the phrase 'you may not approve or reprobate' the Latin 'quod approbo non reprobo,' as used in England is no more than a picturesque synonym for the ancient equitable doctrine of election, originally derived from the civil law, which finds its place in our records as early as the reign of Queen Elizabeth:" D
E
F

The doctrine of election under the common law is the act of choosing one of the alternative remedies for filing a claim before a court. Viscount Maugham in the case of Lissenden v. C.A. v. Bosch Ltd. (1940) A.C. 412 at 418 observed that equitable doctrine of election can be distinguished from the common law principle of election which the learned Law Lord explained in the following elucidation: G

"It is perhaps well to observe here that the equitable doctrine of election has no connection with the common law principle which puts a man to his election (to give a few instances only) whether he will affirm a contract induced by fraud or avoid it, whether he will in certain cases waive a tort and claim as in contract, or whether in a case of wrongful H

conversion he will waive the tort and recover the proceeds in an action for money had and received. These cases mainly relate to alternative remedies in a court of justice."

B An appeal is not an alternative remedy to any proceeding in a court of law. It is a right given by statute and rule. It does not depend on the bounty of a judge. Therefore coming back to the case in hand, it is the right of the defendants/respondents to file an appeal against the default judgment of Olagunju J. So long as the appeal had not been entered in the Court of appeal, Olagunju J. could attend to any application brought C before him in respect of the default judgment. Giving notice of appeal does not constitute the entering of the appeal in the Court of Appeal. Furthermore, until the learned trial judge agreed, through an application brought before him, to stay further proceedings in the case or until the D Court of Appeal orders him to stay proceedings pending an appeal he commits no error in exercising his discretion to set aside his default judgment. The proceedings to set aside his default judgment is not an exercise outside his jurisdiction.

E For these reasons and the fuller reasons given by my learned brother, Wali, J.S.C I hereby dismiss the appeal and affirm the judgment of the Court of Appeal. I also award N10,000.00 costs in favour of the defendants/respondents.

F _____

ONU JSC

G In considering the appeal herein, two issues have stood out poignantly for our determination, to wit: those submitted at the instance of the respondents being no more radically different from those formulated by the appellants the latter which I set out hereunder as follows:

H *"(i) Considering the circumstances of this case, whether the Court of Appeal was right in upholding the decision of the trial Judge setting aside the earlier judgment delivered by him on 20/11/92, particularly when the appeal filed by the appellants (now respondents) and the respondents' were/are subsisting and/or withdrawn - GROUNDS 1, 2, 3, AND 5.*

(ii) Whether it is compulsory or even necessary to serve hearing

notices on a party who is already represented by counsel when such notice has been served on the said counsel - GROUND 4."

Of these two issues, the consideration of the first which I consider dominant, will do to dispose of the appeal herein as was fully argued before us on 21st September, 1998. Learned counsel on both sides after adopting their written briefs made oral submissions in expatiation thereof.

Contrary to the stance earlier adopted by me, it became indisputably clear that the learned trial Judge was right to have set aside the default judgment but this, with a catch, as eloquently exemplified in the appellants' brief, which raised the following questions for answers by this court, to wit:

"(i) What happens to the evidence already given?"

(ii) Is the trial court going to wipe it off and start the case de novo?

(iii) Does it have jurisdiction to do that?

(iv) Where do the proceedings actually start now?"

(v) Is it for defence? and

(vi) How do the appellants (as plaintiffs at the trial court) give evidence in rebuttal of the Statement of Defence, more so when they have closed their case?"

The above and many more fundamental questions, which in my opinion, cannot be answered by the trial court but by the court of Appeal (hereinafter in this judgment where the context so admits, I refer to as the court below) is indeed the court at liberty to give the appropriate directive either to the trial Judge or to another judge, as the case may be. I am thus invited to render an interpretation of Order 1 rule 22 of the Court of Appeal Rules which states that:

"After an appeal has been entered and until it has been finally disposed of, the court shall be seized of the whole of the proceedings every application therein shall be made to the court and not to the court below." (Underlining above supplied by me for emphasis). Consequently, contrary to the interpretation placed on the above Order by the court below, the provisions, thereof, in my firm view, at the very best,

relate to interlocutory applications like stay of execution or injunction but cannot or ought not to be used to open the floodgate for a trial court to set aside its own judgment on the pretext that the Court of Appeal is not yet seised of the matter when an appeal has already been filed. However, B in my respectful view, the true position of the law is that between the time an appeal is filed at the trial court but before the record is transmitted to the court below, the trial court can entertain such interlocutory applications but cannot re-open the case. In effect, when the Record of C proceedings has been transmitted to the court below whereby the court below is seised of the matter, the trial court lacks every jurisdiction to take any proceeding, interlocutory or otherwise. This is exactly what this court was saying in the case of Okafor v. Attorney-General of An-
ambra State (1991) 6 NWLR (part 200) 659, where one of the issues that D arose for the resolution of this court was whether the Court of Appeal in all cases, having handed down its judgment becomes functus officio and lacks the jurisdiction to set such judgment aside. It was held (per Omo, JSC) at page 671, paragraphs D-H of the Report inter alia as follows:

E *"Issues have been properly raised in the application for the court below to consider and determine. What is presently at issue is whether it can consider the application or it is precluded from doing so.*

F *The answer to the issue for determination must be in the negative because:*

(a) *the motion was filed in the Court of Appeal which had jurisdiction to entertain it before the 1st to 3rd respondents filed their appeal to the Supreme Court.*

G (b) *Even if the lodging of an appeal by the 1st to 3rd respondents in the Supreme Court could oust the jurisdiction of the Court of Appeal, no such ouster can arise here because the Supreme Court was not yet seised of the appeal as no appeal had been entered in this court, vide Ogunremi v. Dada (1962) 1 ANLR (part 4) 633 at 688; (1962) 6 SCNLR H 417.*

(c) *The appeal to the Supreme Court filed by 1st to 3rd respondents had been withdrawn before the Court of Appeal heard the application. Even if the applicants had any basis for complaint that was eroded*

by this act, the Court of Appeal could no longer be said to be in conflict with the Supreme Court.

(d) In any event, an appeal filed by the 1st to 3rd respondents to the Supreme Court cannot, in any way fetter the exercise by the 4th and 5th respondents of their right to file a motion in the Court of Appeal. It is true that (the appellants) were sued jointly and severally, but this fact cannot derogate from any of the parties, their right to pursue whatever remedy the law has given them."

See also Ogunremi v. Dada (supra) at page 668 where this court observed in situations where two applications were brought on behalf of the respective applicants for stays of execution of the two High Court judgments pursuant to Order VII Rule 19 of Federal Supreme Court Rules, 1961, albeit that by reason of section 19C of the Western Nigeria High Court Law, the High Court of Western Nigeria retained the jurisdiction to grant stays of execution, pending the determination of appeals to the Federal Supreme Court. It was held inter alia that:

"1. Rule 19 of Order VII of the Federal Supreme Court Rules, which provides for the control of proceedings by the Federal Supreme Court during pendency of appeals in Civil cases, does not come into operation, as regards applications in such proceedings, until after the appeal has been entered under the Rules.

2. An appeal to the Federal supreme Court is entered when the Record of appeal is received in that court and entered in the Cause List, in that court and entered in the Cause List, in accordance with Order VII rule 12(2) of the Federal Supreme Court Rules.

3. The giving of Notice of Appeal does not constitute the entering of the Appeal in the Federal Supreme Court."

Any other interpretation as made by the court below would render nugatory the provisions of Order 3 rule 5 of the Court of Appeal Rules which provides that:-

"An appeal shall be deemed to have been brought when the notice of appeal has been filed in the Registry of the court below."

See also sections 219 and 220 of the Constitution of the Federal Republic of Nigeria, 1979 (hereinafter referred to as the constitution) both of which

provide from which courts appeals lie to the Court of Appeal and/or where notice of such appeals would go as of right etc.

Learned Senior Advocate for the appellants, Chief Olanipekun, has argued in both his brief and oral submissions that having delivered a well considered judgment after the appellants had called evidence in proof of their case, the trial Judge became functus officio in respect of the matter. Such a sound judgment, he contended, could only be set aside, if and only if, it is fraught with one or more of the following fact or circumstances:-

- (a) *If the judgment was obtained by fraud;*
 (b) *If the judgment is a complete nullity ab initio*
 (c) *If it is obvious on the face of the record that the court was misled. See united Bank for Africa Ltd. v. Majeed Taan & ors. (1993) 4 NWLR (part 287) 368 at 378."*

Learned Senior Advocate further submitted that the statutory power of a court to set aside its own judgment, would still not be exercised in vacuo but with strict regard and deference to the above factors. He added that the learned trial Judge's judgment in the instant case was/is not vitiated by any of the above three factors and that that court would have no jurisdiction to set it aside. He called in aid the cases of Commissioner of Lands, Mid Western State of Nigeria v. Chief Francis Edo-Osagie & ors. (1973) All NLR 620 (1990) Edition); Bakare v. Apena (1986) 4 NWLR (part 33) 1; Minister of Lagos Affairs, Mines and Power and Anor. v. Chief Akin Olugbade & Ors. (1974) All NLR 748 (1990) Edition).

Learned leading counsel for the respondents and Attorney-General, Kwara State, Alhaji M.A. Sanni, SAN in his oral expatiation of his brief submitted that an appeal was pending and asked that where an appeal was pending, can one bring an application to set aside the action? He pointed out that if a motion is filed in the trial court its residual powers enabled it to do what it did, adding that in the instant case, the appellants did not withdraw the action but left it open for them to pick and choose.

Arguing further in his written brief, the learned Attorney-General submitted that the judgment delivered on 20/11/92 was a default

judgment and being a default judgment, the trial court had jurisdiction to set it aside and that the court below in such a situation was not functus officio. He called in aid the case of Sanusi v. Ayoola (1992) 11/12 SCNJ (part 11) 142, 154; (1992) 9 NWLR (Part 265) 275, where Karibi-Whyte, JSC observed:

"It is true and well settled that a court has an inherent jurisdiction to set aside its own judgment where the conditions have been met by the applicant. These are where the judgment sought to be set aside was obtained on failure to comply with procedural rules - See Evans v. Bartlam (1937) A.C. 473 etc."

He also relied on Order 37 rule 9 and Order 27 rule 10 of the High Court (Civil Procedure) Rules, 1989 of Kwara State and argued with zeal and candour that a judgment obtained in default of defence and appearance where such default is later found to be reasonable and on excusable grounds, can be set aside by the trial court which gave the judgment, being one of the exceptions which does not need an appeal before being set aside.

The learned Attorney-General, in my view, and much against the grain of my earlier perception of the case, is right in describing the judgment of 20/11/92 as a default judgment. DEFAULT means nothing more, nothing less than not doing something which you ought to do, having regard to the relations which you occupy towards the other persons interested in the transaction. See In Re Bayley Worthington and Cohens Contract (1909) 1 Ch.D 648 at 658 and Ozara Ekuma v. Silver Eagle Shipping Agencies Limited (1987) 4 NWLR (part 65) 472. The words DEFAULT JUDGMENT ARE defined in U.T.C. (Nig.) Ltd. v. Pamotei (1989) 20 NSCC (part 1) 523 at 549 wherein this Court (per Karibi-whyte, JSC) said:

"The word default which qualifies the noun 'judgment' as used in this appeal seems to me to mean a judgment obtained by a plaintiff in reliance on some omission on the part of the defendant in respect of something which he is directed to do by the rules. The word is used widely to signify situations where a person has omitted to do what he is required to do what he is required to do having regard to the law govern-

ing his actions to the relations he occupied. In ordinary parlance it means not doing what is reasonable in the circumstances."

Distinguishing default judgment" from "Judgment on the merits" the learned Justice at pages 558-559 of the Report said:

B *"A judgment on the merits is one based on legal right as distinguished from mere matters of procedure or jurisdiction. A judgment on the merits is thus a decision that was rendered on the basis of the evidence led by the parties in proof or disproof of the issues in controversy between them. Normally, a judgment based solely on some procedural error is not, as a general rule, considered on the merits of the case - the essential issues, the substantive rights presented by the action, as contra distinguished from mere questions of practice and procedure."* See also Cardoso v. Daniel & ors. (1986) 2 NWLR (part 20) 1.

D In the instant appeal, the learned trial Judge, in my view, acted within the statutory exception that was espoused in Sanusi v. Ayoola (supra). Order 37 rule 9 (ibid) provides as follows:-

E *"Any judgment obtained where one party does not appear at the trial may be set aside by the court upon such terms as may seem just, upon an application made within six days after the trial or within such long period as the court may allow for good cause shown."*

Order 27 rule 10 (ibid) on the other hand, provides as follows:-

F *"The court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order." (This Order is titled DEFAULT OF PLEADINGS).*

G In the case in hand, judgment was given in default of the appellants' pleading - a clear case of truncated form of summary trial. Being acknowledged to be a default judgment therefore, it is indisputable that the trial judge had the jurisdiction via the rules of court to set it aside. Thus, despite the plethora of authorities cited by the appellants at page 10 of their brief, the respondents and their erstwhile counsel, Wande Obatusin H & Co. could not file their Statement of Defence nor was he served a hearing notice for attendance at court when the case came up for hearing on 19/11/92. Nor furtherstill, did the respondent give any evidence at all after the appellant gave some skeletal evidence, the veracity of which

could neither be tested nor could it be weighed on the imaginary scale to determine where the scale of the balance of probability titled vide Mogaji v. Odojin (1978) 4 SC. 91. Thus, a judgment already delivered as in the instant case, can be set aside if there had been fundamental defects in the proceedings culminating in judgments that resulted in a nullity vide Skenconsult (Nig.) Ltd. & ors. v. Ukey (1981) 1 SC. 6. That in the instant case the respondents had no notice of hearing can be seen in the trial court's ruling wherein the learned trial Judge said inter alia:

"Firstly, the applicants' excuse for not appearing in court on 19/11/92 is that they were not informed by the former counsel on whose Chambers the Hearing Notice was served that the case was coming up for hearing on that day. The respondents not having come up with any positive evidence to cast doubt on the fact that they had no notice of the hearing the excuse appears to me to be plausible. The record of the court which I take judicial notice of shows that since 29/11/91 when Wande Obatusin & Co's Chambers filed a memorandum of Appearance on behalf of the applicants service of court processes had always been on counsel. That lends credence to the fact that the applicants may not be aware of the notice that was served on their counsel. They are to be entitled to be given the benefit of doubt that they were not aware that the case was coming up on 19/11/92." I think the learned Judge was right. The court below referred to the above passage in its judgment when it held thus:-

"The issue of service of a hearing notice on the parties is very important and before any court embarks on hearing a case it must satisfy it- self that the parties are duly served with a hearing notice if the court proceeded to hear a matter on the basis that the parties were served and if it later turns out that one of the parties was not served, it is of course a very good ground to set aside a judgment obtained in default against one of the parties." (Underlining is supplied by me).

I think too that the learned Justices were also right here. What is more, in the instant case, it was the first time ever that the case was called for hearing when the judgment was given in default of appearance. See Oke v. Aiyedun (1986) 4 SC. 61 at 90-92. It is trite law that it is open

- to a party in a subsequent proceeding to plead that the decision of a lower court was given without jurisdiction and therefore a nullity (as the respondents sought to show in the instant case) and this notwithstanding that no proceeding had been taken to set the decision aside. See Aladegbemi v. Fasanmade (1988) 3 NWLR (Part 81) 129 Contrast the above statement of the law with that which enunciates that once a judge has arrived at a decision in the presence of the parties, which decision contains no fundamental defect pertaining the jurisdiction and competence of the court amounting to the decision being a nullity, he becomes functus officio and has no right to set it aside. The only way open to any party dissatisfied is to go on appeal. See
1. Minister of Lagos Affairs v. Akin Olugbade (1974) 11 SC. 11;
 2. Sken-Consult (Nig.) Ltd & Anor. v. Godwin Sekondy Ukey (1981) 1 SC. 6 at 35-39;
 3. Grace Ayanru v. Alexander Okafor & Anor (1966) 1 ALL NLR (part 1) 475;
 4. Akporue & Anor. v. Okei (1973) 12 SC. 137 and
 5. Chief Uku & Ors. v. D.E. Okumagba & Ors. (1974) 1 All NLR (part 1) 475.

The decision of the two courts below are concurrent findings of facts which, in the absence of their being shown to be perverse or arrived at with errors either of procedure or law (substantive or otherwise), ought not to be disturbed or otherwise set aside. See Ibodo v. Enarofia (1980) 5-7 SC. 42 at 58; Western Steel Works v. Iron & Steel Workers Union (1987) 1 NWLR (part 49) 284; Akinsanya v. U.B.A. (Nig.) Ltd. (1986) 4 NWLR (part 35) 273 and Nwadike v. Ibekwe (1987) 4 NWLR (part 67) 718, to name but a few.

The respondents had acted with despatch, to wit: timeously in keeping with the rules of court when they moved the trial court to set aside the default judgment and this despite their handicap of having in their hands a counsel that replaced a former counsel.

Thus, in the case in hand, a re-opening has not been shown to be capable of leading to an embarrassment of the appellant; nor is the application shown to be hopeless and unsupportable on the issues generated

during the hearing of the interlocutory application. Default judgment being obtained on technicalities and not one based on the merits, ought not to be allowed to stand. I so hold. I am also of the opinion that as it is clear that it is the paramount responsibility of an Appeal Court as well as other courts to hear the parties but not to shut them out; to hear the merits of the case or appeal and decide according to those merits. (See Nneji v. Chukwu (1988) 3 NWLR (part 81) 184 at 206; U.T.C. v. Pamotei (1989) 2 NWLR (part 103) 244 and Ondo State Agric. Corporation v. Chief Morakinyo & 4 Ors. (1986) 2 NWLR (part 26) 670 a re-opening of the case by the respondents has not been shown to be hopeless and unsupportable on the issues herein agitated. Said the writer of the leading judgment of the court below (Okwuchukwu Opene, J.C.A.) on this stance:

"It can be seen that the learned trial Judge in a well considered ruling applied the provisions of Order 27 rule 10 and Order 37 rule 9 of the High Court of Kwara State (Civil Procedure) rules which of course empowers him to set aside a default judgment and also the provisions of Order 1 Rule 22 of the Court of Appeal Rules, 1981 as he found that even though there is a pending appeal, but the Court of Appeal is not seized of the matter as it has not been entered in the Court of appeal." (Underlining is mine for emphasis). I cannot agree more.

Order 1 Rule 22 of the Court of Appeal (ibid) provides as follows:-

"After an appeal has been entered and until it has been finally disposed of the court shall be seized of the whole of the proceedings as between the parties thereto and except as may be otherwise provided in those rules every application therein shall be made to the court below, but any application may be filed in the court below for transmission to the Court."

What it means therefore is that it is settled law that until the appeal is entered in the court below, that court has no control over the proceedings as between the parties. My perusal through the records has not disclosed where the appeal has been entered in the court below for me to hold that that court became seized of the appeal which the learned trial Judge has been alleged to have Ostensibly interfered with and set aside. It is settled law that a judgment of a trial court is normally given after a

due satisfaction of the applicable Rules, and cannot be validly set aside except only on appeal. See First Bank of Nigeria Ltd. v. J.N. Khadadu & Anor. (1993) 9 NWLR (part 315) 44 at 57 and Shahimi v. Akinola (1993) 5 NWLR (part 294) 434 at 447. This is the more so where the order of the court had been drawn up and enrolled, hence the inherent jurisdiction of the court cannot be used or employed to set it aside vide Asiyanbi v. Adeniyi (1967) NSCC 81 at 85; Chukuka v. Ezulike (1986) 12 SC. 246 at page 254 and Agbenyin v. Abo (1994) 7 NWLR 748 at 749, all to the effect that once a judgment has been drawn up, signed and sealed, the court that gave the judgment has no jurisdiction to re-open or review it as it becomes functus officio. What, one may then ask, became of the appeal 'pending' in the court below in the instant case? The appellants have argued to the effect that once a Notice of Appeal had been filed, it was deemed to be pending in the court below as from 24/11/94. With due respect there is no law that compels an appellant to pursue his appeal. Rather, the law allows him to legally abandon it. The authority to adjudicate must of course not be left in abeyance and since the appeal has not been entered, the trial court and a fortiori the court below, were right in their application of Order 1 Rule 22 of the Court of Appeal rules. See Ezomo v. Attorney-General of Bendel State (supra). The fact that a Notice of Appeal is abandoned as in this case, it goes without saying that no further appeal subsists based upon that Notice. The point at issue is whether the respondents had notice that their case was fixed for hearing and they deliberately chose to slight the court or throw in the towel. The trial court having resolved the matter in favour of the respondents the matter, in my view, ought to have ended there and my answer thereto is accordingly rendered in the affirmative.

For the reasons I have set out above and those contained in the leading judgment of my learned brother Wali JSC the draft of which I had been privileged to read before now, I too dismiss the appeal. I also make the same consequential orders inclusive of costs as in the leading judgment.