

SUPREME COURT OF NIGERIA

6TH MARCH, 1998. SC. 134/93

**CORAM:- I. L. KUTIGI, M. E. OGUNDARE, U. MOHAMMED,
S. U. ONU, A. I. IGUH, JJSC.**

ECHAKA CATTLE RANCH LTD. PLAINTIFF/APPELLANT
AND
NIGERIAN AGRICULTURAL AND DEFENDANT/
COOPERATIVE BANK LTD. RESPONDENT

ACTIONS - *Proceeding with plaintiff's case - From the circumstances of this case - It is obvious appellant had no intention of prosecuting it's claim.*

BANKING - *Indebtedness - Appellant's unreasonable proposal on payment of overdue bank loan - Show lack of intention to settle the indebtedness.*

COURTS - *Discretion - Dismissal of plaintiff's case - On ground of bad faith and not inordinate delay to prosecute - The discretion was exercised judiciously.*

PRACTICE & PROCEDURE - *Striking out the cause - For plaintiff's non appearance under O.41 r. 2 - Is different from dismissing the suit for want of prosecution.*

FACTS

The plaintiff/appellant took a loan of 2 million naira from the defendant/respondent sometime in 1982. Appellant failed to repay the loan which together with the interest had increased so much. The respondent published intention to sell appellant's property held as security for the loan, in a Newspaper. In order to stop the sale by auction, appellant filed an action before the Ogoja High Court claiming inter alia, injunction to restrain the respondent from selling the property. It also secured

an interim injunction ex parte before the former judge that handled the matter restraining sale pending the determination of the suit. In denying the appellant's claim, the respondent counter claimed against the appellant the sum of N3,644,789.70 being the total sum (principal loan and interest thereon) due as at 30-9-89.

It would seem that appellant was never interested in prosecuting its claim but merely wanted to use the court in perpetuating his unwillingness to pay the loan. On 16th May, 1991, the appellant's chairman, and counsel were not in court. The Managing Director refused to go on with the case or make any explanations in the absence of appellant's counsel. The trial court delivered a ruling dismissing the appellant's claim, vacated the interim injunction and then adjourned the respondent's counter claim to another date. Appellant's appeal to the Court of Appeal was dismissed by a majority judgment of that Court. It had further appealed to the Supreme Court and raised a single issue.

ISSUE FOR DETERMINATION

Whether the Court of Appeal was right in holding that the learned trial judge had power to dismiss the action and had exercised it's discretion in so doing judicially and judiciously.

HELD (Unanimously dismissing the appeal per lead judgment of **MOHAMMED JSC**)

Proceeding with plaintiff's case

1. Learned counsel for the respondent is quite right that the appellant was not ready to proceed with the case on 14/5/98 for hearing. It seems to me that the Managing Director of the appellant, Mr. Morphy, is not sincerely pursuing a genuine settlement with the respondent. At the time Chief Morphy offered to pay N50,000.00 within two months of putting up his proposal for settlement with the respondent and requested for rescheduling of the loan for 20 years, the appellant's outstanding indebtedness to the Bank was N3,644,789.70. The sincerity of the appellant could be judged by the offer given to the Bank for settlement. I will answer the question put up by the appellant's counsel i.e. whether the appellant had no intention of prosecuting it's claim, in the affirmative.

(p. 481 G)

Indebtedness - Appellant's unreasonable proposal

2. The second question posed by the learned counsel for the appellant, Viz, whether the appellant had no intention of meeting its indebtedness to the respondent has been answered in the first poser. It is crystal clear that the appellant had not made any serious and reasonable proposal for the payment of what had already fallen due for payment of the loan the company received from the respondent. For how could one who is to pay N3,644,789.70 offer to make a down payment of N50,000.00 only and the payment shall be within two months of the date Mr. Morphy wrote the letter of proposal for settlement and how could the Company be acting in good faith if it asks for rescheduling of its loan for 20 years? (p. 482 E)

Discretion - Dismissal of plaintiff's case

3. The learned trial judge did not dismiss the case because of inordinate delay to prosecute same. It is quite clear that the issue dealt with by the learned trial judge is bad faith on the side of the appellant and she explained it clearly in her ruling. The appellant had used the process of the court to delay the foreclosure sale of its mortgaged property in order to obtain satisfaction of the loan which the appellant was in breach of its repayment. The Company filed this suit in order to obtain an injunction restraining the respondent from disposing off the secured property tied to the loan and Binang J readily granted the injunction ex parte. Since it obtained the injunction it is one excuse after another delaying the prosecution of the claim. It is for the above reasons I agree with the majority judgment of the Court of Appeal that the lower court exercised its discretion judicially and judiciously. (p. 483 C)

Striking out the cause

4. The learned Senior Advocate argued that Order 41 Rule 2 of the Cross River State High Court Rules does not apply to a situation where the suit is dismissed for want of diligent prosecution. It applies only to a situa-

tion where the plaintiff does not appear on the date fixed for hearing. Mr. Daudu is quite right because the meaning of Order 41 rule 2 is without any ambiguity. It reads thus:

"If the plaintiff does not appear, the court shall, unless it sees good reason to the contrary, strike out the cause (except as to any counter-claim by the defendant) and make such order as to costs in favour of any defendant appearing as seems just:" (Underlining mine)

So even if I accept that the court had dismissed appellant's suit for want of prosecution, generally where the plaintiff fails to set the suit down for hearing within the time laid down for that purpose or to take any other steps as may be ordered for the expeditious hearing of the suit, the court may on the application of the defendant make an order dismissing the suit for want of prosecution - see Reggentin v. Brechholme Bakeries Ltd. (1967) III C.A. 216. (p. 484 C)

NOTABLE POINTS OF INTEREST

MOHAMMED JSC

E 1. Court's discretion - How properly exercised

The exercise of discretion is a matter exclusively for the court to do after weighing all the circumstances of the case in the interest of justice and the balancing of the interest of the parties involved, including the balance of convenience and disadvantages, which might be suffered by any of the parties concerned. It is after the court shall have given consideration to such matters that it can arrive at what is undeniably a difficult decision which must appear reasonable in all circumstances of a particular case. A liberty or privilege to decide and act in accordance with what is fair and equitable under the peculiar circumstances of the particular case, guided by the spirit and principles of law, and exercise of such discretion is reviewable only for an abuse thereof - see American case of State v. Draper, 83 Utah 115, 27 P2d 39. (p. 483 F)

H 2. Inherent jurisdiction of court - When resorted to

In the case of Ajayi v. Omorogbe (1993) 6 NWLR (Pt. 301) 512 at 534 this court held that courts have often resorted to the inherent jurisdiction

of the Court whenever the grounds for seeking a relief cannot be properly brought under a rule of court or any enabling statutory provision. The court has an inherent jurisdiction to dismiss an action for want of prosecution where there is default in compliance with an order of court or where the plaintiff is guilty of inexcusable and inordinate delay in the prosecution of the action. (p. 484 G)

OGUNDARE JSC

3. Plaintiff was not interested in the case being heard

The conduct of the plaintiff in this case right from the inception of the action to the time the trial Court dismissed it showed clearly that the action was instituted for the sole purpose of preventing the defendant from exercising its right under the loan agreement between the parties. It was obvious that the plaintiff would not repay the loan and would not let the defendant foreclose. Having obtained ex parte an interlocutory injunction pending the determination of the action, restraining the defendant from selling Plaintiff's properties mortgaged to the defendant, it (plaintiff) had achieved its objective and was no longer interested in having the case heard and decided. (p. 486 F)

4. Strange to now grant ex parte injunction pending suit

Before ending this judgment I need to comment briefly on the interlocutory injunction obtained ex parte by the Plaintiff in this case. It is observed that the order of interlocutory injunction was made by Binang J. without hearing the defendant. It is strange that after all that has been said and written on the grant of interlocutory injunction, one would still see a Judge granting ex parte an interlocutory injunction pending the determination of an action. This, to say the least, is very unfortunate. (p. 487 B)

IGUH JSC

5. Discretion - No one case can be authority for another

I think the point that needs be emphasized is that the jurisdiction or power of a trial court to dismiss a suit for want of diligent prosecution must be

exercised judicially and judiciously. Thus, because the exercise of the court's discretion necessarily comes into play, no one set of facts or circumstances can be a guide or authority for the other instances. In other words, in matters of discretion, no one case can be an authority for another; and the court cannot be bound by a previous decision to exercise its discretion in a particular way. See Odusote v. Odusote (1971) 1 ALL N.L.R 219. Accordingly since the circumstances constantly change or are never exactly the same, it is for the trial court to meet the ends of justice and to be fair and just in all the circumstances of each and every case. (p. 494 E)

REPRESENTATION

Kanu A. Agabi, for the Appellant

D J. B. Daudu, SAN, with S. U. Solagberu, for the Respondent

CASES REFERRED TO

Odusote v. Odusote (1971) 1 ALL N.L.R 219.

E Ajayi v. Omorogbe (1993) 6 NWLR (Pt. 301) 512

State v. Draper 83 Utah 115, 27 P2d 39.

Birkett v. James (1978) A.C. 297 at 318

Abiegbe v. Ugbodume (1973) 1 S.C. 133 at 155 - 156

F Nwachukwu v. Nze (1953) 15 W.A.C.A. 36

Province v. Lagunju (1954) 14 W.A.C.A. 549 at 552

Kudoro v. Alaka (1956) 1 F.S.C. 82 at 83

University of Lagos v. Aigoro (1985) 1 N.W.L.R.

G RULES REFERRED TO

High Court Rules of Cross River State O.42 r.2

LEAD JUDGMENT BY MOHAMMED JSC

H On 19th April, 1982 Nigerian Agricultural and Cooperative Bank, the respondent in this appeal, granted a loan of N2,000,000.00 (Two million Naira) to the plaintiff under certain terms and conditions signed by both parties to the agreement. On 23rd July, 1988, the respondent

caused to be published in Nigeria Chronicle Newspaper it's intention to sell plaintiff's property held as security for the loan.

In order to stall the sale of it's properties by public auction, the appellant went to Ogoja High Court and claimed for the following reliefs:

"i. *A declaration that the threatened sale or other alienation of B the plaintiff's properties by the defendant or its agents will violate the plaintiff's rights under the agreement and be null and void.*

ii. *An injunction restraining the defendant by itself and or its agents or servants from selling or alienating the plaintiff's properties as C the loan is not yet mature for payment.*

iii. *N5,000,000 damages suffered by the plaintiff as a result of the false impression created by the malicious publication."*

The suit was first handled by Binang J who granted an ex parte D interim injunction and restrained the respondent from disposing of the secured properties of the appellant by public auction pending the determination of the suit.

During the exchange of pleadings the respondent averred in the Statement of Defence that at the time of the institution of this suit in the E High Court the appellant's indebtedness to the respondent stood at N3,644,789.70 (Three million, six hundred and forty-four thousand, seven hundred and eighty-nine naira, seventy kobo), Therefore, the respondent made a counter-claim against the appellant in the following averments: F

18. The defendant hereby counter-claims against the plaintiff for the sum of N3,644,789.70 (Three million, six hundred and forty-four thousand, seven hundred and eighty-nine naira, seventy kobo) being the total sum owing by the plaintiff to the defendant as at 30/9/89, made up G of the principal loan and interest thereon.

19. Wherefore and in further answer to the statement of Claim, the defendant will at the trial set up and rely on all legal and equitable defences open and available to it and it will in particular urge the Court H to:-

(a) Dismiss all the arms of the Plaintiff's Claim as being untenable in law, misconceived, frivolous and an adventure at unjust enrichment and a gold digging exercise.

(b) *Enter judgment for the plaintiff (sic) defendant in terms of its counter claim and furthermore.*

(c) *The defendant will urge the Court in limine, to discharge the Order of Court dated the 2/9/88 made ex parte for Interim injunction against the defendant till the determination of the suit, the same being bad in law."*

The suit suffered several adjournments. On 12th December, 1990, Mbanefo J adjourned the matter to the 18th and 19th February, 1991 for hearing. On that day appellant's counsel sought for leave to withdraw from the case on the ground that his BRIEF had not been "perfected". The secretary of the appellant admitted that they received a letter from the counsel four days before the hearing reminding the company about problems of his assignment. The court however refused to grant appellants' counsel leave to withdraw from the suit and adjourned it to the following day.

On the following day appellant's counsel did not show up, but the Managing Director, Chief Morphy did. He prayed the court to grant him a long adjournment so that he could settle with the Bank. The Court recorded that it had adjourned the case to 14th, 15th and 16th May, 1991 for report of settlement or definite hearing.

On 14th May, 1991, a lawyer, Mr. E.E.E. Ita, announced himself representing the appellant. He said that he was a new counsel in the case and would like a further adjournment of the matter so as to effect a settlement with the Bank. Respondent's counsel opposed the application and told the court that during the three months period that the case had been adjourned the Managing Director of the appellant did not make any written or personal contact with the Head Office of the Bank in Kaduna over the settlement. The Court nevertheless adjourned the case to 16th May, 1991, for the appellant to submit proposals for settlement of its indebtedness to the Bank or have the case dismissed.

On 16th May, 1991, Chief Morphy appeared without his new lawyer. He said his counsel was in Enugu Court of Appeal. The Court asked Chief Morphy if it was true that the proposal he submitted to the respondent was for payment of N50,000.00 within two months of writ-

ing his proposal for settlement and re-scheduling of the loan for 20 years. Mr. Morphy told the court that he would like to speak through his counsel. At the end of the frustrating encounter the learned trial judge wrote the following ruling:

*"It gives me a feeling that the Chairman of the Plaintiff Com- B
pany filed his Claim of 1st September, 1988 in bad faith and so in his
plea for settlement. He seems in my view to treat the Order of the Court
with extreme levity which must be deprecated in the strongest terms. It
seems after taking Bank for a ride upon being given a loan of C
N2,000,000.00 about 19th April, 1982 the chairman of the plaintiff is
set to do the same with proceedings before the Court otherwise how could
the Chairman who has promised to pay N750,000 about 13th February,
1988 and defaulted and was faced with a fore-closure proceedings run
into Court for a Claim for N5,000,000.00 damages suffered by the plain- D
tiff as a result of the false impression created by the malicious publica-
tion" (notice of fore-closure) sit in his office on a date the matter was
adjourned for 3 days for definite hearing or settlement and offer N50,000
by 2 months from date (sic) and rescheduling of the loan for 20 years. E
The Court cannot be used to perpetuate this type of impropriety against
any one much less the Defendant Company which is set up for the good
of the Community. The handling of this matter by plaintiff and its Chief
leaves a lot to be desired and impresses me that the plaintiff has no F
intention of prosecuting his claim nor an intention to meet its indebted-
ness and that the court is being used to sustain the smoke-screen of this
impropriety.*

*The claim of the Plaintiff is hereby dismissed. The interlocutory Order G
of 2nd September, 1988 restraining the Defendant/Respondent by itself,
its agent or servant in person of E.O. Ubokulo Esq. or any other person
from carrying out the sale of the Plaintiff/Appellant properties under the
agreement between the Plaintiff/Applicant and the Defendant/Respon-
dent as advertised of 23rd July, 1988, pending the determination of H
the substantive Suit is hereby vacated.*

Court: Counter claim adjourned to 1st July, 1991 for hearing".

Dissatisfied with the ruling, the appellant filed his appeal before

the Court of Appeal, Enugu Division. In a considered judgment, Umaru Abdullahi, JCA, with whom Akintan, JCA, agreed, dismissed the appeal. Uwaifo, JCA, dissented, saying that under Order 41 Rule 2 of the High Court Rules of Cross River State, the learned trial judge had power to strike out the action but not to dismiss it. The appellant appealed to this court against the majority judgment. There is only one ground of appeal filed and it reads:

"The majority of the Justices of the Court of Appeal erred in law when they held that in dismissing the action:-

"..... the lower court had exercised its discretion judicially and judiciously having regard to the attitude exhibited by the Appellant in the handling of his claim".

The single issue formulated from the ground of appeal is whether the Court of Appeal was right in holding that the learned trial judge had power to dismiss the action and had exercised it's discretion in so doing judicially and judiciously. The respondent's counsel, Mr. J.B. Daudu, SAN, raised two issues on the single ground of appeal. The issues read:

"1. Whether having regard to the facts and circumstances leading to this appeal, the Court of Appeal was correct in affirming the trial courts undoubted exercise of judicial discretion to dismiss the appellant's suit for want of diligent prosecution?

2. Having regard to the facts and circumstances leading to the appeal including the applicable law, is the appropriate order one of striking out or dismissal?"

Learned counsel for the appellant enumerated three points and said that he would examine them in detail and show that the learned trial judge was in error in coming to those conclusions and that the Court of Appeal was also wrong to uphold the order made by Mbanefo J. The learned counsel submitted that there was no evidence and no basis for the assertion that the appellant:

- i). had no intention of prosecuting its claim;
- ii). had no intention of meeting its indebtedness to the Respondents, and
- iii) that the Court was being used to sustain the smokescreen of

the impropriety".

On the first point, learned counsel traced the history of the case filed by the appellant and submitted that the only delay caused by the appellant was on 18th February, 1991 when the case was first set for hearing. On that day, counsel for the appellant signified his intention to withdraw from representing the appellant. However, even though the court had refused to grant appellant's counsel leave to withdraw the counsel refused to go on with the case. On 19th February, 1991 having been abandoned by its counsel, the appellant had to get its Managing Director to address the court and he intimated the court that he would secure a settlement with the bank.

Learned appellant's counsel submitted that on the next adjourned date, 14th May 1991, the appellant's Managing Director came to court with a new counsel, Mr. E.E.E. Ita. The new counsel pleaded for time to effect a settlement with the Bank. The court adjourned the matter to 16th May, 1991 for the appellant to inform the Court of the proposals for settlement. On 16th May, 1991 the Managing Director, Mr. Morphy, came to court without his counsel and after the court had gone into dialogue with him it dismissed the suit. The appellant's counsel before us, Mr. Kanu Agabi, who is now a Senior Advocate, argued that the appellant was not guilty of any delay in this matter. He said that only three months had elapsed from the time when the action was ripe for hearing to the time when it was dismissed by the learned trial judge.

Learned counsel for the respondent, Mr. J.B. Daudu, SAN, submitted in reply to submission of the appellant's counsel, that the appellant was not asking for an adjournment to produce his witnesses or prepare himself for hearing. Instead, his application was for settlement, which, although every court had a duty to encourage, is not the primary function of a High Court. **Learned counsel for the respondent is quite right that the appellant was not ready to proceed with the case on 14/5/98 for hearing. It seems to me that the Managing Director of the appellant, Mr. Morphy, is not sincerely pursuing a genuine settlement with the respondent. At the time Chief Morphy offered to pay N50,000.00 within two months of putting up his proposal for**

settlement with the respondent and requested for rescheduling of the loan for 20 years, the appellant's outstanding indebtedness to the Bank was N3,644,789.70. The sincerity of the appellant could be judged by the offer given to the Bank for settlement. The proposal submitted on the 16th May, 1991 to the Bank by the Chief Executive of the appellant was the same as the one he submitted three years before 16th May, 1991. When asked by the court to explain whether it was true that the proposal he submitted was similar to the one he submitted to the Bank three years ago and that the Bank rejected it, Chief Morphy said he would not speak except through his counsel. Chief Morphy had no answer to the question put to him by the court. But there is a letter written by him on 14/5/91 to the Managing Director of the respondent in which Chief Morphy made such proposal. The letter has been copied at page 21 of the record of this appeal. It was after this incident that the court exercised its discretion and dismissed appellant's Suit. **I will answer the question put up by the appellant's counsel i.e. whether the appellant had no intention of prosecuting its claim, in the affirmative.**

The second question posed by the learned counsel for the appellant, Viz, whether the appellant had no intention of meeting its indebtedness to the respondent has been answered in the first poser. It is crystal clear that the appellant had not made any serious and reasonable proposal for the payment of what had already fallen due for payment of the loan the company received from the respondent. For how could one who is to pay N3,644,789.70 offer to make a down payment of N50,000.00 only and the payment shall be within two months of the date Mr. Morphy wrote the letter of proposal for settlement and how could the Company be acting in good faith if it asks for rescheduling of its loan for 20 years?

The third poser is where learned counsel for the appellant asked whether the court was being used to sustain the smokescreen of the appellant's impropriety. In dealing with this issue learned counsel for the appellant cited the case of Usikaro v. Itsekiri land Trustees (1991) 2 NWLR (Pt. 172) 150 in which Nnaemeka-Agu J.S.C., contributing to the lead

judgment, considered the issue of what amount to inordinate delay in prosecution of a case and opined thus:

"It would of course be irritating to any trial judge to have come to court prepared for a two-day of trial on a special fixture only to have a two-day unexpected holidays forced down on him. The only question in this appeal is not whether he was right, as I believe he was, to have reacted adversely to the situation. It is however, whether he made the order which the Justice of the case justified".

The last sentence in the opinion of his Lordship Nnaemka-Agu J.S.C., is the pertinent issue in considering the reasons behind the learned trial judge's dismissal of appellant's claim. **The learned trial judge did not dismiss the case because of inordinate delay to prosecute same. It is quite clear that the issue dealt with by the learned trial judge is bad faith on the side of the appellant and she explained it clearly in her ruling. The appellant had used the process of the court to delay the foreclosure sale of it's mortgaged property in order to obtain satisfaction of the loan which the appellant was in breach of its repayment. The Company filed this suit in order to obtain an injunction restraining the respondent from disposing off the secured property tied to the loan and Binang J readily granted the injunction exparte. Since it obtained the injunction it is one excuse after another delaying the prosecution of the claim.**

It is for the above reasons I agree with the majority judgment of the Court of Appeal that the lower court exercised it's discretion judicially and judiciously. The exercise of discretion is a matter exclusively for the court to do after weighing all the circumstances of the case in the interest of justice and the balancing of the interest of the parties involved, including the balance of convenience and disadvantages, which might be suffered by any of the parties concerned. It is after the court shall have given consideration to such matters that it can arrive at what is undeniably a difficult decision which must appear reasonable in all circumstances of a particular case. A liberty or privilege to decide and act in accordance with what is fair and equitable under the peculiar circumstances of the particular case, guided by the spirit and principles of

law, and exercise of such discretion is reviewable only for an abuse thereof
- see American case of State v. Draper, 83 Utah 115, 27 P2d 39.

A person aggrieved by the exercise of a discretionary power may, instead of attacking the merits of the exercise of discretion contend
B that the repository of the discretion has acted without jurisdiction or Ultra vires because of the non-existence of a state of affairs upon which the validity of the exercise of discretion depends.

Mr. J.B. Daudu, SAN, referred to the minority judgment of
C Uwaifo, JCA, where the learned justice referred to Order 41 Rules 2 of the High Court Rules of the Cross River State where the learned justice opined that the learned trial judge acted without jurisdiction to have dismissed the suit of the appellant instead of striking it out. **The learned Senior Advocate argued that Order 41 Rule 2 of the Cross River**
D **State High Court Rules does not apply to a situation where the suit is dismissed for want of diligent prosecution. It applies only to a situation where the plaintiff does not appear on the date fixed for hearing. Mr. Daudu is quite right because the meaning of Order 41**
E **rule 2 is without any ambiguity. It reads thus:**

"If the plaintiff does not appear, the court shall, unless it sees good reason to the contrary, strike out the cause (except as to any counter-claim by the defendant) and make such order as to costs in favour of any defendant appearing as seems just:" (Underlining mine)
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So even if I accept that the court had dismissed appellant's suit for want of prosecution, generally where the plaintiff fails to set the suit down for hearing within the time laid down for that purpose or to take any other steps as may be ordered for the expeditious hearing of the suit, the court may on the application of the defendant make an order dismissing the suit for want of prosecution - see Reggentin v. Brecholme Bakeries Ltd. (1967) III C.A. 216. In the case of Ajayi v. Omorogbe (1993) 6 NWLR (Pt. 301) 512 at
G
H 534 this court held that courts have often resorted to the inherent jurisdiction of the Court whenever the grounds for seeking a relief cannot be properly brought under a rule of court or any enabling statutory provision. The court has an inherent jurisdiction to dismiss an action for want

of prosecution where there is default in compliance with an order of court or where the plaintiff is guilty of inexcusable and inordinate delay in the prosecution of the action.

The appellant filed this action on 30th August, 1988 in ogoja High Court. When the action was set down for hearing on 18th and 19th February 1991 the Managing Director of the Company Mr. Morphy sought for adjournment in order to settle the matter with the Bank. The court adjourned the suit to 14th, 15th and 16th May, 1991 for a report of settlement or definite hearing. When no reasonable proposal was submitted for settlement and Managing Director showed no intention to call evidence for the hearing of the case the court found that the appellant was not acting in good faith. It therefore dismissed the claim of the appellant and vacated the interlocutory injunction granted exparte in favour of the appellant in which the respondent was restrained from foreclosure sale of the appellant's secured property tied to the loan. I agree with the Court of Appeal that the learned trial judge, Mbanefo J, exercised her discretion judicially and judiciously in dismissing the appellants suit at the stage she reached in the proceedings.

This appeal has failed and it is dismissed. The majority judgment of the Court of Appeal in which the decision of Mbanefo J of Cross River High Court, was affirmed is hereby affirmed by me. I award the respondent N10,000.00 costs against the appellant.

KUTIGIJSC

I read before now the judgment just delivered by my learned brother, Mohammed, JSC. I agree with him that the appeal lacks merit. It is accordingly dismissed with N10,000.00 costs against the plaintiff/appellant.

OGUNDAREJSC

I agree with the judgment just delivered by my learned brother Mohammed JSC. A trial High Court has inherent jurisdiction to dismiss

a suit before it where plaintiff is unwilling or unable to prosecute the action. See Ajayi v. Omorogbe (1993) 6 NWLR 512 at p. 534 where Karibi-Whyte JSC observed:

"Counsel has often resorted to the inherent jurisdiction of the Court whenever the grounds for seeking a relief cannot be properly brought under a rule of Court, or any enabling statutory provision. This inherent jurisdiction is the power resident in all courts of superior jurisdiction, which is necessary for the proper and complete administration of justice and essential to their existence There is the inherent power to dismiss an action where the default had been intentional and contumelious, i.e. disobedience of a peremptory order amounting to an abuse of the process of the Court. For instance where plaintiff has failed to comply with certain procedural rules, or an appeal where appellant has failed to comply with certain procedural rules such (as) filing briefs of argument, see Order 6 rule 10. The Court has an inherent jurisdiction in addition to dismiss an action for want of prosecution where there is default in compliance with an Order of Court, or where the plaintiff is guilty of inexcusable, inordinate delay in the prosecution of the action." Olatawura, JSC in the lead judgment had on p. 527 said:

"It is the totality of the conduct of the party that the Court will take into consideration in exercising its discretion."

The conduct of the plaintiff in this case right from the inception of the action to the time the trial Court dismissed it showed clearly that the action was instituted for the sole purpose of preventing the defendant from exercising its right under the loan agreement between the parties. It was obvious that the plaintiff would not repay the loan and would not let the defendant foreclose. Having obtained ex parte an interlocutory injunction pending the determination of the action, restraining the defendant from selling Plaintiff's properties mortgaged to the defendant, it (plaintiff) had achieved its objective and was no longer interested in having the case heard and decided. Every manoeuvre to delay the trial of the action it instituted was employed by the plaintiff. Having regard to all these, I think the learned trial Judge was right in dismissing the action in the exercise of the inherent jurisdiction of the Court. In the circumstances

of this case the Court below rightly affirmed the exercise of the trial court's discretion, for the reasons given for the exercise of that discretion; the discretion was both judicially and judiciously exercised.

This is not a case falling under Order 41 rule 2 of the High Court Rules of the Cross River State for the Plaintiff, through its Managing Director, was present on the day fixed for hearing. Its representative was just not ready or willing to proceed.

Before ending this judgment I need to comment briefly on the interlocutory injunction obtained ex parte by the Plaintiff in this case. It is observed that the order of interlocutory injunction was made by Binang J. without hearing the defendant. It is strange that after all that has been said and written on the grant of interlocutory injunction, one would still see a Judge granting ex parte an interlocutory injunction pending the determination of an action. This, to say the least, is very unfortunate.

The lower Court was right in not interfering with the exercise of the trial Court's discretion. And I, too, will not interfere. I dismiss this appeal with costs as assessed in the judgment of my learned brother Mohammed JSC.

ONU JSC

I was privileged to read before now the judgment of my learned brother Mohammed, JSC just delivered. I am in entire agreement with him that the appeal lacks substance and must therefore fail.

The appellant on 30th August, 1988 sued the respondent in the High Court of Cross-River State sitting at Ogoja sequel to the respondent's action in causing to be published in the Nigerian Chronicle Newspaper of 23rd July, 1988. This followed its (respondent's) intention to sell the appellant's property held as security for a loan of N2,000,000.00 (Two Million Naira) it (appellant) received from the respondent on 19th April, 1982. The appellant's action in which he was claiming against the respondent -

"(i) A declaration that the threatened sale or other alienation of the plaintiff's properties by the defendant, or its agents will violate the

plaintiff's right under the agreement and be null and void.

(ii) An injunction restraining the defendant by itself and or its agents or servants from selling or alienating the plaintiff's properties as the loan is not yet mature for payment.

B *(iii) N5,000,000.00 damages suffered by the plaintiff as a result of the false impression created by the malicious publication."*

was setting in motion larger-than-life repercussions in that, as I had the opportunity in eliciting from learned counsel for the appellant in court at the hearing of this appeal on 8th December, 1997, its Chairman (Chief I. C I. Morphy) has since died leaving behind an indebtedness to the respondent of over N3,644,789.70. Indeed, from the onset, the appellant was bent on embarking on using the process of court to delay the foreclosure sale of its property it mortgaged in order to obtain satisfaction of the loan D repayment of which it was in breach, can be seen from the act of Binang, J. who on 2nd September, 1988 readily yielded to granting an ex parte injunction restraining the respondent from disposing the secured property. From the moment the appellant got the injunction, its successive E actions aimed at avoiding or frustrating the payment of the loan mirrored through the slippery, evasive, dilatory and erratic behaviour of its Chairman, epitomises the erroneous but often held Nigerian belief that monies taken out under whatever guise from public financial institutions, are never meant to be repaid or refunded but rather to be spent with impunity F at the whims and caprices of lenders.

When therefore, the appellant aided by its late Chairman engaged in the antics of employing delay tactics; asking to pay the heavy indebtedness in paltry installments of N50,000.00 every other month and being G unmindful of the fact that it had many times asked for settlement out of court (an undertaking it observed more in the breach than in obedience) and asking provokingly for unnecessary adjournments, its aim through which the learned trial Judge and the Court of Appeal saw, was to avoid H its liability to the respondent who had a right to foreclose.

The Court being imbued with an inherent jurisdiction to dismiss an action for want of prosecution where there is default in compliance with such an order or where, as in the instant case, the plaintiff (appellant

herein) is guilty of inordinate, unwarranted and inexcusable delay in the prosecution of the action, the court is justified, in my view, to dismiss the appeal. Compare Philip Obiora v. Paul Osele (1989) 1 NWLR (Part 98) 279 in which this court held *inter alia* that the Court of Appeal cannot dismiss the appeal of an appellant on the ground that his brief of argument is defective. Not so in the instant case in which the learned trial Judge at her discretion dismissed the case for want of diligent prosecution.

This was what she said among other things in her judgment which she wrote across the Bench on 16th May, 1991:

"..... The handling of this matter by Plaintiff and its Chief leaves a lot to be desired and impresses me that the Plaintiff has no intention of prosecuting this claim nor an intention to meet its indebtedness and that the court is being used to sustain the smoke screen of this impropriety."

The claim of the Plaintiff is hereby dismissed. The interlocutory Order of 2nd September, 1988 restraining the Defendant/Respondent by itself, its agent or servant in person of E.O. Ubokulo Esq. or any other person from carrying out the sale of the Plaintiff/Appellant and the Defendant/Respondent as advertised..... of 23rd July, 1988, pending the determination of the substantive Suit is hereby vacated."

I am therefore, of the firm view that the court below was justified when it upheld the decision of Mbanefo, J. who, in my opinion, exercised her discretion both judicially and judiciously to dismiss the appellant's suit at the stage she did. See Solanke v. ajibola (1968) 1 ALL NLR 46; Kudoro v. Alaka 1 FSC 86; Demuren v. Asuni (1967) 1 ALL NLR 94; Lauwers Import-Export v. Jozebson Industries Ltd (1988) 3 NWLR (Part 83) 429 and Alhaji A. O. Opeyemi & Ors. v. Irewole Local Government, Ikire & ors. (1993) 1 NWLR (Part 270) 462 at 467.

It is for the reasons stated by me above and the fuller ones contained in the leading judgment of my learned brother Mohammed, JSC with which I entirely agree that I too dismiss this appeal. I similarly award N10,000.00 costs in favour of the respondent.

IGUH JSC

I have had the privilege of reading in draft the judgment just delivered by my learned brother, Mohammed, J.S.C. and I agree entirely that this appeal is without substance and ought to be dismissed.

B The facts of this case, briefly, are that the appellant, following its application to the respondent in 1981 for a loan of N5.3 million was granted N2 million. This loan was secured by a legal mortgage dated the 19th April, 1982. Some six years latter, after the respondent had exhausted various avenues for the repayment of the loan by the appellant
C without success, it published its intention, as required by the deed, to sell the appellant's mortgaged property it held as security for the loan.

The appellant immediately reacted by instituting an action against the respondent on the 1st of September, 1988 claiming all manners of
D reliefs. In particular, it claimed an injunction to restrain the respondent from exercising its rights under the said legal mortgage together with N5 million as damages for what was described as malicious publication. The appellant further proceeded and, by an application ex parte, swiftly obtained an order of interim injunction restraining the respondent from selling the mortgaged property. In the face of the said order of interim injunction, there is little wonder that nothing was done by the said appellant for an expeditious disposal of the action. Indeed on the 13th March,
E 1989 when pleadings were ordered in the suit, the appellant applied for and was granted 90 days within which to file its Statement of Claim although there was no suggestion that a survey plan appeared necessary. The respondent, for its own part, only asked for and was granted 30 days within which to file its Statement of Defence. The case was there-
F after adjourned to the 14th December, 1989 for hearing before Binang, J.
G

It is not clear what happened subsequently until the 12th December, 1990 when the case came up for hearing before Mbanefo, J. On an application for an adjournments by the appellant on that day, the case
H was adjourned to the 18th and 19th February, 1991 for hearing.

On the 18th February, 1991, however, the case was again at the instance of the appellant further adjourned to the 19th February, 1991 for hearing or dismissal. But on the 19th February, 1991, the appellant then

applied for a long adjournment to enable it, "sort themselves out" and "settle this matter with the Bank". It was with the greatest reluctance that the trial court once again adjourned the case to the 14th, 15th and 16th May, 1991 for a report of settlement or definite hearing.

I think it should be observed that between the said 19th February, 1991 and 14th May 1991 - a period of about three months, no sincerity of purpose in the appellant's application for an out of court settlement of his claim was manifested as nothing new had been done towards effecting such settlement. It ought also to be noted that the respondent had consistently opposed all applications for adjournment by the appellant, insisting that they were designed to perpetuate the appellant's dilatory tactics thereby maximising undue advantage of the ex parte interlocutory order of interim injunction it obtained the moment the suit was filed.

The position remained unchanged until the 14th May, 1991 on which date learned appellant's counsel conceded that "the matter has been on the list for too long". Never-the-less, he applied for yet another adjournment ostensibly for report of settlement. The respondent, for its own part, as usual, opposed the application stressing that there was no sincerity in the application for settlement. It added that it was most unusual for a plaintiff who was purportedly aggrieved by the conduct of a defendant to be "feverishly begging for a settlement of the matter out of court". The respondent pointed out that by hallowed practice, a plea for out of court settlement ought to proceed from the defendant.

The trial court in its usual magnanimity, ordered the appellant to submit its proposals for the settlement of its indebtedness to the respondent on the 16th May, 1991 or it would dismiss its claim.

As at the 16th May, 1991 nothing tangible had happened on the part of the appellant. It merely resubmitted the same memorandum of terms which was unacceptable and was duly rejected by the respondent as far back as in September, 1987. As issues were joined in the suit since the 25th October, 1989 and the case had been subjected unduly to six adjournments at the instance of the appellant, the learned trial Judge refused any further adjournment of the suit. The court then directed the

appellant to lead evidence in proof of its case, but the appellant's representative declined to do so whereupon the appellant's case was dismissed. Ruled the learned trial Judge -

"It gives me a feeling that the Chairman of the Plaintiff Company filed his Claim of 1st September, 1988 in bad faith and so is his plea for settlement. He seems in my view to treat the Order of the Court with extreme levity which must be deprecated in the strongest terms. It seem after taking Bank for a ride upon being given a loan of N2,000,000.00 about 19th April, 1982 the Chairman of the Plaintiff is set to do the same with proceedings before the Court otherwise how could the Chairman who had promised to pay N750,000 about 13th February 1988 and defaulted and was faced with a fore-closure proceedings run into Court for a Claim for N5,000,000.00 damages suffered by the Plaintiff as a result of the false impression created by the malicious publication" (notice of fore-closure), sit in his office on a date the matter was adjourned for 3 days for definite hearing or settlement and offer N50,000.00 by 2 months from date and rescheduling of the loan for 20 years. The Court cannot be used to perpetuate this type of impropriety against any one much less the Defendant Company which is set up for the good of the Community. The handling of this matter by Plaintiff and its Chief leaves a lot to be desired and impresses me that the Plaintiff has no intention of prosecuting this claim nor an intention to meet its indebtedness and that the court is being used to sustain the smoke screen of this impropriety.

The claim of the Plaintiff is hereby dismissed. The interlocutory Order of 2nd September, 1988 restraining the Defendant/Respondent by itself, its agent or servant in person of E.O. Ubokulo Esq. or any other person from carrying out the sale of the Plaintiff/Applicant's properties under the agreement between the Plaintiff/Applicant and the Defendant/Respondent as advertised of 23rd July, 1988, pending the determination of the substantive Suit is hereby vacated."

Dissatisfied with this decision of the trial court, the appellant lodged an appeal against the same to the Court of Appeal which on the 6th of May, 1993 dismissed the appeal. The appellant has further ap-

pealed to this court.

The single issue raised by the appellant in its brief of argument as calling for the determination of the court in this appeal runs thus -

"Whether the Court of Appeal was right in holding that the Learned Trial Judge had power to dismiss the action and had exercised her discretion in so doing Judicially and Judiciously".

The respondent, for its own part, formulated two issues in its brief of argument for the determination of this court. These are as follows -

"1. Whether having regard to the facts and circumstances leading to this appeal, the Court of Appeal was correct in affirming the trial court's undoubted exercise of judicial discretion to dismiss the appellants suit for want of diligent prosecution.

2. Having regard to the facts and circumstances leading to the appeal including the applicable law, is the appropriate order one of striking out or dismissal."

The issues raised by both parties seem to me interrelated and I propose in this judgment to consider them together.

On the question whether the Court of Appeal was correct in holding that the learned trial Judge has the right in the peculiar circumstances of this case to dismiss the appellant's suit, it cannot be doubted that there is inherent jurisdiction in all superior courts of record to dismiss an action in appropriate cases for want of diligent prosecution. This jurisdiction is exercisable where, inter alia, there exists evidence of inordinate and inexcusable delay on the part of the plaintiff or his counsel in the prosecution of the action, and such delay is most likely to be prejudicial to the defendant or to the fair hearing of the action. See Birkett v. James (1978) A.C. 297 at 318, Abiegbe v. Ugbo-dume (1973) 1 S.C. 133 at 155 - 156, Thorpe v. Alexander Fork Life Trucks Ltd (1975) 3 ALL E.R. 579, Fawole Ajayi and Another v. Omorogbe (1993) 6 N.W.L.R (Part 301) 512 at 534. It may also be exercised where without good cause, a plaintiff refuses or declines to offer evidence or to proceed with his case fixed for hearing when directed by the court to do so, particularly where he had been obliged with several previous adjournments which

in the opinion of the trial court were quite unnecessary and without justification. See Nwobu Nwachukwu and Others v. David Nze and others (1953) 15 W.A.C.A 36. However, because of the severity of the penalty of dismissing a plaintiff's suit for want of diligent prosecution, in that the life of such an action is finally terminated, courts exercising such inherent jurisdiction must always ensure that they are cautious and judicious in the exercise of this power. But there is definite jurisdiction in the superior courts of record to dismiss a suit for want of diligent prosecution.

So, in Nwobu Nwachukwu and Others v. David Nze and others, supra, the plaintiffs/appellants sought for leave to discontinue their suit after the same had been fixed for hearing but was refused leave by the trial court. On the plaintiffs' counsel declining to proceed with his case when directed to do so, the learned trial judge dismissed the claim. The West African Court of Appeal, on appeal, held that the learned trial judge in his inherent jurisdiction was right in dismissing the claim when the plaintiffs' counsel refused and/or declined to proceed with his case in defiance to the order of the trial court.

I think the point that needs be emphasized is that the jurisdiction or power of a trial court to dismiss a suit for want of diligent prosecution must be exercised judicially and judiciously. Thus, because the exercise of the court's discretion necessarily comes into play, no one set of facts or circumstances can be a guide or authority for the other instances. In other words, in matters of discretion, no one case can be an authority for another; and the court cannot be bound by a previous decision to exercise its discretion in a particular way. See Odusote v. Odusote (1971) 1 ALL N.L.R 219. Accordingly since the circumstances constantly change or are never exactly the same, it is for the trial court to meet the ends of justice and to be fair and just in all the circumstances of each and every case. While it is the law that the exercise of its discretion by the trial court may be reviewed on appeal, an appellate court must not interfere unless it can be shown that such discretion was not exercised judicially and judiciously, that is to say, if the exercise was mala fide, arbitrary, illegal either by the consideration of extraneous or irrelevant matters or

failure to consider material issues, or otherwise that it was exercised in a manner that was inconsistent with the ends of justice. See Resident, Ibadan Province v. Lagunju (1954) 14 W.A.C.A 549 at 552, Kudoro v. Alaka (1956) 1 F.S.C. 82 at 83, University of Lagos v. Aigoro (1985) 1 N.W.L.R. (Part 9) 143 at 148, Oyeyemi v. Irewole Local Government (1993) 1 N.W.L.R. (Part 270) 462 at 484. B

Turning now to the facts of the present case, it is beyond doubt that the conduct of the appellant throughout the proceedings before the trial court was calculated to delay the proceedings and avert the consequences of its indebtedness to the respondent bank. The trial court was of the firm view, and quite rightly too, that the appellant and his solicitors had been engaged in delay tactics, that they had no intention of prosecuting their claim nor had they any intention to meet their indebtedness to the respondent and that their unusual and persistent plea for settlement was clearly a ruse, described by the learned trial Judge as a "smoke screen" of impropriety. D

Dealing with the above findings of the learned trial Judge, the court below questioned thus and proffered an answer as follows - E

"Now coming back to this case and applying the principles of law discussed above, can it be said that the learned trial judge exercised her discretionary power judicially and judiciously in dismissing the appellant's suit on 16/5/91 if so, it is open to this court to interfere with the exercise of that discretionary power of the lower court." F

It is my view that the facts in this case set out earlier in this judgment showed clearly that the lower court had exercised its discretion judicially and judiciously having regard to the attitude exhibited by the appellant in the handling of his claim. I therefore find no reason to interfere with the exercise of that discretion. I find no merit in the appeal. I accordingly dismiss it. What remains now is for the parties to go back and take what ever steps they deem fit to solve the problem of the debt." G H

I agree entirely with the above observations of the court below and fully endorse the same. In my view, all that mattered to the appellant as soon as the respondent published it's intention to foreclose the appellant's

mortgaged property was immediately to rush before the trial court and to file an action which, it seems to me, was entirely frivolous and wholly misconceived. It is significant that even the appellant's learned counsel conceded the point when on the 14th May, 1991, he admitted before the trial Judge that the case had been on cause list for too long and that he did not agree with the claim hence he was pleading for settlement.

Swiftly, the appellant proceeded by a motion ex parte to obtain an order of interim injunction restraining the respondent from selling the mortgaged property. This achieved, all intention to prosecute its action which, inter alia, included a handsome claim for N5,000,000.00 as damages was abandoned and the trial court was thenceforth inundated with nothing else than applications for adjournments from the appellant on all occasions the suit came up for hearing. I think the learned trial Judge, after several adjournments, was perfectly in order when, in effect, she held that enough was enough, ordered the appellant to proceed with proof of its case and dismissed the suit upon the appellant's refusal to proceed with the action. See Nwobu Nwachukwu and Others v. David Nze and Others, *supra*.

I therefore entertain no doubt that the court below was perfectly right when it upheld the trial court's exercise of discretion by dismissing the appellant's case.

It is for the above, and the more elaborate reasons contained in the leading judgment of my learned brother, Mohammed, J.S.C. that I, too, dismiss this appeal as lacking in substance. I abide by the order as to costs contained in the said judgment.

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