

SUPREME COURT OF NIGERIA

17TH APRIL, 1998. SC. 204/1991

**CORAM:- S. M. A. BELGORE, M. E. OGUNDARE, E. O.
OGWUEGBU, U. MOHAMMED, A. I. IGUH, JJSC**

AKUKALIA ALFRED AMACHUKWU DEFENDANTS/
AGHADIUNO & 2 OTHERS APPELLANTS

(Substituted for Chief I. A. Mbanefo Odu, by
the Order of the Supreme Court on 29/1/97)
(For themselves and on behalf of the members
of Odimegwugbuagu family of Onitsha)

AND

EKEGBO ONUBOGU (NWAKWO) PLAINTIFF/
(For himself and on behalf of Umuamaifeobu RESPONDENT
family in Opo-na-ezeani quarter in Umuota village,
Obosi

***APPEALS** - Order - Notice of discontinuance - Where it is invalid - The Court below ought to have remitted the case to the High Court for hearing - But there is no invalidity in the present case.*

***COURTS** - Order - To be made in an application for leave to discontinue a suit - Is a matter exclusively for the court in exercise of its judicial discretion - But all the circumstances of the case must inevitably be taken into consideration.*

***JUDGMENTS** - Grant of leave to discontinue an action - In view of the special plea of estoppel per rem judicatam raised in the statement of defence - The learned trial judge was entitled to look at the averments - In deciding whether or not to grant the leave.*

***PRACTICE AND PROCEDURE** - Notice of discontinuance - Brought under Order 47 Rule 1 of the High Court Rules, Eastern Nigeria, - Where Counsel had declared his intention to withdraw the action - And sought*

an adjournment to enable him bring a formal application - The learned trial judge was perfectly right to have treated the notice subsequently filed - As an application to withdraw the suit under the second limb of Order 47 Rule 1.

PRACTICE AND PROCEDURE - *Notice of discontinuance - Brought after the date fixed for hearing - The application was not invalid since how it was headed is of no consequence - And as the notice was not brought under the first limb of Order 47 Rule 1 - The ratio decidendi of Okorodudu's case would not apply.*

FACTS

The plaintiff/respondent instituted an action in the High Court of the former Anambra State, Onitsha Judicial Division claiming inter alia against the defendant/appellant a declaration that the plaintiff is entitled to the customary right of occupancy of the piece and parcel of land known as and called Ozalla land in Obosi. In the Statement of defence filed, the defendant averred that the plaintiff is estopped per rem judicatam from maintaining or prosecuting the present suit by virtue of the judgment in the various suits and appeals set out in the statement of defence. At the close of pleadings the case was fixed for hearing on 6 - 3- 87. When the case came up on that day, the plaintiff's counsel indicated his intention to withdraw the action and sought an adjournment to enable him bring a formal application. The defence counsel had no objection but was of the view that the plaintiff could withdraw orally. The plaintiff's counsel insisted on a date. A notice of discontinuance under Order 47 Rule 1 of the High Court Rules was subsequently filed on 17-3-87. The notice came up for determination on the adjourned date (24-3-87)

In a short ruling the learned trial judge took into consideration the pleadings filed and exchanged. He saw no point in merely striking out the case but dismissed it with cost to the defendant. The plaintiff dissatisfied appealed to the Court of Appeal, Enugu Division which allowed the appeal. The defendant was aggrieved and has appealed to the Supreme

Court. From the grounds of appeal filed, the appellant formulated the following issues.

ISSUES FOR DETERMINATION

"(a) (i) *Was the Court of Appeal right in holding that the decision of the Supreme Court in Emmanuel Amoma Okorodudu & Anor. v. Erastus M. Okoromadu & Anor. (1977) 3 SC. 21 applied to the present case and in relying thereon to set aside the decision of the learned trial judge in the case?*

(ii) *Was the Court of Appeal right in holding that the learned trial judge was not entitled to take into account the state of the pleadings in determining whether or not to dismiss or to strike out the suit following the Notice of discontinuance?*

(b) *Having held that the Notice of discontinuance was invalid was the Court of Appeal right in ordering that the case be listed on the Cause list before another Judge of the Anambra State High Court to enable that Court proceed in the matter with a consideration of the notice of discontinuance filed contrary to the relief prayed for by the plaintiff/appellant/respondent and without an opportunity to address it on the Order eventually made?"*

HELD (Unanimously allowing the appeal per lead judgment of **OGWUE-GBU, JSC**)

Notice of discontinuance brought under O. 47 r. 1

1. The learned trial judge was perfectly right to have treated the notice as an application to withdraw the suit under the second limb of Order XLVII, Rule 1. What was involved at that stage was a question of procedure after counsel had declared his intention to withdraw the action and sought an adjournment to enable him bring a formal application. (p. 697 F)

Notice of discontinuance brought after the date fixed for hearing

2. How he headed the application in my view is of no consequence. I therefore refuse to accept the contention of Chief Ikeazor, S.A.N. that the application was invalid having been brought after the date fixed for hearing. The plaintiff/respondent did not bring his notice of discontinu-

ance under the first limb of Order XLVII Rule 1. If he had done so, the ratio decidendi of Okorodudu's case would have applied. The substance of the order sought by the plaintiff in the notice he filed on 17-3-87 was an application for leave to discontinue or withdraw his action. (p. 697 G)

B

Courts - Order

3. What order to make in consequence of the said application was a matter exclusively for the court in due and deliberate exercise of its judicial discretion. He must inevitably take into consideration all the circumstances of the case. See the case of Rodrigues & Ors. v. The Public Trustee & Ors. (supra) at pages 36-37. The Court will then decide whether:

(a) to grant leave for the suit to be withdrawn simply on terms that the same be struck out subject to payment of costs;

(b) or grant leave for the suit to be withdrawn subject to the imposition of certain conditions to be fulfilled before a fresh suit concerning the same subject matter and the same parties may be instituted;

E or

(c) to refuse such leave in which case the suit must be dismissed also on terms as to costs. See Nwobu Nwachukwu & Ors. v. David Nze & Ors. in re Ofoegbu Nze v. David Nze (1955) 15 W.A.C.A 36.

In the instant case having weighed all the circumstances of the case in the interest of justice, the learned judge granted leave and dismissed the suit. (p. 698 C)

Grant of leave to discontinue an action

4. It is the law that averments contained in pleadings are no evidence but in the special procedure of Order 10 Rules 1, 2, 3, 4 and 5 and Order 40 Rule 1 of the High Court of Lagos (Civil Procedure Rules) which are quite strict and could not have accommodated the statement of defence, the Court felt bound to look at the said statement of defence which was before it in order to do substantial justice to the parties. In view of the special plea of estoppel per rem judicatam raised by the defendant in

paragraphs 6, 7, 8, 9 and 10 of his statement of defence, I am unable to come to the conclusion that the learned trial judge was in error to have taken those averments into consideration when the plaintiff had expressed his intention to discontinue the action. Those averments are peculiar and are the type of circumstances which the learned trial judge is enjoined to weigh in the interest of justice. (p. 700 B)

Appeals - Order

5. As to the third question where the notice is invalid, the court below ought to have remitted the case to the High Court for hearing before another judge without more. There was no invalidity in the case on appeal. (p. 701 A)

NOTABLE POINTS OF INTEREST

OGUNDARE JSC

1. Application to discontinue an action - How made is immaterial

As this Court had held in (1) RODRIGUES AND (2) Sonekan v. Smith (1967) ANLR 350 and other similar case, the trial Judge had a discretion in circumstances as in the case on hand whether or not to grant leave to discontinue. In my respectful view it would not matter how the application to discontinue was made; whether it was made by a way of motion on notice or orally or by way of notice as in this case. The rule has not prescribed a particular mode and the words used in the 2nd limb of the rule are "if in any other case the plaintiff desires to discontinue a suit" In my respectful view a plaintiff can discontinue as of right before the date for hearing but can only do so with leave of Court after the date for hearing. Whichever way leave is sought would, in my respectful view, not be material. What is material is that where the plaintiff desires to discontinue after the date fixed for hearing he can only do so with leave of court. In the case on hand the trial Judge considered the matter before him as one seeking his leave. He granted the leave. It does not lie in the mouth of the plaintiff to now say he applied by a wrong procedure. What he can complain about is the consequential order made. The learned trial Judge considered the surrounding circumstances of this

case and it being clear to him, from the pleadings, that the matter should never have been brought, in the light of the defendant's plea of res judicata to which the plaintiff filed no reply, he was right in granting leave to discontinue the action and to dismiss it. The Court below allowed itself to be carried away by mere technicality as to the procedure employed by the plaintiff in seeking leave to withdraw the action. (p. 708 D)

MOHAMMED JSC

2. *The principle underlying the requirement for leave to discontinue*
The principle underlying the requirement for leave is that after proceedings have reached a certain stage the plaintiff, who has brought his adversary into court, should not be able to escape by a side door and avoid the contest, since he is no longer dominus Litis and it is for the court to say whether the action should be discontinued and upon what terms. See Fox v. Star Newspapers Co. (1898) 1 Q.B. 636 at 639. Nevertheless it is not desirable that a plaintiff should be compelled to litigate against his will. The court will normally grant him leave to discontinue if he wants to, provided no injustice will be caused to the defendant. The court has a wide discretion as to the terms upon which it may grant leave to a plaintiff or counterclaiming defendant as the case may be, to discontinue or withdraw the whole or part of the action or counterclaim. It may impose terms as to costs, as to the bringing of a subsequent action or otherwise as it thinks just. (p. 709 E)

IGUH JSC

3. *Discontinuance as a court process -Principles applicable*
Where a plaintiff exercises his right to discontinue his action without the leave of the court before the date fixed for the hearing of the case, it is an error to dismiss the action, since at that stage, there would then have been no litis contestatio and the discontinuance would not have been on the merits. It ought also to be noted that the said first arm of Order 47 Rule 1 of the High Court Rules 1963 of former Eastern Nigeria itself enacts that discontinuance thereunder "shall not be a defence to any subsequent suit" It thus clearly envisages an order striking out the suit and

not a dismissal thereof at that stage of the proceedings. See Soetan v. Total Nigeria Ltd (1972) 1 ALL N.L.R. 1 at 3, Izieme and others v. Ijeoma Ndokwu and other (1967) N.M.L.R. 280. However, from and beyond the stage after the date fixed for the hearing of the suit, the plaintiff may discontinue only with the leave of the court and subject to conditions that may be imposed by the court. See Nigeria Properties Co. Ltd. v. Alegbeleye 19 N.L.R. 101, Abasi Giwa v. John Holt Co. Ltd (1930) 10 N.L.R. 77 and Eronini v. Ihuko (1989) 2 N.W.L.R. (Part 101) 46 at 65. Such discontinuance with leave is covered by the second arm of Order 47 Rule 1, ante, and it may be effected by an oral or formal application on notice. Such leave is at the discretion of the trial Judge to grant or refuse and he may grant it on terms as to costs and/or as to whether or not the plaintiff will be debarred from bringing another suit founded on the same facts. (p. 712 C)

4. Notice of discontinuance made under a wrong rule is invalid

It seems to me therefore plain that the Notice of Discontinuance in the Okorodudu case having been specifically made under Order 28 Rule 1(1) as aforesaid after the relevant Suit No. W/8/73 was fixed for hearing was clearly incompetent and invalid and was rightly so pronounced by this court. This is because a Notice of Discontinuance filed after the date fixed for the hearing of the case and purported to be brought under Rule 1 (1) of Order 28 of the High Court (Civil Procedure) Rules, 1958 (ibid) would be null and void and cannot be treated by the court as having been brought under Rule 1(2) of the same Order 28. See Emmanuel Okorodudu and Another v. Okoromadu and another, (supra) at page 28. In the present case, however, the plaintiff/appellant had expressed his intention to terminate his claims against the defendant/respondent. It was pursuant to this termination of the plaintiff/respondent's claims against the defendant/appellant that the Notice of Discontinuance was filed in the present suit. This is unlike the position in the Okorodudu case where the Notice of Discontinuance was made with a view to circumventing the order of the court refusing leave to the plaintiffs in that suit to amend their writ of

summons and Statement of Claim and thus enable them to prosecute a new suit against the defendants on the same claims. The Notice of Discontinuance in the present case was made under the provisions of Order 47 Rule 1 of the High Court Rules, Cap. 61, Volume 4, Laws of Eastern Nigeria, 1963. As the said Notice of Discontinuance was filed after the case was fixed for hearing, it must, in my view, be deemed to have been made under the second arm of Order 47 rule 1 of the High Court Rules applicable to the Anambra State of Nigeria. It therefore seems to me that the Notice of Discontinuance in the present case was entirely valid and effective, unlike the Notice of Discontinuance in the Okorodudu case which was unquestionably invalid. (p. 716 A)

5 An order of court which is contrary to the relief sought is wrong
 D It is thus plain that the said order of the Court of Appeal complained of by the defendant/appellant was contrary to the relief sought by the said plaintiff/respondent and therefore clearly wrong. This is because it is settled law that a court of law must not grant to a party, a relief which he has not E sought. See Ekpenyong v. Nyong (1975) 2 S.C. 71 at 81 - 82, Kalio v. Daniel-Kalio (1975) 2 S.C. 15 at 17 - 19, Makanjuola v. Balogun (1989) 3 N.W.L.R. (Part 108) 192 at 206, Olorotimi v. Ige (1993) 8 N.W.L.R. (Part 311) 257 at 271 etc. What seems to me more serious is that in F making the said order not applied for, the Court of Appeal failed to give the parties, the defendant/appellant, in particular, an opportunity to be heard thereon or to address it on the issue. This, in my opinion, is patently wrong. See Ogunlowo v. Ogundare (1993) 7 N.W.L.R. (Part 307) 610 at 624. (p. 717 H)

G
REPRESENTATION

G. R. I. Egonu, SAN with B. A. Iwegbu for the Appellant
 Respondent is absent and not represented.

H
CASES REFERRED TO

Nze v. Nze (1955) 15 W.A.C.A 36.
 Fox v. Star Newspapers Co. (1898) 1 Q.B. 636 at 639.

Soetan v. Total Nigeria Ltd (1972) 1 ALL N.L.R. 1 at 3

Rodrigues v. The Public Trustee (1977) 4 S.C. 29 at page 32

Nishizawa Ltd. v. Jethwani (1984) 12 S.C. 234 at 263

Izieme v. Ndokwu (1967) N.M.L.R. 280.

Nigeria Properties Co. Ltd. v. Alegbeleye 19 N.L.R. 101

B

Abasi Giwa v. John Holt Co. Ltd (1930) 10 N.L.R. 77

Eronini v. Ihuko (1989) 2 N.W.L.R. (Part 101) 46 at 65

Ekpenyong v. Nyong (1975) 2 S.C. 71 at 81 - 82,

Kalio v. Daniel-Kalio (1975) 2 S.C. 15 at 17 - 19

C

Makanjuola v. Balogun (1989) 3 N.W.L.R. (Part 108) 192 at 206, Olorotimi

v. Ige (1993) 8 N.W.L.R. (Part 311) 257 at 271

Ogunlowo v. Ogundare (1993) 7 N.W.L.R. (Part 307) 610 at 624.

STATUTES AND RULES REFERRED TO

D

High Court (Civil Procedure) Rules, 1958, Western Region of Nigeria
Order 28 Rule 1 (1) and (2)

High Court Rules Cap. 61, volume 4, Laws of Eastern Nigeria 1963,
Order 47 Rule 1

E

High Court of Lagos (Civil Procedure Rules) Order 10 Rules, 1, 2, 3, 4
and 5, and Order 40 Rule 1

Supreme Court (Civil Procedure) Rules cap. 211, Laws of Nigeria (1948,
Order XLIV Rule (1)

F

LEAD JUDGMENT BY OGWUEGBU JSC

This is an appeal against the judgment of the Court of Appeal,
Enugu Division which allowed the appeal of the plaintiff in that court.

The plaintiff instituted an action in the High Court of the former
Anambra State, Onitsha Judicial Division claiming the following reliefs:-

G

*"1. Declaration that the Plaintiff is entitled to the customary
rights of occupancy of the piece and parcel of land known as and called
Ozalla Land situate in Obosi in Idemili Local Government Area of An-
ambra State within the jurisdiction of this Honourable Court with the
annual value of N20.00 (Twenty Naira).*

2. N10,000.00 (Ten thousand naira) being damages for trespass

to the said piece and parcel of land called "Ozalla" Land.

3. *Perpetual Injunction restraining the Defendant his servants agents and/or workmen from further trespass and from further interfering with the possessory rights of the Plaintiff over the said piece and parcel of land known as and called "Ozalla" Land.*"

In the statement of defence filed on 8-12-86, the defendant averred as follows in paragraphs 7, 8, 9 and 10:-

"7. *The defendant's family have from as far back as 1917 been prosecuting and defending series of actions against the Obosi people over the whole of Isiafor land and of portions thereof. In Suit No. 8 of 1932 Chief J. N. Kodilinye for and on behalf of the people of Obosi sued Mbanefo Odu for and on behalf of the Odimegwugbuagu family of On-itsha in respect of Isiafor land and lost. Chief J.N. Kodilinye's appeal to the West African Court of Appeal against the judgment in Suit No. 8 of 1932 was dismissed. In 1949, the defendant's family instituted Suit No. 0/34/1949 against the people of Obosi for damages for trespass and injunction over Isiafor land and got judgment.*

8. *In 1977 some sections of Obosi people, in the effort to over-reach and undermine the judgments in Suits NO. 8 of 1932 and No. 0/34/1949 and the appeal against the judgment in Suit No. 8 of 1932, brought four Suits Nos. 0/157/77, 0/158/77, 0/159/77 and 0/160/77 over portions of the Isiafor land but the four suits were dismissed on a plea of estoppel per rem judicatam. The appeal to the Court of Appeal No. FCA/E/91/81 against the judgment in the said suits Nos. 0/157/77, 0/158/77, 0/159/77 and 0/160/77 was dismissed.*

9. *The plaintiff is estopped per rem judicatam from maintaining or prosecuting the present suit by virtue of the judgment in the various suits and appeals set out in paragraphs 7 and 8 hereinabove. At the hearing of this suit, the defendant will pray the Court to dismiss (sic) action in limine on the ground of estoppel per rem judicatam.*

10. *The defendant will at the hearing of this suit found and rely on the Records of the proceedings and the Plans of the suits and appeals mentioned in paragraphs 7 and 8 of this statement of defence."*

At the close of pleadings, the case was fixed for hearing on 6-3-

87. When the case came before Aneke, J. on that day, the record of appeal shows:

"Case called. Parties present. Defendant absent. Obi Okpudo (sic) for the plaintiff, G.R.I. Egonu (SAN) with E.C. Ayalogu for the defendant. Mr. Akpudo asks for time to file motion of discontinuance in this matter. Mr. Egonu has no objection but thinks plaintiff could withdraw orally. Akpudo insists on date. Case adjourned to 24th March, 1987 for a notice of discontinuance to be filed." (underlining is for emphasis). B

The notice was filed on 17-3-87 and it reads: C

*"To the Registrar,
High Court,
ONITSHA.*

RE: SUIT NO: 0/389/85 MR. EKEGBO ONUGOGU VS. CHIEF ISAAC D MBANEFO D

NOTICE OF DISCONTINUANCE PURSUANT TO ORDER XLVII RULE 1 OF THE HIGH COURT RULES.

TAKE NOTICE that the plaintiff in the above mentioned suit desire (sic) to and hereby discontinues his said action. E

Dated this 17th day of March, 1987

Sgd. -----

MR. EKEGBO ONUBOGU (NWAKWO) F

For himself and on behalf of Umuamaifeobu family in Okpo na Ezeani Quarter in Umuota Village Obosi."

It was also addressed for service on the plaintiff's counsel as well as the defendant/respondent. G

The notice of discontinuance came up for determination on the adjourned date (24-3-87) and after recording the appearances of counsel, the learned trial judge recorded the following:

"Mr. Akpudo says there is a notice of discontinuance dated 17/3/ 87 filed. Mr. Egonu says the plaintiff filed their Statement of Defence filed to (sic) Statement of Defence and Plan. Says the Statement of Defence cost N22 and the Plan cost N3000.00. Says the case was fixed

for hearing on 6th March, 1987. Asks for N5,000 cost. Mr. Akpudo says the proper order here is striking out and not dismissed. Egonu says the Court has a discretion (sic) to whether to dismiss or strike out. Says there are so much previous cases in this land dispute which have
 B estopped the defendants to discontinue this case. Says the proper order is dismissal."

In a short ruling the learned trial judge ordered as follows:

"Order of Court:

C Pleadings were ordered and exchanged in this case and hearing has been fixed. The plaintiff in asking leave to discontinue did not give reasons whatsoever for so doing, and the Court must therefore presume that the decision to withdraw must have stemmed from the contents of the pleadings filed and exchanged. That being the case the Court in the
 D exercise of its discretion sees no point in merely striking out the case. This case is accordingly dismissed with N2,500.00 cost to the defendant." (Underlining is for emphasis).

The plaintiff was dissatisfied with the order dismissing the suit
 E hence the appeal to the Court of Appeal, Enugu Division. The court below allowed the appeal and held as follows:-

"The appeal must therefore succeed. The order of the lower court dismissing plaintiff's case including the award of costs is set aside.
 F It is ordered that the case be listed on the cause list before another judge of the Anambra State High Court to enable that court proceed in the matter with a consideration of the notice of discontinuance filed."

The defendant was aggrieved by the above decision and has appealed to this court. Briefs of argument were filed and served by the parties.
 G From the grounds of appeal filed, the appellant formulated the following issues for our determination:-

"(a) (i) Was the Court of Appeal right in holding that the decision of the Supreme Court in Emmanuel Amoma Okorodudu & Anor. v. H Erastus M. Okoromadu & Anor. (1977) 3 SC. 21 applied to the present case and in relying thereon to set aside the decision of the learned trial judge in the case?

(ii) Was the Court of Appeal right in holding that the learned

trial judge was not entitled to take into account the state of the pleadings in determining whether or not to dismiss or to strike out the suit following the Notice of discontinuance?

(b) Having held that the Notice of discontinuance was invalid was the Court of Appeal right in ordering that the case be listed on the Cause list before another Judge of the Anambra State High Court to enable that Court proceed in the matter with a consideration of the notice of discontinuance filed contrary to the relief prayed for by the plaintiff/appellant/respondent and without an opportunity to address it on the Order eventually made?"

The plaintiff who is the respondent in this court identified the following issues as arising for determination in the appeal:-

"(1) Whether the Court of Appeal correctly applied the decision of this Court in Emmanuel Amoma Okorodudu & Anor. vs. Erastus M. Okoromadu & Anor. (1977) 3 S.C. 21 to the facts and circumstances of this case on appeal.

(2) Whether, having regard to the nature of the issues raised in this matter, the Court of Appeal was right in its view that the contents of the pleadings of the parties ought not to determine the orders which the Court would make in the circumstances?

(3) Whether, in all the facts and circumstances of this case on appeal, the order of the Court of Appeal that the Notice of Discontinuance (which it held to be invalid) be listed before another judge of the Anambra State High Court to enable that judge proceed with the matter with a consideration of the Notice of Discontinuance afore-said was correct and proper?"

The two sets of issues for determination are saying the same thing in different words. I will consider the appeal on this issues submitted by the appellant and the resolution of those issues one way or the other will answer the questions contained in the respondent's brief.

The mis-application or otherwise of the decision of this Court in Okorodudu & Or. v. Okoromadu & or. (supra) by the Court of Appeal is the dominant issue in this appeal. Mr. Egonu, S.A.N. submitted in the appellant's brief that the notice of discontinuance filed in Okorodudu's

case was specifically made under Order 28 Rule 1(1) of the High Court (Civil Procedure) Rules, 1958, Western Region of Nigeria then applicable to the Mid Western State of Nigeria after the case was fixed for hearing in an attempt to circumvent the order of the trial judge refusing to grant
 B the plaintiffs in that case, leave to amend their writ of summons and statement of claim and thus enable them to prosecute a new suit which they subsequently instituted against the defendants. He further submitted that the plaintiff in the present proceedings had in the High Court, in
 C his notice of appeal and brief of argument as well as oral argument in the court below consistently expressed his intention to terminate his claims against the defendant.

It was his contention that the application was brought under Order 47 Rule 1 of the High Court Rules Cap. 61, Volume 4, Laws of
 D Eastern Nigeria, 1963 and that the second limb of Order 47 Rule 1 applied unlike the case of Okorodudu where the notice of discontinuance was specifically made under Order 28 Rule 1(1) of the High Court (Civil Procedure) Rules, 1958. Western Region of Nigeria.

Mr. Egonu further submitted that in the present case the plaintiff intended to terminate his claims against the defendant and this was not so in Okorodudu's case. He further contended that where a valid notice of discontinuance is filed in a case after the same has been fixed for hearing,
 F it is incumbent on the trial judge to take into account the state of the pleadings in the case before determining whether to strike out or dismiss the action.

Chief Ikeazor, S.A.N. in reply referred us to Order XLVII Rule 1 of the High Court Rules Cap. 61, Laws of Eastern Nigeria, 1963 then
 G applicable in Anambra State. It was his submission that the dominant issue before the Court of Appeal was whether the learned trial judge was right to have dismissed the case following a notice of discontinuance filed by the plaintiff after the date for hearing had been fixed. He further
 H submitted that Order XLVII Rule 1 of the High Court Rules of Eastern Nigeria under which the notice of discontinuance was filed has two limbs:

(a) notice of discontinuance of suits before the date fixed for hearing of the suit and,

(b) notice of discontinuance after the case has been fixed for hearing.

It was his contention that the first limb did not apply to the facts and circumstances of this case and that if a plaintiff filed his notice of discontinuance under the first limb of Order 47 Rule 1, a court would be in error to dismiss the action at that stage as there would then be no litis contestatio and the determination would not have been made after hearing evidence on the whole or some fundamental part of the claim. He cited and relied on the cases of Izieme & Ors. v. Ndukwa & Ors. (1967) N.W.L.R. 280 and Soetan v. Total Nigeria Ltd. (1972) 1 ALL N.L.R.1 at 3.

He further submitted that the second limb of Order 47, Rule 1 aforesaid is apposite to the instant case, that after a case has been fixed for hearing, the plaintiff can only withdraw his claim or any part thereof with the leave of the court. He cited the case of Eronini v. Ihuko (1989) 2 N.W.L.R. (Pt. 101) 46 at 65 and argued that the courts observe and maintain a difference between notice of discontinuance and an application for leave to discontinue. He submitted that the former is used before the date fixed for hearing and the latter, after the date fixed for hearing and that it would be an error to treat one as the other because they are not used interchangeably. He cited and relied on the case of Okorodudu & Or. v. Okoromadu & Or. (supra). He referred to the case of Giwa v. John Holt 10 N.L.R. 77 where a notice of discontinuance was filed after the date fixed for hearing was held invalid as in Okorodudu's case. On the first issue, Chief Ikeazor finally submitted that the court below came to a correct decision and that the use which the court below made of Okorodudu's case was justified because the circumstances in Okorodudu's case and the issues that fell for decision in that case were similar to those in the instant appeal.

The submissions of both learned senior Advocates of Nigeria call for the examination of the provisions of Order XLVII Rule 1 Cap. 61, High Court Rules of Eastern Nigeria, 1963 which were then applicable in Anambra State and Order 28 Rule 1 (1) and (2) of the High Court (Civil Procedure) Rules, 1958, Western Region of Nigeria.

Order XLVII Rule 1 is in these terms:

"If before the date fixed for hearing, the plaintiff desires to discontinue any suit against all or any of the defendant, or to withdraw any part of his claim, he shall give notice in writing of discontinuance or withdrawal to the Registrar, and to every defendant as to whom he desire to discontinue or withdraw. After the receipt of such notice such defendant shall not be entitled to any further costs with respect to the matter so discontinued or withdrawn than those incurred up to the receipt of such notice, unless the Court shall otherwise order, and such defendant may apply ex parte for an order against the plaintiff for the costs incurred before the receipt of such notice and of attending the Court to obtain the order. Such discontinuance or withdrawal shall not be a defence to any subsequent suit.

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

The wording of Order XLVII Rule 1 are exactly the same as those of Order 28 Rule 1(1) and (2) of the High Court (Civil Procedure) Rules, 1958 of the Western Region of Nigeria. The only point of difference which is also significant is that the first limb of that of Eastern Nigeria is worded like Order 28 Rule 1(1) of the Civil Procedure Rules of Western Region of Nigeria, 1958 and the second limb is also worded like Order 28 Rule 1(2) of the aforesaid Western Region of Nigeria High Court (Civil Procedure) Rules.

I will now compare and contrast the facts and circumstances of Okorodudu's case with those of the proceedings leading to this appeal.

In Okorodudu's case, the plaintiffs had applied by motion on notice seeking leave to amend their Writ of summons and statement of claim following a grant of an application to be joined as co-plaintiffs by a group of people. In his ruling on the motion seeking leave to amend, the learned judge granted leave to amend only the acreage of the land in dispute and refused to allow the amendments. This led to the filing of the

notice of discontinuance by the plaintiffs. In their notice of discontinuance, the plaintiffs stated that they were satisfied that the said suit was not properly constituted and that they had instituted a fresh suit against the same defendants. They gave the reasons for their intention to discontinue the suit even though the appeal was allowed on the invalidity of the notice of discontinuance. B

In the instant case, there was an oral application by plaintiffs counsel for adjournment to enable him file a motion to discontinue the action. This oral application for adjournment was made on 6-3-87, the day the case came up for hearing. The oral application went thus: C

"Mr. Akpudo asks for time to file a motion of discontinuance in this matter.

Mr. Egonu has no objection but thinks plaintiff could withdraw orally. Akpudo insists on a date." (the underlining is for emphasis). D

On the said 6-3-87, Mr. Akpudo in no uncertain terms applied for an adjournment to enable him file a motion to discontinue the suit. The motion was to discontinue the action and that was why Mr. Egonu said that he could withdraw the case orally. This was the type of application made in the case of Rodrigues & Ors. v. The Public Trustee & Ors. (1977) 4 S.C. 29 at page 32. Since Mr. Akpudo insisted on an adjournment, whatever he filed on 17-3-87 meant no more than an application to withdraw the action as the case was adjourned from 6-3-87 to 24-3-87 for that purpose. **The learned trial judge was perfectly right to have treated the notice as an application to withdraw the suit under the second limb of Order XLVII, Rule 1. What was involved at that stage was a question of procedure after counsel had declared his intention to withdraw the action and sought an adjournment to enable him bring a formal application.** F G

How he headed the application in my view is of no consequence. I therefore refuse to accept the contention of Chief Ikeazor, S.A.N. that the application was invalid having been brought after the date fixed for hearing. The plaintiff/respondent did not bring his notice of discontinuance under the first limb of Order XLVII Rule 1. If he had done so, the ratio decidendi or Okorodudu's case H

would have applied. The substance of the order sought by the plaintiff in the notice he filed on 17-3-87 was an application for leave to discontinue or withdraw his action.

Neither Order 28, Rule 1(2) of the High Court (Civil Procedure) Rules, 1958, Rules, 1958 of Western Region of Nigeria nor Order XLVII Rule 1 of the High Court Rules of Eastern Nigeria, 1963 provided any form for an application for leave to discontinue or withdraw an action after the date fixed for hearing hence an oral application was even considered sufficient in the case of Rodrigues.

Having held that the application was valid, what order to make in consequence of the said application was a matter exclusively for the court in due and deliberate exercise of its judicial discretion. He must inevitably take into consideration all the circumstances of the case. See the case of Rodrigues & Ors. v. The Public Trustee & Ors. (supra) at pages 36-37. The Court will then decide whether:

(a) to grant leave for the suit to be withdrawn simply on terms that the same be struck out subject to payment of costs;

(b) or grant leave for the suit to be withdrawn subject to the imposition of certain conditions to be fulfilled before a fresh suit concerning the same subject matter and the same parties may be instituted; or

(c) to refuse such leave in which case the suit must be dismissed also on terms as to costs. See Nwobu Nwachukwu & Ors. v. David Nze & Ors. in re Ofoegbu Nze v. David Nze (1955) 15 W.A.C.A 36.

In the instant case having weighed all the circumstances of the case in the interest of justice, the learned judge granted leave and dismissed the suit. The next question is whether the dismissal of the action by the learned judge was in truth the result of the exercise of judicial discretion within the provisions of Order XLVII, Rule 1 of the High Court Rules of Eastern Nigeria, 1963.

It was contended by Chief Ikeazor, S.A.N who appeared for the respondents that our rules of evidence, procedure and pleadings are but

foundations upon which evidence would be led at trial and cannot be treated as evidence upon which a court can act. He cited the case of Nishizawa Ltd. v. Jethwani (1984) 12 S.C. 234 at 263. In that case the plaintiff filed a specially endorsed writ with a Statement of Claim under Order 10 Rule 1 of the High Court of Lagos (Civil Procedure Rules). The defendant entered an appearance but did not file any affidavit disclosing any defence on the merit. After the defendant's appearance the plaintiff by motion on notice applied under Order 10 Rules 1 and 2 and Order 40 Rule 1 of the same Rules for an order empowering him to enter judgment against the defendant/respondent as upon the Writ of Summons and Statement of Claim.

The affidavit in support of the plaintiff's motion verified the fact pleaded with the Statement of claim. The defendant did not challenge the facts deposed to in the plaintiffs' affidavit by counter-affidavit. Instead, a Statement of Defence was filed by the defendant's solicitors and the said defence did not meet directly the facts deposed in the affidavit in support of the plaintiff's motion. The plaintiff objected to this procedure. He was over-ruled. The trial judge was of the view that having gone through the Statement of Defence filed, he was satisfied that there were triable issues for which leave to defend ought to be granted. He dismissed the summons for judgment and the appeal by the plaintiff to the Court of Appeal was dismissed.

On a further appeal to this court, it was held amongst other things, that:

"With the guidelines given by Order 10 rule 3(a), (b) and (c) in mind, a statement of defence simpliciter is not a manner of showing cause against a statement of claim verified by affidavit. The only problem is whether the judge or court can shut its eyes against the statement of defence. The clear answer is that faced with the difficult task of deciding that the defendant has no defence to the action, he cannot shut his eyes against it. This must not be taken as elevating a statement of defence to the requirement of the rule."

I have gone to this length to bring to the fore that the case concerned a claim filed under Order 10 Rule 1 aforementioned followed by a

motion for judgment supported by an affidavit verifying the facts pleaded with the Statement of Claim. Even though the defendant should have filed a counter-affidavit under Order 10 Rule 3, he filed a statement of defence which was no answer to the facts pleaded by the plaintiff and
 B verified by a supporting affidavit. That notwithstanding, the court did not shut its eyes against the Statement of Defence which was filed contrary to the rule.

**It is the law that averments contained in pleadings are no
 C evidence but in the special procedure of Order 10 Rules 1, 2, 3, 4 and 5 and Order 40 Rule 1 of the High Court of Lagos (Civil Procedure Rules) which are quite strict and could not have accommodated the statement of defence, the Court felt bound to look at the said statement of defence which was before it in order to do substantial justice to the parties. In view of the special plea of estoppel
 D per rem judicatam raised by the defendant in paragraphs 6, 7, 8, 9 and 10 of his statement of defence, I am unable to come to the conclusion that the learned trial judge was in error to have taken
 E those averments into consideration when the plaintiff had expressed his intention to discontinue the action. Those averments are peculiar and are the type of circumstances which the learned trial judge is enjoined to weigh in the interest of justice.**

**The principle of Order XLVII Rule 1 is that after proceedings
 F have reached a certain stage the plaintiff who has brought his adversary into court, should not be allowed to escape by the side door and avoid the contest. At that stage, he is to be no longer dominus litis and it is for the judge to say whether the action should be discontinued and upon what
 G terms. See Fox v. Star Newspapers Company (1898) 1 Q.B. 636.**

**The conclusion I have reached is that the decision of the learned trial judge in dismissing the plaintiff's claim is right. It is the result of a proper exercise of judicial discretion. The appeal therefore succeeds and
 H sit is allowed by me. The first question for determination is answered in the negative. In view of the peculiar nature of the averments in the statement of defence, the learned trial judge was entitled to look at those averments in deciding whether or not to grant leave to discontinue the**

action. **As to the third question, where the notice is invalid, the court below ought to have remitted the case to the High Court for hearing before another judge without more. There was no invalidity in the case on appeal.**

The defendant/appellant is entitled to costs both in the court below and in this court which I assess at N350.00 and N10,000.00 respectively against the plaintiff/respondent.

BELGORE JSC

Having received all the pleadings and the plaintiffs having seen what the defendants set up as their defence, with the issue of res judicata clearly pleaded, the case having thus been set down for hearing, the withdrawal in the circumstance of this case could attract only dismissal not striking out. Trial Court was therefore right in entering dismissal. The judgment of my learned brother, Ogwuegbu, J.S.C., has amply addressed all the issues just as I would have done and I adopt his reasoning as mine in allowing this appeal. I make the same consequential orders as made by him.

OGUNDARE JSC

I have had a preview of the judgment of my learned brother Ogwuegbu JSC just delivered. I agree entirely with him that this appeal be allowed, the judgment of the Court below be set aside and the judgment of the trial High Court be restored.

This appeal turns on the proper construction and application of Order XLVII Rule 1 of the High Court Rules of Eastern Nigeria Cap 61 Laws of Eastern Nigeria 1963 which rules applied at the time of the trial of this action. The facts have been fully set out in the judgment of my learned brother, I need not restate them here again. Suffice it to say that it is not in dispute that the plaintiff's counsel intimated the trial court on 6th March 1987 when the matter was fixed for hearing that he was withdrawing the action. He sought an adjournment "to file a motion of

discontinuance". What he filed subsequently was a notice of discontinuance. On the adjourned date, that is 24th of March 1987, the learned trial judge treated the notice as an application to discontinue and after hearing arguments from learned counsel as to the consequential order to make, dismissed the action with costs. The plaintiff being dissatisfied with the order of dismissal appealed to the Court of Appeal seeking an order setting aside the order of dismissal and substituting, therefore, an order striking out the action. I may mention that there was also an appeal against the order for costs made by the learned trial Judge. That part of the appeal was, however, not considered by the Court of Appeal and as there has been no appeal to this Court on the issue of costs I will only confine myself to the order of striking out appealed against.

The Court of Appeal following Okorodudu & Ors. v. Okoromadu & Ors. (1977) 3 SC. 21 at p. 29 allowed plaintiff's appeal and adjudged as follows:

"This appeal must therefore succeed. The Order of the lower court dismissing plaintiff's case including the award of costs is set aside. It is ordered that the case be listed on the Cause List before another Judge of the Anambra State High Court to enable that Court proceed in the matter with a (sic) consideration of the notice of discontinuance filed." It is against this judgment that the defendant has appealed to this Court.

The main issue that calls for determination in this appeal in my respectful view, is as to whether the notice of discontinuance filed by the plaintiff at the trial Court was a nullity. Order XLVII rule 1 provided as follows:

"ORDER XLVII, - DISCONTINUANCE OF SUITS
1. If before the date fixed for hearing, the plaintiff desires to discontinue any suit against all or any of the defendants, or to withdraw any part of his claim, he shall give notice in Writing of discontinuance or withdrawal to the Registrar, and to every defendant as to whom he desires to discontinue or withdraw. After the receipt of such notice such defendant shall not be entitled to any further costs with respect to the matter so discontinued or withdrawn than those incurred up to the receipt of such notice, unless the Court shall otherwise order, and such defendant

may apply ex parte for an order against the plaintiff for the costs incurred before the receipt of such notice and of attending the Court to obtain the order. Such discontinuance or withdrawal shall not be a defence to any subsequent suit.

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

This rule in my respectful view is in pari materia with Order 28 rule (1) & (2) of the High Court (Civil Procedure) Rules of Western Nigeria considered by this Court in Okorodudu v. Okoromadu (supra). In the former rule there was provision for both discontinuance before the date of hearing and discontinuance after the date of hearing. In the Western Nigeria rule, the 2 limbs were separated into 2 separate sub-rules (1) & (2). The situation that arose in OKORODUDU V. OKOROMADU fell under subrule (2) of the Western Nigeria rule. The situation that arose in this case also fell under the 2nd limb of the Eastern Nigeria rule. That appears to be the only resemblance in the case before us now and the case of OKORODUDU V. OKOROMADU.

In OKORODUDU V. OKOROMADU, hearing had been fixed for certain dates in June 1974. Before the date fixed for hearing however, a 3rd party applied by way of motion on notice to be joined as co-plaintiff in the case. The motion came before another Judge different to the one that had fixed the case for hearing. The Ruling on the motion for joinder was given after the date fixed for hearing, that is, 13th June, 1974. On that date the learned Judge who heard the motion and delivered the Ruling fixed 22-23 July, 1974 for hearing of the action. In the meantime, the plaintiffs on 10th July, 1974 applied by motion on notice for leave to amend their Writ of summons and statement of claim. On the 18th July 1974 in a Ruling delivered by the learned trial Judge one of the amendments sought was granted but the rest were refused. On 19th July 1974, the plaintiffs filed a notice of discontinuance which reads:

"NOTICE OF DISCONTINUANCE

TAKE NOTICE that the plaintiffs being satisfied that the above suit is not properly constituted and having consequently instituted Suit No. W/117/74, against the defendants intend and do hereby wholly discontinue this suit against all the defendants pursuant to Order 28 rule 1 (1) of the High Court (Civil Procedure) Rules 1958, Western Region of Nigeria applicable in the Midwestern State of Nigeria."

On the 22nd July 1974 the adjourned date for hearing, the validity of this notice came up for determination. It was contended by the defendants that the notice could not come under Rule 1(1) as it was filed after the original date for hearing. The Court was urged to refuse the discontinuance and to dismiss the case if the plaintiff failed to proceed with the hearing. It was the contention of the defendants in the case that the notice fell under Rule 1(2). It was contended by the plaintiffs, on the other hand, that as hearing did not proceed on the original date, the adjourned dates should be taken as "the date fixed for hearing" within the meaning of Rule 1(1) and, as the notice was filed before the fresh dates, the plaintiffs were entitled as of right to discontinue under Rule 1(1). It was plaintiffs' contention that Rule 1(2) was inapplicable as there was no application thereunder before the Court. The trial Judge held that "the date fixed for hearing" within the meaning of Rule 1(1) was the original date and not an adjourned date and that, therefore the notice of discontinuance filed by the plaintiffs came under rule 1(2). He treated the notice as an application for leave to discontinue and after considering the pleadings before him he dismissed the action. On appeal to this Court, this Court agreed with the learned trial Judge that the original date fixed for hearing was "the dates fixed for hearing" within the purview of Rule 1(1) and that the notice of discontinuance was filed after that date, therefore, Rule 1(1) would not avail the plaintiffs. This Court, however, held that a notice of discontinuance filed by the plaintiff having been filed after the date of hearing was invalid and that what the trial Court should have done would have been to strike out the notice and call upon the plaintiffs to proceed with their case as pleaded and where the plaintiffs failed or declined to proceed the trial Court would have been right to dismiss the claim.

Before I proceed with my determination of the issue before us I need to refer yet to another decision of this Court on the same subject matter and decided about the same time and by the same panel as in OKORODUDU V. OKOROMADU. It is Olayinka Rodrigues & Ors. v. Public Trustees & Ors. (1977) 4 SC. 28. This case was decided under B Order XLIV rule (1) of the old Supreme Court (Civil Procedure) Rules Cap 211 of the Laws of Nigeria 1948 which reads:

"1. (1) If before the date fixed for hearing, the plaintiff desires to discontinue any suit against all or any of the defendants, or to withdraw any part of his claim, he shall give notice in writing of discontinuance or withdrawal to the registrar, and to every defendant as to whom he desires to discontinue or withdraw. After the receipt of such notice such defendant shall not be entitled to any further costs with respect to the matter so discontinued or withdrawn than those incurred up to the receipt D of such notice, unless the court shall otherwise order, and such defendant may apply ex parte for an order against the plaintiff for the costs incurred before the receipt of such notice and of attending the court to obtain the order. such discontinuance or withdrawal shall not be a defence E to any subsequent suit.

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

When the case came up for hearing after several adjournments, the counsel for the plaintiff applied orally for leave to withdraw the action. The plaintiffs were absent in Court on that day but their counsel said that he had their instructions to withdraw the action. Counsel on both sides addressed the Court on the oral application. The learned trial Judge after giving consideration to the whole circumstances of the case dismissed the action with costs. On appeal by the plaintiffs to this Court, the Court G treated counsel's application as coming under sub-rule (2) of Rule 1 above. Sir Udoma, JSC delivering the judgment of this Court observed at pages H 36 - 37 of the report:

"That being so, leave of the court was necessary in order to be able to withdraw the suit from court. What therefore learned counsel for the appellants in the court below did was to apply for that leave to enable him to withdraw the suit from court in accordance with the instructions given to him by the appellants.

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

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

The case of Nwobu Nwachukwu & Ors. v. David Nze & Ors. In re: Ofoegbu Nze v. David Nze (1955) 15 WACA 36 was referred to in the judgment of this Court. In the latter case the plaintiff had in the trial Court sought to discontinue his action after the date fixed for hearing. The trial Judge refused leave to discontinue the action and on the plaintiff declining to proceed with the case, dismissed the claim. On appeal to the West African Court of Appeal, that Court, in a rather short judgment

held:

"In our view the construction placed upon Order 44 Rule 1 sub-rules (1) and (2) by the learned trial Judge is correct, that is to say 'a plaintiff may discontinue without leave at any time before the date fixed for hearing :::::', on or after that date, discontinuance 'may be allowed', i.e., by the Court; the plaintiff may discontinue but only with leave'.

It follows that the learned trial Judge had the power to refuse leave to discontinue as he did in this case, and we are of the opinion that he was right in dismissing the claim when plaintiff's Counsel declined to proceed with his case."

I now come to the present appeal. The rules applied in RODRIGUES and NZE are in pari materia with the rule under consideration in this appeal, so also is the rule under consideration in OKORODUDU. Learned counsel for the plaintiff on 6/3/87 asked for time to file a motion of discontinuance in the matter. Mr. Egonu SAN, learned counsel for the defendant did not object but thought the plaintiff could withdraw the action orally. On Mr. Akpudo for the plaintiff insisting on a date, the matter was adjourned to the 24th of March 1987 for a notice of discontinuance to be filed. In the interval plaintiff filed a notice of discontinuance which reads:

"To The Registrar,

High Court,

ONITSHA

RE; SUIT NO: 0/389/85

RE. EKEGBO ONUGOGU V. CHIEF ISAAC MBANEFO

NOTICE OF DISCONTINUANCE PURSUANT TO ORDER XLVII RULE 1 OF THE HIGH COURT RULES

TAKE NOTICE that the plaintiff in the above mentioned suit desires to and hereby discontinues his said action.

Dated this 17th day of March, 1987.

Sgd.

MR. EKEGBO ONUBOGU (NWAKWO)

For himself and on behalf of Umuamaifeobu

family in Okpona Ezeani Quarter in Umuota Village Obosi."

On the 24th of March when the matter came up, counsel addressed the Court as to the consequential order to make if leave to discontinue were granted. The trial Judge in his short ruling said:

"Pleadings were ordered and exchanged in this case and hearing has been fixed. The plaintiff in asking leave to discontinue did not give any reasons whatsoever for so doing, and Court must therefore, presume that the decision to discontinue must have stemmed from the contents of the pleadings filed and exchanged. That being the case the Court in the exercise of its discretion sees no point in merely striking out the case."

This case is accordingly dismissed with N2,500.00 costs to the Defendant." (underlining is mine)

As this Court had held in (1) RODRIGUES AND (2) Sonekan v. Smith (1967) ANLR 350 and other similar case, the trial Judge had a discretion in circumstances as in the case on hand whether or not to grant leave to discontinue. In my respectful view it would not matter how the application to discontinue was made; whether it was made by a way of motion on notice or orally or by way of notice as in this case. The rule has not prescribed a particular mode and the words used in the 2nd limb of the rule are "if in any other case the plaintiff desires to discontinue a suit" In my respectful view a plaintiff can discontinue as of right before the date for hearing but can only do so with leave of Court after the date for hearing. Whichever way leave is sought would, in my respectful view, not be material. What is material is that where the plaintiff desires to discontinue after the date fixed for hearing he can only do so with leave of court. In the case on hand the trial Judge considered the matter before him as one seeking his leave. He granted the leave. It does not lie in the mouth of the plaintiff to now say he applied by a wrong procedure. What he can complain about is the consequential order made. The learned trial Judge considered the surrounding circumstances of this case and it being clear to him, from the pleadings, that the matter should never have been brought, in the light of the defendant's plea of res judicata to which the plaintiff filed no reply, he was right in granting leave to

discontinue the action and to dismiss it. The Court below allowed itself to be carried away by mere technicality as to the procedure employed by the plaintiff in seeking leave to withdraw the action. Even if I had agreed that the Court below was right, I would still have varied the order made by it wherein it asked that at the rehearing of the suit the notice of discontinuance be further considered. Surely if the notice of discontinuance was invalid as held by them, it would be pointless asking the same notice to be considered by the trial Court. The proper order would have been that the plaintiff be asked to proceed with his case and if he declined to do so, for a trial Court to make an appropriate order, consequential thereof.

Finally, I, too, like my learned brother Ogwuegbu JSC, allow this appeal, set aside the judgment of the Court below and restore the judgment of the trial High Court. I abide by the Order for costs made in the judgment of my brother Ogwuegbu JSC.

MOHAMMED JSC

I agree. The decision of the learned trial judge in dismissing the plaintiff's claim is a correct exercise of judicial discretion.

The plaintiff had indicated his desire to discontinue with the action and had applied for the leave of the court to do so. The principle underlying the requirement for leave is that after proceedings have reached a certain stage the plaintiff, who has brought his adversary into court, should not be able to escape by a side door and avoid the contest, since he is no longer dominus Litis and it is for the court to say whether the action should be discontinued and upon what terms. See Fox v. Star Newspapers Co. (1898) 1 Q.B. 636 at 639. Nevertheless it is not desirable that a plaintiff should be compelled to litigate against his will. The court will normally grant him leave to discontinue if he wants to, provided no injustice will be caused to the defendant. The court has a wide discretion as to the terms upon which it may grant leave to a plaintiff or counterclaiming defendant as the case may be, to discontinue or withdraw the whole or part of the action or counterclaim. It may impose terms as to costs, as to the bringing of a subsequent action or otherwise

as it thinks just.

In the case in hand, after the learned counsel for the plaintiff had filed a Notice of Discontinuance, the learned trial judge considered the fact that pleadings had already been filed and, quite rightly, the court B presumed that the decision to discontinue must have stemmed from the contents of the pleadings. The learned trial judge, thereafter exercised his discretion and dismissed the action. I agree that the learned trial judge had acted within his powers under the provisions of Order 47, Rule 1 of C the High Court Rules, cap 61 Volume 4, Laws of Eastern Nigeria, 1963 then applicable to the Anambra State. The discretion had been exercised both judicially and judiciously.

For these reasons and the fuller reasons given in the lead judgment, just read by my learned brother, Ogwuegbu., J.S.C., the appeal is D allowed. The judgment of the Court of Appeal is set aside. The ruling of the High Court, dismissing the action of the plaintiff, is hereby restored. I award N10,000.00 in favour of the appellant.

E

IGUH JSC

I have had the advantage of reading in draft the leading judgment just delivered by my learned brother, Ogwuegbu, J.S.C. and I am in full F agreement with him that there is merit in this appeal and that the same ought to be allowed.

The facts that gave rise to this appeal have been dealt with exhaustively in the leading judgment and no useful propose will be served G by my recounting them all over again. It suffices to state that the central issues between the parties in this appeal revolve almost entirely on the validity or otherwise of the Notice of Discontinuance filed in the suit by the plaintiff/respondent on the 17th day of March, 1987, whether the Court of Appeal was right in holding that the decision of this court in H Emmanuel Okorodudu and Another v. Erastus Okoromadu and Another (1977) 3 S.C. 21 applied to the facts and circumstances of the present case and whether the Court of Appeal made the correct order by directing that the case be listed on the cause list before another Judge of the

Anambra State High Court to enable that court proceed with a consideration of the Notice of Discontinuance filed in the suit. I find it convenient to consider these issues together and I will now proceed to do so.

It is trite that pending suits may be discontinued by the plaintiff as provided by the Rules of Court. The present suit on appeal emanated from the High Court of Justice of the former Anambra State of Nigeria. The relevant Notice of Discontinuance in the suit was filed by the plaintiff/respondent pursuant to the provisions of Order 47 Rule 1 of the High Court Rules, Cap. 61, Volume 4, Laws of Eastern Nigeria, 1963, then applicable to the former Anambra State of Nigeria. These provide as follows -

"1. If before the date fixed for hearing, the plaintiff desires to discontinue any suit against all or any of the defendants, or to withdraw any part of his claim, he shall give notice in writing of discontinuance or withdrawal to the Registrar, and to every defendant as to whom he desires to discontinue or withdraw. After the receipt of such notice, such defendant shall not be entitled to any further costs with respect to the matter so discontinued or withdrawn than those incurred up to the receipt of such notice, unless the court shall otherwise order, and such defendant may apply ex parte for an order against the plaintiff for the costs incurred before the receipt of such notice and of attending the Court to obtain the order. Such discontinuance or withdrawal shall not be a defence to any subsequent suit.

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

It is clear from the above provisions of the Rules that the discontinuance of a suit may or may not be with the leave of court depending entirely on the stage of the proceedings the suit is being discontinued. A plaintiff may, thereunder, without the leave of the court, discontinue a suit against all or any of the defendants or withdraw any part of his claim before the date fixed for the hearing of the suit. This is covered by the

first arm of Order 47 Rule 1 aforementioned. Such Notice of Discontinuance, however, must be in writing. But after the receipt of such Notice by the defendant, the plaintiff cannot recall it as such discontinuance or withdrawal automatically terminates the proceedings and a formal order of striking out the suit may be made by the court whether in the presence or absence of the parties and either in open or in chambers. See Chief C.C. Obieniu and others. v. Chief K. O. Orizu and others (1972) 2 E.C.S.L.R. 606.

Where a plaintiff exercises his right to discontinue his action without the leave of the court before the date fixed for the hearing of the case, it is an error to dismiss the action, since at that stage, there would then have been no litis contestatio and the discontinuance would not have been on the merits. It ought also to be noted that the said first arm of Order 47 Rule 1 of the High Court Rules 1963 of former Eastern Nigeria itself enacts that discontinuance thereunder "shall not be a defence to any subsequent suit" It thus clearly envisages an order striking out the suit and not a dismissal thereof at that stage of the proceedings. See Soetan v. Total Nigeria Ltd (1972) 1 ALL N.L.R. 1 at 3, Izieme and others v. Ijeoma Ndokwu and other (1967) N.M.L.R. 280. However, from and beyond the stage after the date fixed for the hearing of the suit, the plaintiff may discontinue only with the leave of the court and subject to conditions that may be imposed by the court. See Nigeria Properties Co. Ltd. v. Alegbeleye 19 N.L.R. 101, Abasi Giwa v. John Holt Co. Ltd (1930) 10 N.L.R. 77 and Eronini v. Ihuko (1989) 2 N.W.L.R. (Part 101) 46 at 65. Such discontinuance with leave is covered by the second arm of Order 47 Rule 1, ante, and it may be effected by an oral or formal application on notice. Such leave is at the discretion of the trial Judge to grant or refuse and he may grant it on terms as to costs and/or as to whether or not the plaintiff will be debarred from bringing another suit founded on the same facts.

However, before the trial Judge exercises his discretion to grant or refuse such leave for a plaintiff to discontinue or withdraw his action, he must take into consideration all the circumstances of the case. When leave to discontinue or withdraw a suit is granted, the court will have to

make one or the other of two possible consequential orders, namely, that of striking out the action on conditions or of outright dismissal of the suit. Whichever order the court will make under the discontinuance of the suit pursuant to the provisions of the second arm of Order 47 Rule 1, *ibid*, will depend on all the circumstances of the case. See Amina Ajayi v. B Adudu Odunsi (1959) 4 F.S.C. 189.

Having examined briefly the general principles of law governing Notice of Discontinuance as a court process, I will now apply them to the undisputed facts of the present case. I will firstly deal with the question of the validity or otherwise of the Notice of Discontinuance filed in the suit and whether the decision of this court in Emmanuel Okorodudu and Another v. Erastus Okoromadu, (*supra*) applied to the present case.

For the appellant, the argument of learned counsel, G.R.I. Egonu Esq, S.A.N. was that the Notice of Discontinuance filled in this suit was valid and effective and that the Court of Appeal was in error by holding that the procedural matter raised in the Okorodudu case was identical with that in the present suit thus rendering the said Notice of Discontinuance in question invalid and liable to be struck out.

Learned counsel for the respondent, Chief C. Ikeazor, S.A.N., on the other hand argued that the said Notice of Discontinuance was invalid and ineffective, that the procedural matter that arises in the present case was identical with that raised in the Okorodudu case as a result of which the Notice of Discontinuance filed in the latter case was pronounced invalid.

It is not in dispute that on the completion of pleadings the present case was adjourned to the 6th day of March, 1987, for hearing. Both parties are also in agreement that when the case came up for hearing on the 6th day of March, 1987, learned counsel for the plaintiff/respondent indicated that his client had decided not to prosecute the case any more and applied for time to file a Notice of Discontinuance in the suit. The case was thereafter adjourned to the 24th March, 1987 for a Notice of Discontinuance to be filed. On the 17th day of March, 1987, the plaintiff/respondent duly filed his Notice of Discontinuance in the suit.

On the 24th day of March, 1987, the suit was called up before the court and learned counsel for the plaintiff/respondent applied to withdraw the suit. In reply, learned counsel for the defendant/appellant applied that in the circumstances of the case, the appropriate order was that of the dismissal of the suit. Relying on the decisions in Izieme and others v. Ijeoma Ndokwu and others (1967) 1 N.M.L.R. 280, and Soetan v. Total Nigeria Ltd (1972) 1 ALL N.L.R. (Part 1) at 3, learned counsel for the plaintiff/respondent submitted that even after the exchange of pleadings but before the hearing of evidence, the court may only strike out and not dismiss a suit after a Notice of Discontinuance has been filed.

The learned trial Judge at the conclusion of arguments dismissed the case with costs. On appeal, however, the Court of Appeal allowed the appeal, set aside the judgment of the High Court and ordered that the case be listed before another Judge of the Anambra State High Court for a consideration of the Notice of Discontinuance which, it held, was invalid. The Court of Appeal stated inter alia as follows:-

"I think that the lower court ought to have simply struck out the invalid notice of discontinuance filed by the plaintiff. It would then call on the plaintiff to proceed with the case. It would be right to dismiss the case only after the plaintiff had expressed an inability to proceed with the case."

Earlier on in its judgment, the court below had also observed -
"It is my humble view that the procedural matter raised here is identical with that in Okorodudu and others v. Okoromadu and others"

With the greatest respect to the Court of Appeal, it cannot be correct to state that the Notice of Discontinuance filed in the suit on the 17th March, 1987 was invalid or that the procedural matter raised in the present case is identical with that in the Okorodudu and others v. Okoromadu and others case (supra). In the latter case, the Notice of Discontinuance filed was specifically made under the provisions of Order 28 Rule 1 (1) of the High Court (Civil Procedure) Rules 1958 of the Western Region of Nigeria, applicable to the then Midwestern State of Nigeria. The said order 28 Rules 1 (1) and (2) read thus -

"1(1) If before the date fixed for hearing the plaintiff desires to Discontinue any suit against all or any of the defendants, or to withdraw any part of his claim, he shall give notice in writing of discontinuance or withdrawal to the Registrar, and to every defendant as to whom he desires to discontinue or withdraw. After the receipt of such notice such defendant shall not be entitled to any further costs with respect to the matter so discontinued or withdrawn than those incurred up to the receipt of such notice, unless the Court shall otherwise order; and such defendant may apply *ex parte* for an order against the plaintiff for the costs incurred before the receipt of such notice and of attending the Court to obtain the order. Such discontinuance or withdrawal shall not be a defence to any subsequent suit

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

Perhaps, I ought to observe at this stage that the provisions of Order 47 Rule 1 of the High Court Rules, Cap. 61, Volume 4, Laws of the Eastern Nigeria, 1963, then applicable to the Anambra State of Nigeria earlier reproduced in this judgment had no Sub-Rules as was the case with Order 28 of the former High Court (Civil Procedure) Rules, 1958 of the Western Region of Nigeria above reproduced. The latter made provision for Rules 1 (1) and 1 (2) as against the former which combined both provisions of the said rules 1(1) and (1 (2) to form Rule 1 of Order 47 of the High Court rules, Cap. 61, Volume 4, Laws of Eastern Nigeria, 1963.

As already stated, the Notice of Discontinuance in the Okorodudu case was expressly made under the provision of Order 28 Rule 1 (1) of the High Court Civil Procedure Rules, 1958. This provision, without doubt, governs discontinuance of suits without leave before the date fixed for the hearing of the suit. But the Notice of Discontinuance in the Okorodudu case was filed after the relevant suit No. W/8/73 was fixed for hearing in an attempt to abandon the said suit NO. W/8/73 and prosecute the same claims in a new suit No. W/117/74 which the plaintiffs in

those cases subsequently instituted. It seems to me therefore plain that the Notice of Discontinuance in the Okorodudu case having been specifically made under Order 28 Rule 1(1) as aforesaid after the relevant Suit No. W/8/73 was fixed for hearing was clearly incompetent and invalid and was rightly so pronounced by this court. This is because a Notice of Discontinuance filed after the date fixed for the hearing of the case and purported to be brought under Rule 1 (1) of Order 28 of the High Court (Civil Procedure) Rules, 1958 (ibid) would be null and void and cannot be treated by the court as having been brought under Rule 1(2) of the same Order 28. See Emmanuel Okorodudu and Another v. Okoromadu and another. (supra) at page 28.

In the present case, however, the plaintiff/appellant had expressed his intention to terminate his claims against the defendant/respondent. It was pursuant to this termination of the plaintiff/respondent's claims against the defendant/appellant that the Notice of Discontinuance was filed in the present suit. This is unlike the position in the Okorodudu case where the Notice of Discontinuance was made with a view to circumventing the order of the court refusing leave to the plaintiffs in that suit to amend their writ of summons and Statement of Claim and thus enable them to prosecute a new suit against the defendants on the same claims. The Notice of Discontinuance in the present case was made under the provisions of Order 47 Rule 1 of the High Court Rules, Cap. 61, Volume 4, Laws of Eastern Nigeria, 1963. As the said Notice of Discontinuance was filed after the case was fixed for hearing, it must, in my view, be deemed to have been made under the second arm of Order 47 rule 1 of the High Court Rules applicable to the Anambra State of Nigeria. It therefore seems to me that the Notice of Discontinuance in the present case was entirely valid and effective, unlike the Notice of Discontinuance in the Okorodudu case which was unquestionably invalid. I entertain no doubt, that the court below, with profound respect, was in gross error by holding that the procedural defect in the Notice of Discontinuance filed in the case of Emmanuel Okorodudu and Another v. Okoromadu, (supra) exists in the Notice of Discontinuance filed in the present case and in relying on that case to set aside the decision of the learned trial

Judge in the present suit. Accordingly, I find it difficult to endorse the decision of the court below to the effect that the Notice of Discontinuance filed in the present case is invalid or ineffective.

There is finally the question whether the Court of Appeal made the correct order by directing that the case be listed before another Judge B of the Anambra State High Court to enable that court proceed with a consideration of the Notice of Discontinuance filed in the suit. In this regard, the Court of Appeal after holding that the Notice of Discontinuance filed in the suit was invalid strangely went on to order -

"that the case be listed on the cause list before another Judge of the Anambra State High Court to enable that court proceed in the matter with a consideration of the Notice of Discontinuance filed." C

In the first place, and again with respect, the Court of Appeal having held that the Notice of Discontinuance filed by the plaintiff/respondent in the suit was invalid was in error in purporting to remit the case back to the Anambra State High Court to reconsider the same Notice of Discontinuance the court below had pronounced invalid. In the second place, the order of the Court of Appeal in this case was clearly E contrary to the relief sought by the plaintiff/respondent from that court which in the Notice and Grounds of Appeal read as follows:-

"That the order of dismissal of plaintiff/Appellant's claim made by the learned trial Judge be set aside and that the Court of Appeal F substitutes the said order with one striking out plaintiff/appellants claim."

Similarly in the plaintiff/respondent's brief of argument in the Court of Appeal, the relief sought was stated as follows -

"On the fore-going, the Court of Appeal shall be urged to allow G the appeal, set aside the order of dismissal of plaintiff-appellant's case made by the learned trial Judge and substitute same with one striking out plaintiff-appellant's claim; and also to vary the Order awarding the sum of N2,500.00 (Two Thousand Five Hundred Naira) as costs in favour of the defendant-respondent." H

It is thus plain that the said order of the Court of Appeal complained of by the defendant/appellant was contrary to the relief sought by the said plaintiff/respondent and therefore clearly wrong. This is be-

cause it is settled law that a court of law must not grant to a party, a relief which he has not sought. See Ekpenyong v. Nyong (1975) 2 S.C. 71 at 81 - 82, Kalio v. Daniel-Kalio (1975) 2 S.C. 15 at 17 - 19, Makanjuola v. Balogun (1989) 3 N.W.L.R. (Part 108) 192 at 206, Olorotimi v. Ige (1993) 8 N.W.L.R. (Part 311) 257 at 271 etc.

What seems to me more serious is that in making the said order not applied for, the Court of Appeal failed to give the parties, the defendant/appellant, in particular, an opportunity to be heard thereon or to address it on the issue. This, in my opinion, is patently wrong. See Ogunlowo v. Ogundare (1993) 7 N.W.L.R. (Part 307) 610 at 624.

I am finally to observe that where a valid Notice of Discontinuance is filed in a case after the same has been fixed for hearing. It is incumbent on the trial court to take into consideration all the circumstances of the case, including the state of the pleadings in the suit in determining the final order it may make in the action. I think the learned trial Judge in the present case was entitled, as he did, to take all the surrounding circumstances into account in deciding whether to strike out or dismiss the suit. This, in the present case, included various pleas of res judicata raised by the appellant to which the respondent made no answer. I think the learned trial Judge, was right in dismissing the plaintiff/respondent's action.

It is for the above and the more elaborate reasons contained in the judgment of my learned brother, Ogwuegbu, J.S.C. that I, too, allow this appeal, set aside the judgment of the court below and restore the decision of the trial court. I abide by the order for costs made in the leading judgment.

H