

SUPREME COURT OF NIGERIA
17TH DAY OF JULY, 1998. SC. 257/1990.
CORAM:- S. M. A. BELGORE, I. L. KUTIGI, E. O.
OGWUEGBU, U. MOHAMMED, A. I. IGUH, JJSC.

NABISCO INC. APPELLANTS
AND
ALLIED BISCUITS COMPANY LTD. RESPONDENTS

***APPEALS** - Respondent's notice - That did not comply with the requirements - Of Order 3 rule 14 of the Court of Appeal Rules - Is incompetent - And should be struck out.*

***APPEALS** - Respondent's notice - It's effect - Is only to vary and retain the judgment - But not its reversal.*

***JUDGMENTS** - Order of a new trial - In view of the findings of the registrar which were not appealed against - And that no miscarriage of justice was occasioned - Nothing can be gained from an order of a new trial.*

***TRADEMARKS** - Application for registration - Opposition proceedings - The general sequence of procedure.*

***TRADEMARKS** - Opposition proceedings - Failure by the opponent to file statutory declaration - He is deemed to have abandoned his opposition - But the registrar has a discretion under Regulation 52 of the Trade-marks Regulation 1967.*

***TRADEMARKS** - Opposition Proceedings - Objection - Contending that there was no evidence - The Registrar is not functus officio after upholding the objection.*

FACTS

The Opponent (Allied Biscuits Co. Ltd.) who are the respondents herein filed an application to register "RITZ" as a trade mark after conducting searches in the Registry of Trade. The application was accepted and numbered 31795. Thereafter, Nabisco Inc., the appellants herein, made an application for the same "RITZ" to be registered as their own trade-mark. The application of the appellants was advertised in the Trade Marks Journal. When the respondents noticed the advertisements they commenced Opposition proceedings in the Trade Marks Registry. When the matter came before the Registrar of Trade Marks, the learned counsel for the appellant raised a preliminary objection contending that there was no evidence before the Registrar on which the matter could proceed. Counsel filed a counter-statement which was served on the respondents. It was the contention of the appellants before the registrar that the respondents should have filed a Statutory Declaration upon receipt of their counter-statement pursuant to regulation 51 of Trade Marks Regulation, 1967. After hearing arguments from counsel for both parties, the registrar upheld the objection and adjourned for hearing. At the close of hearing and after considering the evidence, the Registrar refused to register the device "RITZ" as the appellants trademark.

The appellant being dissatisfied with the decision appealed to the Federal High Court. The appeal was allowed. Aggrieved, the respondents appealed to the Court of Appeal, Lagos Division. The Court of Appeal allowed the appeal, set aside the decision of the Federal High Court and restored the judgment of the Registrar of Trade Marks. The appellants have now appealed to the Supreme Court raising the following issues.

ISSUES FOR DETERMINATION

"(1) (a) Whether the Justices of the Court of Appeal were right in holding that under Regulation 52 of the Trade Marks Regulation 1967 (L.N. 70 of 1967) the Registrar of Trade Marks has a discretion after granting an application to strike out a Notice of Opposition for want of evidence as required under Regulation 51 of the said Trade Marks Regulations 1967;

2. *Whether the Justices of the Court of Appeal were right in holding that an appellant who desires confirmation of the judgment of the Court below on other grounds should either come by way of cross-appeal or a Respondent's Notice under Order 3 Rule 14(1) of the Court of Appeal Rules which deals with variation of judgment. (Ground 4)*

3. *Whether the Justices of the Court of Appeal were right in their restoration of the ruling of the learned Registrar of Trade Marks instead of ordering a retrial having regard to all the irregularities and other circumstances they identified in the trial before the said learned Registrar of Trade Marks. (Ground 3)."*

HELD (Unanimously allowing the appeal per lead judgment of **OGWUEGBUJSC**

Trademarks - Application for registration

1. From the rules, the general sequence of procedure in opposition proceedings is that the opponent files a notice of opposition, stating the grounds of his opposition; the applicant if he wishes to maintain his application, then files a counter-statement; the parties file evidence in turn, the opponent first. There is then a hearing. (p. 1910 E)

Trademarks - Opposition Proceedings

2. Where an opponent as in this case failed to file a statutory declaration as provided in Regulation 51, by virtue of Regulation 52, he is deemed to have abandoned his opposition unless the Registrar otherwise directs. Indeed, the Registrar upheld the objection of the learned counsel for the applicants. He did not stop there. He proceeded to extend the time for the provision of evidence and fixed a date for hearing. The above order of the Registrar though badly and inelegantly worded, was in exercise of the discretion conferred on him by Regulation 52. (p. 1910 G)

Opposition Proceedings - Objection

3. It was the contention of the learned counsel for the appellants that after the Registrar upheld the objection, he was functus officio and could not have granted an extension of time to file evidence or adjourn the

hearing. This cannot be correct having regard to the discretion given to the Registrar in the said Regulation 52. He was still seized of the matter when he made the order extending time to provide evidence and fixing a date for hearing. After upholding the objection, there remained consequential orders to be made for example, striking out the opposition and making an order as to costs. It was at that stage that time was enlarged for provision of evidence and the date fixed for hearing. (p. 1911 A)

C Appeals - Respondents' notice

4. After reading the purported grounds in the Respondents' Notice, I agree with the court below that the notice did not comply with the requirements of Order 3, rule 14 of the said rules. The notice should have been struck out. Since the notice was incompetent, it should not have been an issue of complaint in this court. Those grounds could have been proper grounds of appeal to the Federal High Court against the decision of the Registrar and not grounds of Respondents' Notice in the court below. (p. 1912 B)

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Respondents Notice - It's effect

5. One characteristic of Order 3, rule 14 is that it applies only where the respondent intends to retain the judgment but at the same time wants it varied. The point or points which the notice contemplates must have arisen from the appeal. A respondent's notice is only available to vary and retain the judgment and not its reversal.³ Where a respondent seeks to contest a different issue or cause of action different from the one raised by the appeal served on him, or a reversal of an adverse finding, he can only do so by notice of appeal or cross-appeal. See Lagos City Council v. E. A. Ajanyi (1970) ALL N.L.R. (Reprint) 293. (p. 1912 D)

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³ In *Adene v. Datunbu* (1994) 4 KLR 45 and *Afro-Continental Ltd. v. Ayantuyi* (1995) 12 KLR 2127 the use of respondent's notice was considered by the Supreme Court.

Judgments - Order of new trial.

6. In the light of the above findings of the Registrar which were not appealed against nothing can be gained from an order of a new trial.⁴ It is my view also that the time extended for filing of evidence and fixing a date for the hearing of the application did not prejudice the appellants and no miscarriage of justice was occasioned as a result. The Registrar was right in refusing the application. (p. 1913 F)

NOTABLE POINT OF INTEREST

BELGORE JSC

1. The use of Respondent's Notice

Respondent's Notice under Order 3 rule 14 of Court of Appeal Rules is a means for fine-tuning a victory not to destroy it. It is obsolete in many Common Law jurisdictions and has in fact been abolished in the Supreme Court Rules 1985. The respondent's Notice is open to the respondent who having had victory in the Court below but dissatisfied with certain aspects of the reasons for that victory now asks that the reasons be varied in whole or in part. If the prayer is beyond variation of the reasons and goes substantially to the facts and the law leading to the judgment in such a way as to alter the *raison d'etre* of the judgment, the respondent would be better off with a cross-appeal [See African Continental Bank Ltd. vs G. W. (1977) 5 S.C. 235; Adeleke vs Akin-Olugbade (1987) 3 NWLR (Pt. 60) 214, 216. (p. 1914 B)]

REPRESENTATION

O. Ogunkeye Esq. for the appellants

Ene Tamuno Esq. for the respondents

⁴ The Supreme Court in the following cases made pronouncements on when an order of retrial will be granted and when it will be refused *Salami v. Gbodoolu* (1997) 4 KLR (pt 50) 689; *Okonkwo v. Udoh* (1997) 7 KLR (pt 54) 1722; *Ejindu v. Obi* (1997) 1 KLR (pt 47) 113, *Fadlallah v. Arewa Textiles Ltd.* (1997) 7 KLR (pt 53) 1527.

CASES REFERRED TO

- Lagos City Council v. E. A. Ajanyi (1970) ALL N.L.R. (Reprint) 293,
Western Steel Works Ltd. v. Iron & Steel workers Union of Nigeria (1987)
1 NSCC 133 at 142,
- B National Society for the Distribution of Electric etc. v. Gibbs (1900) 2
CB. 280 at 287 and
Elochin (Nig.) Ltd. v. Mbadiwe (1986) 1 N.W.L.R. (Pt. 14) 47.
The Registrar of Trade Marks v. W. & G. DuCross Ltd. (1913) A. C.
624
- C In re Garrets Application To Register A Trade Mark (1916) 1 Ch. 436.
Solanke v. Ajibola (1969) 1 N.M.L.R. 253
Odusola v. Odusote (1971) 1 N.M.L.R. 228.
Lagos City Council v. E. A. Ajanyi (1970) ALL N.L.R. (Reprint) 293,
- D Elochin (Nig) Ltd. v. Mbadiwe (1986) 1 N.W.L.R. (Pt. 14) 47.

STATUTES AND RULES REFERRED TO

- Trade Marks Act, 1965 (now cap. 436, Laws of the Federation of Nige-
E ria, (1990) S 21(1)
Trade Marks Regulation, 1967, Regulations 51,52,56, and 106
Court of Appeal Rules, Order 3 rule 14
Supreme Court Rules, 1985

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LEAD JUDGMENT BY OGWUEGBU JSC

- This is an appeal against the judgment of the Court of Appeal
(Lagos Division) which allowed the appeal of Allied Biscuit Co. Ltd. to
that court. The proceedings originated from the applications of both
G parties for registration under the Trade Marks Act, 1965 (now Cap. 436,
Laws of the Federation of Nigeria, 1990).

- In June, 1997, the opponent (Allied Biscuit Co. Ltd.) who are
the respondents in this court filed an application to register "RITZ" as a
H trade mark after conducting searches in the Registry of Trade. The
application was accepted and numbered 31795. Thereafter, Nabisco
Inc., the appellants in this court, made an application for the same "RITZ"
to be registered as their own trade mark. The application of the appel-

lants was advertised in the Trade Marks Journal at the instance of the appellants (Nabisco Inc.). When the respondents noticed the advertisement they commenced Opposition Proceedings in the Trade Marks Registry.

When the matter came before the Registrar of Trade Marks, the learned counsel for Nabisco Inc. raised a preliminary objection contending that there was no evidence before the Registrar on which the matter could proceed. Counsel filed a counter-statement which was served on the opponents (Allied Biscuit Co. Ltd.). It was the contention of the appellants before the Registrar that the respondents should have filed a Statutory Declaration upon receipt of their counter-statement pursuant to Regulation 51 of Trade Marks Regulation, 1967. After hearing arguments from both counsel who appeared for the parties, the Registrar upheld the objection and adjourned for hearing. At the close of hearing and after considering the evidence, the Registrar refused to register the device "RITZ" as the appellants' trade mark.

Nabisco Inc. being dissatisfied with the decision of the Registrar appealed to the Federal High Court under section 21(1) of the Trade Marks Act, 1965 (now Cap. 436, Laws of the Federation of Nigeria, 1990). Anyaegbunam, C.J. allowed the appeal. Allied Biscuit Co. Ltd. (the Opponents before the Registrar) appealed to the Court of Appeal, Lagos Division against the decision of Anyaegbunam, C.J. The court below allowed the appeal, set aside the decision of Anyaegbunam, C.J. and restored the judgment of the Registrar of Trade Marks. Nabisco Incorporated appealed to this court and identified the following issues in their brief of argument as arising for determination in the appeal:

"(1) (a) Whether the Justices of the Court of Appeal were right in holding that under Regulation 52 of the Trade Marks Regulation 1967 (L.N. 70 of 1967) the Registrar of Trade Marks has a discretion after granting an application to strike out a Notice of Opposition for want of evidence as required under Regulation 51 of the said Trade Marks Regulations 1967;

(b) If so, whether they were also right by necessary implication that such discretion extends to granting an enlargement of time and the

fixing of the matter for hearing by the Registrar Suo motu in spite of the provisions of Regulation 56 of the Trade Marks Regulation 1967;

(c) Whether the learned Justices of the Court of Appeal were also right in holding that the Appellants by not refusing further participation in the proceedings after upholding their application to strike out the Notice of Opposition have waived their right to regard the Registrar functus officio and thus by necessary implication, conferred fresh jurisdiction on the said Registrar to hear the application (Grounds 1 and 2)

2. Whether the Justices of the Court of Appeal were right in holding that an appellant who desires confirmation of the judgment of the Court below on other grounds should either come by way of cross-appeal or a Respondent's Notice under Order 3 Rule 14(1) of the Court of Appeal Rules which deals with variation of judgment. (Ground 4)

3. Whether the Justices of the Court of Appeal were right in their restoration of the ruling of the learned Registrar of Trade Marks instead of ordering a retrial having regard to all the irregularities and other circumstances they identified in the trial before the said learned Registrar of Trade Marks. (Ground 3)."

The issues formulated by the appellants are sufficient in determining this appeal and I am going to consider the appeal on those issues. It is therefore not necessary to set out the respondent's issues for determination.

The learned counsel for the appellants referred the court to Regulations 48 to 60 of the Trade Marks Regulations, 1967 as the procedure to be followed in opposition proceedings before the Registrar and that Regulations 51, 52 and 56 are relevant to this appeal. Counsel submitted that Regulations 51 and 52 are mandatory and that the Registrar's discretion under Regulation 52 did not go beyond not deeming as abandoned any Notice of Opposition which would otherwise be deemed abandoned. It was his further contention that on a proper interpretation of the Regulation, any opponent who failed to provide evidence in support of his opposition is deemed to have abandoned his opposition unless the Registrar otherwise directs and after upholding the application to strike out the Notice of Opposition, there was no discretion left in the Registrar under Regulation 52.

It was again contended that the Court of Appeal failed to consider the time the Registrar exercised the discretion under Regulation 52 and that no matter was pending before him when he purported to exercise the said discretion.

It was argued in the appellants' brief that after upholding the application to strike out the Notice of Opposition, there was no matter before the Registrar and the grant of the said application was a final order as far as the Registrar was concerned. He thus became functus officio and the order for hearing made thereafter was a violation of Regulation 56. B
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It was submitted in the respondents' brief that under Regulation 106 of the Trade Marks Regulations of 1967, the Registrar has discretionary power and before exercising the power adversely to any person, he should hear such a person if so required and that the court would not interfere with the exercise of the Registrar's discretion unless it is clearly wrong. The court was referred to the cases of The Registrar of Trade Marks v. W. & G. DuCross Ltd. (1913) A. C. 624 and In re Garrets Application To Register A Trade Mark (1916) 1 Ch. 436. D
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It was also submitted on behalf of the respondents that at the time the case was fixed for hearing both parties believed and knew that the respondents had been granted time to file their Statutory Declaration and neither party knew that there had been an error on the record. We were urged to hold that the Registrar had the discretion to order otherwise than deeming the objection abandoned. F

I will at this stage reproduce the provisions of Regulations 51, 52 and s 56 of Trade Marks Regulation, 1967 and other relevant provisions of the Trade Marks Act and Regulations bearing on the exercise of the Registrar's discretion in adjourning the matter for hearing. Regulations 51, 52 and 56 provide: G

"51. Upon receipt of the counter-statement and duplicate the Registrar will forthwith send the duplicate to the Opponent and within one month from the receipt of the duplicate the opponent shall leave with the Registrar such evidence by way of statutory declaration as he may desire to adduce in support of his opposition and shall deliver to the

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applicant a copy of such evidence.

52. *If an opponent leaves no evidence, he shall, unless the Registrar otherwise directs, be deemed to have abandoned his opposition but, if he does leave evidence, then, within one month from the receipt of the copies of declarations, the applicant shall leave with the Registrar such evidence by way of statutory declaration as he desires to adduce in support of his application and shall deliver to the opponent a copy of such evidence.*

56(1) *Upon completion of the evidence the Registrar shall give notice to the parties of a date when he will hear the arguments in the case and such appointments shall be for a date at least fourteen days after the date of the notice, unless the parties consent to another shorter notice.*

(2) *....."*

The Registrar after hearing arguments on the preliminary objection ruled as follows:

"Ruling - Objection upheld. Applicant is granted time till 14th June 1983 for hearing."

This is the order that has led to this appeal.

From the rules, the general sequence of procedure in opposition proceedings is that the opponent files a notice of opposition, stating the grounds of his opposition; the applicant if he wishes to maintain his application, then files a counter-statement; the parties file evidence in turn, the opponent first. There is then a hearing.

It is the evidence by statutory declaration which the opponents in the proceedings failed to file after receiving the counter-statement of the applicants/appellants that gave rise to the objection.

Where an opponent as in this case failed to file a statutory declaration as provided in Regulation 51, by virtue of Regulation 52, he is deemed to have abandoned his opposition unless the Registrar otherwise directs. Indeed, the Registrar upheld the objection of the learned counsel for the applicants. He did not stop there. He proceeded to extend the time for the provision of evidence and fixed a date for hearing. The above order of the Registrar though

badly and inelegantly worded, was in exercise of the discretion conferred on him by Regulation 52.

It was the contention of the learned counsel for the appellants that after the Registrar upheld the objection, he was functus officio and could not have granted an extension of time to file evidence or adjourn the hearing. This cannot be correct having regard to the discretion given to the Registrar in the said Regulation 52. He was still seized of the matter when he made the order extending time to provide evidence and fixing a date for hearing. After upholding the objection, there remained consequential orders to be made for example, striking out the opposition and making an order as to costs. It was at that stage that time was enlarged for provision of evidence and the date fixed for hearing.

There is no doubt that Regulation 52 gave the Registrar discretion to act in the way he did in the present proceedings and like all judicial discretions, he was required to act judicially and judiciously. There is no allegation that he did not so act. It has not been shown that the exercise of that discretion worked hardship and injustice on the applicants/appellants. If it had been wrongly exercised, this court would review it. See Solanke v. Ajibola (1969) 1 N.M.L.R. 253 and Odusola v. Odusote (1971) 1 N.M.L.R. 228.

Having come to the conclusion as did the court below that the Registrar was not functus officio when he made the orders, the issues of waiver and jurisdiction do not call for any consideration.

The second issue for determination had been set out above. The appellants were respondents in the court below. They filed Respondents' Notice pursuant to Order 3, rule 14(2) of the Court of Appeal Rules. The purported notice specified five grounds why the judgment should be affirmed on grounds other than those relied upon by the Federal High Court which heard the appeal from the decision of the Registrar of Trade Marks. The said grounds were complaints against the decision of the Registrar. They were not even complaints against the decision of Anyaegbunam, C.J. let alone a notice of contention that his judgment be affirmed or varied on other grounds as required by Order 3, rule 14 of the Court of

Appeal Rules.

This led the court below to observe as follows:

"Now, the grounds filed for the purpose of affirming the decision on grounds other than those relied on by Anyaegbunam, C. J. complain that the learned Registrar of Trade Marks erred in law etc. One begins to wonder as to whose decision was to be affirmed - that of the learned Registrar, or that of Anyaegbunam C.J."

After reading the purported grounds in the Respondents' Notice, I agree with the court below that the notice did not comply with the requirements of Order 3, rule 14 of the said rules. The notice should have been struck out. Since the notice was incompetent, it should not have been an issue of complaint in this court. Those grounds could have been proper grounds of appeal to the Federal High Court against the decision of the Registrar and not grounds of Respondents' Notice in the court below. One characteristic of Order 3, rule 14 is that it applies only where the respondent intends to retain the judgment but at the same time wants it varied. The point or points which the notice contemplates must have arisen from the appeal. A respondent's notice is only available to vary and retain the judgment and not its reversal. Where a respondent seeks to contest a different issue or cause of action different from the one raised by the appeal served on him, or a reversal of an adverse finding, he can only do so by notice of appeal or cross-appeal. See Lagos City Council v. E. A. Ajanyi (1970) ALL N.L.R. (Reprint) 293, Western Steel Works Ltd. & Or. v. Iron & Steel workers Union of Nigeria & Ors. (1987) 1 NSCC 133 at 142, National Society for the Distribution of Electric etc. v. Gibbs (1900) 2 CB. 280 at 287 and Elochin (Nig) Ltd. v. Mbadiwe (1986) 1 N.W.L.R. (Pt. 14) 47. There is therefore no substance in issue number two.

It was finally submitted in the appellants' brief of argument that the court below should have ordered a rehearing instead of restoring the decision of the Registrar having regard to all the irregularities identified in the trial before the Registrar. The Registrar in his considered judgment found as follows:-

"This is a case involving the Registration of "RITZ & Devise" Trademark in Class 30. The applicants filed their application on 15th June, 1978 by Messrs. David & Garrick & Co (Solicitors) as against the opponents who filed their own (8) eight months earlier on 31st October 1977 by Messrs. Chris Ogunbanjo & Co. (Solicitors). Due to an unpar- B
adonable oversight on the part of the Registry the later application was advertised for the applicants in the Trademark Journal No. 15 Vol. 11 of 19th July 1982 at page 69, Letter of Acceptance culminating into this advertisement was having been (sic) negligently issued by the Registry C
on 12th February 1980. Whereas for the same mark in the same class in respect of the same goods for the opponents, Letter of Acceptance had earlier been legally and validly issued on the 7th December 1980. The 1980 Letter of Acceptance ought to have been Letter of Refusal for conflict with an earlier mark subject of course to section 13(3) of Trade- D
marks Act, 1965. But this was not done, thereby giving cause for this opposition. From the totality of the pros and cons high lighted above I accept the opponents' arguments that they are first in law and that the registry issued Letter of Acceptance to the applicant in error. I E
find as a fact that the applicants have not used the mark sufficiently to acquire a reputation for the mark in Nigeria. I accordingly accept the opponents (sic) evidence that the applicants intended to destabilize the Nigerian market and her economy. Only an unreasonable tri- F
bunal would fail to take judicial notice or cognizance of commercial law promulgations of his (sic) Government."

In the light of the above findings of the Registrar which were not appealed against nothing can be gained from an order of a new trial. It is my view also that the time extended for filing of evidence and fixing a date for the hearing of the application did not prejudice the appellants and no miscarriage of justice was occasioned as a result. The Registrar was right in refusing the application. H

In the result, I am of the view that this appeal should be dismissed and it is hereby dismissed. Costs of N10,000.00 are awarded against the appellants in favour of the respondents.

BELGORE JSC

I agree with the judgment of my learned brother, Ogwuegbu, J.S.C., that this appeal has no merit and for the reasons contained therein
B I also dismiss it.

Respondent's Notice under Order 3 rule 14 of Court of Appeal Rules is a means for fine-tuning a victory not to destroy it. It is obsolete in many Common Law jurisdictions and has in fact been abolished in the Supreme Court Rules 1985. The respondent's Notice is open to the
C respondent who having had victory in the Court below but dissatisfied with certain aspects of the reasons for that victory now asks that the reasons be varied in whole or in part.

If the prayer is beyond variation of the reasons and goes substantially to the facts and the law leading to the judgment in such a way as to alter the *raison d'être* of the judgment, the respondent would be better off with a cross-appeal [See African Continental Bank Ltd. vs G. W. (1977) 5 S.C. 235; Adeleke vs Akin-Olugbade (1987) 3 NWLR (Pt. 60) 214, 216; Western Steel Works vs Iron & Steel Workers (1987) 1
E NWLR (Pt. 48) 284; Ogwuma vs IBWA Ltd. (1988) 1 NWLR (Pt. 73) 658].

As I have held earlier, the appeal has no merit and I dismiss it
F with N10,000.00 cost to the respondents.

KUTIGI JSC

I read in advance the judgment just delivered by my learned
G brother, ogwuegbu, JSC. I agree with it. The appeal is therefore dismissed with N10,000.00 (Ten thousand naira) costs against the appellant.

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MOHAMMED JSC

I have the preview of the judgment of my learned brother, Ogwuegbu, JSC, in draft and I agree with him that this appeal has failed.

It is accordingly dismissed by me. I also award N10,000.00 costs in favour of the respondent.

IGUHJSC

I have had the privilege of reading in draft the leading judgment just delivered by my learned brother, Ogwuegbu, J.S.C. and I agree entirely with the reasoning and conclusion therein reached.

This appeal is without substance and the same is hereby dismissed by me.

I abide by the order for costs contained in the said judgment.

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