

SUPREME COURT OF NIGERIA

16TH JULY, 1999. SC. 78/1993

**CORAM:- A. B. WALI, M. E. OGUNDARE, U. MOHAMMED,
O. ACHIKE, A. O. EJIWUNMI, JJSC.**

ROBERT C. OKAFOR & 5 ORS. PLAINTIFFS/APPELLANTS/
(Suing for themselves and on behalf of the RESPONDENTS
Ozo's, Ndichies and Ezeanas of Agulu and
Amikwo Communities Awka)

AND

1. THE ATTORNEY-GENERAL & COMMISSIONER)
FOR JUSTICE, ANAMBRA STATE)
2. ANAMBRA STATE COMMISSIONER FOR LOCAL
GOVERNMENT RURAL DEVELOPMENT AND)
CHIEFTAINCY MATTERS)DEFENDANTS/
3. SOLE ADMINISTRATOR AWKA LOCAL RESPONDENTS
GOVERNMENT AREA (R. N. OKENWA))
4. OZO A. C. NDIGWE)
5. OZO DR. S. E. ONEJEME)

IN THE MATTER OF THE APPLICATION

OGBUEFI ONUZULIKE NWUDE & 7 ORS. APPLICANTS/
(For themselves and on behalf of the Ozo's, RESPONDENTS
Ndichies and Ezeanas)

PARTIES SEEKING TO BE SUBSTITUTED FOR THE PLAINTIFFS/
APPELLANTS ON RECORD OR TO BE
JOINED AS PLAINTIFFS/APPELLANTS

APPEALS - Judgment - Nullity - Breach of the constitutional right of fair hearing - By the Court of Appeal - Is sufficient to render it's judgment a nullity.

APPEALS - Preliminary Objection - To the hearing of an appeal - It's meaning and Purpose.

APPEALS - Parties - Substitution - Application to substitute a representative sole Appellant - After the appeal has been withdrawn - Ought to have been refused.

APPEALS - Withdrawal - Notice of withdrawal - Made pursuant to order 3 Rule 18 (2) - Of the Court of Appeal Rules, 1981 - Where one of the parties did not subscribe his signature to the notice - The ingredients of that sub rule have not been satisfied.

COURTS - Judgment - Setting aside - Judgment which is a nullity - The court's jurisdiction to set aside its own judgment which is a nullity - Can be exercised suo motu.

COURTS - Setting aside judgment - Nullity - Where the issue of nullity of the court's decision was not before it - The court has no duty to have it's decision set aside - Even though it found that the decision was a nullity.

COURTS - Suo motu setting aside - Of a judgment that is a nullity - What is meant by the court exercising its jurisdiction suo motu.

INTERPRETATION OF STATUTES - Court of Appeal Rules - Provisions of Rule 18 - Effect of withdrawal of an appeal - Under the provisions - Is that the appeal shall be deemed to have been dismissed.

JUDGMENTS - Nullity - Legal consequences - Of an act which is a nullity.

JUDGMENTS - Nullity - Setting aside - How to set aside a judgment that is a nullity.

FACTS

The plaintiffs in a representative capacity, instituted an action at the Awka high court of Anambra State of Nigeria, (Suit No. AA/70/86). They

claimed against the defendants certain declaratory and injunctive reliefs pertaining to the traditional rulership of Awka. After the plaintiffs had filed their statement of claim, the 4th and 5th defendants, by a motion on notice, sought to dismiss the suit on the ground that the plaintiffs lacked locus standi. The learned trial judge accepted the defendants' contention and accordingly dismissed the suit. The plaintiffs Appealed against this decision to the Court of Appeal in suit No. CA/E/172/87 which is still pending at the Enugu Division of the Court of Appeal. Presently, it would appear that there are no plaintiffs/appellants on record to prosecute the appeal. This is because the 1st and 2nd plaintiffs were by their motion, struck out as plaintiffs on 17/12/89 by the trial court. The 3rd, 4th and 6th plaintiffs had since died at various dates, leaving the 5th plaintiff as the sole surviving plaintiff/appellant on record and who by a notice of withdrawal of appeal dated 12/11/91 filed in court withdrew the appeal. The said notice of withdrawal was brought pursuant to order 3 Rule 18 (2) of the Court of Appeal Rules, 1981 (as amended) and all the Parties subscribed their signatures to the notice except the 5th defendant. In the interim, an appeal was lodged against the striking out of the 1st and 2nd plaintiff's names which came up before the Court of Appeal Enugu under the same appeal number. The Court of Appeal, in the course of hearing the appeal for striking out the names of the two plaintiffs erroneously delivered judgment in the main appeal without an oral hearing. The main appeal was allowed and consequential orders were made. The 1st - 3rd defendants appealed against this judgment to the Supreme Court. The appeal was later withdrawn. The 4th and 5th defendants applied to the court of Appeal to set aside the judgment on the ground that the main appeal was not heard. The plaintiffs opposed the motion to set aside on grounds that the court of Appeal had become functus officio and therefore lacked jurisdiction to set aside its own judgment. The court of Appeal overruled the plaintiff's objection and agreed that its judgment was a nullity. The plaintiffs appealed against the ruling and the appeal was dismissed by the Supreme Court, see (1991) 6 NWLR 659.

Consequent to the difficulties of getting willing plaintiffs/appellants on record to prosecute the appeal still pending at the court of Ap-

peal, some eight applications from the same Agulu community as the plaintiffs in the representative action, leading to the appeal, brought an application on notice at the court of Appeal seeking, inter alia, to be substituted for the plaintiffs /appellants on record in suit No. CA/E/172/87.

B The Court of Appeal granted their prayer. The 4th and 5th defendants dissatisfied with the ruling have now appealed to the Supreme Court raising four issues but the appeal was decided on two main issues.

ISSUES DETERMINATION

- C 1. *Whether the appeal No. CA/E/172/87 allegedly pending at the Court of Appeal Enugu was extant or was duly withdrawn before that court purportedly granted the Applicants/Respondents' motion for substitution of the eight applicants on 25/2/93.* 2. *Whether the Court of Appeal suo motu was right in setting aside its own judgment commonly agreed to by*
D *the parties and the court below to be a nullity.*

HELD (Unanimously allowing the appeal per lead judgment of **ACHIKE JSC**)

E Appeals - Preliminary objection

1. A preliminary objection at the hearing of an appeal, as the name readily suggests, is an opposition to the hearing of an appeal that should be raised promptly and at the beginning of the hearing of the appeal by
F Respondents' counsel before counsel for the Appellants opens his oral submissions on behalf of his clients. The purpose of a preliminary objection is, if successful, to terminate the hearing of the appeal in limine either partially or in toto. This purpose, of course, will be defeated if the objection is not taken timeously as a preliminary issue, and although it may not
G be shut out as a result of its belatedness, its sting to neutralize the entire appeal or part thereof itself may, to that extent, be neutralized. (p. 2374E)

Appeals - Parties

- H 2. All that I wish to point out is that the authorities of Atanda v Olanrewaju (supra) and Moon v Atherton (Supra) are distinctly different from the facts and circumstances of the present appeal and are therefore unhelpful. The point of difference is this: in those two cases there were still

named plaintiffs on record that the substitute plaintiffs sought to replace while in the case in hand the substitute appellants sought to fill the gap or vacuum that has arisen following the Notice of Withdrawal of the appeal. I am clearly of opinion that such error for substitution cannot avail the applicants because the case ceases to exist once it has been withdrawn. B It is obviously ridiculous to attempt to revive a case that has been completely terminated by a purported order of substitute plaintiffs or appellants as decreed by the court below that would have been appropriate if the appeal had not been withdrawn, so that there would, at all material times before the filing of a Notice of Withdrawal, have been in existence C a surviving plaintiff/appellant to be joined by the substitute applicants/appellants. That situation was no longer available to the applicants, consequently the application ought, therefore, to have been refused. (p.2380B) D

Appeals - Withdrawal

3. Construing the provisions of Order 3 Rule 18(2), I hold that the wordings of the provisions of the sub-rule are clear, plain and unambiguous and therefore should be accorded their literal or ordinary meaning. To E that extent I hold that Exhibit "A", made pursuant to Order 3 Rule 18(2), did not satisfy the ingredients of that sub-rule because the 5th Respondent, Ozo Dr. S.E. Onejeme did not subscribe his signature to Exhibit "A" notwithstanding the arrogant averment on the face of Exhibit "A" that, F the appeal was "withdrawn with the consent of all parties thereto". See Kanda v Governor Kaduna State (1986) 4 NWLR (Pt.35) 361 and Niger Progress Ltd. v NEL Corp. (1989) 3 NWLR (Pt.107) 68 at 72. (p.2383D)

Interpretation of Statutes - Court of Appeal Rules

4. But this posture is not the end of the matter. It is a cardinal rule of interpretation of law and, I think, well-settled that in order to ascertain the intention of the lawmaker, the entire provisions of an enactment should be read and construed together. See Chime v Ude (1996) 7 NWLR H (Pt.401) 379. Even though the withdrawal, stricto sensu, may appear to be ineffectual under sub-rule 2, nevertheless it seems to me that the withdrawal can be propped up under sub-rule 4 since all the parties have

not consented, because notwithstanding that the withdrawal does not enjoy the consent of all the parties, it is patently clear that the effect of the said withdrawal under the far-reaching provisions of sub-rule 5 in any event is that an appeal withdrawn under Rule 18 - whether with or without an Order of the Court - shall be deemed to have been dismissed. In other words, although relying alone on the withdrawal under sub-rule 2 may not be full-proof, I am clearly of the view that the combined effect of withdrawal pursuant to sub-rule 2 and sub-rule 4 will undoubtedly effectuate the desired withdrawal. (p. 2383 G)

Appeals - Judgment

5. There is no doubt whatsoever that where the steps taken by a court in the course of its proceedings amount to serious procedural irregularity, the mistake or error will render the proceedings a nullity and accordingly its judgment in this respect will be of no legal effect. Such were the proceedings of the Court of Appeal wherein it delivered its judgment of 11/4/88. The irregularity in the judgment of 11/4/88 arose from the Court of Appeal delivering two judgments on the same day in respect of two appeals without counsel to both parties having been given the opportunity of being heard in respect of one of the appeals (indeed the main appeal). In other words, the Court of Appeal acted glaringly in breach of the constitutional right of fair-hearing. Such infringement of substantial procedural irregularity, as already noted, leading to the judgment of the court, is unquestionably a serious breach that is sufficient to render the judgment of that court a nullity. (p. 2385 F)

Judgment - Setting aside

6. The court has inherent powers to set aside such a judgment which is a nullity in the sense that the judgment was delivered without jurisdiction. Again, it is a popular saying that the court's jurisdiction to set aside its own judgment which is a nullity, can be exercised by the Court suo motu. Authorities are replete which show that by the inherent powers of the court, it has jurisdiction to set aside suo motu its own judgment rendered a nullity by serious procedural irregularity. See Westminster

Bank Ltd v Edwards (1942) A.C. 529 at 536. (pp. 2386 B/H

Nullity - Legal consequences

7. In law, an act which is void is a nullity, ineffectual and of no legal consequence. That an act which is a nullity is completely shorn of legal consequences was emphasized nearly four decades ago by Denning, L.J. in U.A.C. v Macfoy (1961) 3 All E.R. 1169 in these memorable words:

" If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

There is no doubt in my mind that this dictum of Denning, L.J. is too wide to be taken hook, line and sinker. This manner of formal application to set aside an order or judgment that is a nullity negates considerably the dictum of Denning, L.J. in U.A.C. v Macfoy (supra) which suggests, rather simplistically, that there is no need for an order of the court to set it aside. The above dictum was openly criticized by Kayode Eso, JSC as colourful in Aladegbemi v Fasanmade (1988) 6 SCNJ 103 at p. 125 and strongly advocated that a decision that is a nullity should have the pronouncement of the court to that effect, and not left to be ignored by the party affected. Support for this approach has been expressed with the utmost pellucidity in the judgment of Diplock L.J. in Isaacs v Robertson (1984) 3 WLR 709 where the learned Lord Justice expressed himself as follows:

" The contrasting legal principles or concepts of voidness and voidability form part of English Law of contracts. They are inapplicable to orders made by a Court of unlimited jurisdiction in the course of contentious litigation. Such an order is either irregular or regular. If it is irregular it can be set aside by the Court that made it upon an application to that court, if it is regular it can only be set aside by an appellate court upon appeal if there is one to which appeal lies. " (emphasis supplied)

In other words, it is misleading to think that there are orders of court which are void in the sense that they can be ignored at will by persons to whom they are directed. On the contrary, the true position is that there are orders of a court, which strictly speaking are a nullity, and which persons to whom they are addressed are entitled to apply to have set aside ex debito justitiae in the exercise of the inherent jurisdiction of the court. (pp. 2386 D/2388 E)

Nullity - Setting aside

8. The question may now be posed, how does the court set aside a judgment that is palpably a nullity? It is beyond question that a court that has rendered a judgment which is a nullity, as earlier observed, has an inherent jurisdiction, ex debito justitiae, to set it aside. This must, no doubt, be effected by a motion or an application, invariably, by the party or parties affected by the order. The very same court that made the order can take the application, or a court of concurrent jurisdiction. See Obimonure v Erinsho (1966) 1 All NLR 250, Aladegbami v Fasanmade (1988) 3 NWLR (Pt.81) 129 and Okafor v A.G. Anambra (Supra) at p.680. This approach dispenses with the need for an appeal to be taken in respect thereof. I must not be misunderstood to be saying that application to the court that made the ineffectual order is the only mode open for setting aside the void act of judgment. For avoidance of doubt, it may be stated that it is a matter of choice to proceed to set aside a judgment that amounts to a nullity either by a simple application to the court that made it or to appeal against it. (p. 2387 A)

Suo motu setting aside - Of a judgment

9. What is, however, unclear is the expression that by the inherent jurisdiction of the court it can suo motu set aside its own order or judgment or that of another court that is a nullity. Does the term suo motu in this context mean that the order or judgment which is a nullity can be set aside unilaterally by the court without any reference to the parties or their legal representatives once the court is satisfied that the order or judgment is a nullity? If the answer is in the affirmative it is then manifest that a

court involved in such an exercise of setting aside an order of nullity may well do that in the course of writing its judgment and the need to hear from the parties' counsel will not arise. Of course, this approach will constitute a serious infringement of the right of a fair hearing sufficient enough to render such unilateral decision of the court incompetent, because it is done without jurisdiction. In fact, such unilateral disposal by the court of the order that is itself a nullity will, in turn, in my view, render the unilateral decision a nullity. It seems to me that what is important is to determine what is meant herein by the court excising its jurisdiction suo motu. It is the initiatory process whereby the court acts suo motu that calls for amplification. My understanding when a court acts suo motu to set aside an order that is a nullity is that the court is not empowered to act arbitrarily in any event, but rather that it should itself set in motion the process of hearing the parties on the issue of nullity. It is after such input by counsel that the court can pronounce on the nullity, or voidity or otherwise of the order or judgment in question. From all I have been saying, the Court of Appeal was not entitled, without hearing from the parties' counsel, to proceed to set aside its earlier decision dated 11/4/88 in its Ruling of 23/2/93. The court below was clearly in breach of the parties' right to fair hearing. (pp. 2387 G/2389 D)

Courts - Setting aside

10. Secondly, and more importantly, the issue of the nullity otherwise of the lower court's decision of 11/4/88 was not an issue before the lower court in the Ruling for the grant or refusal to grant the eight applicants the order to be substituted or be joined to the Plaintiffs/Appellants on record. In the circumstances, the lower court had no duty to have set its earlier judgment of 11/4/88 aside even though it found that that judgment was a nullity. In other words, the lower court's judgment of 11/4/88 was not effectively set aside by the Court of Appeal's Ruling of 23/2/93. (p. 2389 E)

NOTABLE POINTS OF INTEREST**ACHIKE JSC***1. The unfettered powers of a representative sole plaintiff*

It is common ground that he was not only a plaintiff on record but was also a duly constituted Appellant on record. Equally notable is that with the names of 1st and 2nd plaintiffs having been struck out from the record and the demise of 3rd, 4th and 6th plaintiffs, 5th plaintiff became the only surviving plaintiff on record. This was a crucial turning point in the chequered history of this suit now on appeal. Chief C. Chinwuko was again uniquely placed as a representative sole plaintiff of the "Ozo, Ndichies and Ezeanas of Agulu and Amikwo Communities Awka." Undoubtedly, his powers in that capacity were expansive for he enjoyed the unfettered powers as dominus litis in relation to the prosecution of the communal case until judgment is handed down. In that capacity when the case goes on appeal, unquestionably, his powers as dominus litis remains undiminished. See Alhaji Otapo v. Chief R. O. Sunmonu 29 Ors (1987) 2 NWLR (Pt.58) 587 at 604 and Atanda v Olanrewaju (1988) 4 NWLR (Part 89) 394 at 402 D-F. But this is, of course, without prejudice to the right of the community that the sole Appellant represents to curtail his whims and caprices as sole Appellant by taking legal procedural steps to increase the number of representative appellants on record through the order of court. It would appear that the intention of the Agulu and Amikwo communities of Awka at this point in time was to diminish the powers of the sole Appellant, hence the motion by eight members of these communities to be substituted for the Plaintiffs/Appellants on record or to be joined as Plaintiffs/Appellants. (p. 2377 G)

2. The position of a party in an appeal who did not subscribe to the withdrawal

By way of seeing the complete picture of the efficacy of withdrawal by the combined effect under sub-rules 2 and 4, it remains to clarify the unfettered position of the party in the appeal who did not subscribe to the Notice of Withdrawal. This is exemplified by the position of 5th Respondent who, it may be recalled, did not sign Exhibit "A" in the appeal in

hand. In that situation, the appeal although withdrawn will remain in the cause list and on coming up for hearing, the 5th Respondent will exercise his right with regard to any issue of costs or otherwise remaining outstanding between the parties and for making of an order as to the disposal of any sum lodged in court as security for the costs of appeal. B
(p. 2384 C)

3. Why it is necessary to apply to set aside a void order

The reason for the application to set aside an order or judgment tainted with voidness is that until set aside the order or judgment subsists and remains effectual and binding. In the well-known case of Craig v Kanseen (1943) 1 All ER 108 at 113, after referring to several decisions Lord Greene, M.R. opined: C

" Those cases appear to me to establish that an order which can properly be described as a nullity is something which the person affected by it is entitled ex debito justitiae to have set aside. So far as the procedure for having it set aside is concerned, it seems to me that the court in its inherent jurisdiction can set aside its own order; and that an appeal from the order is not necessary." (p. 2387 E) D

OGUNDARE JSC

4. Setting aside a decision that has already been set aside is wrong F

I think there is a complete misconception of the facts here. It is clear from the lead judgment of Omo JSC in the first appeal to this Court that the judgment of 11/4/88 was set aside by the Court of Appeal on the application of the 4th and 5th defendants on 18th November 1988. It is the Plaintiffs' appeal against this latter decision that was dismissed by this Court on 19th July 1991. [See (1991) 6 NWLR 659 at 675] . It is, therefore, wrong of the Court below to proceed to set aside its decision that had already been set aside by itself. There was no such decision to set aside on 25th day of February 1993. (p. 2395 F) G

5. Leave to appeal as persons interested in the matter

The application was predicated on the assumption that all the appellants H

were no longer available. But the correct situation is that the 5th plaintiff was still available and had withdrawn the appeal. I would think that under this situation the applicants' proper course was to apply to the Court of Appeal for leave to appeal as persons interested in the matter pursuant to section 222 of the 1979 Constitution then applicable. (p. 2398 G)

Rights of a representative plaintiff

6. The authority of the 5th plaintiff to file the notice of withdrawal of appeal was questioned by the Applicants/Respondents on the ground that he did not seek the consent of the communities he was representing before doing so. Granted that the 5th plaintiff did not do so, this would not vitiate the effect of the notice. As a plaintiff suing in a representative capacity, he had full control of the case and could discontinue or compromise the action and could even submit to dismissal and do other things with the action. If he fell out with the represented communities the court, on their application, could add or substitute any other person - see: Thanni v. Adegboyega (1971) 1 NWLR 369 at pp. 376-377, Alhaji Chief Yekini Otapo v. Chief R. O. Sunmonu & Ors. (1987) 2 NWLR 587 at p.604 where Obaseki JSC observed:

"A representative plaintiff is the sole plaintiff and is Dominus litis until judgment, he can discontinue, compromise, submit to dismissal and other things as he decides during the course of the proceedings. If he falls out with the represented parties for any reason, the court has power to add or substitute any person represented though unnamed in the representative action and to bring him in as at the date of the original writ Moon v Atherton (1972) 1 QB. 435; (1972) 3 WLR. 57; (1972) 3 All ER 145 CA. Where several sue, they have the like power as a single representative plaintiff but they must act together Leathley v. McAndrew (1876) WN. 38.

After judgment, a representative plaintiff has no such power; he cannot deprive others in the same interest of the benefit of the judgment if they think fit to prosecute it, for after judgment, no further action can be brought by others. Handford v. Storie 2S & S 196 Re, Alpha Co

(1903) 1 Ch 203; *Re Calgary etc.* (1908) 2Ch 652, C.A."

The position, in my respectful view, will be the same where the representative plaintiff on losing the action, appeals. As he has not obtained any judgment in his favour, he cannot be said to deprive others in the same interest of the benefit of the judgment. As a representative B appellant, he would, in my respectful view, have the same rights over the appeal as a representative plaintiff had over the action, subject of course to the right of the represented parties, where there is a parting of ways, to apply to add or substitute any other person represented, though un- C named in the represented appeal. (p. 2398 H)

REPRESENTATION

Amechi Nwaiwu for 4th & 5th Appellants

F. C. Ofodile for the Applicants/Respondents

D

CASES REFERRED TO

Kanda v Governor Kaduna State (1986) 4 NWLR (Pt.35) 361

Niger Progress Ltd. v NEL Corp. (1989) 3 NWLR (Pt.107) 68 at 72 E

Westminster Bank Ltd v Edwards (1942) A.C. 529 at 536

Okafor v A.G Anambra State (1991) 6 NWLR (Pt.200) 659 at p. 680

Forfie v Seifah (1958) 1 All E.R. 289

Obimomure v Erinoshio (1966) 1 All NLR 250

F

Aladegbami v Fasanmade (1988) 3 NWLR (Pt.81) 129

Otapo v. Sunmonu (1987) 2 NWLR (Pt.58) 587 at 604

Atanda v Olanrewaju (1988) 4 NWLR (Part 89) 394 at 402 D-F.

Isaacs v Robertson (1984) 3 WLR 709

Niger Progress Ltd v N.E.L. Corp. (1989) 3 NWLR (Pt.107) 68 at 72 G

Lazard Brothers & Co. v Banque Ind. LLE De Moscou (1932) 1 KB 617

RULES REFERRED TO

Court of Appeal Rules, 1981 (as amended) O.3 r.18

H

BOOK REFERRED TO

Halsbury's Laws of England, 4th ed. vol.26, para.556

LEAD JUDGMENT BY ACHIKE JSC

The Plaintiff, in a representative capacity, instituted the action at the Awka High Court of Anambra State if Nigeria, Suit No. AA/70/86, which gave rise to the present appeal. After the Plaintiffs had filed their statement of claim, the 4th and 5th Defendants, by a motion on notice, sought to dismiss the suit on the ground that the Plaintiffs lacked locus standi. The learned trial Judge accepted the defendants' contention and accordingly dismissed the suit by the ruling dated 15/12/86. The Plaintiffs on 3/3/87 appealed against this decision to the Court of Appeal, i.e. Suit No. CA/E/172/87 which is still pending at the Enugu Division of the Court of Appeal. Presently, it would appear that there are no Plaintiffs/Appellants on record to prosecute the appeal pending at the Court of Appeal, Enugu.

The twist to the apparent absence of a Plaintiff/Appellant to prosecute the said appeal may be explained graphically. The 1st and 2nd Plaintiffs i.e. Robert C. Okafor and Okafor Ezekwem respectively were, by their motion, struck out as plaintiffs on 17/2/89 by the trial court. The 3rd, 4th and 6th Plaintiffs had since died at various dates, leaving the 5th plaintiff, chief C. Chinwuko as the sole surviving Plaintiff/Appellant on record and who by notice of withdrawal of Appeal dated 12/11/91 filed in Court withdrew the appeal.

In the interim, an appeal was lodged against the striking out of the 1st and 2nd Plaintiff's names which came up before the Court of Appeal Enugu under the same appeal number. On 11/4/88, the Court of Appeal Enugu in the course of hearing the appeal for striking out the names of the two Plaintiffs erroneously delivered Judgment in the main appeal without an oral hearing. The main appeal was allowed and consequential orders were made. The 1st - 3rd Defendants appealed against this judgment to the Supreme Court. The appeal was later withdrawn. The 4th and 5th Defendants applied to the Court of Appeal to set aside the judgment of 11/4/88 on the grounds that the main appeal was not heard.

The Plaintiffs opposed the motion to set aside on grounds that the Court of Appeal had become functus officio and therefore lacked

jurisdiction to set aside its own judgment. The Court of Appeal on 27/5/88 overruled the plaintiff's objection. The Plaintiffs appealed against the ruling and the appeal was dismissed by this Court on 19/7/92.

Consequent to the difficulties of getting willing Plaintiffs/Appellants on record to prosecute the appeal still pending at the Court of Appeal, Enugu, some eight Applicants who are the same Agulu Community as the Plaintiffs in the representative action, in Suit No. AA/70/86 brought an application on notice on 2/7/92 at the Court of Appeal seeking, inter alia, to be substituted for the Plaintiffs/Appellants on record for the appellants in CA/E/172/87.

The Court of Appeal (coram Oguntade, Uwaifo and Akintan JJCA) granted their prayer on 25/2/93. It is against this ruling that the 4th and 5th Defendants have appealed to this Court, having filed Notice and five grounds of appeal.

Learned counsel for the appellants, G.N.A. Okafor Esq formulated the following four issues for determination:

" (1) *Whether the Court of Appeal was right to hold that the Notice of Withdrawal (page 12) did not end the appeal.*

(2) *Whether, if the withdrawal was ineffective, substitution of the applicants was the right order.*

(3) *Whether the Court of Appeal was right to decide on the status of the judgment of 11/4/88, suo motu, which was not the subject-matter of the motion before it, but of another motion not yet fixed for hearing.*

(4) *Whether the surviving 5th plaintiff was competent validly to withdraw his appeal. "*

For the Respondents, their learned counsel, Emeka Ofodile, Esq identified only two issues for determination, namely,

" (1) *Whether the Learned Justices of the Court of Appeal having regard to the antecedents of the documents titled "Notice of Withdrawal of Appeal" and the law were right in allowing the application for substitution?*

(2) *Whether the Learned Justices of the Court of Appeal (in view of the undisputed facts to the effect that the judgment of the 11/4/88*

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was a nullity) were right in setting the same aside?"

A word or two may be said about the relationship of the two sets of issues for determination. A close examination of the parties' Issues for Determination easily shows that the two sets of Issues are identical. B First it may be observed that Appellants' 2nd issue is in the alternative to their 1st issue and it may only be considered if their 1st issue fails. Again, Appellants' issues Nos 1 and 4 can reasonably be taken together, and together they are identical to Respondents' 1st issue. Finally, Appellants' C issue No.3 is similar to Respondents' 2nd issue and the two should be examined side by side.

Respondents' learned counsel, at p.5 of his brief gave Notice of Respondents' intention to raise a preliminary objection at the hearing with regard "to the competence of the grounds of appeal and aspects of the D Appellants' brief." Regrettably, learned Respondents' counsel did not at the commencement of the hearing of the appeal promptly indicate an intention to be so heard on the preliminary objection. The objection was belatedly raised when counsel for the Appellants was almost through E with his submissions. This is procedurally wrong. **A preliminary objection at the hearing of an appeal, as the name readily suggests, is an opposition to the hearing of an appeal that should be raised promptly and at the beginning of the hearing of the appeal by Respondents' counsel before counsel for the Appellants opens his oral F submissions on behalf of his clients. The purpose of a preliminary objection is, if successful, to terminate the hearing of the appeal in limine either partially or in toto. This purpose, of course, will be defeated if the objection is not taken timeously as a preliminary G issue, and although it may not be shut out as a result of its belatedness, its sting to neutralize the entire appeal or part thereof itself may, to that extent, be neutralized.** Nevertheless, the Court directed that the preliminary objection be taken together with the Respondents' H submissions so that Appellants' counsel would thereafter have an opportunity to respond to the objection, along with his reply, if any, to Respondents' main submissions. I shall now take counsel's submissions both in the briefs and at the oral hearing chronologically.

At the oral hearing, Mr. Amechi Nwaiwu submits that the grounds of appeal are competent. Learned counsel also submits that the Notice of Withdrawal at the instance of 5th Plaintiff/Appellant was competent and that it was withdrawn with the consent of all parties thereto, and refers to the copy of Notice of Withdrawal reproduced at p.12 of the record. In the Appellants' brief it was submitted that the consent of all Agulu Community in the withdrawal of the appeal was implicit or apparent. Also in the brief, Mr. G.N.A. Okafor, for the Appellants, submitted that the absence of the 5th Appellant's signature from the Notice of Withdrawal did not vitiate the said Notice. It was his further submission that the phrase "all parties to the appeal" consenting under Order 3 Rule 18(2) meant the Appellants as one party, and the Respondent as one party, consenting. And since Defendants/Respondents were sued jointly, the signature of one Defendant/ Respondent would be adequate to effect the withdrawal and the fact that one of the Respondents did not consent did not make the notice invalid; accordingly, he submitted that the Court of Appeal erred in holding that the absence of the signature of one of the respondents brought the Notice under Order 3 Rule 18(4) of the Court of Appeal Rules. According to counsel, since sub-rule 18(4) says " if all the parties do not consent", there must be evidence that one of the parties refuses to a withdrawal before sub-rule 18(4) can come into operation. And from the notice before the court it showed that "all parties thereto" consented. Counsel further submitted that if, for purposes of argument only, the Court of Appeal was right to hold that the Notice of Withdrawal was ineffective, and the appeal remained on the list of appeals, then the 5th plaintiff remained the surviving appellant, and the order made by the Court of Appeal substituting the applicants for the original Appellants could not stand and ought to be set aside.

On Appellant's 3rd Issue, his learned counsel in his brief submitted that it was erroneous for the Court of Appeal to raise the issue of validity or otherwise of the status of its judgment of 11/4/88 suo motu and to decide on it without calling for input by counsel for the parties because that court lacked the jurisdiction so to do. And in any event, since the judgment of 11/4/88 was a subsisting judgment, not having

been set aside, and which, as it were, decided the appeal No. CA/E/172/87, the Court of Appeal could not on its part set it aside; in effect, the judgment of 11/4/88 had not been set aside and there was, therefore, no more appeal No. CA/E/172/89 into which the applicants could come. In conclusion, learned counsel in both oral hearing and in the brief submitted that the 5th plaintiff successfully withdrew his appeal, and in the absence of a subsisting appeal, the Court of Appeal could not make the substitutional order it allegedly made which was only possible before the appeal was withdrawn. Counsel urged that the appeal be allowed and that the ruling of the Court below be set aside, and the motion of the applicants be dismissed.

Learned counsel for the Applicants/Respondents, both at the oral hearing and in his brief, submitted that there was competent appeal pending at the time the application for substitution was made and granted. To learned counsel, reliance on Order 3 Rule 18(2) mandatorily imposes two pre-conditions that must be met before a withdrawal of the appeal could be successfully made, namely,

- (i) consent of all the parties to the appeal, and
- (ii) the documents signifying such consent must be signed by the parties or their legal representative.

He also urged that since the provisions of Order 3 Rule 18(2), are plain, clear and unambiguous, they should be accorded their literal or ordinary meaning; and called in aid the authorities of Kanda v Governor Kaduna State (1986) 4 NWLR (Pt.35) 361 and Niger Progress Ltd v N.E.L. Corp.(1989) 3 NWLR (Pt.107) 68 at 72. Counsel submitted that the notice of withdrawal was tainted with three fatal defects, namely, (a) that it did not show the consent that the Agulu Awka Community consented to the withdrawal; (b) nor did it show the consent of 5th Defendant to the said withdrawal, and (c) the notice of withdrawal was filed during the subsistence of an order for stay of proceedings pending the determination of the appeal by the Supreme Court, and therefore it was clearly illegal and ineffective to terminate the said appeal (i.e. appeal No. CA/E/172/87). In effect, according to counsel, the appeal remained on the cause list as was held by the Court of Appeal pursuant to Order 3

Rule 18(4) of the Court of Appeal Rules, 1981. Finally on this issue, learned counsel submitted that though the 5th surviving plaintiff on record was, relying on the authority of Alhaji Otapo v Chief R.O. Sunmonu & ors (1987) 2 NWLR (Pt.58) 587 at 604 B, completely seised of the case until judgment, but he had no such power after judgment. Accordingly, B he urged us to hold that the Court of Appeal was justified in granting the application for order of substitution.

Respondents' Issue Two, which has been identified with Appellants' third issue, questions the right of the Court of Appeal to decide suo C motu the status of its judgment (i.e. Court of Appeal earlier judgment of 11/4/88). Relying on various legal authorities - Halsbury's Laws of England, 4th ed. vol.26, para.556, Okafor & Ors v. A.G. Anambra State & Ors (1991) 6 NWLR (Pt.200) 659, Lazard Brothers & Co. v Banque D Industrial LLE De Moscou (1932) 1 KB 617, to mention a few - counsel submitted that the court below had inherent powers to set aside orders which are a nullity. Finally, counsel submitted that "the Court below was entitled, as it did, to set aside the null judgment without the parties having to go through an appeal," calling in aid Obimonure v Erinoshio & anor E (1966) 1 All NLR 250 at 252-253 and accordingly urged us to dismiss the appeal and affirm the decision of the Court of Appeal.

I shall take first Appellants' Issues Nos 1 and 4 which correspond to Respondents' Issue No.1. The crux of the controversy is double- F barreled: first, whether the 5th Plaintiff/Respondent and the only surviving Plaintiff /Appellant on record was competent validly to withdraw his appeal was secondly, whether his purported withdrawal of the appeal finally, terminated the appeal.

Let us start with the competence of 5th Plaintiff/Appellant, Chief G C. Chinwuko to withdraw the appeal. It is common ground that he was not only a plaintiff on record but was also a duly constituted Appellant on record. Equally notable is that with the names of 1st and 2nd plaintiffs having been struck out from the record and the demise of 3rd, 4th and H 6th plaintiffs, 5th plaintiff became the only surviving plaintiff on record. This was a crucial turning point in the chequered history of this suit now on appeal. Chief C. Chinwuko was again uniquely placed as a represen-

tative sole plaintiff of the "Ozo, Ndichies and Ezeanas of Agulu and Amikwo Communities Awka." Undoubtedly, his powers in that capacity were expansive for he enjoyed the unfettered powers as dominus litis in relation to the prosecution of the communal case until judgment is handed down. In that capacity when the case goes on appeal, unquestionably, his powers as dominus litis remains undiminished. See Alhaji Otapo v. Chief R. O. Sunmonu 29 Ors (1987) 2 NWLR (Pt.58) 587 at 604 and Atanda v Olanrewaju (1988) 4 NWLR (Part 89) 394 at 402 D-F. But this is, of course, without prejudice to the right of the community that the sole Appellant represents to curtail his whims and caprices as sole Appellant by taking legal procedural steps to increase the number of representative appellants on record through the order of court. It would appear that the intention of the Agulu and Amikwo communities of Awka at this point in time was to diminish the powers of the sole Appellant, hence the motion by eight members of these communities to be substituted for the Plaintiffs/Appellants on record or to be joined as Plaintiffs/Appellants. This, of course, is the cause of the instant appeal.

As earlier noted, the eight Applicants/Respondents had by their motion dated 2/7/92 sought to be substituted or joined as Appellants in CA/E./172/87. The application was granted on 25/2/93. But it must be borne in mind that on 22/11/91 the sole surviving Appellant had withdrawn the said appeal. The pivot of this appeal hinges on whether the appeal No. CA/E/172/87 allegedly pending at the Court of Appeal Enugu was extant or was duly withdrawn before that court purportedly granted the Applicants/Respondents' motion for substitution of the eight applicants on 25/2/93. Obviously, if the appeal was properly withdrawn on being filed at 10.30 a.m. on 22/11/91 the legal consequence is that the appeal, for all intents and purposes, stood dismissed and ceased to be extant, whereas if the instrument of withdrawal of the appeal was defective, the purported withdrawal would be inconsequential and would not avail the Appellants.

To drive home his contention that the appeal was extant and the Court below was justified in making the order to substitute appellants, notwithstanding the filing of a Notice of Withdrawal, Respondents' learned

counsel, as earlier noted, called in aid the authority of Atanda v Olanrewaju Supra), particularly an excerpt from the judgment of Belgore, JSC where His Lordship at p402 D - observed:

" *Where a case is prosecuted in representative capacity, the fact that the person representing the community develops cold feet and withdraws is no bar to the case being continued in a representative capacity by others having interest in the subject-matter. This is in line with the proposition that a person suing in representative capacity does so not for his benefit alone but for the benefit of the entire community he represents* (Afolabi v. Adekunle (1983) 8 S. C. 98) . *Because if he falls out with the people he represents for any reason the court has power to add or substitute any person represented in a representative action and bring him in as at the date of the original action.* (Otapo v Sunmonu (1987) 2 N.W.L.R. (Pt.58) 587, 591." D

It is useful to refer also to a similar observation cited and relied upon by the Court below and credited to Denning, M.R in Moon v Atherton (1972) 2 Q. B.D. 435 at 442:

" *In my opinion those rules enable the court to amend these proceedings by inserting the name of Mrs. Art instead of the named plaintiff. This is necessary in order to do justice. If it were not so, the named plaintiff might discontinue, or the defendant might settle with the named plaintiff, and then leave the other unnamed plaintiffs out in the cold. It might be too late for them to issue a new writ because of the Statutes of Limitation. That cannot be right. It seems to me that if, in a representative action, the named party falls out for any reason, the court has ample power to substitute one of the unnamed parties as the plaintiff, and to bring him in as at the date of the issue of the original writ.*" G

The above observations emanating from two respectable jurists of two different jurisdictions deserve our respect. Their pronouncements in relation to the powers of a sole surviving named plaintiff are not in doubt, as well as the extensive power of the court to substitute one or more unnamed parties as plaintiffs at the date of the issue of the original writ. Unfortunately, the wide power of the court to substitute unnamed plaintiffs for any of the named plaintiffs on record in a representative

action was not what exercised the court below in the instant appeal, rather, it is the peculiar circumstances where unnamed plaintiffs/appellants have sought the order of the court below to be substituted for the substituted for the named plaintiffs/appellants on record. It being common ground that the only surviving appellant had duly given Notice of Withdrawal of the said appeal. **All that I wish to point out is that the authorities of Atanda v Olanrewaju (supra) and Moon v Atherton (Supra) are distinctly different from the facts and circumstances of the present appeal and are therefore unhelpful. The point of difference is this: in those two cases there were still named plaintiffs on record that the substitute plaintiffs sought to replace while in the case in hand the substitute appellants sought to fill the gap or vacuum that has arisen following the Notice of Withdrawal of the appeal . I am clearly of opinion that such error for substitution cannot avail the applicants because the case ceases to exist once it has been withdrawn. It is obviously ridiculous to attempt to revive a case that has been completely terminated by a purported order of substitute plaintiffs or appellants as decreed by the court below that would have been appropriate if the appeal had not been withdrawn, so that there would, at all material times before the filing of a Notice of Withdrawal, have been in existence a surviving plaintiff/appellant to be joined by the substitute applicants/appellants. That situation was no longer available to the applicants, consequently the application ought, therefore, to have been refused.**

It seems to me that for the better understanding of the scenario posed above, to reproduce the relevant content of the Notice of Withdrawal of Appeal annexed to the application as Exhibit "A" (hereinafter referred to as Exhibit "A") filed by the surviving appellant and examine its legal effect against the background of the applicable law. The same is hereunder reproduced:

H " NOTICE OF WITHDRAWAL OF APPEAL
(ORDER 3 RULE 18(2)).

Whereas the 1st and 2nd plaintiffs in the above-named suit having previously withdrawn their names and the name of their community

Amikwo from the suit; AND WHEREAS plaintiffs/appellants NO. 3, 4, and 6 having all died leaving only the 5th plaintiff/appellant.

TAKE NOTICE that the above appeal is withdrawn with the consent of all parties thereto.

DATED this 12th day of November, 1991.

*(Sigd) CHIEF C. CHINWUKO,
the 5th Surviving Plaintiff/Appellant.*

*(Sigd) Ozo A.C. NDIGWE,
the 4th Defendant/Respondent.*

*(Sigd) Solicitor for 1st, 2nd and 3rd
Defendants/Respondent. "*

Now the appropriate law under which the 5th Appellant expressly sought to withdraw the appeal was Order 3 Rule 18(2) of the Court of Appeal Rules, 1981 (as amended) but the Court of Appeal reasoned otherwise and was of opinion that, in any event, the said appeal could fall within the ambit of withdrawal under Order 3 Rule 18(4) of the Court of Appeal Rules. It is now appropriate, and for ease of reference to have a close look at Order 3 Rule 18. It is hereunder reproduced:

"1. An appellant may at any time before the appeal is called on for hearing serve on the parties to the appeal and file with the Registrar a notice to the effect that he does not intend further to prosecute the appeal.

2. If all parties to the appeal consent to the withdrawal of the appeal without order of the Court, the appellant may file in the Registry the document or documents signifying such consent and signed by the parties or by their legal representatives and the appeal shall thereupon be deemed to have been withdrawn and shall be struck out of the list of appeals by the Registrar. In such event any sum lodged in court as security for the costs of the appeal shall be paid out to the appellant.

3. The withdrawal of an appeal with the consent of the parties under paragraph (2) of this Rule shall be a bar to further proceedings on any application made by the respondent under Rule 14 of this Order.

4. If all the parties do not consent to the withdrawal of an appeal as aforesaid, the appeal shall remain on the list and shall come on

for hearing of any issue as to costs or otherwise remaining outstanding between the parties including any application made by the respondent under Rule 14 of this Order, and for the making of an order as to the disposal of any sum lodged in court as security for the cost of appeal.

B 5. *An appeal which has been withdrawn under this Rule, whether with or without an Order of the Court shall be deemed to have been dismissed. "*

We shall now consider seriatim the legal effects of the above five sub-rules of Order 3 Rule 18 as they relate to the case in hand.

C **Sub-Rule 1**

Under this sub-rule, it is enough to effectively withdraw an appeal by serving on all the parties, before the appeal is called on for hearing, through the registrar, a notice to the effect that he does not intend D further to prosecute the appeal. It seems to me quite clear that the sole surviving Appellant on filing Exhibit "A" on 22/11/91 at 10.30 a.m. effectively terminated or withdrew the appeal on that day. Exhibit "A" having been so duly filed, in practice, neither of the parties need further appear E in court, save that this is without prejudice to the right of the adversary party to attend the next sitting of the court to apprise itself of the consequential order(s) the court may deem fit to make, including orders as to costs. It remains to say that where an Appellant is desirous to make a F withdrawal of the appeal pursuant to sub-rule there is no requirement on the respondent or their counsel to subscribe their signatures to Exhibit "A"

Sub-Rule 5

G Perhaps, it is sensible to examine sub-rule 5, even if it appears it is being taken out of turn. It seems needful to emphasis that a withdrawal pursuant to sub-rule I may well not only excuse both parties from further appearance in court, but more importantly, even without such attendance to court, as well as any formal order being made or pro- H nounced by the court, an appeal so-withdrawn shall be deemed to have been dismissed. (Emphasis supplied)

Sub-Rule 2

It was pursuant to sub-rule 2 that the sloe Appellant expressly

sought to withdraw the appeal as may be discernible from Exhibit "A" Could he successfully do this? Exhibit A clearly shows that the surviving Appellant signed Exhibit "A", so also did the 4th Respondent, as well as counsel for the 1st, 2nd and 3rd Respondents. But 5th Respondent did not subscribe his signature or mark to Exhibit "A". Appellant's learned B counsel submitted that failure of 5th Respondent to sign Exhibit "A" did not make any difference because Order 3 Rule 18(2) under which Exhibit "A" was brought, speaks of "all parties to the appeal" consenting meant the Appellants as one party, and the Respondents also as one party, C and since the Respondent were sued jointly, the signature of one Respondent should be adequate to have the appeal withdrawn. Respondents' learned counsel held a different view and made a heavy weather that evidence of consenting and signing of Exhibit A by all the parties or by their legal representatives was a sine qua non condition for the effectua- D tion of Exhibit "A". **Construing the provisions of Order 3 Rule 18(2), I hold that the wordings of the provisions of the sub-rule are clear, plain and unambiguous and therefore should be accorded their literal or ordinary meaning. To that extent I hold that Exhibit "A", E made pursuant to Order 3 Rule 18(2), did not satisfy the ingredients of that sub-rule because the 5th Respondent, Ozo Dr. S.E. Onejeme did not subscribe his signature to Exhibit "A" , notwithstanding the arrogant averment on the face of Exhibit "A" that the F appeal was "withdrawn with the consent of all parties thereto". See Kanda v Governor Kaduna State (1986) 4 NWLR (Pt.35) 361 and Niger Progress Ltd. v NEL Corp. (1989) 3 NWLR (Pt.107) 68 at 72.**

RULE 4

But this posture is not the end of the matter. It is a cardinal rule of interpretation of law and, I think, well-settled that in order to ascertain the intention of the lawmaker, the entire provisions of an enactment should be read and construed together. See H Chime v Ude (1996) 7 NWLR (Pt.401) 379. Even though the withdrawal, stricto sensu, may appear to be ineffectual under sub-rule 2, nevertheless it seems to me that the withdrawal can be propped

up under sub-rule 4 since all the parties have not consented, because notwithstanding that the withdrawal does not enjoy the consent of all the parties, it is patently clear that the effect of the said withdrawal under the far-reaching provisions of sub-rule 5 in any event is that an appeal withdrawn under Rule 18 - whether with or without an Order of the Court - shall be deemed to have been dismissed. In other words, although relying alone on the withdrawal under sub-rule 2 may not be full-proof, I am clearly of the view that the combined effect of withdrawal pursuant to sub-rule 2 and sub-rule 4 will undoubtedly effectuate the desired withdrawal.

By way of seeing the complete picture of the efficacy of withdrawal by the combined effect under sub-rules 2 and 4, it remains to clarify the unfettered position of the party in the appeal who did not subscribe to the Notice of Withdrawal. This is exemplified by the position of 5th Respondent who, it may be recalled, did not sign Exhibit "A" in the appeal in hand. In that situation, the appeal although withdrawn will remain in the cause list and on coming up for hearing, the 5th Respondent will exercise his right with regard to any issue of costs or otherwise remaining outstanding between the parties and for making of an order as to the disposal of any sum lodged in court as security for the costs of appeal.

I have already touched on sub-rule 2 in passing and no sensible reason demands that I should repeat the views expressed in relation thereto. The result of the above discussion is that the appeal No. CA/E/172/87 was effectively withdrawn by the issuance, and filing of exhibit "A" on 22/11/91, and in point of time, it became operational on that day as of 10.30 a.m. Therefore, the said appeal ceased to be extant on the aforesaid date and time, Consequently, I turn in a negative answer to Appellants' Issue One and an affirmative answer to Appellants' Issue Four. This is the same thing as saying that Respondents' Issue One is not resolved affirmatively.

By the tenor of the above resolutions, Appellants' Issue Two which is alternative to Issue One ceases to exercise the court and should be struck out or be so deemed.

This leaves us with Appellants' Issue 3 which is, as already stated, the same as Respondents' Second Issue. Briefly put, the question is whether the Court of Appeal suo motu was right in setting aside its own judgment commonly agreed to by the parties and the court below to be a nullity. It is the lower court's decision dated 11/4/88 that is under fire. B In the leading Ruling for the Court of Appeal dated 25/2/93, dealing with the application to substitute eight persons for the Plaintiffs/Appellants on record, the subject-matter of the present appeal, and per Oguntade, JCA, to which Uwaifo, JCA (as he then was) and Akintan, JCA concurred, His Lordship candidly explained the circumstances leading to the incompetence of their decision of 11/4/88 as follows: C

" When we heard the appeal (i.e. leading to its judgment of 11/4/88), we did so even before the date on which it was fixed. That hearing and the judgment we gave following it are incompetent. This was a fundamental vice that robbed the court of its jurisdiction. The resulting judgment must be regarded as a nullity." D

Having reached this far-reaching conclusion whereby the Court of Appeal suo motu, not only held that its previous decision was a nullity but E proceeded further to so pronounce it suo motu as such, it inevitably laid the foundation for affirmatively maintaining that the appeal in Suit No. CA/E/172/87 was still pending before it, (i.e. the Court of Appeal Enugu) when in fact the Notice of Withdrawal of the said appeal was filed on 22/ F 11/91.

There is no doubt whatsoever that where the steps taken by a court in the course of its proceedings amount to serious procedural irregularity, the mistake or error will render the proceedings a nullity and accordingly its judgment in this respect will be of no legal effect. Such were the proceedings of the Court of Appeal wherein it delivered its judgment of 11/4/88. The irregularity in the judgment of 11/4/88 arose from the Court of Appeal delivering two judgments on the same day in respect of two appeals without counsel to both parties having been given the opportunity of being heard in respect of one of the appeals (indeed the main appeal). In other words, the Court of Appeal acted glaringly in breach of the consti- G H

tutional right of fair-hearing. Such infringement of substantial procedural irregularity, as already noted, leading to the judgment of the court, is unquestionably a serious breach that is sufficient to render the judgment of that court a nullity. The court has inherent powers to set aside such a judgment which is a nullity in the sense that the judgment was delivered without jurisdiction. Again, it is a popular saying that the court's jurisdiction to set aside its own judgment which is a nullity, can be exercised by the Court suo motu.

One point that must be emphasized in this judgment is that the Court of Appeal in its Ruling leading to this appeal, and dated 23/2/93, acknowledged that its decision of 11/4/88 was a nullity. It is not therefore open to this court at this stage to question that fact. We are here, however, concerned only about whether the court can set aside its judgment which is unquestionably a nullity suo motu. All that we need do at this juncture is to be clear in our mind what we understand by the term "nullity". In law, an act which is void is a nullity, ineffectual and of no legal consequence. That an act which is a nullity is completely shorn of legal consequences was emphasized nearly four decades ago by Denning, L.J. in U.A.C. v Macfoy (1961) 3 All E.R. 1169 in these memorable words:

" If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

There is no doubt in my mind that this dictum of Denning, L.J. is too wide to be taken hook, line and sinker. I shall return to it anon. Authorities are replete which show that by the inherent powers of the court, it has jurisdiction to set aside suo motu its own judgment rendered a nullity by serious procedural irregularity. See Westminister Bank Ltd v Edwards (1942) A.C. 529 at 536, Okafor v A.G Anambra State (1991) 6 NWLR (Pt.200) 659 at p. 680 and Chief

Kofi Forfie v Barime Kwabena Seifah (1958) 1 All E.R. 289.

The question may now be posed, how does the court set aside a judgment that is palpably a nullity? It is beyond question that a court that has rendered a judgment which is a nullity, as earlier observed, has an inherent jurisdiction, ex debito justitiae, B to set it aside. This must, no doubt, be effected by a motion or an application, invariably, by the party or parties affected by the order. The very same court that made the order can take the application, or a court of concurrent jurisdiction. See Obimonure v Erinosh C (1966) 1 All NLR 250, Aladegbami v Fasanmade (1988) 3 NWLR (Pt.81) 129 and Okafor v A.G. Anambra (Supra) at p.680. This approach dispenses with the need for an appeal to be taken in respect thereof. I must not be misunderstood to be saying that application to the court that made the ineffectual order is the only mode D open for setting aside the void act of judgment. For avoidance of doubt, it may be stated that it is a matter of choice to proceed to set aside a judgment that amounts to a nullity either by a simple application to the court that made it or to appeal against it. The reason E for the application to set aside an order or judgment tainted with voidness is that until set aside the order or judgment subsists and remains effectual and binding. In the well-known case of Craig v Kanseen (1943) 1 All ER 108 at 113, after referring to several decisions Lord Greene, M.R. opined: F

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

What is, however, unclear is the expression that by the inherent jurisdiction of the court it can suo motu set aside its own order or judgment or that of another court that is a nullity. Does H the term suo motu in this context mean that the order or judgment which is a nullity can be set aside unilaterally by the court without any reference to the parties or their legal representatives once the

court is satisfied that the order or judgment is a nullity? If the answer is in the affirmative it is then manifest that a court involved in such an exercise of setting aside an order of nullity may well do that in the course of writing its judgment and the need to
 B hear from the parties' counsel will not arise. Of course, this approach will constitute a serious infringement of the right of a fair hearing sufficient enough to render such unilateral decision of the court incompetent, because it is done without jurisdiction. In fact,
 C such unilateral disposal by the court of the order that is itself a nullity will, in turn, in my view, render the unilateral decision a nullity. It seems to me that what is important is to determine what is meant herein by the court excising its jurisdiction suo motu. It is the initiatory process whereby the court acts suo motu that calls
 D for amplification. My understanding when a court acts suo motu to set aside an order that is a nullity is that the court is not empowered to act arbitrarily in any event, but rather that it should itself set in motion the process of hearing the parties on the issue of
 E nullity. It is after such input by counsel that the court can pronounce on the nullity, or voidity or otherwise of the order or judgment in question.

This manner of formal application to set aside an order or
 F judgment that is a nullity negates considerably the dictum of Denning, L.J. in U.A.C. v Macfoy (supra) which suggests, rather simplistically, that there is no need for an order of the court to set it aside. The above dictum was openly criticized by Kayode Eso, JSC as colourful in Aladegbemi v Fasanmade (1988) 6 SCNJ 103 at p.
 G 125 and strongly advocated that a decision that is a nullity should have the pronouncement of the court to that effect, and not left to be ignored by the party affected. Support for this approach has been expressed with the utmost pellucidity in the judgment of
 H Diplock L.J. in Isaacs v Robertson (1984) 3 WLR 709 where the learned Lord Justice expressed himself as follows:

" The contrasting legal principles or concepts of voidness and voidability form part of English Law of contracts. They are inap-

plicable to orders made by a Court of unlimited jurisdiction in the course of contentious litigation. Such an order is either irregular or regular. If it is irregular it can be set aside by the Court that made it upon an application to that court, if it is regular it can only be set aside by an appellate court upon appeal if there is one to which appeal lies. B
" (emphasis supplied)

In other words, it is misleading to think that there are orders of court which are void in the sense that they can be ignored at will by persons to whom they are directed. On the contrary, the true position is that there are orders of a court, which strictly speaking are a nullity, and which persons to whom they are addressed are entitled to apply to have set aside ex debito justitiae in the exercise of the inherent jurisdiction of the court. C

Now we return to the case in hand. From all I have been saying, the Court of Appeal was not entitled, without hearing from the parties' counsel, to proceed to set aside its earlier decision dated 11/4/88 in its Ruling of 23/2/93. The court below was clearly in breach of the parties' right to fair hearing. Secondly, and more importantly, the issue of the nullity otherwise of the lower court's decision of 11/4/88 was not an issue before the lower court in the Ruling for the grant or refusal to grant the eight applicants the order to be substituted or be joined to the Plaintiffs/Appellants on record. In the circumstances, the lower court had no duty to have set its earlier judgment of 11/4/88 aside even though it found that that judgment was a nullity. In other words, the lower court's judgment of 11/4/88 was not effectively set aside by the Court of Appeal's Ruling of 23/2/93. D E F G

The result, therefore, is that I turn in a negative answer to both Appellants' Issue No.3 and Respondents' Issue No. 2.

The end result is that this appeal succeeds. Therefore, the Ruling of the Court of Appeal dated 23/2/93 is accordingly set aside. The application of the Respondents/Appellants is accordingly refused and I award N10,000.00 costs to the Appellants. H

WALI JSC

I have had the advantage of reading in advance the lead judgment of my learned brother Achike JSC and the judgment of my learned brother Ogundare JSC in support and I agree with the reasons contained
B therein for allowing the appeal. I adopt same as mine.

For these same reasons I also allow the appeal, set aside the Ruling of the Court of Appeal given on 23/2/93 and dismiss the application for substitution filed by the Appellants/Respondents with N10,000.00
C costs to the 4th and 5th Defendants/Appellants.

OGUNDARE JSC

This appeal is against the decision of the Court of Appeal (Enugu
D Division) given on 25th day of February 1993 wherein the Court below granted the application of Ogbuefi Onuzulike Nwude and 7 others seeking to be substituted for the Plaintiffs/Appellants is Suit No. CA/E/172/87; Robert C. Okafor and 5 Others v the Attorney-General and Commissioner for Justice Anambra State and 4 Others. The Applicants before
E the court below who are now Respondents in this court had prayed the Court for:

"i. Pursuant to *THE COURT'S INHERENT JURISDICTION*
F *FOR AN ORDER FOR ACCELERATED HEARING OF THIS MOTION.*

ii. (a) Pursuant to *SECTION 16 COURT OF APPEAL ACT 1976 ORDER 1 RULE 20 COURT OF APPEAL RULES 1981 (AS AMENDED) FOR AN ORDER SUBSTITUTING PLAINTIFFS/APPELLANTS ON RECORD FOR THE APPELLANTS.*

G (b) For an *ORDER AMENDING THE RECORDS (BY WAY OF JOINDER OR OTHERWISE BY MAKING THE APPLICANTS THE 2ND SET OF PLAINTIFFS/APPELLANTS IN THIS APPEAL (with liberty to file their Notice of Appeal and Appellants' brief).*

H (iii) Pursuant to the *COURT'S INHERENT JURISDICTION for an accelerated hearing of the appeal.*

(iv) *AND for such further order and/or other orders as this Honourable Court may deem fit to make in the circumstance. "*

The application was supported by two affidavits both sworn to by Emmanuel Nwokafor the 6th Applicant/Respondent. Alfred Chukwuka Ndigwe the 4th Defendant/Appellant in this appeal swore to two counter-affidavits.

From the affidavits and counter-affidavits it would appear that this matter has a chequered history. The original six Plaintiffs had in Suit No. AA/70/86 sued the Attorney-General and Commissioner for Justice of Anambra State and 4 Others, including Ozo Alfred Chukwuka Ndigwe, claiming certain declaratory and injunctive reliefs pertaining to the traditional rulership of Akwa. Upon an application brought by the defendants, the trial Court dismissed the plaintiffs' entire action. Whereupon the plaintiffs appealed to the Court of Appeal. In the interim there were several interlocutory motions filed and argued at the Court of Appeal. After the parties had filed their briefs however, the court fixed hearing of the appeal for the 14th of June 1988 but mistakingly heard the appeal and gave judgment thereon, all on the 11th April 1988 without the knowledge and oral arguments of the parties. Being dissatisfied with the procedure adopted by the Court of Appeal the 4th and 5th defendants applied to that Court to set aside the judgment of 11th April 1988 on the ground that they were denied an opportunity of being heard thereby rendering the judgment a nullity. The 1st to the 3rd defendants appealed to the Supreme Court against the judgment of the Court of Appeal but their appeal was later withdrawn before the decision of the Court of Appeal on the motion of the 4th and 5th defendants. At the hearing of the motion to set aside judgment the plaintiffs raised a preliminary objection on the ground that the Court of Appeal had become functus officio and therefore was in abuse of process. The Court of Appeal in its Ruling overruled the preliminary objection and agreed that its judgment was a nullity and set it aside. The Plaintiffs then appealed to the Supreme Court against the order of the Court of Appeal setting aside its earlier judgment of 11th April 1988. This Court dismissed that appeal and affirmed the Ruling of the Court of Appeal setting aside the said judgment, see (1991) 6 NWLR 659.

By setting aside its judgment of the 11th April 1988 which deci-

sion was affirmed by this Court the position then was that the appeal lodged by the plaintiffs against the judgment of the trial High Court dismissing their entire action, was still subsisting. While this appeal was pending the 1st and 2nd defendants went ahead and recognized the 5th defendant as the traditional ruler of Awka. The plaintiffs therefore brought a motion in the trial High Court praying for:

- (a) stay of execution of the High Court judgment
- (b) an injunction restraining the 1st and 2nd defendants from acting on the ruling of the trial High Court or to recognize the 5th defendant.

This motion was dismissed by the learned trial Judge on 17th March 1987. Before the ruling however, another suit (E/36/87) was filed on the 23rd of February 1987 in another judicial division of the State High court seeking a declaration that the recognition of the 5th defendant by the 1st and 2nd defendant was null and void, that the 5th defendant was not duly and validly selected and an injunction restraining the 1st and 2nd defendants from presenting him a certificate of recognition. This action was still pending between the same parties when the plaintiffs brought yet another motion before the Court of Appeal in respect of the appeal then pending before that Court praying for the stay of execution of the ruling of the trial High Court dismissing their earlier action and an injunction to restrain the recognition of the 5th defendant by the 1st and 2nd defendants pending the determination of the said plaintiffs' appeal. The defendants through their counsel filed a notice of preliminary objection against the motion for stay. The Court of Appeal heard both the plaintiffs' motion and the defendant's recognition was null and void and set it aside. It further restrained by way of injunction, the 1st and 2nd defendants from recognizing the 5th defendant as traditional ruler of Akwa pending the determination of the appeal. The defendants appealed against this ruling of the Court of Appeal. This Court allowed the appeal and set aside the said ruling, see (1992) 2 NWLR 396. The position at the end of this second appeal in this matter to this Court was that the judgment of the trial Judge given on 15/12/86 dismissing plaintiffs original action was subsisting whilst the appeal against it was also still subsisting.

I think it is pertinent at this stage to mention that all along the plaintiffs sued for themselves and on behalf of the Ozos, Ndichies and Ezeanas of Agulu and Amikwo communities of Akwa. I may also mention that on 17/2/87 the names of the 1st and 2nd plaintiffs were struck out by the learned trial Judge; thus they did not join in the appeal filed on 3/3/87 against the judgment of the trial High Court dismissing plaintiffs' claims. The 3rd, 4th and 6th plaintiffs died during the pendency of the appeal to the Court of Appeal leaving only the 5th plaintiff to prosecute the appeal. B

On 22nd November 1991 the 5th plaintiff who was the sole surviving Appellant filed a notice of withdrawal of the appeal in the Court of Appeal. The Notice reads thus: C

"NOTICE OF WITHDRAWAL OF APPEAL
(ORDER 3 RULE 18(2)) D

WHEREAS the 1st and 2nd plaintiffs in the above-named suit having previously withdrawn their names and the name of their community Amikwo from the suit; AND WHEREAS plaintiffs/appellants Nos. 3, 4, and 6 having all died leaving only the 5th plaintiff/appellant. E

TAKE NOTICE that the above appeal is withdrawn with the consent of all parties thereto.

DATED this 12th day of November, 1991"

and was signed by the 5th plaintiff, the 4th defendant and the solicitor for the 1st and 3rd defendants. This was the factual situation when in June 1992 the applicants filed the motion leading to this appeal. They claimed to be representing Ozos, Ndichies and Ezeanas. F

The facts set out above are discerned from the affidavits and counter affidavits filed in this matter and the law reports of the appeals to this Court. G

The Court below, after consideration of the issues raised before it, granted the applicant's application and made this order: H

- "(1) O. Ogbuefi Onuzulike Nwude*
- (2) Ogbuefi Rueben N. Onwubuya*
- (3) Ezeana Peter Iloegbuna*
- (4) Ozo Nnameka Obukwelu*

(5) *Ozo Nwosu Akwuba*

(6) *Emmanuel A. N. Nwokafor*

(7) *David Ekwenugo and James O. Osakwe for themselves and on behalf of the Ozos, Ndichies and Ezeanas are substituted as the plaintiffs/appellants in this appeal. "*

The 4th and 5th defendants were dissatisfied with this order and have now appealed to this Court upon five grounds of appeal. They filed a Brief of Argument through their counsel G. N. A. Okafor Esqr. The applicants also filed a Brief. The sole surviving plaintiff and the 1st, 2nd and 3rd defendants did not however, file any Brief nor have they participated in this appeal.

In the Appellants' Brief, the following issues are set out as calling for determination:

"1. *Whether the Court of Appeal was right to hold that the Notice of Withdrawal (page 12) did not end the appeal*

(2) *Whether, if the withdrawal was ineffective, substitution of the applicants was the right order.*

(3) *Whether the Court of Appeal was right to decide on the status of the judgment of 11/4/88, suo motu, which was not the subject-matter of the motion before it, but of another motion not yet fixed for hearing.*

(4) *Whether the surviving 5th plaintiff was competent validly to withdraw his appeal. "*

I have considered the issues as formulated in the Applicants'/Respondents' Brief but I think the issues as formulated in the Appellants' Brief are to be preferred and as issues 1, 2 and 4 relate to the Notice of withdrawal of appeal filed by the 5th plaintiff, I shall take them together while issue (3) will be considered separately.

Learned counsel for the Applicants in their Respondents' Brief gave notice of intention to raise at the hearing of the appeal a preliminary objection "to the competence of the grounds of appeal and aspects of the Appellants' Brief". No such notice has, however, been given nor was any preliminary objection raised at the oral hearing of the appeal. I think no more need be said on the applicants intention to raise prelimination objec-

tion.

I will start by considering first Issue (3) raised in the Appellants Brief. Oguntade JCA in his lead judgment in the Court of Appeal observed:

"Further and perhaps more fundamental, if the judgment we gave on 11/4/88 without hearing the parties is considered valid (and it is as I said still extant), there would in fact be no pending appeal which the 5th plaintiff/appellant could apply to withdraw by his notice of withdrawal filed in court on 22-11-91. "

Later in the judgment he said as follows:

"In this ruling, I think that an important preliminary point to be decided relates to the status of the judgment delivered by this court, on 11-4-88. The positions now taken by parties' counsel would appear to be contrary to what they had taken earlier.

When the judgment was delivered on 11-4-88 without the parties first being heard, Mr. G.N.A. Okafor brought an application that the said judgment be set aside on the ground that it was a nullity. Unfortunately, we could not hear that motion as the then counsel for the plaintiff/appellants had gone to the Supreme Court in an appeal against our order to hear the motion to set aside our judgment given without hearing parties. As it turned out, the Supreme Court dismissed that appeal."

I think there is a complete misconception of the facts here. It is clear from the lead judgment of Omo JSC in the first appeal to this Court that the judgment of 11/4/88 was set aside by the Court of Appeal on the application of the 4th and 5th defendants on 18th November 1988. It is the Plaintiffs' appeal against this latter decision that was dismissed by this Court on 19th July 1991. [See (1991) 6 NWLR 659 at 675] . It is, therefore, wrong of the Court below to proceed to set aside its decision that had already been set aside by itself. There was no such decision to set aside on 25th day of February 1993.

It is unfortunate that the Court below ignored the oft repeated warnings of this Court that a court should not take up a point suo motu and decide the matter before it on that point without hearing the parties. See Lahan v. Lajoyetan (1972) 6 SC 190; Kuti v. Jibowu (1972) 6 SC

147; Kuti v. Balogun (1978) 1 SC 53, Olusanya v. Olusanya (1983) 1 SCNLR 134, The Court below, per Oguntade JSC, recognized that the parties ought to be invited to address the court on the status of the judgment of 11/4/88 but strangely went on to say that it was unnecessary to do so as the matter before it was an issue of nullity. Surely if their Lordship had invited counsel to address them on the status of that judgment of 11/4/88 their attention might have been drawn to the fact that that judgment had infact been set aside by the Court of Appeal on 18th November 1998. Incidentally Oguntade JCA was on the panel of the court of Appeal that set aside that judgment on the latter date. The observation and the decision of the Court below on the status of their judgment of 11/4/88 are therefore, of no consequence.

ISSUES 1, 2 & 4:

D This appeal relates once again to the correct interpretation or Order 3 Rule 18 of the Court of Appeal Rules 1981 (as emended) which reads:

E *"18. - (1) An appellant may at any time before the appeal is called on for hearing serve on the parties to the appeal and file with the Registrar a notice to the effect that he does not intend further to prosecute the appeal.*

F *(2) If all parties to the appeal consent to the withdrawal of the appeal without order of the Court, the appellant may file in the Registry the document or documents signifying such consent and signed by the parties or by their legal representatives and the appeal shall thereupon be deemed to have been withdrawn and shall be struck out of the list of appeals by the Registrar. In such event any sum lodged in Court as security for the costs of the appeal shall be paid out to the appellant.*

G *(3) The withdrawal of an appeal with the consent of the parties under paragraph (2) of this Rule shall be a bar to further proceedings on any application made by the respondent under Rule 14 of this Order.*

H *(4) If all the parties do not consent to the withdrawal of an appeal as aforesaid, the appeal shall remain on the list, and shall come on for the hearing of any issue as to costs or otherwise remaining outstanding between the parties, including any application made by the re-*

spondent under Rule 14 of this Order, and for the making of an order as to the disposal of any sum lodged in Court as security for the cost of appeal.

(5) An appeal which has been withdrawn under this Rule, whether with or without an order of the Court, shall be deemed to have been dismissed."

The 5th plaintiff/appellant who was the sole surviving appellant in appeal CA/E/172/87 filed a notice of withdrawal of the appeal. I have already set out this notice in this judgment. It was signed by all the parties or their counsel to the appeal except the 5th defendant/respondent. It is the view of the court below per Oguntade JCA that :

"It is therefore not a withdrawal that terminates the appeal under Order 3 Rule 18(2) above. This is because it does not reveal that all the parties have consented to the withdrawal. At order 3 Rule 18(4) of the Court of Appeal Rules. "

As the application brought before the Court of Appeal by the applicant depended on the existence of an appeal, it became necessary for that Court to consider whether appeal No. CA/E/172/87 was still subsisting. The Court below per Oguntade JCA, was of the view that the notice of withdrawal filed by the sole surviving Appellant in the appeal notwithstanding, the appeal was still subsisting. Oguntade JCA said:

"The appeal, in spite of the Notice of withdrawal filed by the 5th plaintiff/respondent remains on the cause list to abide the discretion of this court. Since we have not made an order striking out or dismissing the appeal, it is my view that an appeal exists to which the applicants can be brought as substitute parties. "

This conclusion has come under attack in this appeal. It is the submission of the defendants/ appellants that that notice of withdrawal terminated the appeal and that the Court below was wrong that the appeal still subsisted. The applicants/respondents on the other hand, are of the view that the notice of withdrawal did not have the legal effect of terminating the appeal.

I have considered the submission made on behalf of the parties. It is true that the 5th defendant did not sign the notice of withdrawal of

appeal. That by itself would not make the notice ineffective in so far as the other defendants who or their counsel signed the notice, were concerned. Therefore, the notice of withdrawal of appeal filed by the 5th plaintiff terminated the appeal, pursuant to sub-rule (2) of Rule 18 of Order 3, in so far as the 1st, 2nd, 3rd and 4th defendants were concerned. As regards the 5th defendant who did not sign, it would be taken that he did not consent to the withdrawal. That notwithstanding the notice would still be effective in so far as he was concerned as a notice filed under sub-rule (4). The notice nevertheless terminated the appeal in so far as he was concerned. All that remained in his own case would be the hearing of any issue as to costs or otherwise remaining between him and the 5th plaintiff. With profound respect to their Lordship of the court below, I think they are wrong to conclude that the appeal still "exists to which the applicants can be brought as substitute parties." Sub-rule (5) is conclusive on this issue for that sub-rule provides that an appeal which has been withdrawn under Rule 18 whether with or without an order of Court shall be deemed to have been dismissed. Under this sub-rule, by the notice of withdrawal of appeal filed by the 5th plaintiff as the sole surviving appellant, the appeal is deemed to have been dismissed. All that remains is for the 5th defendant who did not sign that notice to bring up an application, if he so desires, for his costs.

This conclusion would have been sufficient to determine this appeal because if there is no appeal pending, there can be no substitution of parties. I need however, to consider whether the application was a proper one having regard to the fact that there was still a surviving appellant at the material time. The application was predicated on the assumption that all the appellants were no longer available. But the correct situation is that the 5th plaintiff was still available and had withdrawn the appeal. I would think that under this situation the applicants' proper course was to apply to the Court of Appeal for leave to appeal as persons interested in the matter pursuant to section 222 of the 1979 Constitution then applicable.

The authority of the 5th plaintiff to file the notice of withdrawal of appeal was questioned by the Applicants/Respondents on the ground

that he did not seek the consent of the communities he was representing before doing so. Granted that the 5th plaintiff did not do so, this would not vitiate the effect of the notice. As a plaintiff suing in a representative capacity, he had full control of the case and could discontinue or compromise the action and could even submit to dismissal and do other things with the action. If he fell out with the represented communities the court, on their application, could add or substitute any other person - see: Thanni v. Adegboyega (1971) 1 NWLR 369 at pp. 376-377, Alhaji Chief Yekini Otapo v. Chief R. O. Sunmonu & Ors. (1987) 2 NWLR 587 at p.604 where Obaseki JSC observed:

"A representative plaintiff is the sole plaintiff and is Dominus litis until judgment, he can discontinue, compromise, submit to dismissal and other things as he decides during the course of the proceedings. If he falls out with the represented parties for any reason, the court has power to add or substitute any person represented though unnamed in the representative action and to bring him in as at the date of the original writ Moon v Atherton (1972) 1 QB. 435; (1972) 3 WLR. 57; (1972) 3 All ER 145 CA. *Where several sue, they have the like power as a single representative plaintiff but they must act together* Leathley v. McAndrew (1876) WN. 38.

After judgment, a representative plaintiff has no such power; he cannot deprive others in the same interest of the benefit of the judgment if they think fit to prosecute it, for after judgment, no further action can be brought by others. Handford v. Storie 2S & S 196 Re, Alpha Co (1903) 1 Ch 203; Re Calgary etc. (1908) 2Ch 652, C.A."

The position, in my respectful view, will be the same where the representative plaintiff on losing the action, appeals. As he has not obtained any judgment in his favour, he cannot be said to deprive others in the same interest of the benefit of the judgment. As a representative appellant, he would, in my respectful view, have the same rights over the appeal as a representative plaintiff had over the action, subject of course to the right of the represented parties, where there is a parting of ways, to apply to add or substitute any other person represented, though unnamed in the represented appeal.

It is also argued that as the notice of withdrawal of appeal was filed after the Court below had stayed further proceedings in the appeal, the notice was ineffective. I cannot accept this argument. First, the order for stay of further proceedings made by the Court below on 30/9/89 was to the effect that -

"Further proceedings in this case particularly in respect to the motion filed by the 4th & 5th respondents dated 18/4/89 is hereby stayed pending determination of the appeal by the Supreme Court. "

I do not see how this order could preclude the 5th plaintiff from withdrawing his appeal by filing the necessary notice. Furthermore, this Court gave its first judgment in the matter on 19/7/91 before the filing of the notice of withdrawal of appeal in November 1991.

Again the action was taken and prosecuted on behalf of the "Ozos, Ndichies and Ezeanas of Agulu and Amikwo Communities Awka". Applicants claimed to represent "Ozos, Ndichies and Ezeanas". Surely these two are not the same. There is no indication the Ozos, Ndichies and Ezeanas of which community they are representing. It would be wrong, therefore, to make an order that they represent the Ozos, Ndichies and Ezeanas of Agulu and Amikwo communities.

It is for the reasons I have stated herein that I agree with my learned brother Achike JSC that there is merit in this appeal. I too allow it. I set aside the Ruling of the Court of Appeal given on 23rd February 1993 and dismiss the application of the applicants/respondents for substitution. I award N10,00.00 costs of this appeal to the 4th and 5th defendants/appellants.

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MOHAMMED JSC

I have had a preview of the opinion of my learned brother, Achike, J.S.C., in the judgment he has written in respect of this appeal. I agree with him that there is merit in this appeal. I agree that the court cannot Suo moto set aside its own judgment or order or the judgment or order of another court that is a nullity without being called upon by a party to the suit or the legal representative of the party to the suit inviting

the court to declare the judgment or order a nullity. The Court, after finding that its earlier decision was a nullity because it had no jurisdiction to adjudicate in the matter had an inherent jurisdiction, *ex debito justitiae*, to set it aside. See Craig v. Kanseen (1943) 1 All ER 108 at 111. It however must hear the parties on the issue before setting aside the decision. B

In consequence this appeal succeeds and it is allowed. The Ruling of the Court of Appeal delivered on 23/2/93 is hereby set aside. I also award N10,000.00 costs to the appellants. C

EJIWUNMI JSC

I have had the advantage of reading in draft the judgment just delivered by my learned brother Achike, JSC. It is manifest from the reasons given in his judgment and the judgment of my learned brother Ogundare, JSC, which I have also had the privilege of reading before now, that there is merit in this appeal. I therefore also allow it. The ruling of the Court of Appeal given on 23rd February, 1993 is set aside, E and I dismiss the application of the Applicants/Respondents for substitution. I award N10,000.00 costs of this appeal to the 4th & 5th Defendants/Applicants. D

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