

SUPREME COURT OF NIGERIA

16TH JULY, 1999. SC. 69/1997

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

ALHAJI AUDU SHUGABA	APPELLANT
AND	
UNION BANK OF NIGERIA PLC.	RESPONDENT

***ACTIONS** - Fresh action - Condition precedent - Where two previous suits were struck out - With an order that no further steps be taken - In the case until costs were paid - What further steps mean - And when a fresh action can be filed.*

***ACTIONS** - Precondition - Incompetence - Where the appellant filed fresh suits - In disobedience of the precondition - To pay the costs awarded by the court - The fresh suits are incompetent.*

***COURTS** - Abuse of court process - Contempt - The conduct of the appellant in the instant case - In flouting the orders of court - Is a glaring abuse of court process - And contempt of its lawful orders.*

FACTS

In the High Court of Borno State holden in Maiduguri, the plaintiff/appellant filed suit No. M/135/87 in which he challenged the validity of a deed of legal mortgage in respect of his property situate at Maiduguri and registered in favour of the defendant/respondent. The plaintiff is a customer of the defendant. Sometime in 1983, he mortgaged his property situate at Maiduguri covered by certificate of Occupancy No.BO/3131 to the defendant for Banking facility he received from the bank. Being unable to pay up his indebtedness to the bank, the latter threatened to foreclose the mortgage. Hence the plaintiff took out the action in suit No.M/135/87. The case was part heard until it was struck out on 11th July, 1994 for want of diligent prosecution. In striking out the suit the court

awarded costs of N500.00 to be paid before any further step is taken towards relisting the suit. The plaintiff, instead of complying with the court order, filed a fresh suit No.M/177/94 claiming same reliefs as in M/135/87. This suit was also struck out on 23rd January, 1995 on ground that the plaintiff had failed to pay the costs awarded against him on 11th July, 1994. The court awarded another N500.00 costs against the plaintiff with an order that no further step was to be taken in the case until the costs awarded were paid. The plaintiff did not comply with the court order and proceeded to file another fresh case on 27th January, 1995 suit NO.M/29/95, claiming the same reliefs as in the two previous cases. In the interval the plaintiff filed motion No.M/149/94 praying for an order of interlocutory injunction to restrain the defendant from conducting the sale by auction of the plaintiff's property in dispute. On 23rd January, 1995 this application was refused. The property was sold by auction on 4th February, 1995.

Aggrieved with the defendant's action of sale by auction of the property, the plaintiff filed Motion No.M/94m/95 challenging the sale. While suit M/29/95 and the motion challenging the sale {M/94m/95} were pending the plaintiff took out yet another action M/147/95 against the defendant Bank and two other persons asking for a declaration that the purported sale by auction was null and void. The defendant filed a Notice of preliminary objection to the hearing of suit No M/147/95 by reason of the plaintiff's failure to comply with the order of the court in suit No. M/177/94. Motion M/94m/95 was argued along with the defendant's preliminary objection. The learned trial judge after a pains-taking consideration of the motion and the preliminary objection before it, refused the prayers asked for in Motion No.M/94m/95 and also struck out suit No. M/147/95 as incompetent. The plaintiff who was dissatisfied with the ruling appealed to the court of Appeal, Jos Division. His appeal was dismissed by the court of Appeal. The plaintiff has further appealed to the Supreme Court raising a single issue.

ISSUE FOR DETERMINATION

"Can it be said that the learned Justices of the Court of Appeal, Jos Division were right in affirming the decision of the trial High Court

when the decision was not based on the merit of the case?"

HELD (Dismissing the appeal per lead judgment of **WALI JSC**, **ACHIKE** and **AYOOLA JJSC** dissenting)

Actions - Fresh action

1. Suit No. M/29/95 is the suit filed after the two previous suits M/135/87 and M/177/94 were struck out with award of N500.00 costs in favour of the Respondent in respect of each suit with an order that no further steps be taken in the case until costs were paid. Further steps in the context could be either by payment of the relevant costs and thereafter getting the case relisted or seeking to withdraw or abandon the cases after evidence of due payment of the costs. Thereafter the appellant would be free to file a fresh action as he purported to do. It is a condition precedent that the order of the court had to be complied with before taking either of the options open to the appellant. (p. 2460 B)

Actions - Precondition

2. *In the case on hand, the order of the court below was to the effect that the appellant should not take any further step in the proceedings until costs awarded against him had been paid. It is well settled that where a statute provides for the fulfillment of a condition before an action is commenced, failure on the part of the plaintiff to fulfil the condition will render the entire action and the subsequent trial a nullity, however ably it was conducted: See Sauda v. Abdullahi (1988) 4 NWLR (pt. 116) 387; Raymond Obato & Attorney-General Enugu State v. Josephat Maduabuchi Okpe (1996) 9 NWLR (pt. 473) 401 at 445. By analogy, it seems to me that the suits filed by the appellant in disobedience of the pre-condition to pay the costs awarded by the court below are incompetent."*

I cannot agree more with these findings and conclusion referred to supra. Where a party has refused to implement a court order, the court will not give him audience. See Mobil Oil Nigeria Ltd. & Anor. v. S. T. Assan (1995) 9 SCNJ 97. (p. 2463 H)

Courts - Abuse

3. Courts do not exercise their discretionary powers to aid those who flout its orders. The conduct of the appellant in this case is not only a glaring abuse of court process and contempt of its lawful orders but also most irresponsible and reprehensible. (p. 2464 D)

NOTABLE POINTS OF INTEREST

OGUNDARE JSC

1. Systematic abuse of the court's process
I must express dismay on the conduct of the plaintiff in this matter. Following the striking out of his first action which he commenced in 1987, one would think that all he need do was to pay the costs of N500.00 and apply to the Court to have the case relisted. He did not do that. He commenced a new action without paying the costs. And this new action too, on the objection of the defendant was again struck out for non-compliance with the Orders as to payment of costs. Again one would think that the prudent thing to do would be to pay all outstanding costs and seek relistement of the first action. Still, he did not do this; he kept on coming back with new actions. I do not know what he hoped to gain by defying the Court's Orders as to payment of costs and yet expect the same court to give him a hearing. In my view he engaged in a systematic abuse of the Court's process. I think he needs a rethink. (p. 2468 F)

ACHIKE JSC (Dissenting)

2. Filing a new suit rather than pay the costs awarded by the court is not contumacious
Having said that, I am bound to state unequivocally that the action of the Appellant in filing a new suit rather than pay the costs awarded by the court cannot be regarded as being defiant or contumacious of the order of the court in relation to costs. I venture to say that the learned trial Judge herself can hardly agree with the view being paraded that the Appellant was defiant in relation to her order as to costs. Permit me to emphasize that it is of no moment that the Appellant relentlessly failed to pay the cost and chose an expensive mode of prosecuting his case. That

is his business and does not invite any comment . It is trite that an order of the court must be obeyed and if the order is couched as a condition precedent, than as would be expected in such a situation, the order must contain its own sting or coercive consequence if the condition precedent is manifestly violated or ignored with reckless abandon. In the case B under appeal, the compliance with order as to costs clearly is a condition precedent to the relistment of the suit that was struck out. Therefore, since the Appellant did not take any step to relist the suit, the order remained inviolate. We are only to remind ourselves that the court jealously guards C its powers to punish for ridicule or contempt of its orders, whether committed in facie curiae or ex facie curiae (p. 2474 A)

3. Implications of filing a new suit in respect of the same reliefs contained in an earlier suit that had been struck out D

I am bound to observe that the misunderstanding of the weird interpretation given to the trial court's orders as regards costs emanates from the erroneous reading into the orders what was clearly outside the orders. Thus the orders as stated simply restrained the Appellant from (a) relisting E the suit unless the costs had been paid or (b) taking any further step in the case unless the costs had been paid. These orders were very clear, unambiguous but unfortunately narrow. In my judgment, no court, even the appellate court, has powers to read into these orders extraneous F meaning which would have made the orders satisfactorily comprehensive in glaring contrast to the short-comings of these orders. Such disingenuous exercise of filling in the gap is clearly against the principle of literal interpretation that words which are not ambiguous must bear G their ordinary simple meanings. As we have stated earlier, the epithel qualifying the consequence of non-payment of costs by the Appellant in the situation under reference, was quite clear and should be so construed. It is manifest that it did not prohibit the filing of a new suit by the Appellant. Thus had the order stipulated that unless the Appellant paid the costs H awarded by the trial court, he was restrained or prohibited from seeking a relistment of the suit that was struck out or filing a new suit in respect of the same reliefs contained in the earlier suit that had been struck out,

the Appellant would, undoubtedly, have been bound to comply with the order relating to costs or be shut off for good in making any attempt to seek a relistment or agitate in a new suit reliefs involving similar ones as those in the suit earlier struck out. Such was the order made by the court in Akinwunmi v. Oludipe (1969) NSCC 234. The above example of an order in relation to costs would clearly have provided a condition precedent whose performance or fulfillment would be obligatory before any relistment or institution of a new suit, predicated on the same reliefs as the earlier suit, will be estopped and therefore not entertained by the trial court. Failure to comply with the condition precedent would render any such new action incompetent and a nullity. The orders, as loosely worded by the trial court, in my judgment, did not constitute a condition precedent to the institution of a fresh action. The mandatoriness of the orders to pay costs was not at large; it was expressly restricted to the right of relistment and taking of further step in the suit struck out. Accordingly, all the authorities cited wherein it was urged that the Appellant's conduct was an abuse of court or contemptuous, namely Lawal Osula v Lawal Osula (1995) 3 NWLR (pt 382) 128 at 143, First African Trust Bank Ltd & Anor v. Basil O. Ezegbu & Anor (1992) 7 NWLR (pt 251) 89, Mobil Oil (Nig) Ltd v Assan (1995) (pt 412) 129 at 143, Sauda v Abdullahi (1988) 4 NWLR (pt 116) 387 and Raymond Obato & A.G., Enugu State v. Josephat Maduabuchi (1996) 9 NWLR (pt 473) 410 at 445, are irrelevant and unhelpful and would be discountenanced because they are inapplicable to the circumstances of this appeal. (p. 2475 H)

G EJIWUNMIJSC

4. *Negligence of counsel*

Perhaps it is consign for me to add that it further explains the total misconception and/or misunderstanding of the uses of Court processes and the law by those who where involved with the prosecution of this case for the plaintiff/appellant. By refusing or advising that the Order of the Court that costs in the sum of N500.00 be paid before any further step was taken in the matter, the appellant, was made to spend money in

pursuant of actions that had not resulted in any benefit to the appellant. What is more and obviously disheartening is the fact that the property over which action was initiated was lost in the process. It is difficult in my respectful view, to envisage a situation where negligence of counsel and the obvious abuse of the process of Court has resulted in so much waste of money and judicial time. In my humble view, a situation such as has happened in this case must not be allowed to be repeated in our Courts. (p. 2479 H)

AYOOLA JSC (Dissenting)

5. Failure to pay costs ordered by the court does not by itself amount to contempt

When costs are merely ordered in proceedings against a party, the failure of that party to pay such costs does not by itself amount to contempt. A mere order for costs is enforceable in the ordinary way by execution like a money judgment. It is very rarely that an order for costs will take the form of a mandatory order to pay money within a specified period. None has suggested that such order has been made in this case. Where the court orders costs against a party and subjoins to the order a further order that certain things should not be done by him unless costs ordered are paid, default in payment of the costs does not by itself constitute a contempt of the order unless such default is accompanied by a breach of the prohibition. What may be contemptuous is doing what is prohibited whilst still in default of payment and not the default, simpliciter. This is why in cases like the present one, as in all cases where contempt is alleged, the first step is to ascertain what was prohibited and the second is to find out if there had been a breach of the prohibition. It cannot be said that had the trial court and the Court of Appeal adopted this approach, their decision would have been the same. (p. 2482 F)

6. Fresh steps that can be taken in a suit that was struck out

The court's jurisdiction to order that costs awarded against a plaintiff must be paid before the plaintiff exercises his right of instituting another action in respect of the same subject matter is undoubted. Such order

was clearly made in the case of Akinwunmi v. Oludipe (1969) N.S.C.C. 234 in which this Court held that the consequence of such order was that the plaintiff was estopped from instituting another action while still in default and that if he did, such action should be struck out. However, in my view, an order prohibiting a party from taking steps in a case is not the same as an order prohibiting him from instituting another action. An order, such as in the present case, that costs ordered must be paid "before any further step is taken in this case," is not a prohibition of a fresh action by the plaintiff, even in respect of the same subject-matter. Instituting a fresh action is not a step taken either in a pending case or even in a case which had been struck out. I venture to think, without at all attempting to be exhaustive, that "fresh steps" that can be taken in a case struck out would be steps taken to set aside the order striking out the case or to relist the case or in relation to costs awarded in the case or steps taken, however, incidental to that case. All these will not include a fresh action. The terms of the order of the trial judge are so explicit that there is no necessity to divine her intention. I find it difficult to see how, or to agree that, instituting a fresh action was tantamount to taking a fresh step in the action which had been struck out. (p. 2483 C)

7. The right to institute an action is not a discretionary right

Before I part with this appeal, it is pertinent to make two observations. The first is that a person who institutes an action is exercising a legal right not subject to the discretion of the court. He cannot be defeated at the threshold by invocation of the equitable maxims: "He who comes to equity must do equity." and "He who comes to equity must come with clean hands." as the trial judge tried to do. For a similar reason, the case of Odogwu v. Odogwu (1992) 2 NWLR (Part 225) 539 is not relevant. That was a case in which the alleged contemnor was seeking an exercise of the discretion of the court in his favour. The right of a plaintiff to institute an action is not a discretionary right. Where a court strikes out an action taken in abuse of the process of the court, it is because the right to institute the action has been abused and not because commencement of the action is subject to the discretion of the court. (p. 2484 B)

8. Action which related to a different cause of action

The second observation, though of less importance or relevance, is that the cause of action on which suit No. M/147/95 was founded occurred after the order of costs in question was made and related not to the validity of the mortgage transaction, as was the case in the previous actions, but to the conduct of the auction sale which was challenged. Although the point had not been argued and has not been an issue on this appeal, it is doubtful if such action which related to an entirely different cause of action can reasonably be held to be taken in abuse of the process of the court in the circumstances. (p. 2484 E)

REPRESENTATION

O. B. James Esq. for the Appellant

Joe Kyari Gadzam Esq. SAN with A Izinyen for the Respondent

CASES REFERRED TO

Mobil Oil Nigeria Ltd. v. S. T. Assan (1995) 9 SCNJ 97

Akinwunmi v. Oludipe (1969) NSCC 234

Osula v. Osula (1995) 3 NWLR (pt 382) 128 at 143

First African Trust Bank Ltd v. Ezegbu (1992) 7 NWLR (pt 251) 89

Mobil Oil (Nig) Ltd v Assan (1995) (pt 412) 129 at 143

Sauda v Abdullahi (1988) 4 NWLR (pt 116) 387

Obato & A.G., Enugu State v. Maduabuchi (1996) 9 NWLR (pt 473) 410 at 445

Odogwu v. Odogwu (1992) 2 NWLR (Part 225) 539

Arubo v. Aiyeleru (1993) 3 NWLR (pt. 280) 126

LEAD JUDGMENT BY WALI JSC

It is pertinent to set out the sequence of events in this case leading to the filing of action in the High Court of Borno State sitting in Maiduguri.

Alhaji Audu Shugaba, the plaintiff/appellant is a customer of the defendant/respondent. On October 30th, 1987, the appellant filed suit No. M/135/87 in which he prayed for the following reliefs:-

"(a) A declaration that the purported deed of legal mortgage in

respect and covered by certificate of occupancy No. BO/3131 and known as International Airport Hotel Maiduguri and situate along Kano Road, Maiduguri, registered in favour of the defendant is illegal, null and void and of no effect whatsoever.

B *(b) An order perpetually restraining the defendant, its agents, servants or privies from auctioning, selling or in any way disposing of the property covered by Certificate of occupancy No. BO/3131 in pursuance of or under the purported deed of legal mortgage, illegally and unlawfully registered in favour of the defendant at the Lands Registry, Registry,*
C *Maiduguri.*

(c) A declaration that the plaintiff is not owing the defendant the sum of N333,210.85 or any sum whatsoever."

It appears from the bundle of papers filed in this Suit pleadings
D were ordered and same were filed and exchanged. The trial proceeded and evidence of the appellant in support of his case was partly taken. The appellant's evidence was being taken when he stopped coming to court for no apparent reason. As stated in the appellant's brief before this
E court: "The case was part heard until it was struck out on 11th July, 1994 for want of diligent prosecution." In striking out the suit the court awarded costs of N500.00 to be paid before the suit could be relisted. The Ruling of the learned Judge in which she struck out the case and made the order stated in the appellant's brief (*supra*) is contained on page
F 32 of the record of proceedings wherein it is stated -

"..... I struck out this suit for lack of diligent prosecution. In respect of the costs sought for I hold the view that costs of N500.00 is appropriate in favour of the defendant and the same to be paid before
G *any further step is taken towards relisting the suit, the suit is struck out with N500.00 costs."*

Instead of complying with order of the court by paying the N500.00 costs to get the suit relisted, the appellant filed another Suit No.
H M/177/94.

The filing of fresh suit to wit, No. M/177/94 was objected to by the Respondent on ground that the costs awarded in M/135/87 had not been paid when the step in filing the fresh action was taken. The learned

trial judge agreed with counsel for the defendant when she stated in the drawn up order signed by her on 25th January, 1995, that -

"That an order is made refusing the application for interlocutory injunction and a further order is also made striking out the main suit No. M/177/94 now pending before this court as same is incompetent with the applicant failing or refusing to comply with the Court's Order as to costs. There is also a cost of N500.00 to the respondent and same to be paid before any further step is taken in this case."

The appellant abandoned both M/135/87 and M/177/94 and filed another fresh suit on 27th January, 1995 M/29/95 in which he repeated the reliefs sought for in the previous suits. He refused to comply with order of the court in M/177/94 to pay costs awarded therein before any further step is taken in the case.

It was after the drawn up order dated 25th January, 1995 copies on page 33 of the Record that the defendant proceeded with the sale by auction, of the appellant's property the subject of this litigation. The sale by auction was carried out by the respondent on 4th February, 1995.

Aggrieved with the Respondent's action of sale by auction of the property the appellant yet commenced another action to wit, suit No. M/147/95 challenging the auction sale. He claimed as follows:-

"1. A Declaration that the purported Auction of the Immovable property covered by Statutory Certificate of Occupancy No. B/3131 on 4/2/95 is Null and Void ab initio.

2. A Declaration that the purported Sale of the said property by the first Defendant is Null and Void ab initio.

3. A Declaration that the Conduct of the purported Auction by the third Defendant and purported Sale and purchase by the first Defendant to the 2nd Defendant respectively is contemptuous of the Court.

4. An Order Setting-aside the purported Conduct of the said auction.

5. An Order setting-aside the purported Sale of the said property.

6. An Order for perpetual Injunction Restraining the Defendants, their Servants, Agents, privies or whosoever Claiming for or by them jointly or severally from further Conduct of Auction Sale of the said

property.

7. *One Million Naira (N1,000.00) as General Damages.*

8. *The Cost of this Suit."*

The appellant followed this new Suit by a Motion on Notice No. M/94M/95. The appellant was praying in the Motion for an order of the trial court to set aside the auction sale on two grounds -

1. that he had a pending Suit No. M/29/95 in the Court yet to be decided.

2. that no public bidding took place at the auction sale but the property was purportedly sold to an undisclosed purchaser.

The Motion was extensively argued and contested by learned counsel on both sides and in a considered ruling as a result thereof, the learned trial judge concluded-

"On the totality of the determinations supra, it is my considered opinion and it follows that the motion in issue No. M/94m/95 in suit No. M/29/95 is incompetent on the ground that the applicant had failed to comply with order of court and thus in contempt of the said order made the 23rd January 1995 on exhibit I attached to the counter affidavit of the respondent. The order which was to the effect that the N500.00 costs which ought to be paid before any further step is taken in the said case. In the same vein and with Suit No. M/147/95 also filed after the courts order and thus amounting to contempt of such order on the failure to comply with the said cannot also be competent.

In the result and on the totality of the matter before me I hold the view that both the motion in point and also the Suit No. M/147/95 are hereby refused and struck out respectively. Consequently and with the same motion being incompetent I do not consider it necessary to dwell into the rest of the arguments and authorities cited which in view of the incompetency lack foundation. While motion No. M/94M/95 is refused the Suit No. M/147/95 is struck out. I also make no order as to costs."

Against this Ruling, the appellant appealed to the Court of Appeal. The unanimous judgment of the Court of Appeal, the lead of which was delivered by Muntaka-Coomassie JCA, dismissed the appeal.

The appellant has now further appealed to this Court. Both parties

filed and exchanged briefs of argument.

In the brief filed by the appellant, one issue was raised for consideration and determination by this court. It reads-

"Can it be said that the learned Justices of the Court of Appeal, Jos Division were right in affirming the decision of the trial High Court when the decision was not based on the merit of the case?" B

The Respondent adopted this issue in its brief.

It was the contention of the learned counsel for the appellant that having filed Suit No. M/29/95 on 27th January, 1995, it was wrong for the Respondent to carry out the auction sale of the property in dispute on 4th February, 1995. He then filed Suit No. M/147/1995 and Motion No. M/94M/1995 praying for the court intervention to set aside the auction sale, and submitted that the trial Judge, instead of considering the merit or other-wise of the application went ahead to consider the competence of the Motion No.M/94M/95 and Suit No. M/147/95 which he claimed has not then come before her and wrongly found that the appellant, having not paid the costs earlier awarded in Suit No. M/177/94 was in contempt of that order and struck out both the Suit and the Motion. He submitted that the Court of Appeal was wrong to have affirmed the trial court's decision. C D E

In reply learned counsel for the respondent extensively went into the antecedents of the case and the various applications and different suits filed by the appellant without complying with orders made by the learned trial judge as regards the payment of costs awarded before taking any further step in resuscitating the case. He stated that the appellant's effort to get an order of the court to restrain the auction sale was refused and the auction went ahead on 4th February, 1995 as arranged and the property was sold to the highest bidder. In paragraph 6 of the Respondent's brief learned counsel contended as follows:- F G

"The trial court delivered a well considered Ruling on the 14th October, 1995 and dismissed the said motion No. M/94/M/95 and also struck out the latest substantive suit No. M/147/95. See pages 59 - 72 for the Ruling of the Trial Court. This is reminiscent of the fact that the substantive suit No. M/29/95 is still pending at High Court No. 3, H

Maiduguri (as stated supra). It is therefore against this background and Ruling that the appellant appealed to the Court of Appeal, Jos and thereafter to this Honourable Court."

He urged this court to affirm the decision of the Court of Appeal and
B dismiss the appeal.

Suit No. M/29/95 is the suit filed after the two previous suits M/135/87 and M/177/94 were struck out with award of N500.00 costs in favour of the Respondent in respect of each suit with an order that no further steps be taken in the case until costs were paid.
C **Further steps in the context could be either by payment of the relevant costs and thereafter getting the case relisted or seeking to withdraw or abandon the cases after evidence of due payment of the costs. Thereafter the appellant would be free to file a fresh**
D **action as he purported to do. It is a condition precedent that the order of the court had to be complied with before taking either of the options open to the appellant.**

What seemed to have happened is that while the appellant was
E testifying in Suit No. M/135/87 he stopped coming to court in 1992 and after all efforts to bring him to court to continue his evidence had failed, learned counsel for the respondent applied to the court to strike out the case. This was granted on 11th July, 1994. The suit was struck out,
F and N500.00 was awarded to the respondent as costs with a rider that before any further step was taken towards relisting the suit, the N500.00 costs had to be paid as a condition precedent. This was on 11th July, 1994.

The appellant, instead of complying with the court order, filed a
G fresh suit No. M/177/94 claiming same reliefs as in M/135/87 (*supra*). This suit was also struck out on 23rd January, 1995 on ground that the appellant had failed to pay the costs awarded against him on 11th January, 1994. The court awarded N500.00 costs to the Respondent with an
H order that no further step was to be taken in the case until the costs awarded were paid.

The appellant did not comply with the court order and proceeded to file another fresh case on 27th January, 1995 Suit No. 29/95, claiming

the same reliefs as in the previous two cases. In the interval the appellant filed Motion No. M/149/94 praying for an order of interlocutory injunction to restrain the Respondent from conducting the sale by auction of the appellant's property in dispute.

On 23rd January, 1995 this application was refused. The property was sold by auction on 4th February, 1995. B

On 20th February, 1995 the appellant filed a Motion No. M/94/95 on Notice challenging the sale. He also filed another suit No. M/147/95 on 2nd May, 1995 asking for a declaration that the purported sale by auction was null and void. C

It should be borne in mind that the appellant had filed suit No. M/29/95 albeit improperly which was still to be dealt with. At the time the appellant filed Suit No. M/147/95 the respondent filed a Notice of Preliminary objection dated 4th October, 1995 to the hearing of the said case by reason of the appellant's failure to comply with the order of the court in suit M/177/94 D

Motion M/94/M/95 was argued along with the Respondent's preliminary objection. The learned trial Judge after a painstaking consideration of the Motion and the preliminary objection before it, delivered a Ruling on 14th October, 1995, and refused the prayers asked for in Motion No. M/94/M/95 and also struck out Suit No M/147/95 as incompetent. E

The Court of Appeal, having meticulously considered the appeal before it came to the following conclusions on the only issue raised and canvassed before it [as per the lead judgment of Coomassie JCA]:- F

"It is manifest from the appellant's counter-affidavit filed on 9/10/95, made part of the bundle of records before us, that the appellant did appear to be uncertain as to whom he paid the said all costs. Paragraph 5 reads thus - G

"That all costs ordered in favour of the 1st defendant has been paid by me either through the court or directly to it" (Underlinings mine). H Whether the payment by the appellant was made through the court or directly to the respondent there must be evidence of payment to be attached to the counter-affidavit. That is not forth coming."

[illegible]

"While I agree that it is not desirable for the courts to make unbridled orders, and that court should not do any thing to put a clog in the wheel of justice orders of the court are to be respected and obeyed."

^B *The dignity and honour of court cannot be maintained if its orders are treated disdainfully and scornfully without due respect. Consequently non-compliance with an order of court makes a matter or suit incompetent. I entirely with respect, agree with the stand taken by the Supreme Court in the case of Odogwu v. Odogwu (1992) 2 NWLR (PT. 225) P. 539 at*
^C *558-559 Per Karibi-Whyte JSC thus*

"The grant of stay of Execution is entirely within the discretion of the court making the order. For an applicant to be entitled to the exercise of discretion he must bring his conduct within the legitimate scope of the exercise of discretion. See Leavis v. Leavise (1921) p. 299. Hence, where he is in continuing disobedience of order of court, I do not conceive it legitimate to consider the exercise of discretion in his favour. See Gower v. Gower [1938] p. 106. The contumacious behavior is more egregious and censorious where the applicant seeks the discretion of the court to endorse such a behaviour. The court guards its powers and image jealously. It should therefore be extremely wary in the manner it exposes such image, the diminution of its powers and the enforcement of its authority to public ridicule. In my respectful opinion as no court has an inherent jurisdiction to set aside the exercise of discretion of another except where such exercise has been capricious, or based on extraneous factors, and not following the accepted principles so will the valid exercise of discretion to stay execution not be interfered with"

G *In the circumstances I agree with the learned trial Judge that all the suits filed pending or struck out and all the motions filed as a result of same are incompetent and therefore a nullity. That court cannot therefore assume jurisdiction to entertain them. I refer to McFoy v. H UAC Ltd. (1962) AC 152 at 160 and Esuku v. Keko (1994) 4 NWLR (pt. 340) p. 625/632."*

In his concurring judgment and in emphasis to the findings and conclusions in the lead judgment of the court by Coomassie JCA, Edozie

been paid. It is well settled that where a statute provides for the fulfillment of a condition before an action is commenced, failure on the part of the plaintiff to fulfil the condition will render the entire action and the subsequent trial a nullity, however ably it was conducted:

B See Sauda v. Abdullahi (1988) 4 NWLR (pt. 116) 387; Raymond Obato & Attorney-General Enugu State v. Josephat Maduabuchi Okpe (1996) 9 NWLR (pt. 473) 401 at 445. *By analogy, it seems to me that the suits filed by the appellant in disobedience of the pre-condition to pay the costs awarded by the court below are incompetent."*

C I cannot agree more with these findings and conclusion referred to supra. Where a party has refused to implement a court order, the court will not give him audience. See Mobil Oil Nigeria Ltd. & Anor. v. S. T. Assan (1995) 9 SCNJ 97.

D Courts do not exercise their discretionary powers to aid those who flout its orders. The conduct of the appellant in this case is not only a glaring abuse of court process and contempt of its lawful orders but also most irresponsible and reprehensible.

E The appeal has no merit and it is accordingly dismissed. The decisions of the lower court and the court below are hereby affirmed with N10,000.00 costs to the Respondent.

F

OGUNDARE JSC

This case has a checkered history. Unfortunately counsel on both sides have not really helped much in clearing the muddle in the facts. The record of appeal itself is badly compiled. From the efforts made by me to unravel the muddle, the facts appear to be like this:

G The plaintiff Alhaji Audu Shugaba was a customer of the defendant, Union Bank of Nigeria Plc. Sometime in 1983 he mortgaged his property situate at Maiduguri covered by Certificate of Occupancy No. BO/3131 to the defendant for a banking facility he received from the bank. Being unable to pay up his indebtedness to the bank, the latter threatened to foreclose the mortgage. Thereupon, the plaintiff took an action on 30th October 1987 - suit No. M/135/87 seeking the following reliefs:

"(a) A declaration that the purported deed of legal mortgage in respect of all that property owned by the Plaintiff and covered by Certificate of Occupancy No. BO/3131 and known as International Airport Hotel Maiduguri and situate along Kano Road, Maiduguri registered in favour of the Defendant is null, illegal and void and of no effect whatsoever.

(b) An order perpetually restraining the defendant, its agents, servants or privies from auctioning, selling or in any way disposing of the property covered by Certificate of Occupancy No. BO/3131 in pursuance of or under the purported deed of legal mortgage, illegally and unlawfully registered in favour of the defendant at the Lands Registry, Maiduguri.

(c) A declaration that the Plaintiff is not owing the defendant the sum of N333,210.85 or any sum whatsoever.

(d) Cost of this Suit."

The action suffered protracted delay principally at the instance of the plaintiff who would not complete his evidence. On 11th July 1994 the trial Judge struck out the case for want of diligent prosecution with costs assessed at N500.00 and which costs were to be paid before the suit could be relisted. Rather than complying with the Order of the Court by paying the costs of N500.00 in order to get the suit relisted the plaintiff filed another suit No. M/177/94.

On the second suit coming up for hearing, counsel for the bank raised a preliminary objection to the effect that the costs awarded in the earlier suit had not been paid as ordered by the Court before the second action was filed. The trial Judge upheld the objection and struck out the second action with costs of N500.00 "to be paid before any further step is taken in this case". This was on 25th of January 1995.

On 27th January 1995, without complying with the Order of the Court as to costs, made on 25th January 1995, the plaintiff again instituted yet another action M/29/95 against the same defendant seeking the same relief. He filed along with the writ of summons his statement of claim. On the 4th of February 1995 his property was sold at a public auction by the defendant. Thereupon plaintiff brought a motion seeking to set aside

the said sale; this was on 22/2/95. While this suit M/29/95 and the motion to set aside sale M/94/M/95 were pending the plaintiff on 3rd May 1995 took out yet another action M/147/95 against the bank and two other persons - (1) Alhaji Tijjani Shettima Ta'bu and (2) Alhaji Mohammed Mai

B Glass Sheriff Adam, seeking the following reliefs:

"1. A declaration that the purported auction of the Immovable property covered Statutory Certificate of Occupancy No. BO/3131 on 4/2/95 is null and void.

C *2. A declaration that the purported sale of the said property by the 1st defendant is null and void.*

3. A declaration that the conduct of the purported auction by the third defendant and purported sale and purchase by the first defendant to the 2nd defendant respectively is contemptuous of the Court

D *4. An order setting aside the purported conduct of the said auction.*

5. An order setting aside the purported sale of the said property.

E *6. An order for perpetual injunction restraining the defendants, their servants, agents, privies or whosoever claiming for or by them jointly or severally from further conduct of Auction Sale of the said property.*

7. One Million Naira (N1,000,000.00) as General Damages.

8. The cost of this suit."

F and filed along with this new action a statement of claim.

The motion M/94/M/95 in suit No. M/29/95 came before the learned trial Judge in June 1995 for hearing. After arguments on both sides the learned trial Judge on 14th October 1995 delivered a Ruling concluding as follows:

G *"On the totality of the determinations supra, it is my considered opinion and it follows that the motion in issue No. M/94/M/95 in suit applicant had failed to comply with order of court and thus in contempt of the said order made the 23rd January 1995 on exhibit I attached to the*
H *counter affidavit of the respondent. The order which was to the effect that the N500.00 costs which ought to be paid before any further step is taken in the said case. In the same vein and with suit No. M/147/95 also filed after the court's order and thus amounting to contempt of such*

order on the failure to comply the said cannot also be competent.

In the result and on the totality of the matter before me I hold the view that both the motion in point and also the suit No. M/147/95 are hereby refused and struck out respectively. Consequently and with the same motion being incompetent I do not consider it necessary to dwell into the rest of the arguments and authorities cited which in view of the incompetency lack foundation.

While motion No. M/94/M/95 is refused the suit No. M/147/95 is struck out. I also make no order as to costs."

It is pertinent to mention at this stage that on being served with the writ of summons in M/147/95, the 1st and 3rd defendants through their counsel Mr. Gadzama filed a Notice of preliminary objection to the hearing "of above captioned suit on the ground that the suit is incompetent by reason of non compliance with the Mandatory Order of this Honourable Court in suit No. M/35/89 (sic) made on the 11th July, 1994 (sic), as to payment of N500.00 costs before filing this suit." The notice which was dated 4th October 1995 was served on the plaintiff who filed a counter-affidavit in reply to the affidavit in support of the notice. Both sides filed yet further affidavit and counter-affidavit. It is not clear from the record what further action was taken on this latest suit of the plaintiff except that it was struck out in the Ruling of the learned trial Judge on the 14th October 1995.

The plaintiff was aggrieved by the Ruling of the 14th October 1995 and appealed to the Court of Appeal. This appeal was dismissed by the Court of Appeal (Jos Division) on 11th February 1997. It is against the judgment of the Court of Appeal that the plaintiff has further appealed to this Court upon one ground of appeal which reads:

"The learned justices of the Court of Appeal erred in law in affirming the decision of the trial Court and this error occasioned a miscarriage of Justice.

PARTICULARS OF ERROR

(1) The decision of the trial Court which the learned Justices of the Court of Appeal affirmed was given without considering the merits of the case.

(2) *In the case of OBAKPOLOR VS THE STATE (1991) 1 NWLR Part 165 Page 113.*

(a) *129 Paragraph G-H the Supreme Court per Akpata JSC held*

B *"It is the paramount duty of courts to do justice and not cling to technicalities that will defeat the end of justice. It is immaterial that they are technicalities arising from statutory provisions, or technicalities inherent in rules of Court."*

C (3) *Given the above circumstance the Court of Appeal ought to have allowed the appeal and set aside the decision of the trial Court."*

Briefs of Arguments were filed and exchanged by the parties and in the Appellant's brief the following issue is set down as calling for determination in the appeal:

D *"Can it be said that the learned Justices of the Court of Appeal, Jos Division were right in affirming the decision of the trial High Court when that decision was not based on the merit of the case?"*

The Respondent bank adopted this issue.

E I have considered carefully the arguments adduced by learned counsel both in their briefs and oral submissions. The conclusion I reach is that I find no merit in the arguments adduced in support of the appeal. I agree with my learned brother Wali JSC that the appeal is lacking in merit. I too dismiss it with costs as assessed by him (Wali JSC).

F I must express dismay on the conduct of the plaintiff in this matter. Following the striking out of his first action which he commenced in 1987, one would think that all he need do was to pay the costs of N500.00 and apply to the Court to have the case relisted. He did not do that. He commenced a new action without paying the costs. And this new action too, on the objection of the defendant was again struck out for non-compliance with the Orders as to payment of costs. Again one would think that the prudent thing to do would be to pay all outstanding costs and seek relistement of the first action. Still, he did not do this; he kept on coming back with new actions. I do not know what he hoped to gain by defying the Court's Orders as to payment of costs and yet expect the same court to give him a hearing. In my view he engaged in a

systematic abuse of the Court's process. I think he needs a rethink.

ACHIKE JSC (Dissenting)

The facts of this appeal are straightforward and are hardly in B dispute.

The Plaintiff/Appellant, a customer of the Defendant/Respondent bankers, sued the bankers on 30/10/87 (i.e. Suit No. M/135/87) and sought the following reliefs:

"(a) A declaration that the purported deed of legal mortgage in C respect and covered by certificate of occupancy No. BO/3131 and known as International Airport Hotel Maiduguri and situate along Kano Road, Maiduguri, registered in favour of the defendant is illegal, null and void D and of no effect whatsoever.

(b) An order perpetually restraining the defendant, its agents, servants or privies from auctioning, selling or in any way disposing of the property covered by certificate of occupancy No. BO/3131 in pursuance of or under the purported deed of legal mortgage, illegally and unlawfully E registered in favour of the defendant at the Lands Registry, Registry, Maiduguri.

(c) A declaration that the plaintiff is not owing the defendant the sum of N333,210.85 or any sum whatsoever." F

The hearing of the suit duly took off but protracted. On 11/7/94, while the case was part-heard it was struck out with N500.00 costs by the learned trial Judge for want of diligent prosecution. On issue of costs, His Lordship, Ogunbiyi, J stated as follows:

"In respect of the costs sought for I hold the view that the costs G of N500.00 is appropriate in favour of the defendant and the same to be paid before any further step is taken towards relisting the suit, the suit is struck out with N500.00 costs." (emphasis supplied)

For inexplicable reason, Appellant did not apply to relist the suit H but filed another action, Suit No. M/177/94, seeking the same relief, against the same Defendant/Respondent.

On the second case coming up for hearing, Respondent's counsel

raised a preliminary objection, by a motion in Suit No. M/147/95, dated 4/10/95, contending that the said second suit was incompetent because of failure to pay the costs of N500.00 earlier ordered in Suit No. M/135/89 on 11/7/94. The learned trial Judge agreed with this contention of the learned counsel for the Respondent and again the Appellant's second action was struck out, but no costs were awarded. The record of appeal did not contain the actual Ruling on the objection given by the learned trial Judge but the record shows at p. 33 the drawn up order dated 23/1/95 in relation to the ruling thereof:

"That an order is made refusing the application for interlocutory injunction and a further order is also made striking out the main suit No. M/177/94 now pending before this court as same is incompetent with the Court's Order as to costs. There is also a cost of N500.00 to the respondent and same to be paid before any further step is taken in this case." (emphasis supplied)

Undaunted by the treatment meted to Suits Nos M/135/87 and M/177/94, Appellant filed another suit, on 27/1/95, to wit, Suit No. M/29/25 in which the same reliefs were sought as in the two earlier suits, having overlooked to pay the costs in those previous suits. On 4/2/95 the Respondent sold the Appellant's property by auction sale.

Thoroughly dissatisfied with the sale of his property by auction, Appellant constitution the fourth action, namely, Suit No. M/147/95, challenging the sale of his property by auction, and sought the following reliefs:

"1. A Declaration that the purported Auction of the Immovable property covered by Statutory Certificate of Occupancy No. B/3131 on 4/2/95 is Null and Void abinitio.

2. A Declaration that the purported Sale of the said property by the first Defendant is Null and Void Abinitio.

3. A Declaration that the Conduct of the purported Auction by the third Defendant and purported Sale and purchase by the first Defendant to the 2nd Defendant respectively is contemptuous of the Court.

4. An Order Setting-aside the purported Conduct of the said auction.

5. *An Order setting-aside the purported Sale of the said property.*

6. *An Order for perpetual Injunction Restraining the Defendants, their Servants, Agents, privies or whosoever Claiming for or by them jointly or severally from further Conduct of Auction Sale of the said property.*

B

7. *One Million Naira (N1,000.00) as General Damages.*

8. *The Cost of this Suit."*

He followed up this suit with a motion on Notice No. M/94M/95 where he prayed the court to set aside the auction sale on the grounds:

C

(a) that he had a pending suit No. M/29/95 in the court yet to be decided.

(b) that no public bidding took place at the auction sale by the property was purportedly sold to an undisclosed purchaser.

Counsel for both parties vigorously contested the motion. After a considered and lengthy ruling, the learned trial Judge refused the motion and struck out the Suit No. M/147/95 without any order as to costs. The reason for Ruling is graphically captured in the concluding portion of the Ruling dated 14/10/95 which stated thus:

D

"On the totality of the determinations supra, it is my considered opinion and it follows that the motion in issue No. M/94/M/95 in suit No. M/29/95 is incompetent on the ground that the applicant had failed to comply with order of court and thus in contempt of the said order made the 23rd January 1995 on exhibit I attached to the counter affidavit of the respondent. The order which was to the effect that the N500.00 costs which ought to be paid before any further step is taken in the said case. In the same vein and with suit No. M/147/95 also filed after the court's order and thus amounting to contempt of such order on the failure to comply the said cannot also be competent.

E

F

In the result and on the totality of the matter before me I hold the view that both the motion in point and also the suit No. M/147/95 are hereby refused and struck out respectively. Consequently and with the same motion being incompetent I do not consider it necessary to dwell into the rest of the arguments and authorities cited which in view of the incompetency lack foundation.

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H

While motion No. M/94/M/95 is refused the suit No. M/147/95 is struck out. I also make no order as to costs."

Again, aggrieved with this unfavourable Ruling, the Appellant appealed to the Court of Appeal Jos Division, it dismissed the appeal. It is against the dismissal of this appeal that the appellant has, undauntedly, further appealed to this Court.

The monolithic issue for determination formulated for determination in the appeal by the Appellant was:

"Can it be said the learned Justices of the Court of Appeal, Jos Division were right in affirming the decision of the trial High Court when that decision was not based on the merit of the case?"

The Respondent found no reason to postulate a contrary issue: it readily adopted the Appellant's Issue.

Succinctly put, the Appellant's contention through their learned Counsel, O. B. James, Esq was that the Appellant having filed suits Nos M/29/95 on 27/1/95, it was erroneous for the Respondent to arrange and carry out the sale of Appellant's property by auction on 4/2/95. Appellant in quick succession filed suit No. M/147/1995 and a motion in the appeal No. M/94M/1995 and prayed the trial court to set aside the auction sale. Rather than consider the motion on its merit, the trial court found a convenient haven (but erroneously in the view of learned counsel for the Appellant) in the contention that the motion was incompetent in that the Appellant neglected or refused to pay the costs earlier awarded in Suit No. M/177/94. This refusal, in the view of the court, was an act of contempt for which the court struck out both the Suit No. M/147/1995 and the motion. Concluding, Mr. James submitted that the court below was in error to have affirmed the trial court's ruling.

Replying, learned counsel for the Respondent, J.K. Gadzama Esq, SAN submitted that the trial court was right to have struck out both the main suit No. M/147/1995 and the motion in the appeal because of Appellant's failure to pay the costs before taking further step in the case. He urged this Court to affirm the decision of the Court of Appeal dismissing the appeal to it.

I have carefully considered the arguments marshalled by learned

counsel for the parties set out in the briefs and in oral submissions, and after anxious consideration, regrettably I find myself unable to agree to the leading judgment delivered by my learned brother, Wali, JSC for the reasons I shall set out in the course of this judgment. The line of disagreement is quite narrow but very substantial in that the determination of the appeal rests, in the final analysis, on one's understanding of the import of the order made in relation to costs by the learned trial Judge. B

It may be asked, what then is the import of the orders to costs made by the learned trial Judge? Suit No. M/135/87, was struck out on 11/7/1994, with N500 costs, with caveat that no further step was to be taken towards the relisting of the suit until costs had been paid. It does not, by any stretch of the wildest imagination, seem to me that learned Judge's order as to costs conjures any ambiguity. It is very lucid and simple: it makes it compulsive or obligatory for the Appellant to pay the said N500 costs if he wishes to relist suit No. M/135/87 that was struck out on 11/7/94. No further sensible interpretation can be accorded to the learned trial Judge's order as to costs. C D

Without paying the costs and for no reason that could be gleaned from the record of appeal, inexorably, the Appellant filed a new suit, i.e. Suit No. M/177/94. It is quite clear to me mind that the decision by the Appellant to file a new suit cannot be construed as a step towards the relisting of the struck out suit. In legal parlance, where a suit is struck out for want of diligent prosecution, as was the case in the appeal in hand, the said suit can be brought back to the General Cause List by the prayer for "relistment" made by motion on notice. The Appellant did not move the court in terms of any prayer for relisting of the suit that was struck out, a cheaper and faster process than going the whole hog of filing an entirely new suit. One thing is clear: it is a matter of choice open to a litigant or rather, his counsel, to decide whether to relist a suit that is struck out or file a new suit instead. No doubt, it seems to me that whatever decision counsel reaches in such circumstances is a matter of H strategy. If filing a new suit is decided by counsel, my only reservation is that it is an expensive strategy which ordinarily can hardly be said to be in the financial interest of the litigant. However counsel in the magister E F G

litas vis-a-vis has client.

Having said that, I am bound to state unequivocally that the action of the Appellant in filing a new suit rather than pay the costs awarded by the court cannot be regarded as being defiant or contumacious of the order of the court in relation to costs. I venture to say that the learned trial Judge herself can hardly agree with the view being paraded that the Appellant was defiant in relation to her order as to costs. Permit me to emphasize that it is of no moment that the Appellant relentlessly failed to pay the cost and chose an expensive mode of prosecuting his case. That is his business and does not invite any comment . It is trite that an order of the court must be obeyed and if the order is couched as a condition precedent, than as would be expected in such a situation, the order must contain its own sting or coercive consequence if the condition precedent is manifestly violated or ignored with reckless abandon. In the case under appeal, the compliance with order as to costs clearly is a condition precedent to the relistment of the suit that was struck out. Therefore, since the Appellant did not take any step to relist the suit, the order remained inviolate. We are only to remind ourselves that the court jealously guards its powers to punish for ridicule or contempt of its orders, whether committed in facie curiae or ex facie curiae

Before I end this arm of the contention in relation to the first order as to costs, there arose some unresolved contention whether the costs as ordered had been paid or not: that issue, in my view, is inconsequential because non-payment of the costs first awarded could not be a bar to the institution of a new suit as the express order of the trial Judge limited the coercive consequence of failure to pay costs to denial of the right of the Appellant to exercise his right to relist the struck-out suit. The right to relist is, as it were, a short-cut for reviving the struck-out suit but the coercive restraint of the trial court left untouched the right of the Appellant to 'revive' the reliefs that were struck-out by instituting a new action which would, per chance, include not only the reliefs that were contained in the struck-out suit but, additionally, such other reliefs that are compatible with the new suit.

This brings us to the second order in relation to costs in Suit No.

M/147/95. The relevant part states:

"..... *There is also a cost of N500.00 to the Respondent and same to be paid before any further step is taken in this suit.*" (emphasis supplied)

As we had already noted in this judgment, the second order for cost was not paid and yet the Appellant filed another new suit. Again, the question may be asked, was the Appellant obliged to pay the cost as decreed by the trial court?.

The answer is unhesitatingly in the negative except is the Appellant is desirous to take any step in the case. To my mind, the crucial step in the case open to the Appellant is a step towards the relistment of the case that was struck out. This step, I concede, he cannot take unless he pays the cost. Appellant took no such step in the case, or indeed any step whatsoever in the case. For avoidance of doubt, taking no step in the case means no more than taking step in Suit No M.147/95. Consistent with Appellant's relentlessness, he filed yet a new suit. Permit me to reiterate, if only by way of emphasis, that the Appellant was neither defiant nor contemptuous of the court's order ipso facto that he failed to pay the decreed costs but took a rather unusual approach of filing a new action.

I am, therefore, from all I have said, clearly of opinion that the learned trial Judge was palpably in grave error when she said that the Appellant's filing of Suit No. M/147/95, without first paying the earlier costs awarded, rendered the motion incompetent, and the filing of Suit No. M/147/95 contemptuous of such order as to payment of costs. In the same vein, I further hold that the judgment of the Court of Appeal is insupportable when that court held that the filing of the new suits should be viewed as disobedience of the court's order when it is manifest that the orders made by the courts as regards cost were orders that contained inbuilt coercive restraint which simply prohibited respectively, first the act of relistment of Suit No. M/35/87, and secondly, any step in the case, i.e. in suit No. M/147/95.

I am bound to observe that the misunderstanding of the weird interpretation given to the trial court's orders as regards costs emanates from the erroneous reading into the orders what was clearly outside the

orders. Thus the orders as stated simply restrained the Appellant from (a) relisting the suit unless the costs had been paid or (b) taking any further step in the case unless the costs had been paid. These orders were very clear, unambiguous but unfortunately narrow. In my judgment, B no court, even the appellate court, has powers to read into these orders extraneous meaning which would have made the orders satisfactorily comprehensive in glaring contrast to the short-comings of these orders. Such disingenuous exercise of filling in the gap is clearly against the C principle of literal interpretation that words which are not ambiguous must bear their ordinary simple meanings. As we have stated earlier, the epithel qualifying the consequence of non-payment of costs by the Appellant in the situation under reference, was quite clear and should be so construed. It is manifest that it did not prohibit the filing of a new suit D by the Appellant. Thus had the order stipulated that unless the Appellant paid the costs awarded by the trial court, he was restrained or prohibited from seeking a relistment of the suit that was struck out or filing a new suit in respect of the same reliefs contained in the earlier suit that had E been struck out, the Appellant would, undoubtedly, have been bound to comply with the order relating to costs or be shut off for good in making any attempt to seek a relistment or agitate in a new suit reliefs involving similar ones as those in the suit earlier struck out. Such was the order F made by the court in Akinwunmi v. Oludipe (1969) NSCC 234. The above example of an order in relation to costs would clearly have provided a condition precedent whose performance or fulfilment would be obligatory before any relistment or institution of a new suit, predicated G on the same reliefs as the earlier suit, will be estopped and therefore not entertained by the trial court. Failure to comply with the condition precedent would render any such new action incompetent and a nullity. The orders, as loosely worded by the trial court, in my judgment, did not constitute a condition precedent to the institution of a fresh action. The H mandatoriness of the orders to pay costs was not at large; it was expressly restricted to the right of relistment and taking of further step in the suit struck out. Accordingly, all the authorities cited wherein it was urged that the Appellant's conduct was an abuse of court or contemptuous,

namely Lawal Osula v Lawal Osula (1995) 3 NWLR (pt 382) 128 at 143, First African Trust Bank Ltd & Anor v. Basil O. Ezegbu & Anor (1992) 7 NWLR (pt 251) 89, Mobil Oil (Nig) Ltd v Assan (1995) (pt 412) 129 at 143, Sauda v Abdullahi (1988) 4 NWLR (pt 116) 387 and Raymond Obato & A.G., Enugu State v. Josephat Maduabuchi (1996) 9 NWLR (pt B 473) 410 at 445, are irrelevant and unhelpful and would be discountenanced because they are inapplicable to the circumstances of this appeal.

It is for these reasons, as earlier stated, that, regrettably, I find myself unable to accede to the majority judgment in this appeal. The conduct of the Appellant was a far cry from being an abuse of court nor was it defiant as to tantamount to a contempt of court. Accordingly, I would myself allow the appeal and set aside the judgments of the two lower courts. I award N10,000.00 costs in favour of the Appellant.

EJIWUNMI JSC

I have had the privilege of having the preview of the judgment of my learned brother, Wali, JSC and I agree with him that the appeal lacks merit. Indeed as rightly observed in the leading judgment this is a classic case of abuse of Court process.

The plaintiff, Alhaji Audu Shugaba was a customer of the defendant, Union Bank of Nigeria PLC. Sometime in 1983 he mortgaged his property situate at Maiduguri covered by Certificate of Occupancy No. BO/3131 to the defendant for facility he received from the Bank. Being unable to pay up his indebtedness to the bank, the latter threatened to foreclose the mortgage. Thereupon, the plaintiff took an action on 30th October, 1987, suit No. M.135/87 seeking the following reliefs:-

"(a) A declaration that the purported deed of legal mortgage in respect of all that property owned by the Plaintiff and covered by Certificate of Occupancy NO. BO/3131 and known as International Airport Hotel, Maiduguri registered in favour of the Defendant is null, illegal and void and of no effect whatsoever.

(b) An order perpetually restraining the defendant, its agents, servants or privies from auctioning, selling or in any way disposing of

the property covered by Certificate of Occupancy No. BO/3131 in pursuance of or under the purported deed of legal mortgaged, illegality and unlawfully registered in favour of the defendant at the lands Registry, Maiduguri.

B (c) *A declaration that the plaintiff is not owing the defendant the sum of N333,210.85 or any sum whatsoever.*

(d) *Cost of this suit."*

The Plaintiff who instituted this action and therefore be expected to proceed expeditiously with the hearing of the case decided not to do so. Rather, the hearing was stalled and delayed by the plaintiff. However, the learned trial Judge having see through his antics, struck out the case for want of diligent prosecution with costs in the sum of N500.00, and which were to be paid before the case could be relisted. Thus, the Court left the door open for the plaintiff to come back to Court to prosecute the action. But the plaintiff did not do that. Rather, he instituted a fresh action.

Upon the second suit coming up for hearing, counsel for the Bank raised a preliminary objection to the effect that the costs awarded in the earlier suit had not been paid as ordered by the Court before the second action was filed. The trial Judge upheld the objection on the 25th January, 1995 and struck out the second action with costs of N500.00 "to be paid before any further step is taken in this case". Without complying with this order made on the 25th of January, as to costs, the plaintiff instituted another action M/29/95 against the same defendant seeking the same relief. He filed along with the Writ of summons his Statement of Claim. Before he could begin with the prosecution of this new action, his property was sold on the 4th of February, 1995 at a Public auction by the defendant. In his desire to set aside the sale, the plaintiff brought a motion No. M/94/M/95 on 22/2/95 seeking to set aside the said sale. While suit M/29/95 and the motion to set aside sale M/94/M/95 were pending the plaintiff on 3rd May, 1995 took out yet another action M/147/95 against the Bank and two other persons.

The motion M/94/M/95 in suit No. M/29/95 came before the learned trial Judge in June, 1995 for hearing, after arguments on both

sides the learned trial Judge on 14th October, 1995 delivered a ruling and concluded thus:-

"On the totality of the determinations supra, it is my considered opinion and it follows that the motion in issue No. M/94/M/95 in suit No. M/29/95 is incompetent on the ground that the applicant had failed to comply with order made the 23rd January 1995 on exhibit 1 attached to the counter affidavit of the respondent. The order which was to the effect that the N500.00 costs which ought to be paid before any further step is taken in the said case. In the same vein and with suit No. M/147/95 also filed after the court's order and thus amounting to contempt of such order on the failure to comply the said cannot also be competent.

In the result and on the totality of the matter before me I hold the view that both the motion in point and also the suit No. M/147/95 are hereby refused and struck out respectively. Consequently and with the same motion being incompetent I do not consider it necessary to dwell into the rest of the arguments and authorities cited which in view of the incompetency lack foundation.

While motion No. M/94/M/95 is refused the suit No. M/147/95 is struck out. I also make no order as to costs."

The plaintiff who was dissatisfied with the Ruling of the 14th October, 1995 appealed to the Court of Appeal. His appeal was dismissed by the Court of Appeal (Jos Division) and has further appealed to this Court. Pursuant to this appeal, Briefs of Arguments were filed and exchanged. In the appellant's brief, the issue raised for the determination of this appeal reads thus:-

"Can it be said that the learned Justices of the Court of Appeal, Jos Division were right in affirming the decision of the Trial High Court when that decision was not based on the merit of the case."

The respondent bank also adopted this issue. I am not here concerned with this issue, which has been properly considered in the Judgment of my learned brother Ogundare JSC, and with which I am in entire agreement. Perhaps it is consign for me to add that it further explains the total misconception and/or misunderstanding of the uses of Court processes and the law by those who where involved with the

prosecution of this case for the plaintiff/appellant. By refusing or advising that the Order of the Court that costs in the sum of N500.00 be paid before any further step was taken in the matter, the appellant, was made to spend money in pursuant of actions that had not resulted in any benefit to the appellant. What is more and obviously disheartening is the fact that the property over which action was initiated was lost in the process. It is difficult in my respectful view, to envisage a situation where negligence of counsel and the obvious abuse of the process of Court has resulted in so much waste of money and judicial time. In my humble view, a situation such as has happened in this case must not be allowed to be repeated in our Courts.

This is case where the Court had given an order as to costs and that no further action be taken in the matter until the costs - N500.00 was paid. No appeal was raised against that order. Yet without complying with the order so made, the plaintiff was encouraged to pursue similar actions against the same defendant. All that had happened in this case is clearly an abuse of the process of the Court. This is because the Court process has not been used bona fide and properly. See Arubo v. Aiyeleru (1993) 3 NWLR (pt. 280) 126.

For the above reasons and the fuller reasons given in the leading judgment of my brother Wali, JSC, I too dismiss the appeal, and also award costs in the sum of N10,000.00 to the Respondent.

AYOOLA JSC (Dissenting)

This appeal arose from the decision of the High Court of Plateau State striking out a suit M/147/95 commenced by the appellant sometime in May, 1995 whereby he challenged the auction on 4th February, 1995 of property covered by a Certificate of Statutory Occupancy No. B/3131. He sought declaratory and injunctive reliefs all directed at confirming his contention that the said auction sale was null and void. Apparently, in suit M/29/95 instituted by the appellant against the respondent for declaration of nullity of a deed of mortgage of the property and injunction to restrain the respondent from selling it by auction, the appellant brought

a motion, No.M/94M/95, to set aside the auction of the property which had taken place during the pendency of the suit. In the meantime he had commenced the suit No. M/147/95 whereby he claimed as earlier stated. By an affidavit filed on its behalf, the respondent brought it to the notice of the trial court, and the facts are not disputed, that: (1) the appellant had brought an action No M/135/87 touching on the disputed mortgage of the property, which was struck out for want of diligent prosecution on 11th July, 1994; and, (2) a similar suit NO. M/177/94 brought by the appellant against the respondent was struck out on 23rd January, 1995.

In striking out suit M/135/87, the High Court had ordered that the costs awarded must be "paid before any step is taken towards relisting the suit." Suit M/177/94 was struck out on 23rd January, 1995 because the costs awarded in suit M/135/87 had not been paid when the appellant commenced that suit. In striking out that suit the High Court awarded costs and ordered that the costs awarded must be paid "before any further step is taken in the case." (Emphasis mine). It was in the course of disposing of the application made in suit M/29/94 that suit M/147/95 with which this appeal is directly concerned, was struck out on the ground that costs awarded when suit M/177/94 was struck out had not been paid. Somehow, suit M/29/95 in which the application was made was itself not struck out. Apparently, that suit remained pending in the High Court.

For the sake of completeness, it may well be mentioned that the motion No. M.94M/95 was refused on the same ground on which the learned judge struck out suit M/147/95, namely: that the motion was incompetent on the ground that the appellant had failed to comply with order made on the 23rd January, 1995.

On the appellant's appeal to the Court of Appeal from the decision of the High Court, the main issue was put by the Court of Appeal thus:

"Whether the order of the court that unless and until a party pays costs assessed and awarded that court would not entertain future matters of the defaulting party."

It is doubtful if the statement of the issue by the court below had been accurately reproduced in the record of appeal as it appeared incomplete.

If the issue formulated is taken as implying that the High Court had ordered that "any future matter" of the appellant would not be entertained unless he paid the costs awarded, it is clear that the Court of Appeal was in error because there was no order to that effect, as would be seen shortly.

B Muntaka-Coomasie, JCA, who delivered the leading judgment of the Court of Appeal in which Oguntade and Edozie, JJ.C.A, concurred, modified the issues when he put it thus:

C *"The second issue is whether a trial court can rightly consider any party failing to comply with its order relating to payment of costs as being in contempt of it therefore making any subsequent applications or suit incompetent."*

The modified issue so formulated did not improve the situation in any appreciable degree. Be that as it may, the learned Justice held as follows:

D *"While I agree that it is not desirable for the courts to make unbridled orders, and that courts should not do anything to put a clog on the wheel of justice orders of the court are to be respected and obeyed. The dignity and honour of court cannot be maintained if its orders are*
E *treated disdainfully without respect. Consequently non-compliance with an order of court makes a matter or suit incompetent."*

He "agreed with the learned trial judge that the suits filed pending or struck out and all the motions filed as a result of same are incompetent and therefore a nullity." It may be observed, in passing, that the order of
F the trial judge was not as extensive as was put in the leading judgment of the court below, but was limited to the motion No. M/94M/95 and suit No. M/147/95.

G When costs are merely ordered in proceedings against a party, the failure of that party to pay such costs does not by itself amount to contempt. A mere order for costs is enforceable in the ordinary way by execution like a money judgment. It is very rarely that an order for costs will take the form of a mandatory order to pay money within a specified
H period. None has suggested that such order has been made in this case.

Where the court orders costs against a party and subjoins to the order a further order that certain things should not be done by him unless costs ordered are paid, default in payment of the costs does not by itself constitute

a contempt of the order unless such default is accompanied by a breach of the prohibition. What may be contemptuous is doing what is prohibited whilst still in default of payment and not the default, simpliciter. This is why in cases like the present one, as in all cases where contempt is alleged, the first step is to ascertain what was prohibited and the second B is to find out if there had been a breach of the prohibition. It cannot be said that had the trial court and the Court of Appeal adopted this approach, their decision would have been the same.

The court's jurisdiction to order that costs awarded against a C plaintiff must be paid before the plaintiff exercises his right of instituting another action in respect of the same subject matter is undoubted. Such order was clearly made in the case of Akinwunmi v. Oludipe (1969) N.S.C.C. 234 in which this Court held that the consequence of such D order was that the plaintiff was estopped from instituting another action while still in default and that if he did, such action should be struck out. However, in my view, an order prohibiting a party from taking steps in a case is not the same as an order prohibiting him from instituting another action. An order, such as in the present case, that costs ordered must be E paid "before any further step is taken in this case," is not a prohibition of a fresh action by the plaintiff, even in respect of the same subject-matter. Instituting a fresh action is not a step taken either in a pending case or even in a case which had been struck out. I venture to think, without at F all attempting to be exhaustive, that "fresh steps" that can be taken in a case struck out would be steps taken to set aside the order striking out the case or to relist the case or in relation to costs awarded in the case or steps taken, however, incidental to that case. All these will not include a G fresh action. The terms of the order of the trial judge are so explicit that there is no necessity to divine her intention. I find it difficult to see how, or to agree that, instituting a fresh action was tantamount to taking a fresh step in the action which had been struck out.

H The conduct of the appellant in taking several actions, all emanating from the mortgage transaction he disputed, may appear, at the first blush, unsavoury. Some may even be tempted to consider it oppressive or vexatious. However, the jurisdiction of the court to stay proceedings

which are frivolous, or vexatious or in abuse of the process of the court is not the same as that exercised by the court to strike out an action taken in breach of prohibition imposed by the court. In the former case, the court has to consider several things, including the good faith of the plaintiff, while in the latter case such enquiry is not necessary and the enquiry is limited to whether the plaintiff had failed to fulfil the condition precedent to the exercise of his right to institute an action.

Before I part with this appeal, it is pertinent to make two observations. The first is that a person who institutes an action is exercising a legal right not subject to the discretion of the court. He cannot be defeated at the threshold by invocation of the equitable maxims: "He who comes to equity must do equity." and "He who comes to equity must come with clean hands." as the trial judge tried to do. For a similar reason, the case of Odogwu v. Odogwu (1992) 2 NWLR (Part 225) 539 is not relevant. That was a case in which the alleged contemnor was seeking an exercise of the discretion of the court in his favour. The right of a plaintiff to institute an action is not a discretionary right. Where a court strikes out an action taken in abuse of the process of the court, it is because the right to institute the action has been abused and not because commencement of the action is subject to the discretion of the court. The second observation, though of less importance or relevance, is that the cause of action on which suit No. M/147/95 was founded occurred after the order of costs in question was made and related not to the validity of the mortgage transaction, as was the case in the previous actions, but to the conduct of the auction sale which was challenged. Although the point had not been argued and has not been an issue on this appeal, it is doubtful if such action which related to an entirely different cause of action can reasonably be held to be taken in abuse of the process of the court in the circumstances.

It cannot be denied that the court has jurisdiction to strike out an action taken in breach of a subsisting order prohibiting it unless a condition precedent has been fulfilled and, that the court has an inherent jurisdiction to stay proceedings which are frivolous, vexatious and in abuse of process. However, in this case, in my judgment, there was no order prohibiting

the appellant from instituting any fresh action, and the inherent jurisdiction of the High Court to strike out the action as being in abuse of process had neither been invoked nor exercised.

Being of the view that both the High Court and the Court of Appeal were wrong in the view they held that by instituting the action and bringing a motion the appellant was in contempt of the order made by the High Court on 23rd January, 1995, I feel no hesitation in holding that the appeal should be allowed. B

For the reasons which I have given, I find myself, regrettably, in dissent from the majority opinion that this appeal should be dismissed. I would allow the appeal, set aside the judgments of the High Court and the Court of Appeal and order that the motion and suit struck out by the High Court be remitted to that court for determination in the normal way. I would make no order as to costs. C D

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