

**SUPREME COURT OF NIGERIA**

7TH APRIL, 2000. SC. 106/1994

**CORAM:- S. M. A. BELGORE, M. E. OGUNDARE, A. I. IGUH,  
S. O. UWAIFO, A. O. EJIWUNMI, JJSC**

ISAAC ILOABUCHI ..... 2ND DEFENDANT APPELLANT

AND

COSMAS EBIGBO ..... PLAINTIFF/RESPONDENT

(For himself and on behalf of Ebigo

family of Eziokwu Urualla)

AND

IGNATIUS NNEDU ..... 1ST DEFENDANT/RESPONDENT

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**ACTIONS** - Consolidation - Counter claim - Where in two suits neither of which can be said to be a counter claim to the other - Or that a third party proceedings arose - It was wrong to consolidate the two suits

**ACTIONS** - Consolidation - Common question of law or fact - Where there was no question of law or fact common to all the cases - The order of consolidation was erroneously made.

**ACTIONS** - Consolidation - Evidence - The consolidation of two actions does not render the evidence tendered in one ipso facto evidence in the other

**ACTIONS** - Consolidation - Irregularity - Where the learned trial judge consolidated the suits suo motu and without hearing the parties on it - And also settled the issues suo motu with out reference to them - It cannot be said that a miscarriage of justice was not occasioned

**ACTIONS** - Consolidation - Order of - Circumstances under which consolidation may be ordered

**ACTIONS** - Consolidation - Order of consolidation - Refusal of - Cir-

*cumstances that will militate against consolidation of two or more pending actions*

**ACTIONS** - Consolidation - Suit not pending before the trial judge - It was wrong to consolidate it with the other two suits properly pending before him

**ACTIONS** - Deconsolidation - Where an order of consolidation is made - And it turns out at the trial that the order should not have been made - The actions should be deconsolidated

**APPEALS** - Issues - Ground of appeal - Issue that was intrinsic - To determining whether the order being challenged was properly made - The issue was properly raised without the need for a ground of appeal on it.

**APPEALS** - Issue - Order of consolidation - Made by the trial judge suo motu - And without giving the parties an opportunity to address the court on it - The issue can be raised on appeal

**APPEALS** - Judgment - Interlocutory order - From which there has been no appeal - This does not preclude the order being questioned in an appeal against the final judgment - By virtue of order 3 rule 22 of the Court of Appeal rules

### **FACTS**

In three consolidated cases (suits numbers HOR/27/74, HOR/89/74 and HOR/90/74) before the Orlu Judicial Division of Imo State High Court, plaintiff in suit No. HOR/27/74 Cosmas Ebigbo was the plaintiff. Plaintiff in suits Nos. HOR/89/74 and HOR/90/74 Ignatius Nnedu was the 1st defendant and Isaac Iloabuchi defendant in suits Nos. HOR/27/74, and HOR/90/74 was the 2nd defendant. In Suit No. HOR/27/74, plaintiff in the consolidated suits (for himself and on behalf of Ebigbo family of Eziokwu Urualla sued the 2nd defendant in the consolidated suits for a declaration of title to a parcel of land called "ALA IHUNWA

OJUKWU" situate at Ezi-Okwu, Urualla in Nkwerre Division. He claimed to have inherited the land from his late father (Ebigbo), while Ebigbo on the other hand got the land as one of his shares from his father's (Nnedu) lands. The 2nd defendant denied the claim and contended that the land in dispute has from time immemorial belonged to his ancestors.

In the second suit (Suit No. HOR/89/74) commenced in the Magistrate's Court of the former East Central State as MNK/61/72 the 1st defendant in the consolidated suits sued the plaintiff claiming general damages for trespass on his land known as "OJUKWU" situate in Eziokwu Urualla within the Nkwerre Magisterial District. The 1st defendant is the plaintiff's uncle (that is brother of the plaintiff's late father). The 1st defendant claimed that the land in dispute belonged originally to Ugwu Ezika, his grand father, who many years ago let the land to one Ukatu Osueke as his tenant for the purpose of farming only on the condition that any of his grown up sons could retake the land from the aforesaid tenant anytime. About 37 years ago when the plaintiff's father was alive, the 1st defendant approached him and their other brother (Ezemonye) for a combined effort to get back the land but they refused to cooperate, telling the 1st defendant to claim the land for himself alone and bear the expense if he could. The 1st defendant claimed that he subsequently got back the land from one Alfred Ngerem the surviving grandson of Ukatu Osueke into whose hands the land had passed. The 1st defendant contended that the land now belonged to him alone according to the Native law and custom of Eziokwu Urualla. The plaintiff denied the claim and stated that the land is the property of his Ebigbo family. On application, the suit was transferred to the High Court and finally took the number HOR/89/74.

In the third suit (HOR/90/74) the 1st defendant in the consolidated suits sued the 2nd defendant in the consolidated suits claiming damages for trespass in the same "ALA OJUKWU" Land. The 2nd defendant denied the claim and stated that the 1st defendant and his relative Cosmas Ebigbo (the plaintiff) conspired to lay claim on his land. And that the 1st defendant and the plaintiff are now each claiming for himself, the 2nd defendant's said land in two separate actions against the present

2nd defendant in the High Court, that is suit No HOR/27/74 and Suit No HOR/90/74. The two relatives are also each claiming the same land from each other in suit No HOR/89/74.

After conclusion of pleadings, the suits came before the court on different dates. On 3/3/80, suit No. HOR/90/74 came before the court. The learned trial judge pursuant to the power vested in him by section 46 (i) of the High Court Law of Eastern Nigeria (then applicable) transferred that case to the Magistrate's court. On 4/2/80 the other two suits, that is HOR/27/74 and HOR/89/74 came before the learned trial judge and were taken together. The order that Suit No HOR/90/74 should be transferred to the chief Magistrate's court made the previous day was stayed by the learned trial judge. And he proceeded thereafter to consolidate the three suits suo motu. Also he settled the issues to be determined suo motu. The consolidated suits proceeded to trial, at the conclusion of which, the learned trial judge in a reserved judgment found that title to the land in dispute was in the 2nd defendant's family. In the result, he dismissed all the suits. Both the plaintiff and the 1st defendant each appealed against the judgment upon a number of grounds. The plaintiff with the leave of court argued an additional ground, inter alia, to the effect that, the learned trial judge wrongly consolidated the plaintiff's action with two other cases and this brought about confusion resulting in a miscarriage of justice. The plaintiff's appeal was allowed on this ground and the three actions were remitted to the trial High Court to be heard separately. Dissatisfied the 2nd defendant has now appealed to the Supreme Court raising two issues while the plaintiff raised a lone issue, but the appeal was determined on three issues formulated by the court.

#### **ISSUES FOR DETERMINATION**

1. *Is the additional ground of appeal questioning the correctness of the consolidation order, competent?*
2. *Is the Court below right in holding that the 3 suits should not have been consolidated by the trial Judge?*
3. *Is the Court below right in allowing arguments on the transfer order made in respect of one of the 3 suits when there was no ground of appeal on it before the Court?*

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

***Appeals - Judgment***

1. True enough the order for consolidation was made on 4/3/80 at the trial Court's instance and there was no appeal against it at the time. But this does not preclude the order being questioned in an appeal against the final judgment. I refer in this respect to Order 3 rule 22 of the Court of Appeal Rules which provides:

"22. No interlocutory judgment or order from which there has been no appeal shall operate so as to bar or prejudice the Court from giving such decision upon the appeal as may seem just."

I considered the application of this rule in (i) Okobia v. Ajanya (1998) 6 NWLR 348

See also Dr. Iweka v. S.C.O.A. Nigeria Limited SC. 231/1992 decided on 10th March 2000 (as yet unreported). The ground of appeal was raised in an appeal against a final judgment. Therefore sections 221 of the Constitution of the Federal Republic of Nigeria 1979 and 25 (2) (a) of the Court of Appeal Act 1976 would not apply to render the ground incompetent. (p. 1230 A)

***Appeals - Issue***

2. In the present case, the order of consolidation was made by the trial Judge suo motu and without asking the parties to address him on it. He did not stop there; he went on to settle the issues to be determined in the consolidated suits. In such circumstance I cannot see how the respondent was precluded from raising the issue on appeal to the Court of Appeal. I would have held otherwise if the parties had been given an opportunity to address the Court on it and the respondent had consented to the order being made. (p. 1231 E)

***Actions - Consolidation***

3. The circumstances under which consolidation may be ordered have been laid down in several cases. In Diab Nasr. v. Complete Home Enter-

prises (Nig) Ltd. (1977) 5 SC. 1, 11; (1977) ANLR 93, 100-101, this Court, per Irikefe JSC (as he then was) observed:

"We pause here to observe that the application to consolidate the two actions was brought by the appellant. The main purpose of consolidation, it has been said, is to save costs and time, and therefore it will not usually be ordered unless there is 'some common question of law or fact bearing sufficient importance in proportion to the rest' of the subject matter of the actions 'to render it desirable that the whole should be disposed of at the same time'. See Payne v. British Time Recorder co. (1921) 2 K. B. p. 16". (p. 1233 G)

### ***Order of consolidation - Refusal of***

4. There are circumstances, however, that will militate against consolidation of two or more pending actions. One such circumstance is where the plaintiff in one action is the same person as the defendant in another action unless one action can be ordered to stand as a counterclaim in another action. Another is where different legal practitioners have been briefed as where there are several actions by different plaintiffs represented by different legal practitioners. As to the application of this latter exception see the case of Healey v. Waddington & sons Ltd. (1954) 1 WLR 688; (1954) 1 All ER 861. Consolidation will also be refused where it would likely cause embarrassment at the trial such as where the actions are by different plaintiffs, based on the same libel, and the defences are different - see Daws v. Daily Sketch (supra). (p. 1234 F)

### ***Actions - Deconsolidation***

5. Where an order for consolidation is made and it turns out at the trial that the order should not have been made, the order should be revoked and the actions deconsolidated - see: Lewis v. Daily Telegraph (No. 2) (1964) 2 Q. B. 601, Obiekweife v. Unumma (1957) 2 FSC 70, 71. (p. 1235 A)

**Consolidation - Evidence**

6. The consolidation of two actions does not render the evidence tendered in one ipso facto evidence in the other - Dugbo v. Kporoaro (1958) WNLR 73. (p. 1235 B)

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**Consolidation - Common question of Law or fact**

7. "In Suit No. HOR/27/74, Cosmas Ebigbo is plaintiff. In suit No. HOR/89/74 he is defendant. In suit No. HOR/89/74 Ignatius Nnedu is plaintiff. In suit No. HOR/90/74 he is also plaintiff and Isaac Iroabuchi is the defendant. Isaac Iroabuchi is also the defendant in suit No. HOR/27/74. Also Isaac Iroabuchi is not involved in HOR/89/74. And Ignatius Nnedu is not involved in suit No. HOR/27/74. It is noted that the suit No. HOR/27/74 is for declaration of title, damages for trespass and injunction while the other two suits are for trespass simpliciter. Different considerations will arise. Possession is the main consideration in the trespass cases. It seems to me that the order for consolidation was not only incongruous but apt to bring confusion. Not only were the reliefs claimed different but they did not arise from the same transaction of series of transactions. The defences to the various suits were bound to be different - Daws v. Daily Sketch & Daily Graphic (1960) 1 All E.R. 397. Different laws would be applicable in resolving the issues.

Now this is what the learned Judge did. He consolidated the three suits, one of the suits he had no jurisdiction over. He did it all on his own - suo motu. The parties were not the same in all the suits. The reliefs claimed were different and the defences were bound to be different. The Subject matter was not the same. The actions did not arise from the same transaction or series of transactions. I am prepared to say that in my judgment the learned judge erred in principle in the order he made. Three sets of different counsel appeared in the cases. The main purpose of consolidation, it has been said, is to save costs and time, and therefore, it will not usually be ordered unless there is 'some common question of law or fact bearing sufficient importance in proportion to the rest of the subject matter of the actions to render it desirable that the whole should be disposed of the same time' see Payne v. British Time Recorder

*Co. (1921) 2 K B p. 16 at 21, Nasr v. C.A.E Ltd. (1977) 5 SC. 1. "*

The observations in this passage are quite apt. I have earlier in this judgment highlighted the penultimate paragraphs of the pleadings in these cases. I cannot find a question of law or fact common to all. (p. 1236 E)

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***Consolidation - Counter claim***

8. In the case of the other suits, Suit HOR/27/74 is a straight fight for title to the land in dispute between the appellant and the respondent while suit HOR/89/74 is a fight between the respondent and the 2nd Respondent.

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The respondent who is plaintiff in HOR/27/74 is the defendant in HOR/89/74 neither of which, going by the pleadings in each, can be said to be a counter-claim to the other or that third party proceedings arise. In such circumstance, it was wrong to consolidate those two suits. (p.1237F)

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***Consolidation - Suit not pending before the trial judge***

9. I say that Suit No. HOR/90/74 was not properly before the trial judge on 4/3/80 when he made the order of transfer because he had on 3/3/80

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pursuant to the power vested in him by section 46(1) of the High Court Law of Eastern Nigeria (then applicable), transferred that case to the Magistrate's Court. I have searched through the High Court Law, and I can find no provision empowering him to subsequently stay that order of

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transfer. By the order for stay which he issued on 4/3/80, the learned trial judge, with respect to him, acted without jurisdiction and that order was, therefore, void. Suit HOR/90/74 was not pending before him on 4/3/80; it was, therefore, wrong of him to consolidate it with the other two suits properly pending before him. ((p. 1237 H)

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***Consolidation - Irregularity***

10. Not only did the learned trial judge consolidate the suits without there being an application to that effect from any of the parties and without hearing the parties on it, he also settled the issues suo motu without reference to them. At least, there is nothing on record to show to the contrary. The learned Judge presumably acted pursuant to Order XXXII rule 1 of the High Court Rules of Eastern Nigeria then applicable, but

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prudence required that the parties should have been involved. As was rightly observed by the Court below issues were settled without due regard to the pleadings. In the light of all these, it cannot be said that a miscarriage of justice was not occasioned by the irregular way the learned trial judge proceeded to order consolidation of these cases. (p. 1239 A) B

***Issue - Ground of appeal***

11. It is submitted by appellant's learned counsel, Mr. Ilobi that as there was no ground of appeal challenging the validity of the stay of order of transfer of Suit HOR/90/74 by the learned trial judge, the Court below ought not allow any arguments on it. With respect to learned counsel, I do not share his views. The issue of transfer and stay of order of transfer of Suit HOR/89/74 arose in the process of showing that that suit was not properly before the trial court when the order of consolidation was made. The issue was intrinsic to determining whether the order was properly made. It is my humble view that it was properly raised without the need for a ground of appeal on it. (p. 1239 E) C D

**NOTABLE POINTS OF INTEREST**

**IGUHJSC**

*1. When suits are not pending in the same court they cannot be consolidated*

It is clear that under the said rule of court, causes or matters pending in the same court may, by the order of the court, be consolidated for purposes of hearing and determination. When, therefore, suits are not pending in the same court, it does not appear that they can be properly consolidated for the purpose of hearing. Where cases are pending in different courts, it stands to reason that they cannot be consolidated until they must all have been brought together in the same court by appropriate orders of transfer. (p. 1241 D) E F G

*2. When suits are said to be pending in the same court*

Suits are said to be pending in the same court if they have been filed, in the case of the High court, in the same Judicial Division or Registry. It H

would not matter that some of such cases have been assigned to different Judges of the same Judicial Division. As long as the cases concerned were filed in the same Registry or Judicial Division, they are deemed to be pending in the same court. (p. 1241 F)

- B 3. *A stay of an order is not tantamount to a revocation of that order*  
 I think I ought to observe, in fairness to the learned trial Judge, that although he indicated in his record book just before his order of consolidation that he was staying his order of transfer of Suit No. HOR/90/79 to the Chief Magistrate's court, a stay of his order of transfer is not tantamount to a revocation or setting aside of that order. In my view, his order of transfer of the suit to the Chief Magistrate's Court with effect from the 3rd March, 1980 remained valid although purportedly stayed.
- C
- D Stay of a judgment or an order of court must be distinguished from a revocation or setting aside of such a judgment or order. The order of transfer of suit number HOR/90/74 by the learned trial Judge to the Chief Magistrate's Court was at no time set aside or revoked. It remained valid, in my view, at the time the order of consolidation in issue was made. (p. 1242 D)
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### **UWAIFO JSC**

- F 4. *Proceedings bedevilled with irregularities of law - Consequence of*  
 It is the law that when proceedings have been bedevilled with irregularities of law, procedural or substantive, such that findings made and conclusions arrived at therein cannot be other than perverse, they ought not to be allowed to stand. They should be set aside. (p. 1243 D)

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### **REPRESENTATION**

Chief F. A. Ilobi, for the Appellant

G. R. I. Egonu, S.A.N. with C. M. I. Egole for the Respondent

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### **CASES REFERRED TO**

Okobia v. Ajanya (1998) 6 NWLR 348

Iweka v. S.C.O.A. Nigeria Limited SC. 231/1992

Nasr. v. Complete Home Enterprises (Nig) Ltd. (1977) 5 SC. 1, 11

Payne v. British Time Recorder co. (1921) 2 K. B. p. 16

Lewis v. Daily Telegraph (No. 2) (1964) 2 Q. B. 601

Obiekweife v. Unumma (1957) 2 FSC 70, 71

Dugbo v. Kporoaro (1958) WNLR 73

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### **STATUTES & RULES REFERRED TO**

Court of Appeal Rules, Ord 3 r 6

High Court Rules of Eastern Nigeria, Ords, 11 r. 7, 32 r. 1

High Court Law of Eastern Nigeria, S. 46 (i)

Court of Appeal Act, 1976, s. 25 (2) (a)

Constitution of the Federal Republic of Nigeria, 1979, S. 221

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### **LEAD JUDGMENT BY OGUNDARE JSC**

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This appeal raises the question: When is consolidation of suits for the purpose of trial desirable or permissible?

In suit No. HOR/27/74 (formerly HOR/16/72) in the Orlu judicial Division of Imo State High Court, Cosmas Ebigbo (for himself and on behalf of Ebigbo family of Eziokwu, Urualla) had sued Isaac Iloabuchi for - E

*"1. Declaration of title to a piece or parcel of land called 'ALA IHUNWA OJUKWU' situate of Ezi-Okwu, Urualla in Nkwere Division within the Okigwe Judicial Division, of the annual rental value of 5 (five pounds) and more particularly delineated on the Plan to be tendered in evidence.* F

*2. 100 (One hundred pounds) damages for trespass.*

*3. An Injunction restraining the Defendant, his servants and agents from entering the said land and acting therein in any manner inconsistent with the plaintiff's ownership and possession."* G

Pleadings were filed and exchanged. The Plaintiff's case in the action was pleaded in paragraphs 3, 4, 5, 6, 7, 8 and 9 of his statement of claim H which run thus:

*"3. The plaintiff is a descendent of the late Ugwa Duruobiaku. The late Duruobiaku had three sons: Nsofor, Onunkwo and Ugwa. Ugwa*

had a son called Nnedu. Nnedu had three sons: Ebigbo, Ezemeonye and Ignatius. Ebigbo was the father of Cosmas (the plaintiff); Romanus and Declan. The sons of Nnedu partitioned their father's lands after his death in accordance with the custom of Urualla people. The plaintiff's late father got the land in dispute as one of his own shares.

4. The land which is known as and called ALA IHUNWA OJUKWU ORALANWA OJUKWU ORALA OJUKWU (hereinafter called the land in dispute) is the property of Ebigbo family and is situate at Eziokwu Urualla within the Okigwe judicial Division. The plaintiff inherited the land from his father. The name 'OJUKWU' refers to the juju worshipped by plaintiff's ancestors on the land.

5. The said land in dispute which is verged RED in plan No. OKE/D51/72 is bounded as follows:-

On the North by the lands of Mr. Anyalebechi Onyeagu and Mr. Ekemezie Onyemaero both of Eziokwu Urualla.

On the South by the lands of Mr. Ngumeoha Okafor and Ignatius Nnedu both of Eziokwu Urualla.

On the East by the Plaintiff's family land leased to the Catholic Mission Urualla.

On the West by the lands of Mr. Ngumeoha Okafor, Ukwuaku Oguekemma and Agbarakwe Alaka all of Eziokwu Urualla.

The salient features are also shown on the said Plan which shall be tendered at the trial of the above suit.

6. The usufruct of the land in dispute was granted to one Osueke by the late Ugwa, the plaintiff's grandfather. The late Osueke gave the late Ugwa a cock, a gallon of palm wine and 4 kola nuts annually as rent. Osueke had a son called Ukatta. When Osueke died, his son Ukatta continued to pay the annual rent by giving the cock, the gallon of palm wine and 4 kola nuts to the plaintiff's family after the death of Ugwa the grantor. Ugwa and his descendants, reserved the right to revoke the grant at any time, according to the custom of Urualla people.

(a) In 1946, the plaintiff's father wished to exercise his right to revoke the grant of the land in dispute to Osueke's family but one Alfred Ngerem the son of the late Ngerem approached the plaintiff's father and

asked him to allow him to continue to use the land as he (Alfred) had no place to farm. The plaintiff's father, Ebigbo agreed and allowed him use of the land in the terms of the old tenancy.

(b) On or about the 19th day of June, 1948, the plaintiff's father died. In 1949, the plaintiff's mother accompanied by one Nga, plaintiff's cousin went to Mr. Alfred Ngerem and informed him of the family's intention to take back the land in dispute. Mr. Alfred Ngerem's relations: Iloabuchi Okoli (Defendant's father). Anunko Agonsi and Patrick Agonsi were present. The said Alfred Ngerem formally surrendered the land to the plaintiff's family.

(c) The plaintiff's family in 1950 had cassava farms on the land in dispute and had been in possession since that date.

7. In 1956 when one Alaka Ikebudu, the father of Agbarakwe Alaka exceeded his boundary with the land in dispute, the defendant; Mr. Alfred Ngerem, Mr. Sunday Nnabuihe among others from Eziokwu Urualla took part in settling the matter between the plaintiff's family and Alaka. The defendant did not at any time during the arbitration mention that the land now in dispute belonged to him or his family.

8. The plaintiff's father gave a portion of the 'Ala Nwa Ojukwu' not rented out to the late Osueke, to the Catholic Mission at Urualla, and a part of the present St. Michael's premises at Urualla is on the said land.

9. Sometime in 1971, the defendant and the plaintiff's uncle began to quarrel over the said land without reference to the plaintiff. The plaintiff returned from Onitsha and heard what had happened and he intervened. He reported to the Amalas and Ndinze in Uzuakoli Urualla according to the custom in Urualla. The Amalas and Ndinze invited the parties to appear before them, the defendant and the plaintiff agreed to abide by the decision of the Amalas and Ndinze. The defendant made two appearances and refused to attend the next meeting. On or about the month of June, 1971 the defendant entered into the land without the plaintiff's leave or licence and harvested some bunches of palm fruits". The defendant, Isaac Iloabuchi, pleaded in reply:-

5. The defendant denies the allegations in paragraph 4 of the Statement of claim, referring to inheritance of the land in dispute or any

part thereof by the plaintiff. The land is defendant's land and is named "Ala Ojukwu" like other people's land in the area after Ojukwu Palm Tree Juju which is worshipped by the whole Umuzoije kindred and never by plaintiff's ancestors as is purported. The Ojukwu palm tree which had died sometime ago now stands as a stump at the point where James Ugochukwu's, Ukatu Ugochukwu's and defendant's lands meet in the Eastern boundary of defendant's land.

6. The defendant's ALA Ojukwu land is shown in defendant's plan No. E/CA/559/72 and there verged blue. The plaintiff's Plan No. OKE/D51/72 has been superimposed on defendant's plan and marked out and verged yellow therein and the plaintiff is laying claim to only part of defendant's land. The defendant's plan depicts the area correctly and accurately. The plaintiff's plan appears to have been made by oral description of the plaintiff as neither defendant nor the fellow villagers of the parties or any of them witnessed the survey on which plaintiff's plan was based. Defendant's plan was made in the presence of fellow villagers with neighbouring owners standing on or indicating their boundaries with the defendant. None of the neighbouring owners has a boundary with the plaintiff who has no land at all in the area of defendant's land. One Ignatius Nnedu plaintiff's uncle is falsely represented by plaintiff as a neighbouring owner. The said Nnedu has no land at all near the land of defendant. The said Nnedu is in fact disputing with plaintiff over the defendant's land each attempting to lay claim for himself to this defendant's land.

7. The defendant vehemently denies the wild allegations in paragraph 6 of the Statement of claim and will put the plaintiff to the strictest proof thereof. The land shown in defendant's plan has always been the defendant's ancestral land. From time immemorial the defendant and before him as ancestors have been the owners in possession of the land part of which the plaintiff now claims. Neither the plaintiff nor any of his fathers have been the owners of the land or part thereof or in possession of the land and or any part thereof. The plaintiff now conspires with defendant's relative Alfred Ngerem with whom the defendant is not in good terms to enable plaintiff claim defendant's land.

10. In answer to paragraph 9 of the Statement of Claim, the defendant asserted that the plaintiff's uncle named Ignatius Nnedu had sometime in 1971 purported to claim for himself the defendant's said land. The elders were divided in their opinion. Some supported Nnedu while others supported defendant. This suit is taken out under the impression that because of poverty, the defendant cannot put up a defence. Evidence of the neighbouring owners will be called at the trial establish defendant's ownership of the land. The defendant had never been engaged in any arbitration proceedings with the plaintiff before the Amalas or Ndinzes of Urualla. The plaintiff and his said uncle Nnedu are now engaged in the chief Magistrate Court, Orlu in a suit over this same defendant's land the action having been started by plaintiff against his said uncle Nnedu after taking out the present suit. The said Nnedu has also sued the defendant in the Magistrate court Orlu in Suit No. MNK/62/72 over this same land or part thereof. The said suit has been referred to the High court Okigwe on the agreement of the parties. Defendant will ask the suits to be consolidated for trial as the subject matter is same viz - defendant's land.

11. The defendant in answer to paragraph 10 of the Statement of Claim denies that he acted in any way contrary to elder's proceedings. The defendant has always protected his said land against invasion by the plaintiff. Placing of palm fronds on land is by Urualla custom the cheapest way for a poor man to protest invasion of the strong. The defendant farms on the land and redeemed the pledge his father Iroawuchi made to Ukatu ugochukwu.

Suit No. HOR/89/74 commenced in the Magistrate's Court of the former East central state as MNK/61/72. Ignatius Nnedu had sued Cosmas Ebigbo claiming

*"The plaintiff claims from the defendant the sum of 25 (twenty-five pounds) being general damages for trespass on the plaintiff's land situate in Eziokwu Urualla within the Nkwere Magistrate District."*

In his particulars of claim filed in the Magistrate's Court, the plaintiff in the action, Ignatius Nnedu, had pleaded, inter alia, as follows:

*"3. The plaintiff is the son of the late Nnedu. Nnedu had two*

*other elder sons called Ezemonye and Ebigbo, the father of the Defendant. Ezemonye and Ebigbo are now deceased. Nnedu was the son of late Ugwa Ezika.*

B 4. *The piece or parcel of land which is the subject matter of this action is known as and called 'OJUKWU' situate in Eziokwu Urualla within the jurisdiction. The said land is the property of the plaintiff and has been in his peaceable possession for about 37 years.*

C 5. *Ugwa Ezika was the original owner of the land. Many years ago, he let the land to one Ukatu Osueke as his tenant for the purpose of farming only on the condition that any of his grown-up sons could retake the land from the aforesaid tenant any time. Nnedu the father of the plaintiff, Ezemonye and Ebigbo, failed to redeem the land in his lifetime.*

D 6. *About 37 years ago, when Ezemonye and Ebigbo were alive, the plaintiff approached them for a combined effort to get back the land but they refused to co-operate, telling him (the plaintiff) to claim the land for himself alone and bear the expenses if he could. At that time*  
 E *Ugwa Ezika and Ukatu Osueke had died and the land passed into the hand of Alfred Ngerem the surviving grandson of Ukatu Osueke. Then the plaintiff met the said Alfred Ngerem and got back the land which now belongs to him alone according to the native law and custom of*  
 F *Eziokwu Urualla. On retaking the land about 37 years ago, the plaintiff went into possession and has been in possession since then.*

*The defendant, Cosmas Ebigbo filed in the Magistrate's court a defence in which he pleaded -*

G "2. *The Defendant admits that Ebigbo, Ezemonye and plaintiff are the sons of Nnedu, and that Ebigbo and Ezemonye are now dead. The defendant in further answer states that Nnedu was the son of Ugwa Duruobiaku and not of Ugwa Ezika. Ezika was the brother of Duruobiaku.*

H 3. *The defendant admits that the land in dispute is known as and called 'ALA OJUKWU' or ALA IHUNWA OJUKWU' but denies that the said land is the property of the plaintiff and that the plaintiff has never been in possession of the said land for thirty-seven years or for any period whatsoever. The Ebigbo family has always been in possession for*

many years.

4. *The land in dispute is the property of Ebigbo family. The Defendant in Suit No. HO/16/72 in the Okigwe High court sued one Isaac Iloabuchi in respect of the said land. A copy of the writ of summons is attached and marked Annexure A.*

B

5. *The Defendant denies every allegation contained in paragraphs 5 and 6 of the Plaintiff's particulars of claim and shall at the trial put the plaintiff to the strictest proof thereof.*

6. *The Defendant and other members of Ebigbo family have always exercised maximum acts of ownership and possession over the land in dispute such as farming, reaping economic crops and suing person or persons who interfered with their rights over the land.*

C

I may at this stage point out that this is the action, the defendant in Suit HOR/27/74 referred to in paragraph 10 of his statement of defence set out above.

D

Following an application made pursuant to section 17 (3) of the Magistrates' Courts Law (as amended) of the former Eastern Nigeria (applicable at the time of the action), the suit was transferred to the High court of the Okigwe Judicial Division of the then East Central State and took the number HO/100/73 and on the creation of Orlu Judicial Division it came before the High Court of that Judicial Division and finally took the number HOR/89/74 where pleadings were formally filed and exchanged.

F

The third action involved in this appeal is the one between Ignatius Nnedu, as plaintiff, and Isaac Iroabuchi as defendant and it is Suit No. HOR/90/74. The claim is for #25 (N50.00) being damages for trespass. Pleadings were ordered, filed and exchanged in his statement of claim, Ignatius Nnedu pleaded, inter alia, as follows:

G

"3. *The plaintiff is the son of the late Nnedu. Nnedu had two other elder sons called Ezemonye and Ebigbo. Ezemonye and Ebigbo are now deceased. Nnedu was the son of the late Ukwa Ezika.*

4. *The place or parcel of land which is the subject matter of this action is known as and called 'ALA OJUKWU' situate at Eziokwu Urualla within the Orlu Judicial Division. The said land is the property of the plaintiff and has been in his peaceable possession for about 39 years.*

H

5. *The land in dispute and its main features are more particularly described, delineated and verged pink in plan No. OKE/D16/74 dated the 18th April, 1974 and filed with this Statement of Claim. The said land is bounded as follows: On the North by lands belonging to Ngumoha Okafor, Ekeke Ogudo and Ukatu Ugochukwu; on the South by lands belonging to the plaintiff and Ngumoha (Okafor; on the East by lands belonging to Ukatu Ugochukwu and the plaintiff; and on the West by lands belonging to Alaka Ikewudu, Okarafor Osudi Egwu and Ngumoha Okafor aforementioned.*

6. *Ukwa Ezika was the original owner of the land. Many years ago he let the land to one Ukatu Osueke as his tenant for the purpose of farming only on the condition that any of his grown-up sons could retake the land from the aforesaid tenant any time. In spite of this express condition of the tenancy, Nnedu the father of the plaintiff, Ezemonye and Ebigbo, failed to redeem the land in their life time.*

7. *About 39 years ago, when ezemonye and Ebigbo were alive, the plaintiff approached them for a combined effort to get back the land but they refused to co-operate, telling him (the plaintiff) to claim the land for himself alone and to bear the expenses arising therefrom if he could. At that time Ukwa Ezika and Ukatu Osueke had died and the land passed into the hand of Alfred Ngerem the surviving grandson of Ukatu Osueke. Then the plaintiff met the said Alfred Ngerem, ran all the expenses alone, and got back the land which now belongs to him alone according to the native law and custom of Eziokwu Urualla. On retaking the land about 39 years ago aforesaid, the plaintiff went into possession and has been in peaceable since then.*

8. *Ten years after the plaintiff redeemed the land and took up possession as stated in paragraph 7 of the Statement of claim one Alaka Ikewudu (now deceased) and one Ukwuaku Oguekemma also now deceased) challenged plaintiff's ownership of the land and lodged a complaint before Mr. Bennett Udueze, head of Eziokwu Amalas. The plaintiff responded to the complaint accordingly. The amalas under the said Bennett Udueze looked into the matter and decided that the land belonged to the plaintiff. Alaka Ikewudu and Ukwuaku Oguekemma were told to*

*leave the plaintiff alone with the land and they did so.*

9. Immediately after the end of the Nigerian Civil war one Cosmas Ebigbo (Defendant in Suit No. HO/100/73), challenged plaintiff's ownership of the land by making a report to the elders of Umuduruobiaku Eziokwu Urualla. He used two gallons of wine and five shillings for his report. The plaintiff accordingly responded in like manner. The elders delved fully into the matter and decided in plaintiff's favour. Cosmas Ebigbo's five shillings was consequently taken and that of the plaintiff refunded. Thereafter the plaintiff continued to be and still in possession of the said land. B  
C

10. Shortly after the incident described in the proceeding paragraph, the Defendant questioned plaintiff's right over the land by placing palm fronds on it and lodging a report before one Mr. Acholonu Nnadimagha, leader and head of Eziokwu 'MMANWU' society, with four gallons of wine and 1 (one pound). The plaintiff responded again. The matter was gone into by the members of the said society and finally decided in plaintiff's favour. The plaintiff received back his money while the Defendant lost his own. Thereafter, the plaintiff continues to be in possession of the said land to date. D  
E

Isaac Iroabuchi, in his statement of defence, retorted:

"3. The defendant admits as stated in paragraph 4 of the Statement of Claim that the land in dispute is usually called 'Ala Ojukwu' or Ala Ihuala Ojukwu but the defendant totally denies the plaintiff's allegation of ownership and possession of the land which is defendant's land and which has been in defendant's possession and which his own ancestors before him had owned and enjoyed without let or hindrance from the plaintiff or his relatives until recently when the plaintiff and his relative Cosmos Ebigbo conspired to lay false claim to defendant's land. The said relatives viz: - Plaintiff and Cosmos Ebigbo are now each claiming for himself; the defendant's said land in two separate actions against the present defendant in the High Court Suit No. HOR/90/74 Ignatius Nnedu versus Isaac Iroawuchi and Suit No. HOR/27/74 (formerly HO/16/74) Okigwe - Cosmos Ebigbo versus Isaac Iroabuchi. The two relatives Cosmos and Ignatius are also each claiming the same land from each other F  
G  
H

in Suit No. MNK/62/72 later renumbered on transfer to the High Court as HO/100/73 Ignatius Nnedu v. Cosmos Ebigbo. Defendant will at the trial ask all the said suits HO/100/73, HOR/27/74, HOR/70/74 and HOR/90/74 to be consolidated as the land is the same or substantially  
B same and the parties are the said two relatives Ignatius Nnedu who is Cosmos Ebigbo's uncle and the present defendant Isaac Iroabuchi.

4. The defendant's land known as 'Ala Ojukwu or Ala Ihuala Ojukwu' is more correctly shown with its features in defendant's plan No. E/GA559/72 filed with this Statement of defence and there verged blue  
C and earlier filed in the said suit No. HOR/27/74 Cosmos Ebigbo v. Isaac Iroabuchi. There the correct features are shown and Cosmos Ebigbo's plan No. OKE/D51/72 super-imposed and verged yellow thereon. Defendant denies that plaintiff owns anything whatever as alleged by plaintiff  
D in his plan No. OKE/D16/74 pleaded in paragraph 5 of the Statement of Claim.

5. The defendant vigorously denies the allegations in paragraphs 6,7,8, 9 and 10 of the Statement of Claim and will put the plaintiff to  
E the strictest proof thereof. In further answer thereto the defendant asserts that the plaintiff had sometime in 1971 purported to claim for himself the defendant's 'Ala Ojukwu or Ala Ihuala Ojukwu' land. The elders looked into the dispute and were divided in their opinion because of a  
F few of them who were induced by plaintiff to support his false claim. The defendant will lead evidence of his neighbouring owners at the trial to establish defendant's ownership and long possession of the land. The said Alfred Ngerem who is defendant's relative mentioned in paragraph 7  
G of the Statement of Claim is not in good terms with the defendant and has been in conspiracy with defendant's enemies Cosmos Ebigbo and the plaintiff Ignatius Nnedu to deprive defendant of his ancestral Ala Ojukwu land. Defendant's land had never at anytime passed to the said Alfred Ngerem as alleged by the plaintiff. The said Alfred's sons by letter through  
H their solicitor M.N. Agunwa and dated 3rd February, 1972 had challenged their father's shady dealings over land of defendant."

After conclusion of pleadings the suits came before the court on different dates. On 3/3/80, suit No. HOR/90/74 came before the court.

The parties were present in court. So also was counsel for the plaintiff present. Counsel for the defendant, Mr. Ilobi, wrote for an adjournment. The learned trial Judge (Uche J.) however, made the following observation:

*"This action is for a claim for #25 for trespass and nothing more. To file such action in the High Court is to my mind an abuse of Court's process. I wonder what fees Counsel filing this suit in the High Court will charge his client. It seems to me the ethics of the profession is also involved."*

and ordered:

*"Without saying more I hereby order that this suit be transferred under Section 46(1) of the High Court Law to the Court of the Chief Magistrate for determination."*

Section 46(1) of the High court Law, Cap 61 Laws of Eastern Nigeria, 1963 under which the order was made provided:

*"A judge may by order under his hand and the seal of the Court at any time or at any stage of the proceedings before final judgment, and either with or without application from any of the parties thereto, transfer any cause or matter before him to a Magistrate Court or to a judge in the same or any other judicial division."*

On 4/3/80 the other two suits, that is HOR/27/74 and HOR/89/74 came before the learned judge and were taken together. After recording the appearances of the parties and their counsel in the two cases, the learned Judge proceeded thus:

*"Court: The order made by this court yesterday that Suit HOR/90/74 should be transferred to the Chief Magistrate's court is hereby stayed and the Case File is brought back to this court. Suits HOR/27/74, HOR/89/74 and HOR/90/74 are hereby consolidated under Order 11, Rule 7 as the subject matter of the three suits are concerned with the same piece of land and Cosmos Ebigbo and Ignatius Nnedu are members of the same family."*

After making the order for consolidation, the learned Judge again suo motu settled the issues to be determined in the three consolidated suits. These were:

"1. In these consolidated suits plaintiff in Suit No. HOR/27/74 Cosmos Ebigbo shall be the plaintiff. Plaintiff in Suit No. HOR/89/74 Ignatius Nnedu shall be the first defendant in the consolidated suits and Isaac Iloabuchi defendant in Suit No. HOR/27/74 and also defendant in  
B Suit No. HOR/90/74 shall be second defendant in the consolidated suits.

2. Plan no. OKE/D51/72 of the plaintiff, Plan No. OKE/D16/74 of the first defendant and Plan No. E/GA559/72 of the second defendant shall be tendered by consent.

C 3. Did the plaintiff inherit the land in dispute from his late father, Ebigbo who got it as his share from Nnedu, plaintiff's grandfather?

4. Was it plaintiff's mother who got back the land in dispute from Alfred Ngerem, a customary tenant inheritance?

D 5. Was there any arbitration in 1956 as to the boundary between the plaintiff and one Alaka and did the first defendant know about this?

6. Who gave the Catholic Mission St. Michael's premises, adjoining the land in dispute?

E 7. The plaintiff to prove that he is suing in a representative capacity.

8. Did the land in dispute originate from Ugwa Ezika the grandfather of the plaintiff and the first defendant? Was Nnedu Ugwa Ezika the father of the first defendant and of Ebigbo Ugwa Ezika, the father of  
F the plaintiff?

9. Did Ugwa Ezika rent the land in dispute to one Ukatu Osueke and the land descended from Ukatu Osueke to Alfred Ngerem?

G 10. Did 1st defendant 38 years ago approach Ezemonye, another son of Ugwa Ezika and Ebigbo, father of the plaintiff that they should join him to get the land in dispute back from Alfred Ngerem?

11. Did they refuse, telling defendant to claim the land for himself and run the expenses all alone and did first defendant do so?

H 12. Did the matter go before the Amala of Eziokwu and did they decide in favour of the plaintiff?

13. After the Nigerian Civil War did the plaintiff take the matter of the ownership of the land in dispute against the first defendant before the Elders of Umuduruobiaku?

14. What was their decision and can it operate as *res judicate*?

15. Did 2nd defendant challenge the first defendant over the land in dispute before Eziokwu 'Mmanwu' Society?

16. What was decision and can that decision operate as *res judicata*? B

17. How has the land in dispute been that of the 2nd defendant from his ancestors?

18. Why has the plaintiff sued and what is the claiming against the second defendant? C

19. Why has 1st defendant sued the plaintiff and what is he claiming against the plaintiff?

20. Why has the first defendant sued the 2nd defendant and what is he claiming against the 2nd defendant."

The consolidated suits proceeded to trial at the conclusion of which, and after addresses by learned counsel for the parties, the learned trial Judge in a reserved judgment found that title to the land in dispute was not in the Nnedu family but in Iloabuchi (Iroabuchi?) family. He also found that title could not be declared in the plaintiff, Cosmos Ebigbo. Nor was he ever in possession. In the result he dismissed Ignatius Nnedu's action against Cosmas Ebigbo and also the latter's action against Isaac Iloabuchi. He also dismissed Ignatius Nnedu's action against Isaac Iloabuchi. Both Ignatius Nnedu and Cosmas Ebigbo each appealed against the judgment of the trial court upon a number of grounds. D E F

Written briefs of argument were filed and exchanged. At the oral hearing of the appeal, Mr. Egonu SAN learned counsel for Cosmas Ebigbo, the plaintiff in the consolidated suits, sought and obtained leave of Court to argue additional grounds to the effect - G

"(i) That the learned trial Judge wrongly consolidated the plaintiff-appellant's action with two other cases and this brought about confusion resulting in a miscarriage of justice.

(ii) That the issues as settled by the learned trial Judge did not accord in part with the pleadings." H

Both of which had been argued in the briefs. The appeal of the plaintiff in the consolidated suits was allowed on the first of the two additional

grounds and the three actions were remitted to the trial High Court to be heard separately. It is against this judgment that the 2nd defendant in the consolidated suits (Isaac Iroabuchi) has now, with leave of this Court appealed upon 3 grounds of appeal which without their particulars read:

B *"Ground One: The learned Justices of the Court of Appeal erred in law and on the facts when they held that the learned trial Judge was in error in consolidating the three cases in the High Court for convenient trial."*

C *"Ground Two: The ground of appeal relating to consolidation and settlement of issues that is to say the additional ground 5 and on which the Court of Appeal allowed the plaintiff's appeal was incompetent and misconceived and in effect the Court of Appeal erred in law in entertaining the said ground."*

D *"Ground Three: The learned Justices of the Court of Appeal erred in law by entertaining argument on the alleged invalidity of the interlocutory order of rescission of the transfer order (of one of the Suits) made by the trial Judge on 4th March 1980 and thus allowing their judgment to be affected by the said argument on a point not contained in any ground of appeal."*

F Pursuant to the rules of this Court the parties filed and exchanged their respective written briefs of argument. The appeal is essentially between the plaintiff and the 2nd defendant in the consolidated suits, that is, Cosmas Ebigbo and Isaac Iroabuchi and they shall henceforth be referred to as respondent and appellant respectively. The 1st defendant/respondent, Ignatius Nnedu did not file a brief nor did he appear at the oral hearing of the appeal.

G *In the Appellant's brief the following two issues are raised as calling for determination in this appeal, that is to say:*

H *"1. Whether the Court of Appeal was right in its decision that the trial Judge's order of 4/3/80 consolidating the three suits was wrong and if the sole additional ground of appeal (over consolidation) on which the appeal was argued and allowed is competent (Ref. Grounds 1 and 2 at p. 321 and 322-323).*

*"2. Whether the learned Justices of the Court of Appeal were*

*right when they entertained argument attacking the interlocutory decision rescinding the order of transfer of one of the three suits from the High Court to the Magistrate Court, an issue not arising from the sole ground of appeal argued? (Ref. Ground 3 at p. 323).*

One issue is formulated in the Respondent's brief. In my respectful view, however, this lone issue raises in it several other issues that I consider it unacceptable having regard to the grounds of appeal and the judgment appealed against. It is just too cumbersome for a just determination of the appeal. The appellant's issue (1) raises two separate questions, to wit, (a) the competence of the additional ground of appeal on which the Court below based its judgment and (b) the correctness of the decision of the Court below on the issue of consolidation. In my respectful view, therefore, this appeal is better determined on 3 questions, that is,

1. *Is the additional ground of appeal questioning the correctness of the consolidation order, competent?*

2. *Is the Court below right in holding that the 3 suit should not have been consolidated by the trial Judge?*

3. *Is the Court below right in allowing arguments on the transfer order made in respect of one of the 3 suits when there was no ground of appeal on it before the Court?*

Question 1:

*The additional ground of appeal reads:*

"5 (a) *That the learned trial Judge erred in law in consolidating suit No. HOR/27/74 with suits Nos. HOR/89/74 and HOR/90/74 as there were no grounds for doing so and as the trial of the three cases together brought about confusion.*

(b) *That some of the issues as settled by the learned trial Judge disregarded the pleadings of the plaintiff-appellant in Suit No. HOR/27/74."*

When Mr. Egonu SAN applied orally to the Court below for leave to argue this ground, Mr. Ilobi for the present appellant did not object to the application. And leave was granted by the Court. It is now being argued that as the order being sought to be attacked was an interlocutory order and the ground of appeal being of mixed law and fact, leave ought to

have been sought and obtained within the statutory period of 14 days of the making of the order on 14th March 1980. It is further argued that the oral leave granted by the court below did not cure the defect.

With respect, I find no substance in these arguments. **True enough the order for consolidation was made on 4/3/80 at the trial Court's instance and there was no appeal against it at the time. But this does not preclude the order being questioned in an appeal against the final judgment. I refer in this respect to Order 3 rule 22 of the Court of Appeal Rules which provides:**

*"22. No interlocutory judgment or order from which there has been no appeal shall operate so as to bar or prejudice the Court from giving such decision upon the appeal as may seem just."*

I considered the application of this rule in (i) Okobia v. Ajanya (1998) 6 NWLR 348 where I said:

*"On the issue that the court below should not have considered the issue of Exhibit 'M' raised by the defendants before it as there was no application to appeal out of time against the trial court's ruling on exhibit 'M', my simple answer (in addition to what my brother Mohammed, JSC said on the issue) lies in Order 3 rule 22 of the Court of Appeal Rules which provides:*

*"22. No interlocutory judgment or order from which there has been no appeal shall operate so as to bar or prejudice the court from giving such decision upon the appeal as may seem just."*

*The court below was, therefore, not precluded from considering the validity or otherwise of Exhibit 'M' notwithstanding that the defendants did not appeal against the trial court's ruling on the document. By virtue of Order 3 rule 22, they could still raise the issue on appeal as they, in fact, did in the court below. It is not necessary for them to seek extension of time to appeal against the interlocutory decision of the trial court, as submitted by Mr. Obishai, learned counsel for the plaintiff/appellant."*

See also Dr. Iweka v. S.C.O.A. Nigeria Limited SC. 231/1992 decided on 10th March 2000 (as yet unreported). The ground of appeal was raised in an appeal against a final judgment.

**Therefore sections 221 of the Constitution of the Federal Republic of Nigeria 1979 and 25 (2) (a) of the Court of Appeal Act 1976 would not apply to render the ground incompetent.**

It is also contended that for an appeal on an issue to be legally tenable, the appellant must have made it an issue on which the trial court had made a decision such as opposing the making of the order while being considered by the trial court. Reliance is placed on Adegoke Motors Ltd. v. Adesanya (1989) 3 NWLR 250 at p. 272 A-B.

In Adegoke Motors Ltd. (supra) Oputa JSC observed:

*"The defendants did not attack the Writ or its Service in the High Court. The High court gave its judgment without the validity or otherwise of the Writ or/and its Service being raised as an issue, can that issue be properly raised for the first time on appeal to the Court of Appeal? To constitute an appeal to that Court on the issue of the writ, that issue should have been argued and ruled upon by the High Court as was done in Skenconsult and Nwabueze supra. There was not even an application by the appellants to the Court of Appeal or to this court for leave to argue an Issue not taken up at the trial Court. May be not, as this was not just arguing a point not taken up in the trial Court but rather putting forward a completely new case on appeal, a case different from what the trial Court was called upon to decide."*

**In the present case, the order of consolidation was made by the trial Judge suo motu and without asking the parties to address him on it. He did not stop there; he went on to settle the issues to be determined in the consolidated suits. In such circumstance I cannot see how the respondent was precluded from raising the issue on appeal to the Court of Appeal. I would have held otherwise if the parties had been given an opportunity to address the Court on it and the respondent had consented to the order being made.**

The additional ground of appeal has also been attacked as not complying with Order 3 rule 2 (2) and (4) of the Court of Appeal Rules in that particulars of the error complained of were not given. I find no substance in this argument. I have examined the ground of appeal and I am satisfied that it complied with the Rules of Court. The appellant did

not object to it at the hearing before the Court below. Nor has it been suggested that he was taken by surprise.

I therefore answer Question (1) in the affirmative.

### Question 2

B This is the main question in this appeal and deals with the correctness or otherwise of the order of consolidation made by the learned trial Judge. The Court below was of the view that the order was wrongly made and that, therefore, there should be a retrial of the suits involved. The appellant thinks otherwise.

C For the appellant, it is contended that an order of consolidation is essentially for the convenience of the parties who are saved both time and the costs of repeated litigation in cases involving some common questions touching the suits consolidated. It is also contended that the making of the order is at the discretion of the trial court. I agree with these statements of law. It is submitted that the order was properly made and that if it was found not to be properly made, the Court below was not obliged purely for that reason to interfere with the trial court's articulate judgment on the merits without its being shown that a miscarriage of justice had occurred. Toriola v. Williams (1982) 7 SC. 27 at 57-58 is cited in support of this submission. It is further submitted that the respondents who actively took part throughout the hearing without raising any objection could not at the stage of brief writing seriously complain of any miscarriage of justice or that the procedure adopted by the learned trial Judge was erroneous. Attah Ors. v. Nnacho & Ors. (1965) NMLR 28, 31 per Idigbe JSC, is cited in support.

G It is argued that the order of consolidation was properly made in that the 3 suits are in respect of the same land as shown on the plans of the parties, Exhs. A, B and C and that common questions arise in the 3 suits.

H For the respondent, it is conceded that the High Court of Imo State at all times relevant to this matter had power under Order 11 rule 7 of the High Court Rules of eastern Nigeria to order consolidation of suits before it but such an order, it is submitted, could not be made to enable a court to try a case properly before it with a case not properly before it.

Obiekweife and Ors. v. Unumma & Anor. (1957) 2 FSC 70, 71 is cited in support of this submission. It is argued that the order of consolidation brought so much confusion into the respective case of the parties that at a stage at the trial it became necessary for the appellant to amend his pleadings in suit HOR/89/74. It is observed that there are 3 statements of claims and 3 statements of defence and that the cases of the parties as disclosed in the pleadings were so conflicting that a joint trial should not have been ordered. It is submitted that the consolidation of the three suits caused embarrassment, injustice and miscarriage of justice against the respondent as where the evidence of the appellant was used by the trial Judge in resolving suit HOR/27/74 where he was not a party. It is also contended that the parties were not given opportunity to impugn the plans of the others which were admitted in evidence not by consent of the parties but by order of the trial court. It is argued that the Court below was justified in finding that a miscarriage of justice resulted from the order of consolidation. On the identity of the land in dispute in each of the 3 suits, it is submitted that the lands are different. It is observed that Ojukwu land or "Ala Ojukwu " or "Ala Nwa Ojukwu" is a vast expanse of land and various portions of it owned by different people bear the same name.

Order 11 rule 7 empowered the trial court to consolidate causes or matters pending before it. The rule provided:

*"7. Causes or matters pending in the same Court may by order of the Court be consolidated, and the court shall give such directions as may be necessary with respect to the hearing of the causes or matters so consolidated."*

The rule did not say much but it has been subject of case law. **The circumstances under which consolidation may be ordered have been laid down in several cases. In Diab Nasr. v. Complete Home Enterprises (Nig) Ltd. (1977) 5 SC. 1, 11; (1977) ANLR 93, 100-101, this Court, per Irikefe JSC (as he then was) observed:**

*"We pause here to observe that the application to consolidate the two actions was brought by the appellant. The main purpose of consolidation, it has been said, is to save costs and time, and therefore*

*it will not usually be ordered unless there is 'some common question of law or fact bearing sufficient importance in proportion to the rest' of the subject matter of the actions 'to render it desirable that the whole should be disposed of at the same time'. See Payne v. British Time*

**B** Recorder co. (1921) 2 K. B. p. 16".

The learned Justice of the Supreme Court added:

*".....once two cases are consolidated, they must be determined as a consolidated matter. The court cannot ignore one and determine the other."*

**C** The same principle applies in the joinder of parties as in consolidation of pending suits. As regards joinder of parties, Scrutton L J said in Payne v. British Time Recorder co. (1921) 2 K B 1 at p. 16:

**D** *"Broadly speaking, where claims by or against different parties involve or may involve a common question of law or fact bearing sufficient importance in proportion to the rest of the action to render it desirable that the whole of the matters should be disposed of at the same time Court will allow the joinder of plaintiffs or defendants, subject to its*  
**E** *discretion as to how the action should be tried."*

The principle enunciated in the above passage was applied to cases of consolidation. See Daws v. Daily Sketch (1960) 1 WLR 126; (1960) 1 ALL E. R. 397; Horwood v. Statesman Publishing Co. Ltd. (1929) All E. R. 397; Diab Nasr v. Complete Home Enterprises (Nig.) Ltd. (supra).

**G** There are circumstances, however, that will militate against consolidation of two or more pending actions. One such circumstance is where the plaintiff in one action is the same person as the defendant in another action unless one action can be ordered to stand as a counterclaim in another action. Another is where different legal practitioners have been briefed as where there are several actions by different plaintiffs represented by different legal  
**H** practitioners. As to the application of this latter exception see the case of Healey v. Waddington & sons Ltd. (1954) 1 WLR 688; (1954) 1 All ER 861. Consolidation will also be refused where it would likely cause embarrassment at the trial such as where the actions

are by different plaintiffs, based on the same libel, and the defences are different - see Daws v. Daily Sketch (supra).

Where an order for consolidation is made and it turns out at the trial that the order should not have been made, the order should be revoked and the actions deconsolidated - see: Lewis v. B Daily Telegraph (No. 2) (1964) 2 Q. B. 601, Obiekweife v. Unumma (1957) 2 FSC 70, 71.

Finally, on the law, the consolidation of two actions does not render the evidence tendered in one ipso facto evidence in the other - Dugbo v. Kporoaro (1958) WNLR 73. C

I now turn attention to the reasons given by the Court below for deciding the way it did and whether such reasons are tenable. The Court below, per Omosun JCA, laid down the circumstances under which consolidation could be ordered. The learned Justices of the Court of Appeal D said:

*"Now where to or more causes or matters are pending in the same Court, the court may order those causes or matters to be consolidated - Order 2 R. 7 High Court Rules. Generally the Court will so E consider if*

*(a) Some common question of law or fact arises in both or all the causes or matters, or*

*(b) the rights to relief are claimed in respect of or arise out of the same transaction or series of transactions. F*

*(c) for some other reason it is desirable to make an order under the rule - Order 4 R. 10 S.C. White Book - English Rules.*

It was pointed out by Baker J in Iman Lawani Lediju v. Daini Odulaja (1943) 17 NLR 15 that the object for which the rule was frame G was 'to save the multiplicit of actions with the attendant costs where one action would serve to determine the rights of a number of persons where the said persons have the same interest in one cause or matter.' Similarly Idigbe JSC in Attah v. Nnacho (1964) 1 All NLR 313 at 316-7 observed H that 'in first place consolidation of suits is a measure adopted for the convenience of the parties and for saving costs in litigation.'

In Ekun & Ors. v. Messrs. A. Younan & Sons and Anor. (1959)

WRNLR 190, the plaintiffs in two different suits claimed damages on behalf of the defendants of two persons who had been killed as a result of the collision of two cars belonging to the two defendants and driven by their respective drivers. The plaintiffs alleged negligence on the part of both or either of the two drivers. It was held that the two suits were properly consolidated. Consolidation cannot be ordered if it is clear on the pleadings that the issues involved are primarily between the plaintiffs - Chief Sam Warri Esi v. Shell B. P. Development Co. of Nigeria Ltd., Olu of Warri v. Shell B. P Development Co. of Nigeria Ltd. (1958) 3 FSC 94 (1959) WRNLR 31. In that case, the issues were primarily between the two plaintiffs and even though the consolidation order was made with the consent of the parties, the Federal Supreme Court held that it was unfortunate that the order of consolidation should have ever been made.

Also it is the law that two actions cannot be consolidated where the plaintiff in one action is the defendant in the other action unless it is possible to order that one action should stand as a counter claim or third party proceedings in the order - See generally PRACTICE AND PROCEDURE - by Aguda (Green Book) Article 13.23 page 180."

I agree with the law as stated in the passage above.

Turning to the consolidated cases before it, the Court observed:  
**"In Suit No. HOR/27/74, Cosmas Ebigbo is plaintiff. In suit No. HOR/89/74 he is defendant. In suit No. HOR/89/74 Ignatius Nnedu is plaintiff. In suit No. HOR/90/74 he is also plaintiff and Isaac Iroabuchi is the defendant. Isaac Iroabuchi is also the defendant in suit No. HOR/27/74. Also Isaac Iroabuchi is not involved in HOR/89/74. And Ignatius Nnedu is not involved in suit No. HOR/27/74. It is noted that the suit No. HOR/27/74 is for declaration of title, damages for trespass and injunction while the other two suits are for trespass simpliciter. Different considerations will arise. Possession is the main consideration in the trespass cases. It seems to me that the order for consolidation was not only incongruous but apt to bring confusion. Not only were the reliefs claimed different but they did not arise from the same transaction of series of transactions. The defences to the**

*various suits were bound to be different - Daws v. Daily Sketch & Daily Graphic (1960) 1 All E.R. 397. Different laws would be applicable in resolving the issues.*

*Now this is what the learned Judge did. He consolidated the three suits, one of the suits he had no jurisdiction over. He did it all on his own - suo motu . The parties were not the same in all the suits. The reliefs claimed were different and the defences were bound to be different. The Subject matter was not the same. The actions did not arise from the same transaction or series of transactions. I am prepared to say that in my judgment the learned judge erred in principle in the order he made. Three sets of different counsel appeared in the cases. The main purpose of consolidation, it has been said, is to save costs and time, and therefore, it will not usually be ordered unless there is 'some common question of law or fact bearing sufficient importance in proportion to the rest of the subject matter of the actions to render it desirable that the whole should be disposed of the same time' see Payne v. British Time Recorder Co. (1921) 2 K B p. 16 at 21, Nasr v. C.A.E Ltd. (1977) 5 SC. 1. "*

**The observations in this passage are quite apt. I have earlier in this judgment highlighted the penultimate paragraphs of the pleadings in these cases. I cannot find a question of law or fact common to all. Moreover, Suit No. HOR/90/74 having been transferred to the Magistrate's Court on 3/3/80 was no longer properly before the learned trial Judge and he could, therefore, not properly consolidate it with the other causes or matters then pending before him. In the case of the other suits, Suit HOR/27/74 is a straight fight for title to the land in dispute between the appellant and the respondent while suit HOR/89/74 is a fight between the respondent and the 2nd Respondent. The respondent who is plaintiff in HOR/27/74 is the defendant in HOR/89/74 neither of which, going by the pleadings in each, can be said to be a counter-claim to the other or that third party proceedings arise. In such circumstance, it was wrong to consolidate those two suits.**

**I say that Suit No. HOR/90/74 was not properly before the**

trial judge on 4/3/80 when he made the order of transfer because he had on 3/3/80 pursuant to the power vested in him by section 46(1) of the High Court Law of Eastern Nigeria (then applicable), transferred that case to the Magistrate's Court. I have searched through the High Court Law, and I can find no provision empowering him to subsequently stay that order of transfer. By the order for stay which he issued on 4/3/80, the learned trial judge, with respect to him, acted without jurisdiction and that order was, therefore, void. Suit HOR/90/74 was not pending before him on 4/3/80; it was, therefore, wrong of him to consolidate it with the other two suits properly pending before him.

It has been argued for the appellant that the trial Judge had a discretion to consolidate the cases before him and that having done so in this case and there having been no objection from the respondents, they could not complain after losing at the end of the trial at which they took an active part. I cannot agree more with the answer given to this submission by the Court below. Omosun J.C.A. said, and I agree entirely with him:

*"Exercise of discretion does not entail that the Judge can arbitrarily, or unilaterally and without considering the rules governing the particular matter act as he likes. The parties to the dispute were not heard on the issue of consolidation and the learned Judge was in serious error in consolidating the suits....."*

*It is true in general that where a party has consented to a wrong procedure at the trial and in fact suffers no injustice, it would be too late to complain on appeal that the wrong procedure was adopted or followed. This is chief Ilobi's contention. See G. A. Akhiwu v. The Principal Lotteries Officers, Midwestern State & Anor. (1972) 1 All NLR 299. C.F.A.O. v. Onitsha Industries Ltd. (1932) 11 NLR 102 and Colony Development Board v. Kamson & Ors. (1955) 21 NLR 75. The case in hand is different. First there was not consent by the parties. We were invited to hold there was consent by implication since counsel and the parties were in court when the order was made. I decline the invitation to so hold. Secondly in my view it is shown clearly and visibly exceptional*

*circumstances exist disclosing a radical mistake in law or procedure or a miscarriage of justice that the irregularity cannot be over looked and defeated on the altar of lateness of making the complaint."*

Not only did the learned trial judge consolidate the suits without there being an application to that effect from any of the parties and without hearing the parties on it, he also settled the issues suo motu without reference to them. At least, there is nothing on record to show to the contrary. The learned Judge presumably acted pursuant to Order XXXII rule 1 of the High Court Rules of Eastern Nigeria then applicable, but prudence required that the parties should have been involved. As was rightly observed by the Court below issues were settled without due regard to the pleadings.

In the light of all these, it cannot be said that a miscarriage of justice was not occasioned by the irregular way the learned trial judge proceeded to order consolidation of these cases. In the circumstance, much as I loathe deciding a case on technicality I have no alternative in this case than to answer Question (2) in the affirmative. Question 3:

It is submitted by appellant's learned counsel, Mr. Ilobi that as there was no ground of appeal challenging the validity of the stay of order of transfer of Suit HOR/90/74 by the learned trial judge, the Court below ought not allow any arguments on it. With respect to learned counsel, I do not share his views. The issue of transfer and stay of order of transfer of Suit HOR/89/74 arose in the process of showing that that suit was not properly before the trial court when the order of consolidation was made. The issue was intrinsic to determining whether the order was properly made. It is my humble view that it was properly raised without the need for a ground of appeal on it.

I, therefore, answer Question 3, too, in the affirmative. In conclusion, all the issues raised in this appeal having been determined in favour of the respondent this appeal stands dismissed. I affirm the judgment of the Court below and the consequential order of retrial made by it. I award to

the respondent against the appellant N10,000.00 (ten thousand Naira) costs of this appeal.

### BELGORE JSC

B Once the trial judge exercise his power of transfer to a Magistrate court for trial from the three cases consolidated by him, his has no power of staying that transfer especially when the parties never prayed for it after exercising his powers of transfer to Magistrate Court under S. 46 (1) High Court Law of Eastern Nigeria he was funstus officio to deal with the matter. The section has not conferred on the court the jurisdiction to stay the transfer. All the steps were taken suo motu by the learned trial judge. His purporting to try the three suits together again made the trial a nullity. I therefore agreed with the judgment of my learned brother, C Ogundare, JSC, which I exhaustively discussed at the conference that this appeal is devoid of merit on all the issues raised. I also dismissed it in affirming the decision of court of appeal with N10,000.00 cost to respondent against the appellant.

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### IGUH JSC

F I have had the privilege of reading in draft the judgment just delivered by my learned brother, Ogundare, J.S.C. and I am in complete agreement with him that this appeal has definite merit and should be allowed.

G The main issue for determination in this appeal is whether the court below was right in its decision that the trial court's order of the 4th March, 1980 consolidating the three suits numbers HOR/27/74, HOR/89/74 and HOR/90/74 was wrong.

H In arriving at a decision on this issue, it is important to observe that on the 3rd day of March, 1980, the learned trial Judge, Uche, J. had made an order transferring suit No. HOR/90/74 from the High Court of Justice, Orlu Judicial Division to the Chief Magistrate's Court for hearing and determination.

However, on the 4th March, 1980, the learned trial Judge made another

order purporting to stay his said order of transfer and proceeded suo motu to consolidate the three suits numbers HOR/27/74, HOR/89/74 and HOR/90/74 for the purpose of hearing and determination under the provisions of Order 2 Rule 7 of the High Court Rules, 1963. This order of consolidation was, on appeal, set aside by the Court of Appeal and the three suits were remitted to the High Court, Orlu for hearing separately by another Judge of that Judicial Division. It is against this decision of the Court of Appeal that the defendant-appellant has now appealed to this court.

Order 2 Rule 7 of the High Court Rules under which the three suits were consolidated provides as follows:-

*"Causes or matters pending in the same court may, by order of the court be consolidated, and the court shall give such directions as may be necessary with respect to the hearing of the causes or matters so consolidated"* (Underlining supplied for emphasis)

It is clear that under the said rule of court, causes or matters pending in the same court may, by the order of the court, be consolidated for purposes of hearing and determination. When, therefore, suits are not pending in the same court, it does not appear that they can be properly consolidated for the purpose of hearing. Where cases are pending in different courts, it stands to reason that they cannot be consolidated until they must all have been brought together in the same court by appropriate orders of transfer. The question now is, when are suits said to be pending in the same court?

Suits are said to be pending in the same court if they have been filed, in the case of the High court, in the same Judicial Division or Registry. It would not matter that some of such cases have been assigned to different Judges of the same Judicial Division. As long as the cases concerned were filed in the same Registry or Judicial Division, they are deemed to be pending in the same court.

In the present proceedings, it cannot be seriously disputed that whereas as at the 4th day of March, 1980, suits numbers HOR/27/74 and HOR/89/74 were pending at the High Court of Justice of the Orlu Judicial Division, suits No. HOR/90/74 was pending in a different court, namely,

the Chief Magistrate's Court for hearing and determination. I cannot, therefore, see my way clear how the learned trial Judge could properly consolidate suits numbers HOR/27/74 and HOR/89/74 pending before his court with suit number HOR/90/74 which he had effectively transferred to the Chief Magistrate's court, an entirely different court from the High Court of Justice of the Orlu Judicial Division. He would, in my view, have been able, properly, to order the consolidation of the three cases if he had by means of an order under his hand and the Seal of the High Court firstly retransferred suit No. HOR/90/74 from the Chief Magistrate's Court back to the High court pursuant to the provisions of section 51(1) of the Magistrates' Courts Law of Eastern Nigeria, 1963 then applicable to Imo State of Nigeria. This, the learned trial Judge failed to do.

I think I ought to observe, in fairness to the learned trial Judge, that although he indicated in his record book just before his order of consolidation that he was staying his order of transfer of Suit No. HOR/90/79 to the Chief Magistrate's court, a stay of his order of transfer is not tantamount to a revocation or setting aside of that order. In my view, his order of transfer of the suit to the Chief Magistrate's Court with effect from the 3rd March, 1980 remained valid although purportedly stayed. Stay of a judgment or an order of court must be distinguished from a revocation or setting aside of such a judgment or order. The order of transfer of suit number HOR/90/74 by the learned trial Judge to the Chief Magistrate's Court was at no time set aside or revoked. It remained valid, in my view, at the time the order of consolidation in issue was made. I think the learned trial Judge was in error by consolidating suits numbers HOR/27/74 and HOR/89/74 which were pending in his court with suit No. HOR/90/74 which, at all material times, was pending in an entirely different court, to wit, the Chief Magistrate's Court. The Court of Appeal was; therefore, right in pronouncing the said order of consolidation of the three suits by the trial court as erroneous on point of law.

It is for the above and the more detailed reasons contained in the judgment of my learned brother, Ogundare, J.S.C. that I, too, dismiss

this appeal and affirm the judgment of the court below and the order of retrial therein made. I abide by the consequential orders, including those as to costs therein contained.

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### UWAIFO JSC

It seems to me that the proceedings at the trial Court in respect of the three consolidated cases may have been affected by a combination of procedural irregularities which would justify the lower court's decision that the order of consolidation should not have been made and that the parties should have had their cases heard and determined separately. The consolidation order was therefore set aside and the cases remitted to the High Court for individual hearing. That decision has been affirmed by my learned brother Ogundare JSC in his judgment which I had the opportunity of reading in advance, and I do agree with it. It is the law that when proceedings have been bedevilled with irregularities of law, procedural or substantive, such that findings made and conclusions arrived at therein cannot be other than perverse, they ought not to be allowed to stand. They should be set aside. That, in essence; was what the lower court found should be done, which, to meet the justice of the case, also led to the consequential order. I find no reason to disturb that decision. I too would dismiss this appeal and order separate hearing of the cases in question. I abide by the order for costs.

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### EJIWUNMI JSC

I was privileged to have read in advance, the leading judgment just delivered by my learned brother, Ogundare JSC. In that judgment, issues raised in the appeal have been dexteriously considered and I agree for the reasons given, that this appeal lacks merit. But I would add a few words of my own. This is relation to the argument put forward for the appellants that the court below was not right to have allowed the appellants to raise and argue in that court, a ground of appeal against the order of consolidation made, suo motu by the trial court. One of the complaints

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of the appellant would appear to be that as the Respondent who was appellant in the court below had failed to appeal timously against the interlocutory order of consolidation made by the trial judge, the appellant has lost his right to appeal against the said order. The Court below, it is argued, has therefore erred in allowing the respondent as appellant in that court to argue the said ground of appeal. I think that argument is misconceived in view of the provisions of Order 3 Rule 22 of the Court of Appeal Rules, which reads:-

"22. No interlocutory judgment or order from which there has been no appeal shall operate so as to bar or prejudice the court from giving such decision upon the appeal as may seem just."

This rule was considered by this court in OKOBIA V. AJANYA (1998) 6 NWLR (pt. 554, 348, where upon facts not dissimilar from those disclosed in the instant case, Ogundare JSC at 364, observed that:-

"By virtue of Order 3 Rule 22, they could still raise an appeal as they, in fact, did in the court below. It is not necessary for them to seek extension of time to appeal against the interlocutory decision of the trial Court....."

Reverting to the instant appeal, I must therefore respectfully hold that the court below was right to have allowed the appellant to appeal against the interlocutory order earlier made in the proceedings by the trial court, when arguing other grounds that arose from the judgment of the trial court. Surely, unnecessary delay in the final determination of disputes between parties, would be avoided if advantage is taken of the provisions of Order 3 Rule 22 (supra), where appropriate.

Apart from the above, the Court below was right to have concluded from the matters placed before it that the decision and orders made by the trial court had occasioned a miscarriage of justice. This is because, it is my respectful view that a judgment where the learned trial judge irregularly consolidated suo motu suits filed by various parties, settled issues for the determination of the consolidation actions without regard to the pleadings filed by the parties, and without hearing the opinion of their respective counsel thereon, cannot be said to have been judicially and judiciously determined. It is surely a travesty of justice if the

judgment is not overturned, and an order of retrial made.

In the result, I also dismiss this appeal for the above reasons, and for the fuller reasons given in the leading judgment of my brother, Ogundare JSC. I therefore affirm the judgment of the Court below and the consequential order of re-trial made by it. The respondent is awarded B against the appellant the sum of N10,000.00 (Ten thousand Naira) as costs of this appeal.

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