

SUPREME COURT OF NIGERIA

14TH JULY, 2000. SC 48/1992

**CORAM:- S. M. A. BELGORE, I. L. KUTIGI, U. MOHAMMED,
S. O. UWAIFO, A. O. EJIWUNMI, JJSC.**

**KHALIL & DIBBO TRANSPORT LTD PLAINTIFF/RESPONDENT
AND**

1. S. T. ODUMADE	DEFENDANT
2. AKINGBEHIN TINUBU	DEFENDANT/APPELLANT
3. CHRIST APOSTOLIC CHURCH	DEFENDANT

COURTS - General jurisdiction - Power to order a non suit - Once the power is omitted in the rules of court - The High Court cannot exercise that power under its general jurisdiction.

COURTS - Inherent powers - Non suit - Order of - Section 6 (6) (a) of the Constitution - Although that subsection provides that the courts shall have inherent powers - But a court may not make an order of non suit - When the Rules of that court have dispensed with that power.

COURTS - Power - Conferred by statute - Inherent power - When a power that is conferred on a court by statute is taken away - It ceases to be power that can be exercised - And so there can be nothing inherent about it to make it exercisable.

JUDGMENTS - Appeal - Retrial order - When a trial court fails in its appraisal of evidence - Circumstances when the appellate court will order a retrial.

JUDGMENTS - Order - Striking out - Case heard to conclusion - It is unusual to strike out a civil case which has been heard to conclusion - Except where the court later found that it has no jurisdiction - Or where the plaintiff lacks locus standi.

TRESPASS - Action for trespass - Possession - Acts of - A plaintiff who fails to prove title - Will not necessarily fail in his action for trespass - If he established acts of possession

FACTS

In the High Court of Lagos State, the plaintiff/respondent sued the defendants claiming for: a declaration that he is entitled to a certificate of occupancy in respect of the land in dispute, injunction and damages for trespass. The plaintiff in its pleading averred that it acquired title in respect of the land in dispute by virtue of a Deed of Lease dated 9th day of March, 1955 from Candido Da Rocha. The plaintiff has been in physical possession of the land since 1955. In exercising its right to be on the land, it erected office building and staff quarters on part of the Land over the years. It has since 1955 been paying rents regularly to its lessor, (now Mrs. L. E. Turton nee Da Rocha), as well as tenement rates and other fees to the Mushin Local Government in respect of the land. It further averred that sometime in 1978, the 1st defendant entered upon the land unlawfully and erected a hut and ramshackle building on part of it. He was then duly warned through a letter by the plaintiff's solicitors, but did not desist from his acts of trespass. The plaintiff arranged to erect a wall fence round the land to protect it from encroachment. The contractors employed to do this job were prevented by the 1st and 2nd defendants in December, 1978. The plaintiff also concluded arrangement with their building contractors to demolish its building on part of the land in order to further develop the land. Sometime in 1985 as the contractors were carrying out this assignment, the 2nd defendant prevented them from continuing, with threat to their lives and property. The 2nd and 3rd defendants filed a joint statement of defence. They claimed that the 2nd defendant was the lawful Attorney of the Tinubu family, Owners of a vast area of land of which the land in dispute formed part; that the Tinubu family got the land from the Oloto Chieftaincy family by a grant made in 1834 to Madam Iyalode Tinubu, that out of the said land the 1st defendant was given land where he built hotels, the 2nd defendant was given land where he has his family house and that the 3rd defendant

was given land where it erected a Church building. The 1st defendant in his statement of defence claimed that he bought a piece of land, part of the land in dispute from the family of Madam Iyalode Tinubu in 1963 upon which he built a house and let to tenants. At the close of pleadings, the issues joined were (1) who as between the plaintiff and the defendants had better title to the land; (2) if neither proved title, who was earlier in possession of the land. The parties led evidence and tendered documents in support of their pleadings.

At the conclusion of trial the learned trial judge in his judgment, appeared to have considered only the issue of title of the plaintiff. He came to the conclusion that there was no evidence as to how Candido Da Rocha, the plaintiff's lessor acquired his title to the land. On that basis he was not minded to dismiss the suit but thought that if an order of non-suit was possible under the Lagos State High Court (Civil Procedure) Rules 1972 then applicable he might have called on counsel to address him on the propriety of making the order. He then struck out the case. Both parties appealed against that decision to the Court of Appeal. That court dismissed both the appeal and cross-appeal and affirmed the judgment of the trial court striking out the suit. The 2nd defendant has further appealed to the Supreme Court raising four issues; but the Supreme Court after hearing the appeal framed two issues.

ISSUES FOR DETERMINATION

1. Whether the trial court's judgment, affirmed by the Court of Appeal, adverted to all the evidence before it in arriving at its decision striking out the suit on the ground that the then Rules of the Lagos High Court had no provision for a verdict of non-suit.

2. If the question (1) above is answered in the negative, whether this is a case to be remitted to the High Court of Lagos, before another judge other than the one that tried the matter, for a retrial.

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

Judgments - Order

1. It must be said that it is unusual to strike out a civil case which has

been heard to conclusion by a trial court. Such a case should be decided upon the evidence available and the applicable law. The known exception to this is where the court later found that it has no jurisdiction to hear and determine the case after it had been concluded. The only order that can
B then be made is one striking out the case: see Okoye v. Nigerian Cons. & Furniture Co. Ltd. (1991) 6 NWLR (pt. 199) 501; or where the plaintiff lacks locus standi: See Oloriode v. Oyebi (1984) N.S.C.C. (vol. 15) 286. In the present case, the striking out of the suit after the parties had con-
C cluded their evidence was not the proper order. The two courts below were in error in this regard. (p. 2740 B)

Courts - Inherent Powers

2. Although s.6(6)(a) of the Constitution provides that the judicial pow-
D ers vested in the courts shall extend to all inherent powers and sanctions of a court of law, it has not been decided that a court may make an order of non-suit even when the rules of that court appear to have dispensed with that power. (p.2740 F)

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Power - Conferred by Statute

3. Power that is conferred on a court by statute or by Rules of Court cannot be called inherent power. When therefore that power is taken
F away, it ceases to be power that can be exercised and so there can be nothing inherent about it to make it exercisable. It has been observed that inherent power, though omnibus, does not extend the jurisdiction of a court of record: see Akilu v. Fawehinmi (No. 12) (1989) 2 NWLR (pt. 101) 122 at 197. (p. 2740 G)

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Courts - General jurisdiction

4. The High Court Procedure Rules 1972 of Lagos State omitted the Order under which the High Court could exercise its power to order a
H non-suit. It was believed to be an oversight. It has now been restored under Order 37 High Court of Lagos State (Civil Procedure) Rules 1994. But once it was omitted, it would seem that the High Court could not make that order because by virtue of the general jurisdiction conferred to

the High Court of Lagos in 1962, it could only, in addition to any other jurisdiction conferred by the Constitution of Nigeria or by the Law of the High Court or any other enactment, possess and exercise "all the jurisdiction, powers and authorities which are vested in or capable of being exercised by the High Court of Justice in England." It has been said that since the introduction of the 1883 rules of the Supreme Court, the High Court of England retains no power to enter a non-suit: see the Supreme Court Practice 1999 Vol. 1, page 399-340, Ord. 21/5/1; Fox v. Star Newspaper Co. (1900) A.C. 19. It would therefore appear that if the High Court of England no longer has jurisdiction to order non-suit, the High Court, Lagos cannot exercise that power under its general jurisdiction. It can only do so if its own Rules of Court provide for it. I think the power to non-suit would appear to be power specifically conferred on a court. (p. 2741 A)

Trespass - Action for trespass

5. In the absence of a valid title the respondent may still succeed in maintaining an action for trespass because the law is that even if a plaintiff is a trespasser, he can maintain an action against a later trespasser for damages and injunction: see Nwosu v. Otunola (1974) 1 ALL NLR 533 at 534; Amakor v. Obiefuna (supra) at page 120. That is why a plaintiff who fails to prove title will not necessarily fail in his action for trespass. If he establishes by evidence acts of possession, his claim for damages for trespass and an order of injunction may be granted: see Oluwi v. Eniola (1967) NMLR 339 at 340. (p. 2741 H)

Appeal - Retrial order

6. When a trial court fails in its appraisal of evidence and the appellant court is in as good a position as the trial court to reappraise such evidence and make appropriate findings thereon from the printed record and/or documents put in evidence, it will do so instead of ordering a retrial: see Fashanu v. Adekoya (1974) 6 SC 83 at 91; Nneji v. Chukwu (1996) 10 NWLR (pt. 478) 265 at 278. But when the evidence is such that the impression of the trial court of the witnesses as to their credibil-

ity is bound to play a decisive role, the appellate court which naturally, had no advantage of making such impression cannot embark on the re-appraisal of the evidence. It will order a retrial, unless the case can be brought to an end by the appellate court on other crucial grounds: see B Ugwu v. Ogbuzuru (1974) 10 SC 191 at 192; Olatunji v. Adisa (1995) 2 NWLR (pt. 376) 167 at 180-181. (p. 2742 D)

NOTABLE POINTS OF INTEREST

BELGORE JSC

C 1. What a court may do when the absence of non suit in the Rules may occasion a miscarriage of justice.

It is no doubt an oversight to omit "non-suit" in the former Rules of Lagos High Court, but where by evidence before trial court the absence D of "non suit" may occasion miscarriage of justice it is right for the court to strike out the case rather than dismiss it. By dismissing a case of this nature, the person in possession for a long time with documents of title or right to occupancy may permanently be deprived of his right merely E on procedural technicality. This certainly is not the purport of judicial adjudication supposed to see that justice is done. (p. 2743 D)

EJIWUNMI JSC

F 2. Consequence of a trial court failing to discharge its primary duty

It is settled that the cardinal duty of a trial Court was to make such findings as deemed appropriate upon facts led at a trial. Where a trial court failed to discharge that duty, it could be said that there had been a miscarriage of justice. This is because where the trial Court has failed to G discharge this primary duty, it becomes difficult for an appellate Court to consider properly the merits of an appeal in the absence of the findings of the trial. This is moreso where the evidence would require for consideration of the credibility of witnesses who gave evidence at the trial. H (p. 2745 D)

3. Principles governing a review of the facts by an appellate court

The Supreme Court has in a number of cases laid down the principles

governing a review of the facts by an appellate Court. See Chinwedu v. Mbamali (1980) 3-4 SC. 31 at page 75 per Obaseki, JSC; Enang v. Adu (1981) 11-12 SC. 25 at page 38 per Nnamani, JSC; Atanda v. Ajani (1989) 3 NWLR (pt. 111) 511 at page 525 where CRAIG JSC, observed that an appellate Court is only left with a duty to see

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(a) Whether there was evidence to support the findings and/or the decision of the trial Court.

(b) Whether the trial Court has made a correct assessment of the evidence before it.

C

(c) Whether the trial Court has wrongly accepted or rejected any evidence tendered at the trial, or

(d) Whether there has been an erroneous appraisal of facts leading to erroneous conclusions in the case.

See also A. Anyaoke v. Dr. F. Adi (1986) 3 NWLR 731 at page 742. (p. 2745 F)

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4. In the absence of non suit in the Rules what a trial court should do in a case that could have been non suited

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The other error of the trial Court was also to have struck out a suit upon which there was evidence before him. If the procedural rules, then applicable to the trial of cases at that time in the High Court of Lagos State made no provision for an order of non-suit to be made, then it cannot be right to strike out a suit, which perhaps could have been non-suited. As there was no such provision in the Lagos State High Court (Civil Procedure) Rules 1972, then the trial court should have arrived at its decision after the proper evaluation of the evidence led at the trial. (p. 2746 D)

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REPRESENTATION

T. O. S. Fadahunsi Esq., for the Appellant

Silas Ukairo Esq., for the Respondent

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CASES REFERRED TO

Okoye v. Nigerian Cons. & Furniture Co. Ltd. (1991) 6 NWLR (pt. 199) 501

Esuku v. Keko (1994) 4 NWLR (pt. 340) 625

Gombe v. P.W. (Nig) Ltd. (1995) 6 NWLR (pt. 402) 402

Akilu v. Fawehinmi (No. 12) (1989) 2 NWLR (pt. 101) 122 at 197

Aromire v. Awoyemi (1972) 2 SC 182

B Amakor v. Obiefuna (1974) 1 ALL NLR 119 at 126

Nwosu v. Otunola (1974) 1 ALL NLR 533 at 534

Ajero v. Ugorji (1999) 10 NWLR (pt. 621) 1 at 11, 17

Olaloye v. Balogun (1990) 5 NWLR (pt. 148) 24 at 39-40

C Nneji v. Chukwu (1996) 10 NWLR (pt. 478) 265 at 278

STATUTE & RULES REFERRED TO

Constitution of the Federal Republic of Nigeria, 1979; s.6 (6) (a)

High Court of Lagos State (Civil Procedure) Rules, 1972;

D High Court of Lagos State (Civil Procedure) Rules, 1994; Ord. 37

LEAD JUDGMENT BY UWAIFO JSC

E In this suit filed in the High Court of Lagos State on 26 December, 1985, the plaintiff, now respondent, sought three reliefs, namely:

"1. A declaration that the Plaintiff is entitled to a certificate of Occupancy in respect of the Building and land comprised in the Deed of Conveyance dated 20th June 1940 and registered as No. 30 at page 30 in Volume 557 of the Lands Registry in the office at Lagos by virtue of their Deed of Lease dated 9th day of March 1955 and registered as No. 17 at page 17 in volume 2 of the Lands Registry in the office at Lagos then known as 99 Agege Motor Road, Idioro, Mushin, Lagos State but now re-numbered 19 Agege Motor Road, Idioro, Mushin Lagos State.

G *2. An injunction to restrain the defendants their servants or agents from remaining on or continuing in occupation of the said building and land.*

H *3. #1,200 damages for trespass and forcible entry by the defendants on the building and land situate lying and being at 19 Agege Motor Road, Idioro, Lagos State and comprised in the above-mentioned Deed of Lease dated 9th March, 1955."*

The statement of claim shows that, apart from the averment as

to how title was acquired in respect of the land in dispute from Candido Da Rocha in March, 1955, the respondent has been in physical possession of the land since 1955. In exercising its right to be on the land, it erected office building and staff quarters on part of the land over the years. As pleaded, the respondent has since 1955 been paying rents regularly to its lessor, (now Mrs. L.E. Turton nee Da Rocha), as well as tenement rates and other taxes to the Mushin Local Government in respect of the land. B

It further averred that sometime in 1978, the 1st defendant entered upon the land unlawfully and erected a hut and ramshackle building on part of it. He was then duly warned through a letter by the respondent's solicitors, but did not desist from his acts of trespass. The respondent arranged to erect a wall fence round the land to protect it from encroachment. The contractors employed to do this job were prevented by the 1st and 2nd defendants in December, 1978. The respondent also concluded arrangement with their building contractors to demolish its buildings on part of the land in order to further develop the land. Sometime in September, 1985 as the contractors were carrying out this assignment, the 2nd defendant prevented them from continuing, with threat to their lives and property. C D E

The 2nd and the 3rd defendants filed a joint statement of defence. They claimed in their statement of defence that the 2nd defendant was the lawful Attorney of the Tinubu family, owners of a vast area of land of which the land in dispute formed part; that the Tinubu family got the land from the Oloto Chieftaincy family by a grant made in 1834 to Madam Iyalode Tinubu; that out of the said land the 1st defendant was given land where he built hotels, the 2nd defendant was given land where he has his family house and that the 3rd defendant was given land where it erected a Church building. The 1st defendant in his statement of defence claimed that he bought a piece of land, part of the land in dispute from the family of Madam Iyalode Tinubu in 1963 upon which he built a house and let to tenants. F G H

At the close of pleadings, the issues joined were (1) who as between the respondent and the defendants had better title to the land; (2)

if neither proved title, who was earlier in possession of the land. The respondent led evidence through its Branch Manager, Mr. Amos Odejimi (p.w. 2), its Transport Supervisor, Mr. Lamidi Sunmonu (p.w. 3), an employee who lived in one of the staff quarters on the land, Mr. Jasper (p.w.4), and a day watchman, to the effect that they have been serving the respondent on the land in dispute. Mr. Amos Odejimi said he joined the respondent in 1957 in Ibadan and was transferred to Lagos in 1963 where he became Branch Manager in 1965. Mr. Lamidi Sunmonu (p. w. 3) was employed in 1966 and lived in the staff quarters from 1968 to 1974. Mr. Lvy Jasper (p. w. 4) said he lived in the staff quarters from 1960 to 1980. All three witnesses testified that apart from the respondent's buildings on the land, part of the land was being used for parking the respondent's commercial vehicles. The conveyance (exhibit 4) relied on by the respondent was tendered through one of its Managers, Mr. Michael Ordia (p.w. 6) while the survey plan of the land was prepared by and tendered through Mr. Marcellin Augustine Seweje (p. w. 7), a licensed surveyor.

The defendants led evidence through six witnesses. The first witness, Momodu Akinwumi Abati who claimed to be the head of Tinubu family testified as to how Madam Tinubu got land from Oloto family. A blacksmith, Yisau Olaniyi Olabanji (d.w.2), said he built his workshop on part of the land, 1st defendant being his landlord. Three other witnesses, Madam Oyetola Kalejaiye (d.w.3), the 2nd defendant, Chief Otunba Samuel Taiwo Odumade (d.w.4) and Emmanuel Ade Oluyi (d.w.6) the Pastor in charge of the Church on the land in dispute, claimed to have bought land from the Tinubu family. The 2nd defendant who testified as d.w.5 said he was the lawful Attorney of his family, the Tinubu family and testified that his family sold land to the 1st and 3rd defendants.

The learned trial judge in his judgment given on 24th June, 1988 appeared to have considered only the issue of title of the respondent. He said: "The judgment is decided by me on a narrow compass. In consideration of the pleadings, the evidence and the addresses an issue emerged upon which the case has turned." He came to the conclusion that there was no evidence as to how Candido Da Rocha, the respondent's lessor,

acquired his title to the land. On that basis he was not minded to dismiss the suit but thought that if an order of non-suit was possible under the Lagos State High Court (Civil Procedure) Rules 1972 then applicable he might have called on counsel to address him on the propriety of making that order. He then struck out the case.

Both parties appealed against that decision to the Court of Appeal. The defendants/appellants, of whom the present appellant was one, argued in that court that the respondent having failed to prove title, the proper order would be that of a dismissal of the suit. On the other hand, the respondent (who was the cross appellant) contended that even if title failed, it was still entitled on the evidence to damages for trespass and an order of injunction. The lower court dismissed both the appeal and cross-appeal and affirmed the judgment of the trial court striking out the suit.

The present appellant further appealed to this court and in his brief of argument set down the following issues for determination:

"1. Whether the High Court of Lagos State has the power to strike out a suit that was concluded at the trial.

2. Whether the Court of Appeal ought to have upheld the decision of the High Court to strike out the respondent's claim when the same Court agreed that the power to non-suit was taken out of the High Court Civil Procedure Rules 1972 and nothing was substituted for it.

3. Was the Court of Appeal not contradicting itself to have held that the power to non-suit taken out of the High Court Procedure Rules 1972 was inherent and have (sic) been there for ages.

4. Whether the proper order to make in the circumstances where the Court of Appeal agreed that the respondent failed to prove any of its claims was to uphold the decision of the High Court to strike out the claim or dismiss it."

After hearing the appeal this court later invited both counsel to address it on issues we considered would lead to the justice of the appeal. The issues are:

1. Whether the trial court's judgment, affirmed by the Court of Appeal, adverted to all the evidence before it in arriving at its decision striking out the suit on the ground that the then Rules of the Lagos High

Court had no provision for a verdict of non-suit.

2. If the question (1) above is answered in the negative, whether this is a case to be remitted to the High Court of Lagos, before another judge other than the one that tried the matter, for a retrial.

B Both counsel accordingly filed further briefs of argument and appeared on 27 June, 2000 before us to proffer oral argument along the lines of these two issues.

It must be said that it is unusual to strike out a civil case which has been heard to conclusion by a trial court. Such a case should be decided upon the evidence available and the applicable law. The known exception to this is where the court later found that it has no jurisdiction to hear and determine the case after it had been concluded. The only order that can then be made is one striking out the case: see Okoye v. Nigerian Cons. & Furniture Co. Ltd. (1991) 6 NWLR (pt. 199) 501; Esuku v. Keko (1994) 4 NWLR (pt. 340) 625; Gombe v. P.W. (Nig) Ltd. (1995) 6 NWLR (pt. 402) 402; or where the plaintiff lacks locus standi: See Oloriode v. Oyebi (1984) N.S.C.C. (vol. 15) 286. In the present case, the striking out of the suit after the parties had concluded their evidence was not the proper order. The two courts below were in error in this regard.

The respondent's counsel has argued before us that the trial court had an inherent power under s.6(6)(a) of the 1979 Constitution to non-suit or strike out actions even where the rules of Court failed to provide for such power. I do not think the issue of non-suit is as simple as that. **Although s.6(6)(a) of the Constitution provides that the judicial powers vested in the courts shall extend to all inherent powers and sanctions of a court of law, it has not been decided that a court may make an order of non-suit even when the rules of that court appear to have dispensed with that power. Power that is conferred on a court by statute or by Rules of Court cannot be called inherent power. When therefore that power is taken away, it ceases to be power that can be exercised and so there can be nothing inherent about it to make it exercisable. It has been observed that inherent power, though omnibus, does not extend the jurisdiction of a court**

of record: see Akilu v. Fawehinmi (No. 12) (1989) 2 NWLR (pt. 101) 122 at 197.

The High Court Procedure Rules 1972 of Lagos State omitted the Order under which the High Court could exercise its power to order a non-suit. It was believed to be an oversight. It has now B been restored under Order 37 High Court of Lagos State (Civil Procedure) Rules 1994. But once it was omitted, it would seem that the High Court could not make that order because by virtue of the general jurisdiction conferred to the High Court of Lagos in 1962, C it could only, in addition to any other jurisdiction conferred by the Constitution of Nigeria or by the Law of the High Court or any other enactment, possess and exercise "all the jurisdiction, powers and authorities which are vested in or capable of being exercised by the High Court of Justice in England." It has been said that since D the introduction of the 1883 rules of the Supreme Court, the High Court of England retains no power to enter a non-suit: see the Supreme Court Practice 1999 Vol. 1, page 399-340, Ord. 21/5/1; Fox v. Star Newspaper Co. (1900) A.C. 19. It would therefore appear E that if the High Court of England no longer has jurisdiction to order non-suit, the High Court, Lagos cannot exercise that power under its general jurisdiction. It can only do so if its own Rules of Court provide for it. I think the power to non-suit would appear to F be power specifically conferred on a court.

However, in the present case the issues framed by this court upon which counsel further addressed us have necessitated our having to examine the evidence on record in the High Court closely to be able to pronounce on those issues. The learned trial judge did not consider the G evidence led by both parties as to who is in possession of the land having held that the respondent did not lead satisfactory evidence of title. He did not also examine the title claimed by the 1st defendant to see whether it is better than that of the respondent so as to decide who is entitled to pos- H session: see Aromire v. Awoyemi (1972) 2 SC 182; Amakor v. Obiefuna (1974) 1 ALL NLR 119 at 126. In the absence of a valid title the respondent may still succeed in maintaining an action for trespass

because the law is that even if a plaintiff is a trespasser, he can maintain an action against a later trespasser for damages and injunction: see Nwosu v. Otunola (1974) 1 ALL NLR 533 at 534; Amakor v. Obiefuna (supra) at page 120. That is why a plaintiff who fails to prove title will not necessarily fail in his action for trespass. If he establishes by evidence acts of possession, his claim for damages for trespass and an order of injunction may be granted: see Oluwi v. Eniola (1967) NMLR 339 at 340; Olaloye v. Balogun (1990) 5 NWLR (pt. 148) 24 at 39-40; Ajero v. Ugorji (1999) 10 NWLR (pt. 621) 1 at 11, 17. The learned trial judge decided the present case without making findings on the respective evidence of the parties that they were in possession of the land in dispute; nor did he examine the title put forward by the appellant. It was an error to fail to do that, and this was likely to lead to a miscarriage of justice. It was also clearly wrong, as already said, to make an order striking out the suit in the circumstances when the case had been concluded.

When a trial court fails in its appraisal of evidence and the appellant court is in as good a position as the trial court to reappraise such evidence and make appropriate findings thereon from the printed record and/or documents put in evidence, it will do so instead of ordering a retrial: see Fashanu v. Adekoya (1974) 6 SC 83 at 91; Nneji v. Chukwu (1996) 10 NWLR (pt. 478) 265 at 278. But when the evidence is such that the impression of the trial court of the witnesses as to their credibility is bound to play a decisive role, the appellate court which naturally, had no advantage of making such impression cannot embark on the reappraisal of the evidence. It will order a retrial, unless the case can be brought to an end by the appellate court on other crucial grounds: see Ugwu v. Ogbuzuru (1974) 10 SC 191 at 192; Olatunji v. Adisa (1995) 2 NWLR (pt. 376) 167 at 180-181; Oro v. Falade (1995) 5 NWLR (pt. 396) 385 at 412; Ayisa v. Akanji (1995) 7 NWLR (pt. 406) 129 at 147; Abusomwan v. Aiwerioba (1996) 4 NWLR (pt. 441) 130 at 141.

I think this appeal has merit and I allow it. I set aside the judgments of the two courts below. I hold that the proper order to make in

the appeal in the circumstances is one for a retrial. I accordingly order that the case be remitted to the Lagos State High Court to be heard by another judge. Since the learned trial judge's failure to consider all the relevant evidence before him and make findings thereon led to this avoidable miscarriage of justice necessitating a retrial, I consider that either party should bear its costs. I therefore make no order for costs. B

BELGORE JSC

In this matter, the trial Court having heard all the evidence of the parties failed to allude clearly in its judgment to salient issues of who was in possession and who had title and it became an impossible task for Court of Appeal that never saw the witnesses to make a conclusion trial court ought to have made. In that case the only justice of the matter is to remit the case to High Court for retrial. It is no doubt an oversight to omit "non-suit" in the former Rules of Lagos High Court, but where by evidence before trial court the absence of "non suit" may occasion miscarriage of justice it is right for the court to strike out the case rather than dismiss it. By dismissing a case of this nature, the person in possession for a long time with documents of title or right to occupancy may permanently be deprived of his right merely on procedural technicality. This certainly is not the purport of judicial adjudication supposed to see that justice is done. C D E

Therefore instead of non suiting, which was no longer a rule in Lagos High Court, or striking out, I agree with Uwaifo JSC that on the important issue of all evidence in trial Court the trial judge never adverted to, striking out will not suffice. There was no proper trial, in the sense the word "trial" embraces all the facts before Court including the judgment; only retrial will remedy the anomaly. I also allow the appeal and order retrial before the High Court of Lagos State. I make no order as to costs. F G

KUTIGIJSC

I read in advance the judgment just rendered by my learned brother Uwaifo, J.S.C. I agree with his reasoning and conclusions. It is H

obvious to me that the applicable Lagos State High Court (Civil Procedure) Rules, 1972 having made no provision for a non-suit, and the trial of the case having been conducted to finality, the High Court in the circumstances could only have dismissed the Plaintiff's case. There was nothing to be struck-out. The Court of Appeal was therefore wrong to have confirmed the striking-out order made by the trial High Court. To that extent the appeal therefore succeeds. The question now left to be answered is whether or not this court can proceed to substitute an order dismissing Plaintiff's claims. I think for the reasons set out in the lead judgment, this is a proper case for retrial by the another judge of the High Court. It is so ordered.

D **MOHAMMED JSC**

I have had the preview of the opinion of my learned brother, Uwaifo, J.S.C., in the judgment just read and I agree with him that this appeal should be allowed. Since the parties had concluded their evidence the proper thing to do was to appraise the evidence and made appropriate findings based on the evidence and pleadings. It is imperative for a judge, after taking down addresses, to sit down and write his judgment. See Ojikutu v. Ojikutu (1971) ALL NLR 92.

I also allow this appeal, set aside judgments of the High Court and the Court of Appeal and order for the trial of the action before another judge. Parties to bear own costs.

G **EJIWUNMI JSC**

I have had the advantage of a preview of the judgment of my learned brother Uwaifo, JSC just delivered. In the light of the authorities relied upon by him, and the applicable Rules for the trial of cases in the High Court of Lagos State, at the time, I agree that the Court below was wrong to have upheld the judgment of the trial Court.

This is because, a careful reading of the judgment of the trial Court would have revealed that the Court failed to make findings of fact

upon the evidence at the trial before deciding the matter upon the issue of title of the respondent. The learned trial Judge having formed the view that "The judgment is decided by me on a narrow compass. In consideration of the pleadings, the evidence and the addresses on issue emerged upon which the case has turned." He then concluded that there was no evidence as to how Candido Da Rocha, the respondent's lessor, acquired his title to the land. On that basis he further formed the view that it would not be proper to dismiss the suit, but thought that if an order of non-suit was possible under the Lagos State High Court (Civil Procedure) Rules 1972 then applicable he might have invited Counsel to address him on whether that order can be properly made. As the order of non-suit was not available to him, he then struck out the case.

Now, in my humble view, the Court below was wrong to have upheld the judgment of the trial Court for two principal reasons. First, a careful reading of the judgment of the trial Court would have revealed that the Court failed to evaluate and make findings of facts upon the evidence led at the trial. It is settled that the cardinal duty of a trial Court was to make such findings as deemed appropriate upon facts led at a trial. Where a trial court failed to discharge that duty, it could be said that there had been a miscarriage of justice. This is because where the trial Court has failed to discharge this primary duty, it becomes difficult for an appellate Court to consider properly the merits of an appeal in the absence of the findings of the trial. This is moreso where the evidence would require for consideration of the credibility of witnesses who gave evidence at the trial.

The Supreme Court has in a number of cases laid down the principles governing a review of the facts by an appellate Court. See Chinwedu v. Mbamali (1980) 3-4 SC. 31 at page 75 per Obaseki, JSC; Enang v. Adu (1981) 11-12 SC. 25 at page 38 per Nnamani, JSC; Atanda v. Ajani (1989) 3 NWLR (pt. 111) 511 at page 525 where CRAIG JSC, observed that an appellate Court is only left with a duty to see

(a) Whether there was evidence to support the findings and/or the decision of the trial Court.

(b) Whether the trial Court has made a correct assessment of

the evidence before it.

(c) Whether the trial Court has wrongly accepted or rejected any evidence tendered at the trial, or

(d) Whether there has been an erroneous appraisal of facts leading to erroneous conclusions in the case.

See also A. Anyaoku v. Dr. F. Adi (1986) 3 NWLR 731 at page 742; Mogaji & Ors v. Odofin & Ors (1978) 4 SC. 91.

Now, the learned trial Judge in the instant appeal having not made any findings of facts upon the evidence, has completely denied an appellate Court the right to consider the evidence led at the trial in order to determine the merit of the appeal. It is not right for the trial Court, having regard to the facts revealed in this case, to limit the consideration of the matter upon what he considered to be upon a narrow compass. At that level of the Court system there must be a proper appraisal of the facts presented to the Court.

The other error of the trial Court was also to have struck out a suit upon which there was evidence before him. If the procedural rules, then applicable to the trial of cases at that time in the High Court of Lagos State made no provision for an order of non-suit to be made, then it cannot be right to strike out a suit, which perhaps could have been non-suited. As there was no such provision in the Lagos State High Court (Civil Procedure) Rules 1972, then the trial court should have arrived at its decision after the proper evaluation of the evidence led at the trial.

I will therefore for the above reasons and the fuller reasons given in the judgment of my learned brother Uwaifo JSC, allow this appeal.

The judgments of the two Courts below are hereby set aside. It is hereby also ordered that the case be remitted to the Lagos State High Court for a retrial by another Judge. Having regard to the reasons given for allowing this appeal, each party is hereby ordered to bear its own costs.

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