

SUPREME COURT OF NIGERIA
19TH JANUARY, 2001. SC. 43/1999
CORAM :- A. B. WALI, I. L. KUTIGI, S. U. ONU, A. I. IGUH,
A. I. KATSINA-ALU, JJSC.

1. AUGUSTA CHIME PLAINTIFF/APPELLANT
2. CHARLES CHIKA CHIME CO-PLAINTIFFS/APPELLANTS
AND 3 ORS.

AND

1. MOSES CHIME
2. ZULOH SERVICES NIG LTD
3. COMMISSIONER FOR DEFENDANTS/RESPONDENTS
WORKS LAND AND TRANSPORT
4. SAMPSON OKAFOR CHIME

***APPEALS** - Issues - Should be hinged on the grounds of appeal -Or they are incompetent and will be struck out.*

***JUDGMENTS** - Delivery - Failure to communicate delivery date to a party - Is a mere irregularity - With no effect on substance of the judgment - Or jurisdiction of the court.*

***JURISDICTION** - .Creation of new states - Does not divest trial judge - Of jurisdiction to proceed - With the case to finality - According to S.6 Decree No. 41 of 1991*

***LEGAL PRACTITIONERS** - Conduct of - Amounted to abandoning his motion - And a failure - In his duty to the court.*

***PRACTICE & PROCEDURE** - Evidence taken on commission - Court has discretion under the Rules of Court - Depending on the circumstances - To order a witness's evidence - To be so taken*

***PRACTICE & PROCEDURE** - Court processes - Non service of - Only*

the affected party can complain - About such a failure.

PROPERTY LAW - *Power of attorney - Does not divest the donor - Of power to deal with his property - As far as donee has not exercised such power.*

FACTS

The Appellant/plaintiff who is the wife of the 2nd plaintiff and in-law to the 4th plaintiff had in the High Court sued the 1st, 2nd and 3rd defendants challenging a power of attorney purportedly issued by the 4th defendant to the 1st defendant which she claimed was invalid and by which the 1st defendant had purportedly conveyed to the second defendant with the consent of the 3rd defendant the property she lawfully occupies at Enugu. She has consequently been asked to vacate the said property by a notice to quit by the 2nd defendant.

The fourth defendant had been joined as a party to the suit on his application and due to his age and with the consent of the counsel his evidence was taken on commission by the trial judge. Subsequent attempts to settle out of court having failed hearing was commenced. The plaintiff and co-plaintiffs who later applied to be joined as parties refused to lead evidence while the defendant counsel led evidence in support of his case.

The trial judge finally delivered his judgment in favour of the defendants and the plaintiffs/Appellants being aggrieved appealed to the Court of Appeal which dismissed the appeal and confirmed the decision of the trial court. Being dissatisfied with the judgment they have further appealed to the Supreme Court raising the following issues for determination.

ISSUES FOR DETERMINATION

"1 Whether the Court of Appeal was right to have dismissed the appellants' appeal when the learned trial Judge who became a Judge of the High Court of the new Anambra State had lost jurisdiction to hear and determine the case after the creation of a separate Enugu State where the property in dispute situates out of the old Anambra State, on the 27th of

August 1991.

2. *Whether the Court of Appeal was right to have dismissed the appellants' appeal after finding that the writ of summons was not served on the 3rd defendant and that the motion for joinder of the 4th defendant had not been served on all the parties to the suit to wit the 1st and 3rd defendants, on the ground that it was for the party not served and not for the plaintiffs/appellants to complain or that the non-service raises an issue of mere technicality.*

3. *Whether the Court of Appeal was right to have dismissed the appellants' appeal when on the chronology of events as outlined by it, it was shown that the learned trial Judge took evidence of the defence and addresses of counsel before pleadings closed.* Etc. See p. 280

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

Non service of court processes

1. It is not in dispute that neither 1st Respondent nor the 3rd defendant complained against the non-service of the court processes referred to above or any other order made. It does not therefore lie in the mouth of the appellant to complain on their behalf. It is abundantly clear from the printed record that neither the 3rd defendant nor the 1st and 2nd respondents complained against non-service of any court process on him, in fact throughout the proceedings in this case the 3rd defendant did not put up any appearance. He did not join issue with the appellants on any aspect of the case. He remained a silent defendant who from the look of things had no stake in the matter he was just a nominal party. (p. 282 B)

Evidence taken on commission

2. The learned trial judge was empowered by the Rules i.e. Order 23 Rule 54 of the Anambra State High Court Rules to make an order that the evidence of a particular witness be taken on commission where the situation warrants that. The instances cited under the Rule are not exhaustive. See Dabiri v Dabiri [1957] NRLR 121. The court has a discretion to make the order or refuse to do so when applied for. In the case in

hand, there was medical evidence attached to the application of the Respondents that the evidence of 4th Respondent be taken on commission for his infirmness, due to old age and failing health condition. (p. 284 G)

B Jurisdiction - Creation of new states

3. As submitted by learned counsel for the Respondents, the fact that Enugu State was created out of the then Anambra State and the landed property in dispute is situate in Enugu State while the learned trial judge belongs to or is an indigene of the new Anambra State, does not divest him of the jurisdiction to continue with the case to finality. Section 6 of Decree No. 41 of 1991 provides as follows:

“Any proceeding pending before any court of a State immediately before the commencement of this Decree may, after such commencement be continued before that court and shall not adversely be affected by the provisions of this Decree.”

This completely answers Issue 1 of the appellants’ brief. I need say no more on it. (p. 286 D)

E

Conduct of counsel

4. When learned counsel finally appeared in court he did not even deem it fit to apologise to the court but only discourteously told the court that he was not ready to go on with the motion and that the case file had been taken away from him. He did not apply for any adjournment. This in my view was nothing short of abandoning his motion for the arrest of judgment and the learned trial judge was perfectly right and in order when he struck it out. Counsel have a duty to be respectful and courteous to courts. It is part of the discipline in the legal profession. It is counsel that should wait for the court and not the other way round. (p. 287 D)

Delivery date of judgment

5. I am yet to come across a provision of any of our laws which provides that where a judgment is delivered without due notice of the delivery date to a party involved in consequence of which he is absent in court when the judgment is delivered, the judgment so delivered is null and void. Its

delivery is neither without jurisdiction, nor is it null and void. It may amount to a mere irregularity which has no effect on the substance of the judgment or jurisdiction of the court. (p. 287 G)

Power of attorney

6. I completely endorse the conclusions reached above on this issue and I do not think I can improve on them. The fact that a power of attorney was given by the 4th Respondent [who is the donor] of his power to alienate the property does not divest the donor of power to deal with the property so long as the 1st Respondent [the donee] had not exercised such power. See Gregory & Biude v (1) Clement Nwara (2) A.C. Rivers State [1993] NWLR (pt 278) 638 at 664 and 665. (p. 292 E)

Appeals - Issues

7. I have gone through the grounds of appeal filed [both original and additional] and I am unable to find any ground of appeal to which this issue is hinged. It is incompetent and is hereby struck out. See Ifediora & 4 Ors. v. Ben Ume & Ors. [1988] 2 NWLR (Pt 74) 5 (p. 293 B)

NOTABLE POINTS OF INTEREST

IGUHJSC

1. Court will tend towards substantial justice instead of technicalities
In the second place, I think it is now settled law that in appropriate cases, our courts now appear to be deliberately shifting away from the narrow technical approach to justice which characterised some earlier decisions of courts on various matters. Instead, it now pursues the course of substantial justice. See Consortium M.C. v. N.E.P.A. (1992) 6 N.W.L.R. (Part 246) 132 at 142, Okonjo v. Dr. Odje (1985) 10 S.C. 267, Bello v. Attorney-General Oyo State (1986) 6 N.W.L.R. (Part 45) 828 etc. It seems to me that if under the provisions of Order 23 Rule 54 of the High Court Rules of Anambra State, 1988 a magistrate or any officer of the court is permitted to take the evidence of a witness by way of commission, it cannot, with respect, be right to suggest that a High Court Judge, a judicial officer with much higher jurisdiction and status than a magis-

trate or any other officer of the court is incompetent to take such evidence unless there exists any law which stipulates to the contrary. I know of no such law and my attention has not been drawn to any in this appeal. (p. 298 C)

B

2. Nature of irrevocable power of attorney

It is where a power of attorney is expressed to be irrevocable and is given to secure a proprietary interest of the donee or the performance of an obligation owed to the donee that it is irrevocable either by the donor without the consent of the donee or by the death, incapacity, bankruptcy, winding up or dissolution of donor, so long as the donee has the interest or the obligation remains undischarged. See Reigate v. Union Manufacturing Co., (Ramsbottom) (1918) 1 K.B. 592, C.A. Where the authority of an agent is given by deed, or for valuable consideration, for the purpose of effectuating any security, or of protecting or securing any interest of the agent, it is irrevocable during the subsistence of such security or interest. See Slatter v. Railway Commissioners (New South Wales) (1931) 45 C.L.R. 68. But it is not irrevocable merely because the agent has an interest in the exercise of it. (p. 300 D)

REPRESENTATION

A. O. Mogboh SAN, with him Happy Modu & N.O.O. Okafor for the Appellants.
Chief O. Ugolo for the Respondents.

CASES REFERRED TO

Onajobi v. Olanipekun (1985) 4 S.C. (part 2) 156 at 163
Ukejianya v. Uchendu 13 W.A.C.A. 45, at 46
Anyanwu v. Mbara (1992) 5 N.W.L.R. (Part 242) 386 at 400
Azuetonma Ike v. Ugboaja (1993) 6 N.W.L.R. (Part 301) 539 at 556
Consortium M.C. v. N.E.P.A. (1992) 6 N.W.L.R. (Part 246) 132 at 142
Okonjo v. Dr. Odje (1985) 10 S.C. 267
Bello v. Attorney-General Oyo State (1986) 6 N.W.L.R. (Part 45) 828
Union Bank limited v. Ogboh (1995) 2 N.W.L.R. (Part 380) 647 at 669

Ude v. Uwara (1993) 2 N.W.L.R. (Part 278) 638 at 665

Ajuwon v. Adeoti (1990) 2 N.W.L.R. (Part 132) 271 at 294

Reigate v. Union Manufacturing Co. (Ramsbottom) (1918) 1 K.B. 592

STATUTE & RULES REFERRED TO

Decree No 41 of 1991 s.6

High Court Rules of Anambra State O. 23 r. 54

LEAD JUDGMENT BY WALI JSC

The facts involved in this case are not seriously in dispute.

The 1st plaintiff is the wife of the 2nd plaintiff and an in-law to the 4th defendant. She sued the 1st; 2nd; and 3rd defendants in the Enugu High Court of the then Anambra State claiming for the following reliefs as contained in paragraph 17 of her Statement of Claim:

“WHEREFORE the plaintiff claims against the defendants jointly and severally as follows:-

(i) *A declaration that the Power of Attorney dated the 13th day of July, 1990 and registered as No. 64 at page 64 in Volume 1299 of the Lands Registry, Enugu was not given by the 4th defendant.*

(ii) *A declaration that the Notice to Quit NO. RP/1998/90 dated 24th July, 1990 and given by the 2nd defendant to the plaintiff in respect of the property plaintiff lawfully occupies at No. 22 Morehouse Street, Ogui Enugu is invalid, null and void and of no effect.*

(iii) *A declaration that the purported Conveyance/Assignment between the 1st and 2nd defendants for which the approval/consent of the 3rd defendant is required and based on the Power of Attorney registered as 64/64/1299 is irregular, null and void.*

(iv) *An injunction restraining the defendants, their servants agents and functionaries from taking steps to perfect the assignment and from interfering with the plaintiff's user and enjoyment of the property situate at No. 22 Morehouse Street, Ogui Enugu.”*

Before filing the statement of claim and on the application of the 4th Defendant he was joined in the action. The application was granted on 29/11/90. An application dated 6/12/90 on behalf of the 1st, 2nd & 4th

defendants praying that the trial court should direct a Magistrate or any officer of the Court to take the evidence of 4th defendant on commission and that during such exercise all parties to the suit should attend the examination of the 4th defendant was filed on 10/12/90. The depositions
 B so taken would be filed in court and that it might be given in evidence by the 1st and 2nd defendants at the fiat. After listening to learned counsel for and against the application the learned trial judge granted it as prayed and adjourned the matter to 21/1/91 for Hearing so that learned counsel
 C could file their statement of claim as well as the statement of Defence respectively.

Subsequent to the order (supra) plaintiff filed her statement of claim on 9/1/91. The 1st, 2nd and 4th defendants filed a joint Statement of Defence on 14/1/91. On the 21/1/91 Charles Chika Chime, John K.
 D Chime, Raphael Chime and Gabriel Chime filed an Application seeking for an order to be joined as co-plaintiffs in the suit.

As earlier fixed, the Court sat on 22/1/91 to take the evidence of 4th defendant who was described as an ailing old man. The learned trial
 E judge had told the parties on 18/2/90 that he would himself take the evidence of the 4th Defendant and on 22/1/91 as requested earlier by Mr. Mogboh SAN, counsel for the plaintiff, and on that date he took down the evidence of 4th Defendant, Chief Mogboh SAN [Miss. Ukoh with
 F him] for the plaintiff while Mr. Anyamene SAN [Dr. Mogbana and Mrs. Udogu with him] for the 1st, 2nd and 4th Defendants appearing for the parties respectively. The 4th Defendant after being sworn on the Bible, gave his evidence at the end of which he was subjected to vigorous examination by Chief Mogboh, SAN. The learned trial judge then ad-
 G journed the case for continuation of hearing on 12/2/91, without objection by learned counsel appearing. When the case came up on 12/2/91, at the request of Miss. Ukoh, learned counsel for the plaintiff, the case was adjourned to 25/4/91 to enable the parties negotiate settlement, and on the
 H adjourned date Mr. Mabu appeared for the plaintiff. He told the court that the parties were continuing with the effort to settle out of Court and to that end another meeting had been fixed for 9/6/91. The case was further adjourned to 19/6/91 for report of settlement or continuation of hear-

ing.

On 19/6/91 Mr. Mabu and Mr. Anyamene SAN appeared for the plaintiff and the Defendants respectively. There was no settlement reached. The learned trial judge reluctantly granted another adjournment because learned counsel for the plaintiff reported that the plaintiff could not be in court for continuation of hearing of the case as she was not well. This was supported by a medical report. The learned trial judge adjourned the case to 3/7/91 with a remark that *“No further application for adjournment will be entertained.”*

On 2/7/91 learned counsel for the plaintiff/applicant moved the court for leave to join Charles Chike Chime, John K. Chime, Raphael Chime and Dr. Gabriel Chime as co-plaintiffs. The application being not opposed was granted as prayed and the co-plaintiffs were given 14 days within which to file their statement of claim while the Defendants were equally given 7 days within which to file Statement of Defence to the Co-plaintiffs’ statement of claim. The case was then adjourned to 24/9/91 for continuation of hearing. It is to be noted that the mode for service of the pleadings herein ordered was to be service on counsel by counsel.

The case came up again on 17/9/91 and with consent of learned counsel for the parties it was again adjourned to 24/9/91, the date originally fixed for the continuation of hearing.

On 24/9/91, learned counsel for the plaintiffs filed a Notice to produce in which he requested the defendants to produce a letter dated 10th February, 1991 said to have been written by Mr. Sampson Okafor Chime, the 4th defendant, to Rev. Nwizu, the Chairman of the 2nd defendant. On the same 24/9/91 learned counsel Mr. Mabu appearing for the plaintiffs informed the court that in line with order 9 Rule 1 (II) of the High Court of Anambra State, he had agreed with counsel for the defendants to file the Co-plaintiffs’ statement of claim and which he had already filed. He also asked the court to re-call 4th defendant for further examination on behalf of the co-plaintiffs who were not parties to the case at the time the 4th defendant testified adding that if the request was granted *“plaintiffs’ counsel or the plaintiffs will have the responsibility of bringing him. The order to recall 4th defendant was granted by the Court as*

prayed.”

As if that was not enough learned counsel for the plaintiffs came up with another application for an adjournment to enable him serve the 3rd defendant with the Statement of Claim of the Co-plaintiffs to which Mr. Anyamene SAN, raised an objection on ground that the 3rd defendant did not enter appearance to the Writ of Summons and other Court’s processes and documents served on him and that it would be idle to adjourn for such purpose as he had nothing to defend from the statement of the plaintiff’s claim as he was a nominal party. Mr. Mabu of plaintiff’s counsel insisted that he was not ready to go on with the case on that day as he had not rehearsed his witness and also that the 4th defendant he wanted to recall was not present in court that day. The court agreed and granted a short adjournment to 30/9/91.

When the case came up on 27/9/91, Mr. Mabu appeared for the plaintiffs while Mr. Anyamene SAN appeared for the Defendants. 4th Defendant was put into Witness box and was sworn on Bible before being further examined by Mr. Mabu of plaintiffs’ counsel.

At the conclusion of the further examination learned counsel for the plaintiffs made the statement as recorded by the court:-

“that the plaintiff and co-plaintiffs do not intend to testify in this case nor do they intend to call any witness says the plaintiff and co-plaintiffs hereby close their case as they do not intend to lead evidence.”

Mr. Anyamene SAN then led further evidence in support of the defence and in proof of the counter-claim. On that same date to wit 27/9/91 the Defence closed its case. The case was adjourned to 30/9/91 for address by learned counsel, and on the adjourned date learned counsel delivered their addresses which was continued to conclusion on 8/10/91. Ubaezonu J [as he then was] reserved judgment to 21/10/91.

On 23/10/91 as evidenced by the court proceedings on that date, learned counsel for the plaintiffs had earlier on before that date filed a motion to arrest the court’s judgment. The court for some reason could not sit on 21/10/91 as scheduled. On 23/10/91 when the case was called Mr. Anyamene SAN [Dr. Mogbana and Mrs. Udogu with him] announced their appearance for the Defendants. Neither the plaintiffs nor their counsel

were in court at the time. The learned trial judge recorded what happened thereafter as follows:-

“Court: This case was adjourned to 21/10/91 for judgment. Before that date a Motion to Arrest the judgment was filed by Counsel for plaintiff and co-plaintiffs. The Court did not sit on 21/10/91 and at the direction of the Judge the case was adjourned to today 23/10/91 for judgment and the motion.

I came into the Court at 9.30 a.m. but counsel for the plaintiff and co-plaintiffs was not in Court. I waited for the Counsel for about 20 minutes. Mrs. Offiah from whose Chambers Mr. Mabu who has conducted this case came into the Court and on being questioned by the Court she said that Mr. Mabu was in the High Court No. 3.

The Court sent for him, firstly through Mrs. Offiah secondly through the Clerk of Court and finally through the Court duty Police. Mr. Mabu eventually arrived and said that he was not ready to go on with the motion. He further says that the case file has been taken away from him.”

Therefore, the learned trial judge struck out the Motion for the Arrest of Judgment and proceeded to deliver his considered judgment in which he dismissed the plaintiffs’ claims while upholding the Counter-Claim of the 1st, 2nd and 4th Defendants. He awarded 5,000.00 general damages specifically to the 2nd Defendant and costs of 2,000.00 generally to the 1st, 2nd and 4th Defendants.

Being not satisfied with the judgment of the trial court, the plaintiffs appealed to the Court of Appeal, Enugu Division. In a considered judgment of that court by Achike JCA [as he then was] with which both Ejiwunmi JCA [as he then was] and Niki Tobi JCA agreed, the appeal was unanimously dismissed with 1,000.00 costs in favour of the Defendants/Respondents.

Still not satisfied by the Court of Appeal decision, the plaintiffs have now further appealed to this Court.

Parties filed and exchanged briefs of argument against the 6 original and the 6 additional grounds of appeal. The appellants formulated the following 9 issues for determination by this Court:

B *"1 Whether the Court of Appeal was right to have dismissed the appellants' appeal when the learned trial Judge who became a Judge of the High Court of the new Anambra State had lost jurisdiction to hear and determine the case after the creation of a separate Enugu State where the property in dispute situates out of the old Anambra State, on the 27th of August 1991.*

C *2. Whether the Court of Appeal was right to have dismissed the appellants' appeal after finding that the writ of summons was not served on the 3rd defendant and that the motion for joinder of the 4th defendant had not been served on all the parties to the suit to wit the 1st and 3rd defendants, on the ground that it was for the party not served and not for the plaintiffs/appellants to complain or that the non-service raises an issue of mere technicality.*

D *3. Whether the Court of Appeal was right to have dismissed the appellants' appeal when on the chronology of events as outlined by it, it was shown that the learned trial Judge took evidence of the defence and addresses of counsel before pleadings closed.*

E *4. Whether the Court of Appeal was right in holding that the learned trial Judge was right to have himself taken the evidence of the 4th defendant before issues were joined and before hearing he plaintiffs and in the manner he did, and upon an application that his evidence be taken on commission by a magistrate.*

F *5. Whether the Court of Appeal was right in failing to note that even if the learned trial Judge had the jurisdiction and power to order the 4th defendant to give evidence upon the application before him, he did not find the factual bases for the exercise of his discretion in the matter established, and also the stage at which he could exercise it has not been reached.*

G *6. Whether the Court of Appeal was right to have failed to observe that the judgment of the learned trial Judge was a nullity, as having been delivered without due notice to the appellants and after the learned Judge had lost jurisdiction.*

H *7. Whether the Court of Appeal was right in holding that the sale of the house in dispute to the 2nd respondent was duly proved and that it*

proved the 5,000.00 damages awarded to it.

8. *Whether the Court of Appeal directed itself correctly as to the validity and effect of the power of attorney, Exhibit A, in the suit.*

9. *Whether upon a proper direction on the evidence the Court of Appeal was right to have held that the respondents proved their case and were entitled to judgment.* B

Save for the objections raised by learned counsel for the defendants against some of the grounds of appeal and the issues raised in the appellants' brief of argument he seems to have adopted the issues as formulated since he did not formulate any in his brief. I shall consider the objections raised. Henceforth the plaintiff and co-plaintiffs and the defendants shall be referred to as the appellants and the respondents respectively in this judgment. C

I have considered both the grounds of appeal and the issues objected to and have come to conclusion that except for issue 9; which is not hinged to any ground of appeal both the grounds of appeal and the issues objected to are competent. Leave was sought and obtained to file the additional grounds and the issues formulated seem to overlap and I therefore prefer to treat them in this judgment. D E

Issue 1 will be taken along with issue 6 when I come to deal with that issue.

Issue II

Under this issue learned counsel for the appellants advanced the argument that the 3rd defendant was not served with the Writ of Summons and that both the 3rd Defendant/Respondent and the 1st Defendant/Respondent were equally not served with the 4th Defendant/Respondent's application for joinder. On the basis of these arguments he submitted that issues were not joined in the case when the learned trial judge took the evidence of the 4th Respondent. F G

In reply to arguments supra learned counsel for the 1st, 2nd and 4th Respondents submitted that both the 3rd defendant and 1st Respondent H were served with all court processes in the case. Learned counsel referred in particular to paragraph 3 of the 1st appellant's affidavit in which she deposed that the 2nd and 1st defendants were served. He also sub-

mitted that both the 1st Defendant/Respondent and 3rd defendant were served with the 4th Defendant/Respondent's application to be joined as a party. After citing authorities in support of his submission learned Respondent's counsel contended that assuming that the parties referred
 B to were not served [which he did not concede], learned counsel for the appellants had no business to complain for and on behalf of such parties and that the party that should have complained for non-service is the party affected.

It is not in dispute that neither 1st Respondent nor the 3rd defendant complained against the non-service of the court processes referred to above or any other order made. It does not therefore lie in the mouth of the appellant to complain on their behalf. It is abundantly clear from the printed record that neither the 3rd defendant
 D nor the 1st and 2nd respondents complained against non-service of any court process on him, in fact throughout the proceedings in this case the 3rd defendant did not put up any appearance. He did not join issue with the appellants on any aspect of the case. He remained a silent defendant
 E who from the look of things had no stake in the matter he was just a nominal party. The Court of Appeal was perfectly right when it stated thus in the lead judgment:

*"The application for nullification of such proceedings would be at
 F the instance of the defendant against whom an order is made without prior notification of proceedings in which the order was made for the simple reason that a condition precedent for the exercise of the court's jurisdiction in making the order has not been fulfilled I am therefore clearly of opinion that for a party to a suit to apply for the proceedings to
 G be nullified by reason of failure of service, where service is a requirement, it must sufficiently be established that he or she has not been served in respect of the proceedings and that the order made therein affects him. It is not in my view open to every party to the proceedings to make such
 H an officious complaint. If such complaint is sustainable, it will yield startling results. Thus an aggrieved plaintiff, as in the instant appeal, would be enabled to appeal against a judgment against him on the technical ground that a party to the proceedings has not served some pro-*

cess.”

See Obimonure v. Erinoshio [1986] 1 All NLR 250; Richardson v. Mellish 2 Bing 225; Madukolu v. Nkemdilim [1962] 1 All NLR 587 and Skeconsult v. Okey [1981] 1 SC 6. Issue II is therefore resolved in favour of the Respondents against the appellants.

Issues 3, 4 and 5 of the appellants’ brief are inter-related as they deal with the recording of the evidence of the 4th Respondent and the relative effect of such action to the proceedings and will be taken together.

The gravamen of the complaint in the three issues is that the learned trial Judge recorded down the evidence of 4th Respondent instead of it being recorded by a magistrate or any other officer of the court assigned to do so by the Judge. It was also canvassed that the learned trial judge was wrong in taking the case of the Respondents before that of the Appellants. Learned counsel for the appellants therefore submitted that the Court of Appeal committed grave error for failing to hold that the method adopted by the trial judge in taking the evidence of the 4th Respondent before the close of pleadings and thereby joining issues was contrary to the known procedure and the rule of evidence. Learned counsel contended that even if it was assumed that the learned trial judge had power to take the evidence of the 4th Respondent on ground of his age and deteriorating condition of his health, there was not, on the evidence before the trial court, a proper factual basis for the exercise of the power of discretion and the Court of Appeal was in error in coming to the conclusion that the procedure adopted by the trial Judge was right.

In reply, learned counsel for the Respondents after setting out in sequence what transpired before the learned trial Judge agreed to take down the evidence of 4th Respondent by himself, submitted that it was Mr. Mogboh SAN, learned counsel for the 1st plaintiff/appellant who was the only plaintiff at that stage, that urged the court to take the evidence of 4th Defendant/Respondent and that happened after pleadings between 1st plaintiff/appellants and 1st, 2nd and 4th Defendants/Respondents had been completed. He also submitted that the learned trial Judge was right by virtue of Order 23 Rule 54 of the High Court Rules of

Anambra State 1988 to have taken out of turn, the evidence of 4th Respondent in view of his old age and dwindling health coupled with the fact that he was the owner of the property in dispute. He further contended that even if the procedure adopted by the trial judge in taking the evidence of 4th Respondent out of turn was wrong [which was not conceded] it was a purely procedural irregularity which did not occasion any miscarriage of justice and that the appellants did not suffer any.

It is to be noted that the appellants did not call evidence in proof of the averments in their pleadings but rested their case on that of the defence. So they must swim or sink with the respondents.

On 18/12/90 during the hearing of the application of learned counsel for the Respondents praying for an order that a magistrate or any officer of the court take the evidence of the 4th Respondent on commission on account of the latter's old age and failing health, it was Mr. Mogboh SAN appearing at that stage for the 1st appellant who was the only plaintiff in the case, that induced the learned trial judge to take the evidence of 4th Respondent by himself. On page 22 volume 1 of the Record of proceedings, he stated:

"The order sought was prejudicial to the plaintiff/respondent in that evidence taken by another person will be of no evidential value to the court. The evidence of the 4th defendant ought to be taken by the court..."

The learned trial judge agreed with the request and adjourned the hearing to 22/1/91 for taking the evidence of 4th Respondent by himself. On 22/1/91 when the evidence of 4th Respondent was taken the plaintiff/1st appellant had already filed her statement of Claim on 9/1/91 while the 1st, 2nd and 4th Respondents filed their joint Statement of Defence on 14/1/91. So the statement by learned counsel for the appellants that the evidence of 4th Respondent was taken before pleadings were filed and issues joined, cannot be correct. **The learned trial judge was empowered by the Rules i.e. Order 23 Rule 54 of the Anambra State High Court Rules to make an order that the evidence of a particular witness be taken on commission where the situation warrants that. The instances cited under the Rule are not exhaustive. See Dabiri v Dabiri [1957] NRLR 121. The court has a discretion to make the**

order or refuse to do so when applied for. In the case in hand, there was medical evidence attached to the application of the Respondents that the evidence of 4th Respondent be taken on commission for his infirmness, due to old age and failing health condition. On request by learned Senior Counsel for the plaintiff/1st appellant who was then the only plaintiff, the learned trial judge agreed to take the evidence himself. This was done and the witness was exhaustively cross-examined and re-examined. In my view it will be now too late for the learned counsel to complain against the procedure which he induced the learned trial judge to adopt. The evidence of 4th Respondent was taken in fear that he might die before the time of taking his evidence was due. In my view the Court of Appeal after considering the circumstances leading to the taking of the evidence of 4th Respondent, was right in its conclusion that

“It is clear that the trial court was competent to take the evidence of 4th respondent as he did, out of turn, for the compelling reasons stated in the supporting affidavit to the application. Even if 4th respondent was well at the time his evidence was taken, yet if it appeared necessary for the purpose of justice, a trial court could and should order that 4th respondent’s evidence be taken out of turn as he in fact did. Surely, that is a sensible and cautious approach dictated by expediency. It is difficult to accept that by taking the evidence of 4th respondent out of turn in the circumstances shown above any reasonable appellate tribunal can hold that the trial court ordered the respondents to first begin their case.”

“Assuming, but not conceding, that it was irregular to take the evidence of 4th respondent out to turn, the complaint of irregularity will only avail the appellant and co-appellants if they can further show that they have in consequences suffered injustice by the fact that 4th respondent’s evidence was taken first. They did not make such complaint and could not have done so because their learned counsel not only subjected 4th respondent, as DWI, to strenuous cross-examination he even had the second bite to further cross-examine that witness when he was recalled at the order of court at the request of the co-plaintiffs.”

There are no merits in these issues and are therefore resolved against

the appellants.

Issues 1 and 6

In Issues 1 and 6 the complaint therein was that the judgment was delivered without due notice to appellants and coupled with the fact that the learned trial judge had lost jurisdiction due to the creation of Enugu State out of the then Anambra State. It was the submission of counsel for the appellants that the trial judge being an indigene of the New Anambra State and the landed property being situate in the New Enugu State, he lacked jurisdiction to continue entertaining the case. He referred to sections 3, 4 and 8 of Decree No. 41 of 1991. It was the further submission of learned counsel that neither his clients i.e. the appellants nor himself were informed of the date the judgment was to be delivered.

In answer to the submission on jurisdiction counsel for the Respondents referred to section 6 of Decree No. 41 of 1991 and submitted that it vested the learned trial judge with the power and jurisdiction to continue with the hearing of the case to conclusion.

As submitted by learned counsel for the Respondents, the fact that Enugu State was created out of the then Anambra State and the landed property in dispute is situate in Enugu State while the learned trial judge belongs to or is an indigene of the new Anambra State, does not divest him of the jurisdiction to continue with the case to finality. Section 6 of Decree no. 41 of 1991 provides as follows:

“Any proceeding pending before any court of a State immediately before the commencement of this Decree may, after such commencement be continued before that court and shall not adversely be affected by the provisions of this Decree.”

This completely answers Issue 1 of the appellants’ brief. I need say no more on it.

On the complaint that the learned trial judge delivered judgment without due notice to the appellants and who had filed a motion for the arrest of such judgment, the record of the proceeding as taken down by the learned trial judge provides a complete answer, it reads thus:

“2nd defendant present. Other parties absent. Mr. Anyamene, SAN

(Dr. Mogbana & Mrs. Udogu with him) for defendants.

Court: This case was adjourned to 21/10/91 for judgment was filed by counsel for plaintiff and co-plaintiffs. The court did not sit on 21/10/91 and at the direction of the Judge the case was adjourned to today 23/10/91 for judgment and the motion.

I came into the Court at 9.30 a.m. but counsel for the plaintiff and co-plaintiffs was not in court. I waited for the counsel for about 20 minutes. Mrs. Offiah from whose chambers Mr. Mabu who has conducted this case came into the court and on being questioned by the Court she said that Mr. Mabu was in the High Court No. 3.

The Court sent for him, firstly through Mrs. Offiah secondly through the Clerk of Court and finally through the Court duty Police. Mr. Mabu eventually arrived and said that he was not ready to on with the motion. He further says that the case file has been taken away from him.

Court: Motion is hereby struck out. (Sgd.) E.C. Ubaezonu), Judge, 23/10/91."

When learned counsel finally appeared in court he did not even deem it fit to apologise to the court but only discourteously told the court that he was not ready to go on with the motion and that the case file had been taken away from him. He did not apply for any adjournment. This in my view as nothing short of abandoning his motion for the arrest of judgment and the learned trial judge was perfectly right and in order when he struck it out. Counsel have a duty to be respectful and courteous to courts. It is part of the discipline in the legal profession. It is counsel that should wait for the court and not the other way round.

I am yet to come across a provision of any of our laws which provides that where a judgment is delivered without due notice of the delivery date to a party involved in consequence of which he is absent in court when the judgment is delivered, the judgment so delivered is null and void. Its delivery is neither without jurisdiction, nor is it null and void. It may amount to a mere irregularity which has no effect on the substance of the judgment or jurisdiction of the court.

Issues 1 and 6 are without merit and are resolved against the appellants.

Issue 7

It was the argument of learned counsel for the appellants under this issue that the 4th Respondent having given an irrevocable power of attorney to the 1st Respondent to sell the property in dispute, his subsequent sale of property by himself to the 2nd Respondent was illegal, null and void. He referred to the affidavit sworn to by 4th Respondent in support of his application of joinder of action.

It was his contention that the Respondents' case was no longer that the 2nd Respondent purchased the property from the 1st Respondent, but that the 2nd Respondent purchased it directly from the 4th Respondent. Learned counsel also attacked the power of attorney given to the 1st Respondent by the 4th Respondent as forgery and same not given by 4th Respondent and therefore the purported conveyance between the 1st and the 2nd Respondents irregular, void and of no effect. He also attacked the evidence adduced by Respondents as contradictory, particularly that of 4th Respondent.

In answer to the arguments above, learned counsel for the Respondent contended that since the appellants adduced no evidence in support of the averments in their pleadings which were successfully traversed, the legal effect would be that the appellants had abandoned their case and therefore the learned trial judge was right when he dismissed their case and that the Court of Appeal was right and in order when it affirmed the decision.

In paragraphs 9 and 10 of the 1st appellant which are the relevant averments on this issue, it was pleaded-

"9. The investigations revealed that the 1st defendant who is the 9th son and youngest child of the 4th defendant had purported to assign the property to the 2nd defendant acting pursuant to a Power of Attorney purportedly given by the 4th defendant. The said Power of Attorney dated the 13th day of July, 1990 and registered as No. 64/64/1299 will be founded at the hearing.

10. These findings were brought to the notice of the 4th defendant

who unequivocally denied having ever given any Power of Attorney to the 1st defendant in respect of the property or ever authorising the 1st defendant to sell the property. The 4th defendant further urged the plaintiff's husband to take all necessary steps to avoid the purported sale."

Also the case of the 2nd, 3rd, 4th and 5th appellants [who were referred to in both the trial Court and the Court of Appeal as co-plaintiffs] on this issue was stated in paragraphs 9, 10, 11 and 12 of the Statement of Claim of co-plaintiffs which state as follows:

9. *The co-plaintiffs aver that the 4th defendant admitted to the 1st co-plaintiff that he never sold, assigned or authorised the sale or assignment of the property to the 2nd defendant or anybody else.*

10. *The 4th defendant also denied ever donating a Power of Attorney registered as No. 64 at page 64 in Volume 1299 in the Lands Registry in the office at Enugu to the 1st defendant or anybody.*

11. *The co-plaintiffs aver that the purported assignment of the property by the 1st defendant to the 2nd defendant on the authority of the said Power of Attorney is null and void.*

12. *The co-plaintiffs aver that the said Power of Attorney was not donated to the 1st defendant by the 4th defendant as the signature thereon was not that of the 4th defendant."*

When learned counsel for the appellants was called upon by the learned trial judge to adduce evidence in proof of the averments in their pleadings, learned counsel Mr. Mabu was recorded to have stated -

"Mr. Mabu says that the plaintiff and co-plaintiffs do not intend to testify in this case nor do they intend to call any witness. Says the plaintiff and co-plaintiffs hereby close their case as they do not intend to lead evidence."

As a result of that submission, the Respondents opened their case and called one Chike Ikeoluonye Nwizu as their 2nd and last witness. Counsel on both sides addressed the court in a considered judgment by the learned trial judge, he opined on this issue as follows-

"Let me however deal with the several claims of the plaintiffs. The first is a declaration that the Power of Attorney dated 13th day of July

1990 and registered as No. 64 at page 4 in Volume 1299 of the lands Registry Enugu was not given by the 4th Defendant. The said Power of Attorney is Exhibit A. The 4th defendant told me that he executed and gave Exhibit A. He identified his signature in Exhibit A. I believe him
 B that he signed Exhibit A. Moreover, the plaintiffs through their Counsel says that the plaintiffs also rely on the evidence of 4th defendant. I find no substance in this claim in the light of the evidence before the Court.

The second relief claimed by the plaintiff but not claimed by the co-plaintiffs is for a declaration that the Notice to Quit No. RP/1998/90
 C dated 24th July 1990 and given by the 2nd defendant to the plaintiff in respect of the property is invalid null and void an of no effect. No such notice is before this Court. No reason was given as to why the notice was not produced in Court. There is no evidence why the Notice to quit
 D should be set aside. My view is that the plaintiff has not made this claim in any seriousness. The claim accordingly fail.

The third relief claimed by the plaintiff which is the same as the 2nd relief claimed by the co-plaintiffs is for a declaration that the purported
 E conveyance/assignment between the 1st and 2nd defendants for which the approval/consent of the 3rd defendants is required and based on the power of Attorney registered as 64/64/1299 is irregular, null and void. No evidence has been led by the plaintiff or co-plaintiffs why the trans-
 F action should be declared irregular, null and void. There is no evidence that the party or parties seeking this declaration have any beneficial interest in the subject matter of the claim. There is no evidence that the plaintiff or the co-plaintiffs are parties to any such transaction. There is
 G no evidence of the nature of the conveyance/assignment. If it is in the form of a document, there is no evidence that any of the plaintiffs is party to it. Moreover, the document is not before me. I hold the view that the plaintiffs have not made out a case to entitle them to the declaration sought. This claim also fails.”

H The Court of Appeal in affirming the above conclusions of the court said-

“First the question of invalidity of Exhibit A. This is an assertion by the appellant. It is trite that he who asserts must prove. If there is a

failure of proof the contested assertions become unsustainable. From appellants' pleadings, Exhibit A was a forgery that involved a criminal act which must be proved beyond reasonable doubt. See section 138(1) and 2 of the Evidence Act, Laws of Nigeria (1990) edition. The burden of proof in respect thereof rested squarely on appellants who gave no evidence whatsoever. On the other hand, 4th respondent testified emphatically as having executed Exhibit A. That piece of evidence remained unchallenged, uncontradicted, supported by the pleading and by its nature, not incredible, the trial judge had no option but to accept it. See *Nwabuko v. Otti* (1961) 2 SCNLR 232, *Bello v. Eweka* (1981) 1 SC 101 *M.I.A. & Sons v. F.H.A.* (1991) 8 NWLR (pt. 209) 295."

In dealing with the contradictory nature of the evidence, the Court of Appeal after referring to some portions of the evidence of 4th Respondent, said -

"I am satisfied that the above piece of evidence is in conflict with the pleading which have earlier been reproduced. It is trite that evidence which differs from what the parties pleaded goes to no issue and ought to be expunged or discarded by the trial court; an appellate court may discountenance it. See *Emegokwu v. Okadigbo* (supra) and *George & Ors. v. Dominion Flour Mills Ltd.* (supra). The law is now commonplace that parties are bound by their pleadings and any evidence at variance or in conflict, with the party's pleading should always be ignored. A trial judge has no responsibility to make a case for either Party which is different for what it had pleaded.

No doubt, if that was the only evidence before the court with regard to how the sale was effectuated, that point would have remained at large, fluid and indeed unproved. Nevertheless, the court, especially the appellate court, has a duty to examine the totality of the evidence tendered before the trial court in order to be satisfied that what the parties had pleaded is in consonance with the evidence led at the trial. Otherwise the assertion being made by the party in such circumstances would go to no issue, and it is another way of saying that the assertion has not been proved. Looking at Exhibit D, I am satisfied that its content is in tune with respondents' pleading with regard to the sale of the property in dis-

pute to 2nd respondent.

The next point of substance that was raised by appellants' Counsel under this issue was that if 4th respondent donated Power of Attorney in favour of 1st respondent it followed that he divested himself of title to sell the same property covered by the power of attorney. In other words, the purported sale of the property by 4th respondent would be invalid. Of course, respondents' counsel submitted to the contrary. The resolution of this controversy calls for a second look at the meaning and scope of the term power of attorney. A power of attorney is a document, and may be under seal, which authorises a person to act for another person as his agent. The person who donates the power is called the 'donor' while the person to whom it is donated is called the 'donee'. The power conferred on the donee may be either general or special. It is inconceivable that given the circumstances described above the right of the donor over certain property will be subordinated to that of the donee by reason only that he has, as it were, made a delegation of such right to the latter. The better view is that so long as the donee has not exercised the power comprised in the power of attorney it is clearly open to the donor to exercise the same power. Therefore, where the donee has in fact exercised the power under the power of attorney the donor's power in this regard expires."

I completely endorse the conclusions reached above on this issue and I do not think I can improve on them. The fact that a power of attorney was given by the 4th Respondent [who is the donor] of his power to alienate the property does not divest the donor of power to deal with the property so long as the 1st Respondent [the donee] had not exercised such power. See Gregory & Biude v (1) Clement Nwara (2) A.C. Rivers State [1993] NWLR (pt 278) 638 at 664 and 665; Ajowon v. Adeoti [1990] 2 NWLR (pt 132) 271 at 292 and 294, and Oshola v. Finnihi [1991] NWLR (pt 178) 192 at H 197.

This covers both Issues 7 and 8 which are both answered in Affirmative.

The last point raised in this appeal is Issue No. 9 under which the

appellants complained that no prior notice of four clear days was given with respect to the counter-claim and he cited order 27 Rule 4 of the High Court Rules of Eastern Nigeria, applicable in Anambra State.

Learned counsel for the Respondents submitted that this issue is incompetent as it was not related to any of the grounds of appeal. B

I have gone through the grounds of appeal filed [both original and additional] and I am unable to find any ground of appeal to which this issue is hinged. It is incompetent and is hereby struck out. See Ifediora & 4 Ors. v. Ben Ume & Ors. [1988] 2 NWLR (Pt 74) 5 AND Momodu v Momon [1991] 1 NWLR (pt 169) 608 at 620-621. C

On the whole I find no merit in any of the grounds of appeal raised and canvassed.

The appeal lacks merit and is hereby dismissed with 10,000.00 costs D to the Respondents.

KUTIGI JSC

I read in advance the Judgment just delivered by my learned brother Wali, J.S.C. I agree with his reasoning and conclusions. I also find no merit in the appeal. It is accordingly dismissed with costs as assessed. E

ONU JSC

Having had the advantage of reading in draft the judgment of my learned brother Wali, JSC just read, i am in entire agreement with him that the appeal is devoid of any merit and must perforce fail. G

In adding a few comments of mine, I wish to stress that, considering all the issues canvassed together:-

(i) the learned trial Judge was not wrong, in my opinion, in recording the evidence of the 4th Respondent himself out of turn instead of H allowing it to be recorded by a Magistrate or any other officer of the court assigned for the purpose upon commission before the close of pleadings and the joining of issues; that the Court of Appeal committed

any grave error in upholding that the method adopted by the trial Judge in taking the evidence of the 4th respondent was contrary to all known procedure and any rule of evidence. Indeed, the 4th respondent, the man who sold the property was called to say before the learned trial Judge that he sold he property involved before the court at the instance of the 1st appellant. That ended the matter as far as the parties were concerned and resorting to another officer of court or a Magistrate to do just that did not help matters favourable to the Appellant. A Magistrate or other officer of court is not better qualified to do what the learned trial Judge did when called upon as the donor of the power of attorney to testify.

(ii) Service on the parties of the processes of court had nothing to do with the Appellant in that the mode of service as agreed to by the parties was to be by service on counsel by counsel. Besides, there was no evidence led by the Respondents that supported any claims by the Appellant for the invocation of the principle of law that where the defendant's case supports the plaintiff's case and contains evidence on which the plaintiff is entitled to rely, the plaintiff may rely thereon in support of his case vide Akinola & ors. v. Oluwo & Ors. (1962) 1 All NLR 224 at 227; Okafor v. Idigo (1984) 1 SCNLR 481 at 512. In the instant case where there was no evidence led by the defence that supported any of the claims by the Plaintiffs/Appellants', there the matter ought to have ended.

(iii) The dismissal of the case of the Appellant by the learned trial Judge after recording the evidence of 4th Defendant/Respondent on commission did not deprive him (trial Judge) of his jurisdiction to proceed with the trial to conclusion because no notice of the delivery date was given; nor was the appeal to the Court of Appeal rendered a nullity thereby. The recording of the evidence of 4th Defendant/Respondent on account of his old age and infirmity on commission being permissible by the Rules of Court (see Order 23 Rule 54 of the Anambra State High Court Rules) was perfectly in order.

(iv) The decisions of the two courts below constitute concurrent findings of fact which ought not to be lightly disturbed unless there is shown some miscarriage of justice, the decision is shown to be perverse

or that there is a violation of some principles of law or procedure. See Okagbue v. Romaine (1982) 5 SC. 133; Nwadike v. Ibekwe (1987) 4 NWLR (Part 67) 718; Western Steel Works v. Iron & Steel Workers Union (1987) 1 NWLR (part 49) 284 and Akinsanya v. U.B.A. (Nig). Ltd. (1986) 4 NWLR (Part 35) 273, to mention but a few. In the instant case no such impediment has been pointed out to warrant such interference by me. B

(v) Should the learned trial Judge be held to have wrongly taken the evidence of 4th defendant/respondent and the court below shown to be in error (a conclusion which I do not concede), since it was learned Senior Advocate, - Mr. Mogboh, - who urged the trial Judge to do so while handling his client's case at a time pleadings had been completed from the 1st Appellant and 1st, 2nd and 4th defendants/respondents' respectively, no miscarriage of justice, in my opinion, had been occasioned on the alleged procedural irregularity, if any. Moreover, since the appellants did not call any evidence or testify at the trial but rather chose to rely on the case of the 4th respondent, they (appellants) cannot now be heard to complain. D E

It is for the above reasons and those fuller ones set out in the leading judgment of my learned brother Wali, JSC that I too, dismiss this appeal. I affirm the decision of the two courts below and make similar consequential orders inclusive of costs awarded by my learned brother Wali, JSC. F

IGUH JSC

I have had the privilege of reading in draft the leading judgment just delivered by my learned brother, Wali, J.S.C. and I am in full agreement with him that this appeal is without substance and ought to be dismissed. I propose, however, to consider, by way of emphasis only, one or two issues that arise for determination in this appeal. G

On the issue of whether Ubaezonu, J., as he then was, the learned trial Judge who tried the case but subsequently transferred his services to the Judiciary of the new Anambra State had jurisdiction to hear and determine the suit after the creation of the new state, it is not in dispute H

that the proceeding was pending before him, before the said new State was created by Section 1(1) of the State (Creation and Transitional Provisions) Decree No. 41 of 1991. Indeed, the actual hearing of evidence in the suit commenced on the 22nd day of January, 1991 following the defence application of the 6th December, 1990 for the evidence of the 4th defendant to be taken by way of commission. Before then, however, the proceeding had been pending before the same trial Judge who on the 1st day of November, 1990 granted an order for the substituted service of the writ of summons in the suit on the 1st defendant.

Section 6 of Decree No. 41 of 1991 provides as follows:-

“Any proceeding pending before any Court of a State immediately before the commencement of this Decree may, after such commencement be continued before that court and shall not be adversely affected by the provisions of this Decree.” (Underlining supplied)

It is thus crystal clear that the hearing of the present proceeding which was part-heard and pending before the said trial Judge in the Enugu Judicial Division of the High court of Justice of the old Anambra State immediately before the commencement of the said Decree No. 41 of 1991 could therefore be continued with and the case determined before the same court. In other words, Ubaezonu, J., as he then was, before whom the case was pending before the commencement of the relevant Decree was vested with ample jurisdiction to continue with the hearing of the suit in his court after the commencement of the Decree. I entirely agree with the submission of learned counsel for the respondents, Chief Ugolo, that if it was the intendment of Section 6 of Decree No. 41 of 1991 that pending cases shall be tried de novo by another Judge of Enugu State origin, the expression that the trial of such cases may, after the commencement of the Decree, “*be continued before that court and shall not be adversely affected by the provisions of this Decree*” should not have been used. This is because, the hearing of a part-heard case taken over by another Judge is not “*continued before the new Judge*” but shall be started de novo by such new Judge in accordance with the basic principles of our law. It is my view, therefore, that the hearing of the present suit which was pending before Ubaezonu, J., as he then was, immedi-

ately before the commencement of Decree No. 41 of 1991 may after such commencement be continued before that court, quite rightly, pursuant to the provisions of Section 6 of that Decree.

There is next the issue which poses the question whether the court below was right in holding that the learned trial Judge was in order to have himself taken the evidence of the 4th defendant upon an application that the same be taken by way of commission before the said trial Judge heard the evidence of the plaintiffs in the case. In this regard, it ought to be observed that it was the respondents who, by a motion or notice applied for an order directing a Magistrate or any officer of the High Court to take the said evidence of the 4th defendant on commission. In opposing this application, learned counsel for the appellants submitted inter alia as follows:-

“Says that the order sought was prejudicial to the plaintiff/respondent in that evidence taken by another person will be of no evidential value to the court. The evidence of the 4th defendant ought to be taken by this court. Says that the nature of his evidence ought to be stated.” (Underlining supplied)

It was learned counsel for the appellants, therefore, who, quite rightly, in my view, urged the learned trial Judge to take the evidence of the 4th defendant himself for the purpose of giving the same more evidential value at the hearing of the case before that court.

I should, perhaps, stress that the testimony of the 4th defendant was taken out of turn in the proceedings by virtue of the provisions of Order 23 Rule 54 of the High Court Rules of Anambra State, 1988. This was on grounds of the very old age and dwindling health of the witness and the fact that as the owner of the landed property in dispute, his testimony on the issues before the court was of vital importance in the just determination of the suit.

Learned appellant’s counsel not only took full part in the proceedings when the evidence of the 4th defendant was taken by the trial court, he also cross-examined him most extensively. Indeed the witness was recalled at the subsequent hearing of the case and was further cross-examined by the appellant’s counsel. It seems to me, in these circum-

stances, that no question of any miscarriage of justice could possibly arise in the procedure and manner the learned trial Judge conducted the proceedings.

I think i ought to point out in this connection that even if there was
 B any error in the procedure the evidence of the 4th defendant was taken,
 and I clearly do not so hold, it is not every error or mistake that will result
 in an appeal against the judgment in a suit being allowed. It is only when
 the error is substantial in that it has occasioned a miscarriage of justice
 C that an appellate court is bound to interfere. See Onajobi v Olanipekun
 (1985) 4 S.C. (part 2) 156 at 163, Ukejianya v. Uchendu 13 W.A.C.A.
 45, at 46, Anyanwu v. Mbara (1992) 5 N.W.L.R. (Part 242) 386 at 400,
Azuetonma Ike v. Ugboaja (1993) 6 N.W.L.R. (Part 301) 539 at 556 etc.

In the second place, I think it is now settled law that in appropriate
 D cases, our courts now appear to be deliberately shifting away from the
 narrow technical approach to justice which characterised some earlier
 decisions of courts on various matters. Instead, it now pursues the
 course of substantial justice. See Consortium M.C. v. N.E.P.A. (1992) 6
 E N.W.L.R. (Part 246) 132 at 142, Okonjo v. Dr. Odje (1985) 10 S.C. 267,
Bello v. Attorney-General Oyo State (1986) 6 N.W.L.R. (Part 45) 828
 etc. It seems to me that if under the provisions of Order 23 Rule 54 of
 F the High Court Rules of Anambra State, 1988 a magistrate or any officer
 of the court is permitted to take the evidence of a witness by way of
 commission, it cannot, with respect, be right to suggest that a High Court
 Judge, a judicial officer with much higher jurisdiction and status than a
 magistrate or any other officer of the court is incompetent to take such
 G evidence unless there exists any law which stipulates to the contrary. I
 know of no such law and my attention has not been drawn to any in this
 appeal. I am therefore of the view that the Court of Appeal was right by
 taking the evidence of the 4th defendant by way of commission as urged
 upon the court by learned counsel for the appellant.

H There is also the issue whether the Court of Appeal was right by
 failing to hold that the judgement of the learned trial Judge is a nullity,
 having been delivered without due notice of the appellants. A close study
 of the record does show that the learned trial Judge rightly struck out the

appellants' motion for the arrest of judgment for want of prosecution. Parties with their learned counsel were in court on the 8th October, 1991 for the hearing of the motion and for judgment. What transpired thereafter is reflected in the record of the proceedings of the 23rd October, 1991 on which date judgment was eventually delivered in the suit. It B reads:-

"Court: This case was adjourned to 21/10/91 for judgment. Before that date a Motion to Arrest the Judgment was filed by Counsel for plaintiff and co-plaintiffs. The Court did not sit on 21/10/91 and at the C direction of the Judge the case was adjourned to today 23/10/91 for judgment and the motion.

I came into the court at 9.30 a.m. but counsel for the plaintiff and co-plaintiffs was not in court. I waited for the counsel for about 20 minutes. Mrs. Offiah from whose chambers Mr. Mabu who has conducted this case came into the court and on being questioned by the court D she said that Mr. Mabu was in the High Court No. 3.

The court sent for him, firstly through Mrs. Offiah secondly through the Clerk of court and finally through the court duty Police. Mr. Mabu E eventually arrived and said that he was not ready to go on with the motion. He further says that the case file has been taken away from him.

Court: Motion is hereby struck out. (Sgd.) E.C. Ubaezonu, Judge 23/10/91" F

Thereafter the learned trial Judge was left with no option than to deliver his judgment in the suit. I cannot see how the trial court can be faulted in this procedure.

It is clear from the record of proceedings that the judgment of the court was not only delivered with due notice to the parties, their respective counsel were in fact in court and announced their appearances before the delivery of judgment on the said 23rd October, 1991. It is therefore plain that the Court of Appeal was absolutely right when it held that no question of nullity arose in respect of the judgment of the trial court in H the suit.

There is finally the issue whether the Court of Appeal was right by holding that the sale of the house in dispute to the 2nd respondent was

duly established. In this regard, both the trial court and the court below so found and I can find no reason for disturbing this concurrent finding of fact by the two courts below. The 4th defendant's evidence that he duly executed the power of attorney, Exhibit A, with which the property in issue was sold remained unchallenged and uncontradicted and both courts below were right to act upon it. See Union Bank Limited v. Ogboh (1995) 2 N.W.L.R. (Part 380) 647 at 669.

Learned counsel for the appellants did submit that the said Exhibit A issued to the 1st defendant by the 4th defendant divested the latter of any power to sell the property. I need only state that even if the 4th defendant sold the house to the 2nd defendant after executing the power of attorney, Exhibit A, this would not be any matter of concern. This is because the 4th defendant as the donor of Exhibit A had a right to dispose of his property on the facts of the present case so long as the donee had not executed his power of sale before disposition by the said donor. See Ude v. Uwara (1993) 2 N.W.L.R. (Part 278) 638 at 665, Ajuwon v. Adeoti (1990) 2 N.W.L.R. (Part 132) 271 at 294. It is where a power of attorney is expressed to be irrevocable and is given to secure a proprietary interest of the donee or the performance of an obligation owed to the donee that it is irrevocable either by the donor without the consent of the donee or by the death, incapacity, bankruptcy, winding up or dissolution of donor, so long as the donee has the interest or the obligation remains undischarged. See Reigate v. Union Manufacturing Co., (Ramsbottom) (1918) 1 K.B. 592, C.A. Where the authority of an agent is given by deed, or for valuable consideration, for the purpose of effectuating any security, or of protecting or securing any interest of the agent, it is irrevocable during the subsistence of such security or interest. See Slatter v. Railway Commissioners (New South Wales) (1931) 45 C.L.R. 68. But it is not irrevocable merely because the agent has an interest in the exercise of it. In my view, Exhibit A is not irrevocable as it did not by itself constitute a security for the agent and was not even made for any valuable consideration.

It is for the above and the more detailed reasons contained in the judgment of my learned brother, Wali, JSC that I, too, dismiss this appeal

with costs to the respondents against the appellant which I assess and fix at 10,000.00

KATSINA-ALU JSC

I have had the advantage of reading in draft the judgment of my learned brother Wali, JSC in this appeal. I entirely agree with it.

The subject matter of this suit is a house and premises lying and situate at No. 22 Moore Street, Ogui, Enugu belonging to the 4th defendant Sampson Okafor Chime. The 2nd, 3rd, 4th and 5th appellants are sons of the 4th defendant. The 1st defendant also is a son of the 4th defendant. The plaintiff Augusta Chime is the wife of the 2nd appellant.

The plaintiff's claim against the defendants is as follows:-

(i) *A declaration that the Power of Attorney dated the 13th day of July, 1990 and registered as No. 64 at Page 64 in Volume 1299 of the Lands Registry, Enugu was not given by the 4th defendant.*

(ii) *A declaration that the Notice to Quit No. RP/1998/90 dated 24th July, 1990 and given by the 2nd defendant to the plaintiff in respect of the property plaintiff lawfully occupies at No. 22 Morehouse Street, Ogui Enugu is invalid, null and void and of no effect.*

(iii) *A declaration that the purported Conveyance/Assignment between the 1st and 2nd defendants for which approval/consent of the 3rd defendant is required and based on the Power of Attorney registered as 64/64/1299 is irregular, null and void.*

(iv) *An injunction restraining the defendants, their servants agents and functionaries from taking steps to perfect the assignment and from interfering with the plaintiff's user and enjoyment of the property situate at No. 22 Moorehouse Street, Ogui Enugu.*

By his motion dated 14/11/90, the 4th defendant applied to be joined as a defendant in this suit. The motion was not opposed by appellant's counsel when it came on for hearing on 29/11/90. It was accordingly granted. Learned counsel for the parties asked for accelerated hearing in view of the age of the 4th defendant who was 89 years old. The trial court granted them accelerated hearing on 29/11/90 and fixed hearing on 21st and 22nd January 1991.

B Meanwhile on 10/12/90 counsel for 1st, 2nd and 4th defendants filed a motion in which he prayed the court to order a Magistrate or any officer of the court to take the evidence of the 4th defendant on commission in view of his old age and poor health. The application was heard on 18/12/90.

In opposing the application, learned counsel for the applicants, A.O. Mogboh Esq. SAN stated inter alia:-

C *The order sought was prejudicial to the plaintiff/respondent in that evidence taken by another person will be of no evidential value to the court. The evidence of the 4th defendant ought to be taken by this court.*” The learned trial judge obliged the plaintiff. He decided to take the evidence of the 4th defendant himself. On 22/1/91 the 4th defendant testified and was cross-examined by Mogboh, Esq. SAN.

D Meanwhile the 2nd, 3rd, 4th and 5th appellants applied to be joined as co-plaintiffs. They were subsequently joined as co-plaintiffs on 2/7/91.

E When the case came on 24/9/91 for hearing, the appellants applied to recall the 4th defendant who had earlier testified as D.W.1. On 27/9/91 4th defendant was recalled and cross-examined. At the end of cross-examination, appellants’ counsel informed the court that he did not intend to call any witness and closed the case of the plaintiff and co-plaintiffs.

F The evidence of the 4th defendant was that the house belonged to him. He also said he made the power of attorney. As I have already pointed out, the appellants as plaintiffs did not testify at the trial. They led no evidence the result of which was that the evidence of the 4th defendant remained unchallenged.

G The statement of claim of the Plaintiff and co-plaintiffs was not evidence before the court of trial. Failure to lead evidence in line with their pleadings means simply this: that the claim must fail.

H For this reason and the fuller reasons given by my learned brother Wali, JSC I, too, would dismiss this appeal with 10,000.00 costs to the defendants/respondents.