

SUPREME COURT OF NIGERIA
FRIDAY 14TH JUNE, 2002. SC. 95/2000
CORAM:- M. L. UWAIS CJN, U. MOHAMMED,
A. I. KATSINA-ALU, U. A. KALGO, E. O. AYOOLA, JJSC

1. JOSIAH CORNELIUS LTD
2. MASTER MALLEABLE FITTINGS
& FOUNDERS NIG LTD APPELLANTS
3. THE WHEEL BARROWS, HAND
TRUCKS & CARTS MAN. CO LTD
4. THE ROAD MASTER INDUSTRIES
NIG LTD
AND
CHIEF CORNELIUS OKEKE EZENWA RESPONDENT

COURTS - Exercise of discretion - Basis - Trial court considered other reasons - Apart from the ones listed by Court of Appeal - Before coming to the conclusion to make its orders (H1)

ORDERS OF COURT - Binding nature of - Respondent is estopped from further challenging the orders - Since he had complied with a part of it (H2)

COURTS - Fair hearing - Breach - Allegation of - Sustainability - Respondent was not unfairly treated - Since he did not complain - When first part of the order was complied with (H3)

COURTS - Discretion - Exercise of - Interference - Appellate court will not interfere with the discretion of trial court - Unless where such discretion was exercised upon wrong principle - Or was tainted by substantial irregularity (H4)

FACTS

This matter had its origin at the Federal High Court, Lagos wherein respondent applied for the winding up of appellants i.e. four companies in this matter. The court refused the application but ordered that majority shareholder of the companies should buy the shares of minority shareholder at a fair price. Respondent success-

fully appealed to the Court of Appeal, Lagos Division. Appellants on their part successfully appealed to Supreme Court, wherein the trial court's judgment was restored.

Nevertheless, the matter returned to the same Federal High Court. The court adjudged the sum of N116,708,678.80 as a fair value of the shares of the minority shareholder. Thereafter, respondent applied to the court to direct appellants to prepare and execute instrument of transfer of his shares and direct time within which the aforesaid sum of money shall be paid to him (respondent). Appellants brought an application seeking for enlargement of time within which to pay respondent the said sum by installment. The court granted the application of appellants by enlarging the payment period. Being dissatisfied respondent filed appeal at the same Court of Appeal. The court fixed a shorter period within which appellants must pay respondent. The judgment was not pleasing to appellants. Hence, they appealed to Supreme Court.

ISSUES FOR DETERMINATION

"1. Whether the court below was right in holding that the reasons given by the trial court for arriving at the orders which it made were in law irrelevant and untenable and therefore insufficient to sustain the orders which it made.

2. Whether the lower court (sic) was not in error in law to have interfered with the trial court's exercise of its discretion in ordering an installment payment by the majority shareholder of the total value of the shares of the minority shareholder."

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

COURTS - Exercise of discretion - Basis

1. The above are the two reasons which the Court of Appeal said were irrelevant and untenable in this case. With the greatest respect to the Court of Appeal the two reasons it listed above are not and cannot be the only reasons envisaged by the learned trial judge in his ruling before coming to the conclusion to make the orders as he did. In the first place the learned trial judge said he has read the motion papers of the

parties which must include affidavits filed therein, and has also heard the submissions of counsel for the parties.

It was after considering these submissions of counsel that the learned trial judge came to the conclusion that he would grant the parties' respective prayers "subject to modifications". This therefore appears to me very clearly that having regard to all what I said above, there are sufficient materials before the learned trial judge to say that he exercised his discretion judiciously and judicially, in making the orders which he made.

(pp. 1838 E/1840 H)

ORDERS OF COURT - Binding nature of

2. It is pertinent to observe that the respondent did not at any stage appeal against the order of the trial court to sell his shareholding in the 4 companies concerned to the majority shareholder at N116,708,678.80. His appeal to the Court of Appeal which has now reached this court, was on the mode of payment only. In fact he agreed with the decision of the trial court even on the mode of payment because he withdrew from that court's registrar the first installment of the sum of N30,708,678.80 which was paid in by the majority shareholder in compliance with the trial court's first order. This order is the most important one by which the whole amount outstanding will be paid if fully complied with and in my view, compliance with any part of it which has been accepted by the respondent, binds the respondent and estops him from further challenging the orders therein. (p. 1842 C)

Fair hearing - Breach - Allegation of - Sustainability

3. The learned counsel for the respondent in his brief and the Court of Appeal in its judgment, referred to the case of *Odusote v. Odusote* (1971) 1 All NLR 219 at 223 alleging that although the learned trial judge exercised a discretion in making the orders complained of, there is miscarriage of justice in the exercise of the discretion and must therefore be reviewed. I have earlier in this judgment set out the circumstances leading to the orders complained of and the fact that none of the parties appealed against them. In fact when the first part of

the first order was complied with by the money deposit into court, the respondent accepted it without any complaint. I do not see how the respondent or any of the parties in this case was unfairly treated or any miscarriage of justice has occasioned on the part of any of them. (p. 1842 F)

B

COURTS - Discretion - Exercise of - Interference

4. It is a well established and settled principle of law that an appellate court will not, in principle, interfere with the exercise of discretion by the trial court unless that discretion is shown to have been exercised upon wrong principle or that the exercise was tinted by some illegality or substantial irregularity.

C

It is also well settled that in an appeal against the exercise of a discretion by a lower court, the appellate court cannot substitute its own discretion for that of the lower court. The appellate court must be satisfied that the discretion was exercised on wrong principle by the lower court before it interferes with the exercise of the discretion. And such wrong principles may include exercising the discretion by reference to extraneous matters done without adverting to relevant considerations. (p. 1843 A)

D

E

REPRESENTATION

F

Kehinde Sofola SAN, with E. Ejuwa (Miss) for the Appellants
T. E. Williams with Mrs. F. Gambari-Mohammed for the Respondent

CASES REFERRED TO

G

Odusote v. Odusote (1971) 1 All NIR 219
Anyah v. A.N.N. Ltd (1992) 6 NWLR (Pt. 247) 319
University of Lagos v. Aigoro (1995) 1 NWLR (Pt. 1) 143
Niger Construction Ltd. v. Okungbeni (1987) 4 NWLR (Pt. 67) 787
7-up Bottling Company Ltd. v. Abiola & Sons Ltd. (1995) 3 NWLR (Pt. 381) 257
Okere v. Nlem (1992) 4 NWLR (Pt. 234) 123
Okafor v. Bendel Newspapers Corporation (1991) 7 NWLR (Pt. 206) 651
University of Lagos v. Olaniyan (1985) 11 NWLR (Pt. 1) 156

H

STATUTE REFERRED TO

Companies and Allied Matters Act (CAMA) s. 312(2)(c)

LEAD JUDGMENT BY KALGO JSC

This case has had a checkered history. It originated in the Federal High Court Lagos where the respondent filed 4 separate petitions for winding up of the appellants in April, 1991. The respondents separately filed replies to the petitions together with verifying affidavits sometimes in May 1992. The Federal High Court heard the petitions and in a considered judgment delivered by Jinadu J, (as he then was) on the 12th of August 1992, he said:-

“I therefore refuse the prayer to wind up the respondents but will make other orders under Section 312 aforesaid. But deciding what power to invoke under the provisions of Section 312 aforesaid, I must by law invite learned counsel on both sides to address the Court.”

Reference to Section 312 here means Section 312 of the Companies and Allied Matters Act. Thereafter the case suffered a lot of adjournments but subsequently counsel were heard and on the 30th of July 1993, the learned trial judge finally ordered:

“1. That the petitions are accordingly hereby struck out with N2,000.00 costs in favour of the respondents.

2. That the majority shareholder Mr. Nnoruka shall buy the shares of the minority shareholder Mr. Ezenwa at a fair value to be assessed by Mr. Tajudeen Odofin of Dapo Odofin & Company, Chartered Accountants of 15, St. Agnes Street, Off Birell Avenue, Sabo, Yaba, who is hereby specifically appointed to assess the fair value of the shares of the minority shareholder in the four companies and his assessment shall form part of the order of this court.

3. That the majority shareholder is hereby ordered to pay to the minority shareholder any sums assessed by the appointed Chartered Accountants as a fair value for the shares of the minority shareholder in the four companies.

4. That the names of the four companies should be changed by substituting new names for the said companies in compliance with the provisions of clause II of the Joint Ventures Agreement dated 9th day of July, 1989.

5. *The Receiver/Manager is hereby granted a period of 3 (three) months ending 30th October, 1993 to finalize the affairs of the four companies with a view to handing over to the majority shareholder who will also pay for the shares of the minority as assessed by Mr. Adofin and who will also effect the change of names of the companies within a period of 3 months from 30th July 1993.*"

The respondent appealed to the Court of Appeal against this decision and his appeal was allowed and the orders were set aside. The appellants were dissatisfied and they appealed to this court. The appeal was successful and the decision of the Court of Appeal was set aside and that of the trial court was restored. The matter still returned to the Federal High Court Lagos and on the 2nd of July 1997 the amount of N116,708,678.80 was adjudged by that court as being the fair value in monetary terms of the shares of the minority shareholder in the four (4) companies.

And by an application dated 17th September, 1997, the respondent prayed the trial court to direct the appellants to prepare and execute instrument of transfer of his shares and direct the time within which the agreed amount of N116,708,678.80 shall be paid to him by the appellants. And on the 18th September 1997, the appellant filed in application praying the court for enlargement of time within which to pay the respondent the sum of N116,708,678.80 by installments according to the schedule attached to the application. He also prayed the court to order the respondent to surrender to him all the title documents relating to the assets of the 4 companies involved prior to the payment mentioned above. The trial court heard arguments of concession of the two applications and on 7th November, 1997, ruled:-

"1. *That the majority shareholder shall pay to the minority shareholder on or about the 31st day of January, 1998 the sum of N30,708,678.80 and thereafter liquidate the balance of N86 million by equal annual installments of N8.6 million effective from 31st day of January, 1999 to end on the 31st day of January, 2008 when the last installment shall be paid. There will be 2% interest on the sums remaining unpaid. All payment shall be made through the Chief Registrar of this court. Simultaneously upon the payment of the sum of N30,708,678.80 on the 31st of January, 1988, through the Chief Registrar, the minority shareholder shall through the Chief Registrar*

hand over all the title documents of all the properties of the four (4) companies to the majority shareholder who becomes the owner of all the properties. To achieve this, the majority shareholder shall prepare all title documents for execution by the minority shareholder on or before the 31st day of January 1998.

2. That upon any default in the payment of the yearly installments of N8.6 million all the outstanding balance shall become due and payable.

3. That the payment of the fees of all professionals shall be made in the proportion of 60% by the majority shareholder and 40% by the minority shareholder on or before the 31st day of January 1998.

4. That the receiver/Manager shall register the new names of the four (4) companies for handing over to the majority shareholder on or before the 31st day of January, 1998 to this end the two parties shall make available to the receiver/Manager all documents necessary to facilitate the said exercise."

Dissatisfied with this order, the respondent again appealed to the Court of Appeal which after hearing the appeal made the following orders per Oguntade JCA:-

"1. The majority shareholder is to pay to the appellant the minority shareholder the sum of N116,708,678.80 being the value in monetary terms of the shares of the Appellant in the four respondents/companies on or before 30th April, 2002.

2. The appellant shall release to the receiver/manager all the documents of title to the shares in respondents/companies upon his being paid the full sum of N116,708,678.80 and the receiver/manager shall release the documents of title to the majority shareholder Chief J. O. Nnoruka.

3. I do not see any need to make any order as to payment of interest in view of the short time I have allowed for payment of the judgment debt.

4. If the majority shareholder had complied with the order to pay N30,708,678.80 to the Chief Registrar of the lower court, the said Chief Registrar shall forthwith pay the said sum to the appellant such that the balance to be paid by the majority shareholder shall correspondingly be reduced to N86 million.

5. I make no order as to cost."

In this court, learned counsel for the parties filed and exchanged their respective briefs in this matter. The appellants identified two issues for the determination of this court to wit:-

B “1. *Whether the court below was right in holding that the reasons given by the trial court for arriving at the orders which it made were in law irrelevant and untenable and therefore insufficient to sustain the orders which it made.*

C 2. *Whether the lower court (sic) was not in error in law to have interfered with the trial court’s exercise of its discretion in ordering an installment payment by the majority shareholder of the total value of the shares of the minority shareholder.*”

The respondent on the other hand formulated only one issue for determination and that is-

D “*Whether the Court of Appeal was right in holding that the reasons given by the trial court for arriving at the orders which it made were in law irrelevant and untenable and therefore incapable of sustaining the Orders which it made.*”

E Looking at the issues raised by the parties’ counsel in their respective briefs, it appears to me that issue No 1 of the appellants is very much identical to the only issue of the respondent. I will therefore adopt and consider the two issues identified by the appellants in this appeal having regard to the grounds of appeal earlier filed.

F The two issues of the appellants taken together deal with whether the reasons given by the learned trial judge before making the orders in his ruling under appeal were irrelevant and untenable in law, and insufficient in sustaining the exercise of the discretion to make the orders. I therefore intend to consider them together.

G It is common ground that the person who was ordered by the trial court to pay the fair value of the respondent shares in the 4 companies concerned Mr. Josiah Samuel Okechukwu Nnoruka, is a close friend of the respondent and both of them together in the spirit of friendliness incorporated the 4 companies in the share proportion of 60% to Mr. Nnoruka and 40% to the respondent. It is also common ground that this order was later confirmed by the Supreme Court in its judgment delivered on 16th April 1996. It is also clear and undisputed that after the trial court settled the question of fair value of the shares of the respondent in the 4 companies at N116,708,678.80 on the 2nd of July 1997 none of the parties chal-

lenged it. On the 17th September 1997, the respondent brought an application in the trial court praying for orders:-

“i. Directing that Josiah Samuel Okechukwu Nnoruka shall forthwith prepare or cause to be prepared and sent to the petitioner’s legal practitioners the shares to himself;

ii. directing the time within which the petitioner shall duly execute the said instruments of transfer;

iii. directing the time within which the said Josiah Samuel Okechukwu Nnoruka shall pay the sum of N116,708,678.80 to the petitioner; and

iv. giving such further or other directions (including direction as to the payment of interest) as the court deems fit.”

On the 18th of September 1997, the appellants also filed an application in the trial court praying for the following orders:-

“a. granting an enlargement of time within which the majority shareholder in the four respondents’ companies herein, Chief Josiah S. O. Nnoruka, is to pay to the petitioner herein, the assessed value of the shares of the petitioner therein by installment payment of the sum of N116,708,678.80 directed to be paid by the said majority share holder as per the mode of payment set out in the schedule annexed to this motion on Notice;

b. directing the petitioner herein to surrender to the said majority shareholder all the title documents and other legal documents relating to the lands, buildings, cars, vehicles, and other properties and assets of respondent companies in the possession of the petitioner as well as the keys to the properties, prior to the payment ordered herein and

c. for such further and/or other orders as this honourable court may deem fit to make in the circumstances.”

I have deliberately omitted the schedule mentioned in prayer (a) above as not being necessary at this stage. The two applications were consolidated and heard together by the learned trial judge, and in the ruling delivered on 7th November, 1997, he made the orders which gave rise to this appeal and which I have already set out earlier in this judgment. I do not intend to repeat them here.

The substance of issue I and ground of appeal is that the reasons given by the learned trial judge before making the orders now appealed against were relevant, tenable and sufficient to sustain the

orders. In his ruling on the applications, the learned trial judge after reviewing the submissions of both counsel in the matter, said:-

B *"I have read through the motion papers on both sides and the submissions of both counsel. This case calls for the exercise of this court's discretion both judicially and judiciously having regard to all the circumstances of this particular case and the checkered antecedent including the prolongation of the finality of his case by the minority shareholder. I agree with the submissions on behalf of the majority shareholder that the economic situation in the country is bad and that it is difficult to raise money these days.*

C *I will grant the first three prayers of the minority shareholder and the first two prayers of the majority shareholder subject to modifications.*" (Underlining mine)

D The Court of Appeal per Oguntade JCA, after setting out the above quoted extract in its judgment under appeal had this to say:-

E *"From what the trial judge said before making the orders, it would appear that he relied on two reasons. (1) that the minority shareholder had been responsible for the delay in bringing the dispute to a finality, (2) that the economic situation in the country was bad and that it was difficult to raise money".*

F ***The above are the two reasons which the Court of Appeal said were irrelevant and untenable in this case. With the greatest respect to the Court of Appeal the two reasons it listed above are not and cannot be the only reasons envisaged by the learned trial judge in his ruling before coming to the conclusion to make the orders as he did. In the first place the learned trial judge said he has read the motion papers of the parties which must include affidavits filed therein, and has also***

G ***heard the submissions of counsel for the parties.*** He also considered the circumstances of this particular case and its antecedents before the coming to the two reasons itemized by the Court of Appeal. In fact the question of the prolongation of the finality of the case was just part of the first group of reasons considered by the

H learned trial judge before making the orders. There is no doubt that in applications like this before him, he has discretion to grant or refuse any prayers by the applicant though such discretion must be exercised judicially and judiciously. The learned trial judge reminded himself about this in the extract quoted above and he specifically stated

that he considered the motion papers including of course averments in the affidavits and more importantly the circumstances and the antecedents of the case. The antecedents of the case have shown that the learned trial judge had exercised his discretion under Section 312 (2) (c) of the Companies and Allied Matters Act (CAMA) when he ordered that the shares of the minority shareholder (the respondent) be bought by the majority shareholder in the 4 companies concerned and this was confirmed by the Supreme Court in case NO. SC. 102/1994. The learned trial judge has also the power to order the payment of the judgment debt by installments with or without interest under Order XLV Rules 7 and 8 of the Federal High Court (Civil Procedure) Rules. The parties have also been in full agreement on the actual amount to be paid to the minority shareholder (respondent) by the majority shareholder.

From the record of proceedings in this appeal, it is clear to me that the respondent appealed to the Court of Appeal after the first order made by the trial court to buy off his shareholding in the 4 Companies involved on 12th August 1992. Thereafter the respondent filed another application which was argued and another decision given by the trial judge on 30th July 1993. Then the respondent appealed against this decision to the Court of Appeal. The two appeals were consolidated, heard and both were set aside by the Court of Appeal. The appellants then appealed to this court in the case No. SC. 102/1994 when the decision of the Court of Appeal was set aside and those of the trial judge of 12th August 1992 and 30th July 1993 were restored. This was on the 16th of April, 1996. This was a delay of 4 years after the first decision of the trial court thereafter the final sum of N116,708,678.80 was agreed as fair value of the respondents shares in the 4 companies concerned. Then on 17th July 1997, the respondent applied to the trial court to fix a deadline for payment of the said amount to him and set the manner of payment. This lasted until 7th November 1997 when the orders now complained about were made. So, it is reasonable in my view, having regard to the above movements of court proceedings to regard the respondent as causing the delay though of course not all of it. And the learned trial judge did not blame him solely for the delay as he mentioned other more serious reasons before “including” the delay.

I will now refer to the submissions of counsel mentioned ear-

lied. The learned counsel for the petitioner/respondent in sum submitted that the trial court should not order payment by installments as requested by the appellant as it would take unreasonably long period of about 15 years before the debt is liquidated. He also objected to the release of the documents of the respondent's assets and shares before full payment of them is made, and that the respondent was even prepared to accept payment in kind if need be.

In his submissions, learned counsel for appellants was recorded by the learned trial judge on pages 124 - 125 of the record thus:-

"On behalf of the majority shareholder Mr. Oyende sought an enlargement of time within which the majority shareholder in the companies is to pay to the petitioner the assessed value of his shares in the companies by installment payment as contained in the application. He referred to the schedule annexed to the majority shareholder's application showing the mode of payment. He then referred to the 15 paragraph affidavit in support and relied on all the paragraphs particularly paragraph 6 - 14 thereof wherein the majority shareholder stated that the plants and machinery in the companies have been lying fallow and unattended to since 1990 and have now been damaged beyond repairs. He said that the majority shareholder stated that the majority shareholder will require colossal sums of money to put the plants and machinery back into operation and that the income of the majority shareholder has been greatly hampered by the petitions filed since 1990 since he derived his main source of income from the companies. Learned counsel submitted that the justice of this case will be better met if the majority shareholder is allowed to resuscitate the companies so that he can raise the assessed value of the petitioner's share therein. He said further that the majority shareholder has also deposed that the resuscitation of the companies will be impossible if he is made to pay the whole sum at once. Also that in view of the poor state of the majority shareholder and the grim economic situation in the country he has been unable to obtain an overdraft or loan from any bank to enable him liquidate the said sum. He invited the court to take judicial notice that even banks are recapitalizing right now. He said that the positions stated above have not been denied therefore they should be deemed admitted". (Underlining mine)

It was after considering these submissions of counsel

that the learned trial judge came to the conclusion that he would grant the parties' respective prayers "subject to modifications". This therefore appears to me very clearly that having regard to all what I said above, there are sufficient materials before the learned trial judge to say that he exercised his discretion judiciously and judicially, in making the orders which he made. B

The Court of Appeal created the impression in its judgment all through that the majority shareholder intended to buy the shares of the minority shareholder in the 4 companies concerned. It said:- C

"Therefore it is preposterous for a person intending to buy out another member of a company to say that because the company whose shares he wants to acquire is not doing well, he cannot raise money to buy the shares. The decision to acquire the shares of another Company is purely optional. It is either that the prospective D buyer sees the shares as worth being purchased in which case he buys or that they are not worth being purchased in which case he does not buy". It went on to say:-

"But the majority shareholder wanted for himself and himself alone 100% shareholding in the respondent/companies and prevailed E on the court to use the money of the minority shareholder as a loan to acquire it".

It is not in dispute at all that the majority shareholder in this case, did not at any time intend to buy out the majority shareholder F in the 4 companies concerned. It was as a result of the orders of the trial court that he agreed to do so. Before the orders were made he was not asked whether he wanted to buy out the minority shareholder or whether he had the funds to do so at that time. So the question of giving the majority shareholder any option does not arise G in the circumstances of this case.

It is also not in dispute that from 1991 when the respondent filed his petitions to wind-up the 4 companies concerned, up to 1997 when the trial judge made the orders complained of (a period of about 6 years) the companies operations had stopped and all the machines left unattended to. It was also not in dispute and the court H can take notice thereof that at the material time the orders were made, the economic situation in the country was so bad that it was not possible to raise money from any banks or financial institutions. There-

fore it was reasonable in my respectful view, to allow the majority shareholder more time to be able to resuscitate the companies concerned. I have no doubt in my mind that the learned trial judge considering the circumstances of this case, including the Joint Venture Agreement between the parties decided to exercise his powers under Section 312 (2)(c) of CAMA so as not to “kill” the 4 companies. It was not and could not be his intention to hand over the 100% shareholding of the companies to the majority shareholder at the expense of the minority shareholder. It was therefore not correct as the Court of Appeal held that the majority shareholder could not pay the respondent because he wanted to keep both his 60% of the companies and the 40% of the respondent’s shares with him exclusively.

It is pertinent to observe that the respondent did not at any stage appeal against the order of the trial court to sell his shareholding in the 4 companies concerned to the majority shareholder at N116,708,678.80. His appeal to the Court of Appeal which has now reached this court, was on the mode of payment only. In fact he agreed with the decision of the trial court even on the mode of payment because he withdrew from that court’s registrar the first installment of the sum of N30,708,678.80 which was paid in by the majority shareholder in compliance with the trial court’s first order. This order is the most important one by which the whole amount outstanding will be paid if fully complied with and in my view, compliance with any part of it which has been accepted by the respondent, binds the respondent and estops him from further challenging the orders therein.

The learned counsel for the respondent in his brief and the Court of Appeal in its judgment, referred to the case of Odusote v. Odusote (1971) 1 All NIR 219 at 223 alleging that although the learned trial judge exercised a discretion in making the orders complained of, there is miscarriage of justice in the exercise of the discretion and must therefore be reviewed. I have earlier in this judgment set out the circumstances leading to the orders complained of and the fact that none of the parties appealed against them. In fact when the first part of the first order was complied with by the money deposited into court, the respondent accepted it without any

complaint. I do not see how the respondent or any of the parties in this case was unfairly treated or any miscarriage of justice has occasioned on the part of any of them.

It is a well established and settled principle of law that an appellate court will not, in principle, interfere with the exercise of discretion by the trial court unless that discretion is shown to have been exercised upon wrong principle or that the exercise was tinted by some illegality or substantial irregularity. See Anyah v. A.N.N. Ltd (1992) 6 NWLR (pt. 247) 319, University of Lagos v. Aigoro (1995) 1 NWLR (pt. 1) 143, Niger Construction Ltd. v. Okungbeni (1987) 4 NWLR (pt. 67) 787, 7-up Bottling Company Ltd. v. Abiola & Sons Ltd. (1995) 3 NWLR (pt. 381) 257 at 285; University of Lagos v. Olaniyan (1985) 11 NWLR (pt. 1) 156. ***It is also well settled that in an appeal against the exercise of a discretion by a lower court, the appellate court cannot substitute its own discretion for that of the lower court. The appellate court must be satisfied that the discretion was exercised on wrong principle by the lower court before it interferes with the exercise of the discretion. And such wrong principles may include exercising the discretion by reference to extraneous matters done without advert to relevant considerations.*** See Okafor v. Bendel Newspapers Corporation (1991) 7 NWLR (pt. 206) 651.

In the instant case, and applying the above principles thereto, I find that the Court of Appeal was wrong to have changed the orders made by the trial court with its own, which amounts to substituting its own discretion for that of the trial court based on the misconception of the relevant facts. I find that the trial court had adverted its mind to all relevant considerations in the matter before making the orders complained of and there was no question of unfairness or miscarriage of justice occasioned on any of the parties in the exercise of the discretion. All the points made by the Court of Appeal appear to me to be those which the Court of Appeal would have considered if the discretion was to be exercised by it. They were not made because the orders of the trial court were contrary to law or made on wrong principles or based on extraneous matters or on failure to advert to relevant considerations in the matter. In the circumstances, this court can properly interfere with the decision of the Court of

Appeal which cannot stand as it was not judiciously and judicially exercised. See *Okere v. Nlem* (1992) 4 NWLR (pt. 234) 123 at 149.

From all what I have stated above, I resolve the two issues for determination in favour of the appellant. In the final analysis I find that there is merit in this appeal. I allow it and set aside the decision of the Court of Appeal and restore that of the trial court delivered on 7th November 1997. I however, make no order as to cost.

UWAIS CJN

I have had the opportunity of reading in draft the judgment read by my learned brother Kalgo, JSC. I entirely agree with the judgment.

The appeal succeeds. I adopt the order contained in the said judgment.

MOHAMMED JSC

I entirely agree with the opinion of my learned brother, Kalgo, J.S.C. in the judgment just delivered and for the reasons given in that judgment I would allow this appeal. I also set aside the judgment of the Court of appeal and restore the decision of the trial court. I agree with my learned brother that parties to bear own costs.

F

KATSINA-ALU JSC

I have been privileged to read in draft the judgment of my learned brother KALGO JSC in this appeal. I agree with it and for the reasons he has given I also allow the appeal with =N=10,000.00 to the Appellants.

AYOOLA JSC

H I have read in draft the judgment delivered by my learned brother, Kalgo, JSC. I agree that this appeal be allowed for the reasons he gives.