

**SUPREME COURT OF NIGERIA**  
FRIDAY 12TH JULY, 2002. SC. 54/1998  
**CORAM:- A. B. WALI, M. E. OGUNDARE,**  
**E. O. OGWUEBGU, A. I. IGUH, E. O. AYoola, JJSC**

STEPHEN LAWSON-JACK ..... APPELLANT  
AND  
THE SHELL PETROLEUM  
DEVELOPMENT CO. OF NIG LTD ..... RESPONDENT

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MASTER & SERVANT - Termination - Validity - Trial judge wrongly foisted on an unwilling employer an employee - Whose conduct had become suspect - And not in the best interest of employer (H1)

APPEALS - Right of appeal - Constitution (Amendment) Decree No. 3 s. 1 - Plaintiff acquired right of appeal - Before the Decree came into existence (H2)

APPEALS - Record of appeal - Filing - Time limit - Supreme Court Rules O.7 r.7(1) - Despite non-compliance with the rules - Appeal may still be heard pursuant to O.10 r.1(1)(2) of the Rules (H3)

AFFIDAVITS - Averments - Not controverted - Since plaintiff failed to deny averments in the penultimate paragraphs - The paragraphs are deemed admitted (H4)

**FACTS**

Plaintiff/appellant was an employee of defendant/respondent. Allegation of misconduct was leveled against appellant by respondent. Consequently, a panel was set up to investigate appellant. The panel had not finished its assignment when appellant instituted this action at High Court claiming inter alia, a declaration that the constitution of the said panel is illegal and for an injunction restraining respondent from interfering with appellant's employment. The court granted appellant's prayers.

Respondent therefore appealed against the ruling to the Court of Appeal. Respondent filed a motion on notice supported by affidavit praying the court inter alia, for an order directing departure from

the Rules on filing of brief of argument. Appellant did not file counter-affidavit to challenge the correctness of the depositions. The court granted the application as prayed. Pursuant to the order of the Court of Appeal, appellant filed in court a copy of the Notice of Discontinuance of the action. At the hearing, appellant raise preliminary objection inter alia, that there was no evidence that the appeal was filed in the trial court. At the end of the hearing of the appeal, the court overruled the preliminary objection, allowed respondent's appeal and set aside all the orders made by the trial court. Aggrieved, appellants appealed to Supreme Court against the part of Court of Appeal judgment overruling his preliminary objection.

### **ISSUES FOR DETERMINATION**

*"i. Whether the Court of Appeal was justified in taking into consideration very extraneous matters not forming part of the records or Counsel submissions before it, without more, in resolving the question whether or not there was evidence of an Appeal before it?*

*ii. Whether Section 74(1)(j) of the Evidence Act which permits judicial Notice of the name of a Judge can be extended to include judicial notice of his signature by an entirely different Court in the resolution of the authenticity of an uncertified document allegedly signed by him?*

*iii. Whether the Court of Appeal was justified in holding that signed copies of Judgments of another Court sought to be used in a different Court or proceedings in proof of the act of judicial tribunal is primary evidence of one another requiring no certification or by extension whether photostat copies of such copies require no certification.*

*iv. Whether the Court of Appeal was justified in holding that there indeed was a lis when the suit upon which an injunction was made pending has ceased to exist 21 days after the injunction."*

**HELD** (Unanimously dismissing the appeal per

**OGUNDARE JSC)**

*MASTER & SERVANT - Termination - Validity*

**1. I need to comment that by his orders of 3/9/97 the learned trial Judge had foisted on an unwilling employer an employee**

***whose conduct had become suspect and not in the best interest of the employer to keep. The learned Judge's orders clearly breached the well settled principles of law relating to master and servant. It is no wonder, therefore, that the Court below set aside those orders. (p. 2342 F)***

*APPEALS - Right of appeal*

***2. As regards the first leg of the objection, the Decree came into force on 20th March 1998. The Court below gave its judgment on 19th March, 1998. Thus, the Plaintiff acquired his right to appeal against that decision on 19th March 1998 before the coming into force of the Decree on 20th March 1998. There is nothing in the Decree giving it a retrospective effect. The Plaintiff having acquired a vested right of appeal before the coming into force of the Decree, that right of appeal was not taken away by the Decree. The first leg of the objection, therefore, fails. (p. 2344 A)***

*Record of appeal - Filing - Time limit*

***3. I now turn attention to the second leg of the objection. There is no doubt that having regard to the rules of this Court, the record of appeal was compiled in contravention of Order 7 rule 7(1), not as to its contents but as to the time of its filing. Sub-rule (1) of rule 7 requires an appellant to file the record within 14 days of the filing of the appeal. The record of appeal was received in the registry of this Court on 17/4/98 when the appeal itself was filed on 25/3/98. The record was thus sent to this Court 23 days after the filing of the appeal, that is 9 days out of time. If there had been an application for extension of time we would readily have granted it. But there is no such application before us. This notwithstanding, however, pursuant to Order 10 rule 1 (1) and (2) of the Supreme Court Rules which provides:***

***"1(1) The Court may, where it considers it in the interest of justice so to do, waive compliance by the parties with these Rules or any part thereof.***

***(2) Where there is such waiver of compliance with the Rules, the Court may, in such manner as it thinks right, direct***

***the appellant or the respondent, as the case may be, to remedy such non-compliance or not but may, notwithstanding, order the appeal to proceed or give such directions as it considers necessary in the circumstance.”***

***I order that the appeal be heard on the record of appeal now before the Court and overrule the Defendant’s preliminary objection.*** (p. 2344 D)

*AFFIDAVITS - Averments - Not controverted*

***4. The plaintiff did not controvert the averments in these penultimate paragraphs. Nor did he oppose the application when it came up for hearing. Paragraphs of affidavit not denied nor controverted are deemed admitted.***

***In the light of the facts deposed to in paragraphs 6 and 7 of the affidavit in support of defendant’s application, plaintiff could no longer contend at the subsequent hearing of the appeal before the Court below that no appeal was filed nor that the copy of the ruling appealed against and contained in the record annexed to the affidavit was inadmissible. The proper time to object to the admissibility of the copy of the ruling, where necessary, was when it was tendered in evidence by the affidavit in support of defendant’s application. In any event I agree with the court below for the reasons given by it, that the plaintiff’s preliminary objection in that court lacked substance. It was rightly overruled.*** (p. 2346 A/C)

## **REPRESENTATION**

No appearance for the Appellant who is absent

G C. Idike Esqr. for the respondent

## **CASES REFERRED TO**

Alagbe v. Abimbola (1978) 2 SC 39

H Council of the University of Ibadan v. Ademolekun (1967) ANLR 225

Colonial Sugar Refining Co. Ltd. v. Irving (1905) AC 369

Agbaje v. Ibru S. F. Ltd. (1972) 5 SC 50

Ogbonna v. The President (1997) 5 NWLR (pt.504) 281

Sunlife Assurance Company of Canada v. Jervis (1944) AC 111

**STATUTE & RULES REFERRED TO**

Constitution (Amendment) Decree No. 3 1998, s. 1  
Supreme Court Rules, O.7 r.7(1)

**LEAD JUDGMENT BY OGUNDARE JSC**

The Plaintiff who is appellant in this appeal was a former employee of the Defendant Company. There were allegations of misconduct made against him in consequence of which the Company set up a panel to investigate the allegations. The panel had not finished its assignment when Plaintiff went to court and on 13th August, 1997 sued the Defendant claiming -

*"1. An order of this Honourable Court quashing or setting aside in all entirety, and declaring null and void any purported decision of the Defendant to terminate or dismiss (him) from the service of the Defendant as being irregular, illegal and a breach of the terms of plaintiff's contract of service and with the Defendant.*

*2. A declaration of this Honourable Court that the constitution, composition, procedure and the subsequent findings, decisions or recommendations of the disciplinary committee and the entire process, was fundamentally flawed and constituted a breach of the terms of the condition of service of the plaintiff and a gross violation of the Right to fair hearing of the plaintiff.*

*3. An order of this Honourable Court perpetually restraining the Defendant, through itself or its servants, agents or privies, from interfering in any way or manner with the normal course of the Plaintiff's contract of employment, and preserving the rights of the Plaintiff to disengage or retire from the services/employment of the Defendant in a way or manner consistent with the totality of his rights and benefits under Defendant's conditions of service."*

He filed along with the writ of summons an application ex parte for interim injunction praying for -

*"(i) An interlocutory Order of injunction of this Honourable Court restraining the Defendant, its servants agents or privies from interfering in any way or manner or doing any act detrimental or adverse with the normal course of the Plaintiff's employment with the Defendant company pending the determination of the substantive suit.*

(ii) *An interlocutory Order of injunction restraining the Defendant from in any way or manner give effect, publish or act on any recommendation, decision or purported findings of the wrongfully constituted disciplinary panel, or any panel or composition of persons by the Defendant pending the determination of the substantive suit.*

(iii) *An interlocutory Order of injunction suspending any decision recommendation by the Defendant purported to in any way or manner hold any finding of culpability, terminate, dismiss alter adversely or in any manner, interfere with the Plaintiff's employment, rights and obligations in the Defendant's employment pending the determination of the substantive suit."*

The ex-parte application was on 15th August 1997 granted and the trial court ordered as follows:-

*"IT IS ORDERED that the Defendant/Respondent its servants agents or privies be and are hereby restrained by this Honourable Court from interfering in any way or manner ordering any act detrimental or adverse with the normal course of the plaintiffs employment with the Defendant company pending the hearing and determination of the Motion on Notice.*

*IT IS ALSO ORDERED that the Defendant/Respondent be and are hereby restrained from in any way or manner give effect, or act on any recommendation decision or purported findings of the wrongfully constituted disciplinary panel, or any panel or composition of persons by the Defendant pending the hearing and determination of the Motion on Notice.*

*IT IS FURTHER ORDERED that the Defendant/Respondent do suspend any decision, recommendation by the Defendant Company purported to in anyway or manner hold any finding of culpability, terminate, dismiss alter adversely or in any manner, interfere with the plaintiff's employment, rights and obligation in the Defendant employment pending the hearing and determination of the Motion on Notice.*

*IT IS FINALLY ORDERED that the plaintiff/applicant do enter into an undertaking to indemnify the Defendant to the tune of N50,000.00 (fifty thousand Naira) should at the end the Motion on Notice is found to be frivolous.*

*RETURN date shall be the 29th day of August, 1997 for the*

*Motion on Notice for interlocutory injunction.”*

The Court heard arguments on the motion on notice on 29th August 1997 and in a reserved ruling delivered on 3rd September granted Plaintiff’s prayers and ordered -

*“I accordingly hereby rule that prayers 1 and 3 as contained on the face of his motion paper, be, and they are hereby granted as prayed.* B

*In the interest of justice, I shall order that prayer 2 in the motion paper be granted only as they relate to the plaintiff/Applicant, that is to say that an order of Interlocutory Injunction is hereby granted ‘restraining the Defendant from in any way or manner giving effect publishing or acting on any recommendation, decision or purported findings of the wrongfully constituted disciplinary panel or any panel set up by the Defendant, as they affect the Plaintiff/Applicant only, pending the determination of the substantive suit’ already filed.* C D

*Defendant/Respondent is at liberty to publish or act on the findings of this panel at any time but is expressly hereby restrained from acting on or taking any action on any aspect of it be it findings or recommendations that concern or affect the Plaintiff/Applicant in anyway or manner whatsoever, till the determination of the substantive Suit.”* E

I may mention that as at the time the above orders were made pleadings had not been filed.

The Defendant quite unexpectedly appealed against the ruling of the trial court to the Court of Appeal and on 11/9/97 brought a motion on notice before that Court praying for the following specific orders: F

*“(a) an order directing departure from the Rules in force, particularly waive and dispense wholly with the preparation and filing of briefs or arguments.* G

*(b) an order granting liberty to the Plaintiff/Respondent to file such additional paper as he may consider necessary.*

*(c) an order that the appeal herein be heard on the bundle of papers attached to the Affidavit in support of this Motion and marked Exhibit ‘A’.* H

*(d) an order directing an accelerated hearing of the appeal in the interest of justice and exceptional circumstances of the case and the appeal.”*

In the supporting affidavit of one Tunde Aribido, a lawyer and head of the legal department (East) of the Defendant Company the deponent deposed, inter alia, as follows:

B “6. *That the Court’s Ruling was delivered on September 3, 1997 and a copy is in the bundle of Record marked Exhibit ‘A’ attached.*

7. *That a Notice of Appeal against the Ruling of September 3, 1997 has been filed and it is attached as Exhibit ‘B’.*

C 17. *That the Defendant has compiled a Record of Appeal containing the relevant documents necessary for the determination of this Appeal which is attached herewith and marked Exhibit ‘A’.*

18. *That I have compared the documents with the authentic certified true copies and authentic office copies and I verily believe that they are true copies.*

D 19. *That I honestly and reasonably believe that the above mentioned Record is sufficient to enable this Honourable Court determine the issues in controversy in this appeal.*

E The Plaintiff did not file a counter-affidavit challenging the correctness of the above depositions. Rather, when the motion came up for hearing his learned counsel, L. E. Nwosu Esquire, did not oppose the motion. The application was granted as prayed and the following orders were made by the Court of Appeal:

“(a) *That the application is granted.*

F (b) *That the bundle of papers compiled as Exh. A shall be the record of appeal in this matter.*

(c) *That the Respondent shall be at liberty to file such additional paper (papers) as he deems necessary.*

(d) *That the appeal shall be heard without brief.*

G (e) *Appeal is adjourned to 20/1/98 for hearing.”*

Pursuant to the order of the Court of Appeal, the Plaintiff filed in court a copy of the Notice of Discontinuance of the action he had on 24/9/97 filed in the registry of the trial court.

H At the hearing of the appeal on 20th January 1998, Mr. Nwosu for the plaintiff raised a preliminary objection to the appeal on the grounds (1) that there was no evidence that the appeal was filed in the trial court; (2) that the copy of the ruling of the trial judge contained in the record of appeal was not certified; (3) that all the grounds of appeal being of mixed law and fact, no leave was sought nor ob-



tained before the appeal was lodged, it being an interlocutory appeal - Section 221 of the 1979 Constitution was relied upon and (d) that there was no *litis* between the parties in that the Plaintiff had to the knowledge of the Defendant discontinued the action by a notice filed on 24/9/97. I need mention that Mr. Nwosu raised this preliminary objection after Chief Akinjide, SAN for the Defendant had argued the appeal and without filing a notice of preliminary objection as required by the rules of the Court of Appeal. Though Chief Akinjide objected to his being taken by surprise, the Court below ruled that Mr. Nwosu should argue the objection along with the appeal and a comprehensive decision was to be given later.

At the end of the hearing of the appeal, the Court below adjourned for judgment and in a well-considered judgment delivered later, it overruled the Plaintiff's preliminary objection, allowed the defendant's appeal and set aside all the orders made in the ruling given by the learned trial Judge on 3rd September 1997. Uwaifo J.C.A., as he then was, in his lead judgment, with which Katsina-Alu JCA, as he too then was and Nsofor JCA agreed, found:-

1. *"It has since been known that the Notice of Appeal was indeed filed at the lower court for an amount of N59.00 paid for on receipt No. 000050562 dated 11/9/97."*

2. *"... the document containing the ruling in question is a public document and having been signed by the trial Judge, P. N. C. Agumagu J., under and by virtue of section 74(1)(j) of the Evidence Act, judicial notice shall be taken by this court of his name as an officer of the court. Section 94(2) of the Evidence Act makes the signed copy of the ruling given to the appellant primary evidence of a public document not secondary evidence needing certification. The said section 94(2) provides that where a document has been executed in several parts, each part shall be primary evidence of the document. It may safely be assumed that a copy of the ruling in question is one of the multiple copies signed by the trial judge. It therefore satisfies the requirement of section 96 which says that documents must be proved by primary evidence except by secondary evidence in its place as provided in section 97 (for example)."*

3. *"It is now well-known that no leave is required to appeal against the grant or refusal of an injunction."*

4. *"I think it cannot be denied that when an advantage has*

been obtained by a plaintiff in a suit before it was discontinued, an aggrieved party who has an arguable issue in order to get rid of that advantage which indeed is a disadvantage to him is entitled to pursue that appeal. It is a different situation if in an appeal there is nothing left to be achieved and no subsisting order of court which affects the

B appellant that would need to be dealt with: see *Ogbonna v. The President* (1997) 5 NWLR (pt.504) 281 at 287. That is not the position here. The appellant is entitled to complain that it has at least been hamstrung by the ruling in question in the running of its affairs

C as regards ensuring the maintenance of its business principles and ethics, among other objectives. In *Sunlife Assurance Company of Canada v. Jervis* (1944) AC 111 at 114 cited in *Ogbonna v. The President* (supra), Viscount Simon L. C. Observed - '.....I think it is an essential quality of an appeal fit to be disposed of by this House

D that there should exist between the parties a matter in actual controversy which the House undertakes to decide as a living issue.' The appellant says the lower court has virtually prevented it from enforcing discipline or publishing or acting on the report of an investigating panel in totality, and that this has created an impossible situation in its

E implementation. That is a living issue appropriate for an appeal. If that be so, the appellant has the right to pursue this appeal as a living issue."

The Plaintiff has now appealed to this Court against that part of the judgment of the Court below overruling his preliminary objection in that Court. He has not complained against the setting aside of the orders of injunction he obtained in the High Court. **I need to comment that by his orders of 3/9/97 the learned trial Judge had foisted on an unwilling employer an employee whose conduct had become suspect and not in the best interest of the employer to keep. The learned Judge's orders clearly breached the well settled principles of law relating to master and servant. It is no wonder, therefore, that the Court below set aside those orders.**

H Pursuant to the rules of this Court, the parties filed and exchanged their respective briefs of argument. The Defendant filed a Notice of Preliminary Objection and argued same in its brief necessitating the Plaintiff filing a Reply Brief in which he proffered arguments against the objection. At the oral hearing of the appeal, both

the Plaintiff and his counsel were absent in court even though hearing notice had been sent by post to learned counsel, Mr. Nwosu since October 2001. Being satisfied that Appellant through his counsel must have had notice of hearing we took the appeal as argued on the Appellant's brief and Reply brief. Counsel for the Defendant adopted his brief and proffered a short argument. B

I shall first deal with the preliminary objection raised in this Court by the Defendant.

The preliminary objection of the Defendant is two-fold. Firstly, it is argued that "the appellant has no right of appeal from the Court of Appeal to the Supreme Court in this interlocutory appeal because of Section 1 of the Decree No.3 of 1998 in force from March 20, 1998 entitled Constitution (Amendment) Decree 1998 amending Section 213 of the Constitution of the Federal Republic of Nigeria 1979. The Appellant's Notice of Appeal to the Supreme Court was filed on March 20, 1998." Secondly, that as the record of appeal was prepared by the registry of the Court below and forwarded to this Court, there is no proper record of appeal before the Court. The ground for this second leg of the objection is that the Plaintiff's appeal to this Court is interlocutory and the record of appeal, therefore, must be prepared as provided for in Order 7 rules 6 and 7 of the Supreme Court Rules rather than under rules 2, 3 and 4 of Order 7 which apply to appeals from final decisions. C D E

The Plaintiff in his Reply Brief argued that his appeal is against a final decision of the Court of Appeal and is, therefore, not caught by the two legs of the preliminary objection. F

I think the Plaintiffs answer to the preliminary objection is rather too simplistic. I say this because from the provisions of section 213(3) of the Constitution of the Federal Republic of Nigeria 1979, as amended by section 1 of the Constitution (Amendment) Decree No. 3 of 1998 (hereinafter referred to as the Decree) which provides: G

*"Notwithstanding the provisions of subsection (2) of this section, no appeal shall lie to the Supreme Court from any decision of the Court of Appeal in respect of an interlocutory decision."* H

and Order 7 rules 1, 2, 3, 4, 6 and 7 of the Supreme Court Rules, the question is not whether the decision of the Court of Appeal is final or interlocutory but whether the decision is made by that Court on appeal from an interlocutory decision of a High Court,

such as it is in the present case.

***As regards the first leg of the objection, the Decree came into force on 20th March 1998. The Court below gave its judgment on 19th March 1998. Thus, the Plaintiff acquired his right to appeal against that decision on 19th March 1998 before the coming into force of the Decree on 20th March 1998. There is nothing in the Decree giving it a retrospective effect. The Plaintiff having acquired a vested right of appeal before the coming into force of the Decree, that right of appeal was not taken away by the Decree - see The Council of the University of Ibadan & Anor. v. N. K. Ademolekun (1967) ANLR 225; Colonial Sugar Refining Co. Ltd. v. Irving (1905) AC 369, 372 followed by this Court in Ademolekun's case. The first leg of the objection, therefore, fails.***

***I now turn attention to the second leg of the objection. There is no doubt that having regard to the rules of this Court, the record of appeal was compiled in contravention of Order 7 rule 7(1), not as to its contents but as to the time of its filing. Sub-rule (1) of rule 7 requires an appellant to file the record within 14 days of the filing of the appeal. The record of appeal was received in the registry of this Court on 17/4/98 when the appeal itself was filed on 25/3/98. The record was thus sent to this Court 23 days after the filing of the appeal, that is 9 days out of time. If there had been an application for extension of time we would readily have granted it. But there is no such application before us. This notwithstanding, however, pursuant to Order 10 rule 1 (1) and (2) of the Supreme Court Rules which provides:***

***"1(1) The Court may, where it considers it in the interest of justice so to do, waive compliance by the parties with these Rules or any part thereof.***

***(2) Where there is such waiver of compliance with the Rules, the Court may, in such manner as it thinks right, direct the appellant or the respondent, as the case may be, to remedy such non-compliance or not but may, notwithstanding, order the appeal to proceed or give such directions as it considers necessary in the circumstance."***

***I order that the appeal be heard on the record of appeal***

**now before the Court and overrule the Defendant's preliminary objection.**

Next is a consideration of the appeal itself. The Plaintiff in his brief raised four questions as calling for determination in the appeal, to wit:

*"i. Whether the Court of Appeal was justified in taking into consideration very extraneous matters not forming part of the records or Counsel submissions before it, without more, in resolving the question whether or not there was evidence of an Appeal before it?"* <sup>B</sup>

*ii. Whether Section 74(1)(j) of the Evidence Act which permits judicial Notice of the name of a Judge can be extended to include judicial notice of his signature by an entirely different Court in the resolution of the authenticity of an uncertified document allegedly signed by him?"* <sup>C</sup>

*iii. Whether the Court of Appeal was justified in holding that signed copies of Judgments of another Court sought to be used in a different Court or proceedings in proof of the act of judicial tribunal is primary evidence of one another requiring no certification or by extension whether photostat copies of such copies require no certification.* <sup>E</sup>

*iv. Whether the Court of Appeal was justified in holding that there indeed was a lis when the suit upon which an injunction was made pending has ceased to exist 21 days after the injunction."*

As the same consideration applies to all these issues I shall take them together. They all relate to the resolution, by the Court below, of the preliminary objection raised by the plaintiff to the appeal before that Court. The parties advanced in this Court the same arguments they proffered in the Court below. <sup>F</sup>

Without wasting much time, I think the answer to the question (i) - (iii) lies in the attitude of the plaintiff to the defendant's application filed in the Court below on 11/9/97. I have already set out the prayers sought in that application and the penultimate paragraphs of the supporting affidavit. In that affidavit, it was deposed - <sup>G</sup>

1. That the Defendant filed an appeal against the ruling of the trial High Court given on September 3, 1997. <sup>H</sup>

2. That a copy of the ruling is in the bundle of record compiled and attached as exhibit to the affidavit.

3. That the record compiled had been compared with the au-

thentic certified copies and authentic office copies and found same to contain true copies.

***The plaintiff did not controvert the averments in these penultimate paragraphs. Nor did he oppose the application when it came up for hearing. Paragraphs of affidavit not denied nor controverted are deemed admitted*** - see: *Alagbe v. Abimbola* (1978) 2 SC 39; *Agbaje v. Ibru S. F. Ltd.* (1972) 5 SC 50, 55 where Sir Ademola, CJN observed:

*“Be that as it may, it is clear that the appellant’s case for an interim injunction is contained in his affidavit which set out facts upon which any court would give consideration to his application. Strangely enough, the Respondents admitted all those facts, since there are no denials of all the acts complained of by a counter-affidavit.”*

***In the light of the facts deposed to in paragraphs 6 and 7 of the affidavit in support of defendant’s application, plaintiff could no longer contend at the subsequent hearing of the appeal before the Court below that no appeal was filed nor that the copy of the ruling appealed against and contained in the record annexed to the affidavit was inadmissible. The proper time to object to the admissibility of the copy of the ruling, where necessary, was when it was tendered in evidence by the affidavit in support of defendant’s application. In any event I agree with the court below for the reasons given by it, that the plaintiff’s preliminary objection in that court lacked substance. It was rightly overruled.***

As regard Issue (iv), the plaintiff claimed that he filed a notice of discontinuance of his action in the registry of the trial High Court. But he did not disclose whether that court had accordingly terminated the action by striking it out before the hearing of the defendant’s appeal to the Court of Appeal. The discontinuance must have been without the consent of the defendant. In that event there would still remain for the trial court not only to strike out the action but to determine any outstanding issues as to costs or damages due to the defendant in relation to the undertaking as to damages given by the plaintiff when interlocutory injunction was ordered in his favour by the High Court. In the absence of proof that these matters have been dealt with and disposed of by the trial court, it would be erroneous to suggest that there was no lis between the parties pending at the time

defendant's appeal came before the court below.

Plaintiff filed his notice of discontinuance on 24/9/97. It is curious that he did not bring this fact to the notice of the court below when the latter court heard defendant's application on 25/11/97. He did not explain why he behaved in such a strange manner.

In sum, I find no substance in the Issues (i) to (iv) and the grounds of appeal on which they are predicated. The plaintiff has not complained against the merit of the judgment of the court below setting aside the orders of interlocutory injunction made in favour of the plaintiff by the trial High Court. Consequently, I dismiss this appeal and affirm the judgment of the court below.

I award N10,000 costs in favour of Defendant/Respondent.

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**WALI JSC**

I have been afforded the privilege of reading in advance the lead judgment of my learned brother Ogundare JSC, with which I entirely agree.

For the same reasons ably stated in the lead judgment and which I hereby adopt as mine, I also hereby dismiss the appeal and adopt all the consequential orders made therein.

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**OGWUEGBU JSC**

I am of the same opinion of my learned brother Ogundare, JSC that this appeal fails. I too will dismiss it for the reasons he has given with N10,000.00 costs in favour of the defendant/respondent.

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**IGUH JSC**

I have had the privilege of reading in draft the judgment just delivered by my learned brother, Ogundare, JSC. and I agree entirely with the reasoning and conclusions therein reached. He has considered all the issues canvassed in this appeal in considerable detail and I have nothing more to add.

Accordingly, I too dismiss this appeal and affirm the judgment of the court below. I abide by the order as to costs therein made.

***AYOOLA JSC***

For the reasons given in the judgment of my learned brother, Ogundare, JSC, which I have read in draft, I agree that this appeal lacks substance and that it should be dismissed. I too dismiss the appeal with N10,000 costs to the respondent.

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