

SUPREME COURT OF NIGERIA
FRIDAY 18TH JANUARY, 2002. SC. 134/1999
CORAM:- A. B. WALI, E. O. OGWUEGBU,
U. MOHAMMED, A. I. IGUH, U. A. KALGO, JJSC

SUNDAY UZOKWE APPELLANT
(Carrying on business under
the name and style of
Sunday-Innocent & Co.)
AND
1. DENSY INDUSTRIES
NIG. LTD.
2. PATRICK IKPALA RESPONDENTS

TRADEMARKS - Industrial design - Nature of - By virtue of Patents & Designs Act s. 12 - It is any combination of lines or colours or both - And any three dimensional form - Whether or not associated with colours (H1)

TRADEMARKS - New design - Infringement - Resolution - Design claimed to be infringed and the infringing one - Should be put side by side - So that court can determine their similarities or differences (H2)

TRADEMARKS - Industrial design - Infringement - Relief - Claim for infringement of rights in design cannot be sustained - Merely because the infringing product is similar to that of plaintiff (H3)

TRADEMARKS - Infringement - Burden of proof - Plaintiff must prove that he has definite cause of action - By showing that Exhibits 2 & 5 are made from Exhibit 1 - And not that the products are merely similar (H4)

FACTS

Plaintiff/appellant instituted this action at the Federal High Court, Enugu claiming against defendants/respondents the sum of N5 million being general damages for infringement of the registered design no. 4464 and an order of injunction restraining respondents

from infringing appellant's copyright in the said design. Appellant's contention is that he is the registered owner/creator of the design in respect of kitchen plastic container and that the design was new at the time of registration. He further stated that he discovered that within two months of registration, his right in the design had been infringed by respondents. At the trial, he tendered Exhibits 1 and 2 which are drawings of the design and finished product from the design, respectively.

Appellant contended that there was no similar product like Exhibit 2 in the market at the time it was produced. He further tendered Exhibit 5 which is a similar product produced and distributed by respondents. 1st respondent contended that the design was neither a new one nor was it created by appellant. It went on to state that the product was common in the market even before the registration of appellant's design. In its judgment, the court found for appellant and awarded damages against respondents. This led to their (respondents) filing appeal at the Court of Appeal, Enugu Division. The appeal was allowed and appellant's case was dismissed by the court. Appellant therefore appealed to Supreme Court.

ISSUES FOR DETERMINATION

"1. Whether the burden of producing the designs and drawings from which Exhibit "5" which is the infringing product still lies with the plaintiff who has produced and tendered in court Exhibit "1", the plans and drawings from which Exhibit "2" was produced.

2. Whether the burden of proving the novelty of Exhibit "2" has not been discharged by appellant as provided by the Patents and Designs Law.

3. Did the Court of Appeal, Enugu properly apply the decision in F. O. Ajibowo & Co. Ltd. v. Western Textile Mills Ltd. (1996) (sic) (1976) 7 SC 97 in the appeal before it?

4. Whether the findings made by the trial court were perverse that the Court of Appeal has to interfere with the said findings."

HELD (Unanimously dismissing the appeal per

OGWUEGBU JSC)

TRADEMARKS - Industrial design - Nature of

1. The nature of an industrial design is described in section 12 of the Act as:-

“12. Any combination of lines or colours or both, and any three dimensional form, whether or not associated with colours, is an industrial design if it is intended by the creator to be used as a model or pattern to be multiplied by industrial process and is not intended solely to obtain a technical result.”

From the above, it will be seen that to be registrable, an industrial design must come within the meaning of the expression “designs” in section 12 of the Act. It is any combination of lines or colours or both, and any three dimensional form, whether or not associated with colours that is an industrial design. What actually constitutes the design is that particular combination and arrangement of lines which give such features. (p. 2526 B)

TRADEMARKS - New design - Infringement - Resolution

2. It is therefore important in a case where the newness of a design is in dispute, as in this case, the design claimed to be infringed and the infringing design should be put side by side to enable the court to compare and determine whether they are basically the same or whether there are fundamental differences in the shape and pattern of the lines.

It is important to put them side by side to enable the court compare having regard to section 13(5) of the Patents and Designs Act which states that an industrial design is not new “merely because it differs in minor or in essential ways from an earlier design.” I am satisfied that the learned trial Judge was in error in coming to his conclusion that the two products are similar and are produced from one design by mere “cursory perusal of the external appearances of Exhibit 2 and Exhibit 5.”

The earlier observation of the learned trial Judge that owing to the absence of the design for Exhibit “5”, he could not compare Exhibits “2” and “5” is sound but he derailed when he proceeded to compare the finished products as against the designs from which they were produced. (pp. 2526 E/2527 A)

TRADEMARKS - Industrial design - Infringement

3. Similarity in design has nothing to do with its novelty or distinctiveness. A claim for an infringement of rights in design cannot be sustained merely because the infringing product is similar to that of the plaintiff. More is required from the plaintiff bearing in mind the provisions of section 1 of the Act.
(p. 2527 A)

TRADEMARKS - Infringement - Burden of proof

4. In civil cases, the ultimate burden of establishing a case is as disclosed on the pleadings. The person who would lose the case if on completion of pleadings and no evidence is led on either side has the general burden of proof.

Thus, to succeed in his claim that his copyright in the design, Exhibit "1" had been infringed, the plaintiff has the onus of showing that the finished products comprised in Exhibits "2" and "5" are made from the same design and not that the products are merely similar as the learned trial Judge concluded in his judgment. He should tender the designs of both products (Exhibits "2" and "5") for comparison. In a patent action for infringement, as in every other kind of action, the onus is on the plaintiff to prove that he has a definite cause of action against the defendant and he is not entitled to call upon the defendant to disprove the alleged infringement in other words, to prove that plaintiff has no cause of action against him. That is precisely what the plaintiff is urging the court to compel the defendants to do.

It is only when the plaintiff has made out a prima facie case that the onus of proof shifts from plaintiffs to defendant and vice versa, from time to time as the case progresses and it rests on that party who would fail if no more evidence were given on either side. The initial burden was not discharged by the plaintiff in this case. It was for him to show the court that the design he registered was new at the time of the application for registration. The defendants did not claim to have any registered design.

I therefore come to the conclusion that the court below was

right when it held that the plaintiff failed to prove his case.
(pp. 2528 C/2529 E)

REPRESENTATION

S. O. P. Okeke, Esq., for the Appellant

Chief J. C. Ifebunandu (with T. I. Dutse), for the Respondents

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CASES REFERRED TO

Ajibowo & Co. Ltd. v. Western Textile Mills Ltd. (1976) 7 SC 97

Osawaru v. Ezeiruka (1978) 6-7 SC 135

Oyude v Ogedegbe (1984) 1 SC 360

Ajide v. Kelani (1985) 3 NWLR (pt. 12) 248

Metropolitan Ind. Nig. Ltd. v. Ind. Applications Nig. Ltd. (1973) 1 NMLR 274

Amp. Incorporated v. Utilux Proprietary Ltd. (1972) R.C.P. 103

Elemo v. Omolade (1968) NMLR 359

Kodilinye v. Odu (1935) 2 WACA 336

Jules v. Ajani (1980) 5-7 SC 96

Ornoregie v. Idugiemwanye (1985) 2 NWLR (pt. 5) 41

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STATUTES REFERRED TO

Evidence Act Cap. 112 LFN 1990, ss. 137, 149(d)

Patents & Designs Act Cap. 344 LFN 1990, s. 13(2)(3)(5)

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LEAD JUDGMENT BY OGWUEGBU JSC

This is an appeal against the judgment of the Court of Appeal, Enugu Division delivered on 7th July, 1998 allowing the appeal of the defendants who were appellants in that court. The plaintiff instituted an action in the Federal High Court, Enugu claiming G against the defendants (respondents herein) jointly and severally as follows:

“1. N5,000,000.00 (Five Million Naira) being general damages for infringement of the Registered Design No. 4464.

2. Injunction restraining the defendants, whether acting by H their agents, directors, officers, servants, privies and/or otherwise however from infringing the plaintiffs copyright in the Registered Design No. 4464.”

The learned trial Judge awarded N10,000.00 damages against

the defendants in favour of the plaintiff for infringement of the plaintiff's Design No. 4464. The defendants were dissatisfied with the judgment and appealed to the Court of Appeal, Enugu Division. Their appeal succeeded and the plaintiff's claim was dismissed. The plaintiff appealed to this court against the decision of the court below. The case of the plaintiff from his pleadings and evidence at the court of trial is that he is the registered owner of Design No. 4464 in respect of kitchen plastic container, that the design was registered on 5th March, 1991 in the name of "*Sunday Innocent and Co.*", that at the time of registration, the design was new and that he is the author. It was his case that he started producing the plastic containers shortly after registration of the design and within two months of registration he discovered that his right in the design had been infringed.

At the trial, the plaintiff tendered Exhibit "1" which contains the plans and drawings of the registered design. He tendered as Exhibit "2", the finished product from the registered design. It was part of his case that he started mass production of Exhibit "2" since 1991 and that at that time, there was no similar design or product in the market. Exhibit "5", the similar product produced and distributed by the defendants was tendered by the plaintiff.

It was the case of the 1st defendant that the design was not new, that the plaintiff was not the creator and that the product was common, available in the market and had been produced even before the registration of the plaintiff's design. In his amended statement of defence, the 2nd defendant denied the newness of the said design and stated that the product had been in the market long before the registration of the design by the plaintiff. It was the evidence of D.W.1 that the defendants had been producing plastic kitchen containers since 1987. As I stated earlier in this judgment, the court below reversed the judgment of the trial court and dismissed the claim of the plaintiff hence this appeal. The following four issues were distilled from the grounds of appeal and submitted by the plaintiff for determination in the appeal:

1. *Whether the burden of producing the designs and drawings from which Exhibit "5" which is the infringing product still lies with the plaintiff who has produced and tendered in court Exhibit "1", the plans and drawings from which Exhibit "2" was produced.*
2. *Whether the burden of proving the novelty of Exhibit "2"*

has not been discharged by appellant as provided by the Patents and Designs Law.

3. *Did the Court of Appeal, Enugu properly apply the decision in F. O. Ajibowo & Co. Ltd. v. Western Textile Mills Ltd. (1996) (sic) (1976) 7 SC 97 in the appeal before it?*

4. *Whether the findings made by the trial court were per-verse that the Court of Appeal has to interfere with the said findings.”* B

The defendants in their brief identified the following two issues for determination in the appeal:-

“1. *Whether the burden lies on the appellant herein to prove the novelty of the design in dispute in this suit?* C

2. *If so, whether the appellant discharged the said burden to entitle him to the registration of the said design and the reliefs claimed”.*

The principal issue in this appeal is whether Exhibit “1” was new at the time of its registration. Coupled with this is the question of proof of its novelty at the said time. I will at this stage reproduce the crucial findings of the courts below which touch on the novelty and proof of the newness of the design of the plaintiff. After considering the evidence and the authorities cited by the parties, the learned trial judge observed as follows: “In the present case the plans and drawings of the plaintiff’s design are contained in the document annexed to Exhibit 1.” The shape and the size of the container including the shape and size of the bottom of the container and cover are claimed (sic). This Design was used in the production of Exhibit “2” The design used by the 1st defendant in the production of Exhibit “5” is not before me in this case. A comparison of the designs therefore cannot be made”. D E F

Later in his judgment the learned trial judge observed:-

‘The next question to be considered is the question of whether or not the defendants can be said in this case to have infringed on the plaintiffs’ copyright in the design covered by the Certificate of Registration No. 4464. A cursory perusal of the external appearances of Exhibit 2 and Exhibit 5 reveals that the two items are similar to each other. It seems Exhibits “2” and “5” are produced from the same design and by the application of the same process. G H

Based on the later observation which is inconsistent with his earlier one, the learned trial Judge found for the plaintiff. The court below had this to say on the inconsistent findings of the trial court:

B *“The learned trial Judge, in my respectful opinion, seems to reprobate and approbate, a thing he is not entitled to do... What constitutes the design is the peculiar combination and arrangement of lines and colour which give such features. Similarity of appearance has nothing to do with its distinctiveness, specialty or peculiarity. There must be something extra which catches the eye and in a way appeals to the eye... A claim for an infringement of a right in a design is not made out mainly because the new design is similar to that of the appellant, more is required.”*

C On burden of proof of the novelty of the design, the court below held as follows:

D *“The first respondent was the plaintiff in the court below who asserts that the design attached to Exhibit 1 is novel or original. The appellant (sic) consequently pleaded in its further amended statement of claim (sic) that the registered design No. 4464 was not a new product or design in the market at the time it was introduced as it had been in circulation since 1987. On the pleadings, the burden of first proving the existence or non existence of a fact lies on the first respondent whose claim would fail if no evidence were produced. To*
 E *succeed in his claim that his copyright in the design had been infringed, evidenced by Exhibit 1, he has the burden of showing that the registered design and the design that is alleged to be previously in use before the registration of his design are not merely similar but are*
 F *one and the same thing. In other words, the first respondent on the authorities is required to show that the finished products comprised of Exhibits 2 and 5 are made from one and the same design. To achieve this he is required to tender not only the design for the finished product in Exhibit 2 but also the design for the finished product*
 G *in Exhibit 5, for comparison. This he failed to do.....The evidence produced by the first respondent was, therefore, far short of what is required of him... The defence put up by the appellant only becomes relevant after the first respondent, the plaintiff at the trial court, makes out his case.”*

H It was contended in the plaintiffs’ brief that he discharged the burden on him by tendering Exhibit “1” which comprises the plans and drawings, Exhibit “2” which is the infringing product. It was further submitted that there is no way the plaintiff could have laid his hands on the defendants’ drawings and plans because they did not

register any and that the onus shifted on the defendants to tender their plans and drawings from which Exhibit “5” was produced. The cases of *Osawaru v. Ezeiruka* (1978) 6-7 SC. 135 at 144, *Oyude v Ogedegbe & Ors.* (1984) 1 SC.360 at 363 and section 149(d) Evidence Act Cap. 112 Laws of the Federation of Nigeria, 1990 were cited and relied upon. B

It was further submitted by learned counsel for the plaintiff that it is the defendants who claimed to have been producing the kitchen container that should have tendered the drawings and plans from which Exhibit “5” was produced. The court was referred to section 13(2), (3) and (5) of the Patents and Designs Act Cap. 344 Laws of the Federation of Nigeria, 1990. It was finally submitted in the plaintiff’s brief that the plaintiff had discharged the onus as required by section 137 of the Evidence Act and that the court below was wrong when it held that the plaintiff was required to tender not only the design of Exhibit ‘2’ but also the design for Exhibit “5”. C D

Learned counsel for the defendants submitted in the defendants/respondents’ brief that on the state of the pleadings of the parties, the plaintiff is bound to prove not only the fact of the registration of the said design but also the novelty at the time of the said registration. The court was referred to sections 12, 13(1)(a), (2) (3) and (5) of the Patents and Designs Act, sections 137 and 139 of Evidence Act and the case of *Ajide v. Kelani* (1985) 3 NWLR (Pt. 12) 248 at 265. It is clear, both from the pleadings and the evidence adduced in support that the parties relied on section 13(1) of the Patents and Designs Act. It provides that: 13(1) Subject to this section, an industrial design is registrable if - E F

(a) it is new; and

The defendants contended that it is not new. It is pertinent to G refer to the provisions of subsections (2), (3) and (5) of section 13 which read:

“13 (2). Where an application is made for the registration of an industrial design, the design shall be presumed to be new at the time of the application except in so far as the following provisions of H this section provides otherwise.

(3) An industrial design is not new if, before the date of application for registration, it has been made available to the public anywhere and at any time by means of description, use or any other

way, unless it is shown to the satisfaction of the Registrar that the creator of the design could not have known that it had been made so available...

(5) An industrial design is not new merely because it differs in minor or in essential ways from an earlier design or concerns a type of product other than the type with which an earlier design is concerned."

The nature of an industrial design is described in section 12 of the Act as:-

"12. Any combination of lines or colours or both, and any three dimensional form, whether or not associated with colours, is an industrial design if it is intended by the creator to be used as a model or pattern to be multiplied by industrial process and is not intended solely to obtain a technical result."

From the above, it will be seen that to be registrable, an industrial design must come within the meaning of the expression "designs" in section 12 of the Act. It is any combination of lines or colours or both, and any three dimensional form, whether or not associated with colours that is an industrial design. What actually constitutes the design is that particular combination and arrangement of lines which give such features.

It is therefore important in a case where the newness of a design is in dispute, as in this case, the design claimed to be infringed and the infringing design should be put side by side to enable the court to compare and determine whether they are basically the same or whether there are fundamental differences in the shape and pattern of the lines. See *Ajibowo & Co. Ltd. v. Western Textile Mills Ltd. (1976) 7 SC. 97*. It is important to put them side by side to enable the court compare having regard to section 13(5) of the Patents and Designs Act which states that an industrial design is not new "merely because it differs in minor or in essential ways from an earlier design." I am satisfied that the learned trial Judge was in error in coming to his conclusion that the two products are similar and are produced from one design by mere "cursory perusal of the external appearances of Exhibit 2 and Exhibit 5."

Similarity in design has nothing to do with its novelty or distinctiveness. A claim for an infringement of rights in design cannot be sustained merely because the infringing product is similar to that of the plaintiff. More is required from the plaintiff bearing in mind the provisions of section 1 of the Act. The earlier observation of the learned trial Judge that owing to the absence of the design for Exhibit "5", he could not compare Exhibits "2" and "5" is sound but he derailed when he proceeded to compare the finished products as against the designs from which they were produced. See Metropolitan Industries (Nig) Ltd. v. Industrial Applications (Nig.) Ltd. (1973) 1 NMLR 274, Amp. Incorporated v. Utilux Proprietary Ltd. (1972) R.C.P. 103.

I will now consider the issue of proof. It is the plaintiff in the trial court who asserts that the design attached to Exhibit "1" is new or original. In paragraphs 5 and 6 of his further amended statement of claim, the plaintiff averred as follows:

"5. The plaintiff is the registered proprietor of Registered Design No. 4464 in respect of the plastic of Pomade Kitchen container which is a new plastic product in the market and which the plaintiff is the author and first producer.

6. The plaintiff has been manufacturing the said products before the 1st defendant began to imitate the design."

In reply to the above, the 1st defendant in paragraph 5 of its further amended statement of defence averred that:

"5. The 1st defendant denies paragraph 5 of the statement of claim and shall put the plaintiff to the strictest proof of same. In further answer the 1st defendant avers that the plaintiff is not the registered proprietor of Registered Design No. 4464 in respect of plastic of pomade kitchen container which is not a new product in the market and which the plaintiff is not the author or the first producer or anything whatsoever."

The 2nd defendant in paragraph 5 of his amended statement of defence denied paragraph 5 of the plaintiff's further amended statement of claim and averred that the plastic container in issue had been in the market long before 1990 and that it was not only being produced by the 1st defendant but also by other plastic manufacturers and that the design is so common and has no special or peculiar nature or invention to warrant exclusive patent.

The defendants in proof of their prior publication tendered Exhibits “16” “16AA” to show that they had been paying excise duties in respect of kitchen containers. They tendered Exhibits 17 - 17AAA (the production register) and Exhibits “18” - “18J” which are invoices of sales. These pieces of evidence were unchallenged and uncontroverted. They are in line with their pleadings and accepted by the court. The defendants’ case was rejected not on the probative value but on the basis that they failed to produce the design from which Exhibit “5” was produced for purposes of comparison with Exhibit “1” - the plaintiff’s registered design No. 4464. Exhibit “5” was tendered through the plaintiff’s witness - Sunday Uzokwe who recovered it through a policeman.

In civil cases, the ultimate burden of establishing a case is as disclosed on the pleadings. The person who would lose the case if on completion of pleadings and no evidence is led on either side has the general burden of proof. See *Elemo & Ors. v. Omolade & Ors* (1968) NMLR 359. See also section 137(1) of the Evidence Act. ***Thus, to succeed in his claim that his copyright in the design, Exhibit “1” had been infringed, the plaintiff has the onus of showing that the finished products comprised in Exhibits “2” and “5” are made from the same design and not that the products are merely similar as the learned trial Judge concluded in his judgment. He should tender the designs of both products (Exhibits “2” and “5”) for comparison.*** In a patent action for infringement, as in every other kind of action, the onus is on the plaintiff to prove that he has a definite cause of action against the defendant and he is not entitled to call upon the defendant to disprove the alleged infringement in other words, to prove that plaintiff has no cause of action against him. That is precisely what the plaintiff is urging the court to compel the defendants to do. See *Saccharin Corporation Ltd. v. Wild* (1930) 1 Ch. 410. ***It is only when the plaintiff has made out a prima facie case that the onus of proof shifts from plaintiffs to defendant and vice versa, from time to time as the case progresses and it rests on that party who would fail if no more evidence were given on either side.*** See *Ajide v. Kelani* (1985) 3 NWLR (Pt.12) 248 at 265. ***The initial burden was not discharged by the plaintiff in this case. It was for***

him to show the court that the design he registered was new at the time of the application for registration. The defendants did not claim to have any registered design. See Kodilinye v. Odu (1935) 2 WACA 336 and Jules v. Ajani (1980) 5-7 SC 96 at 108.

I have no doubt in my mind that the court below properly applied the decision of this court in Ajibowo & Co. Ltd. v. Western Textiles Mills Ltd. (supra) where Fatayi-Williams, J.S.C. (as he then was) held as follows:

“...What actually constitutes the design is that particular combination of and arrangement of lines, which give such features. Thus, like the disputed design in the case in hand, a design for a pattern may consist of a mere arrangement of straight lines or stripes. This is why it is important that in a case where the newness of such a design is disputed, the design claimed to be new and the old design should be put side by side to enable the court to compare and see whether they are basically the same or there are fundamental differences...”

The above conclusion did not suggest that a comparison of both products be embarked upon as was done by the learned trial Judge in the case before us. I am not saying that the finding of the learned trial Judge is perverse. I would say that it is unsound. See Ornoregie v. Idugiemwanye (1985) 2 NWLR (Pt.5) 41. **I therefore come to the conclusion that the court below was right when it held that the plaintiff failed to prove his case.**

On the whole the appeal fails. The decision of the court below is upheld. The defendants are entitled to cost which I assess at N10,000.00.

WALI JSC

I was privileged to have read before now, the lead judgment of my learned brother Ogwuegbu, JSC and I agree with the reasoning and conclusion that the appeal lacks merit. The learned trial Judge after making a correct finding on the evidence before him that: -

“In the present case the plans & drawings of the plaintiff’s design are contained in the document annexed to Exhibit “1”. The shape & size of the container including the shape & size of the bottom of the container and cover are claimed (sic). This design was

used in the productions of Exhibit “2”. The design used by the 1st defendant in the production of Exh. “5” is not before me in this case. A comparison of the designs therefore cannot be made. “Went back on the finding (supra) and compared the two products to wit: Exhibits “2” & “5” and concluded: -

B *“A cursory perusal of the external appearances of Exhibits “2” and “5” reveals the two are similar to each other. It seems Exhibits “2” & “5” are produced from the same design and by the application of the same process.”*

C This, the law says the learned trial Judge, cannot do without comparing the two designs from which Exhibits 2 & 5 were respectively made. In the case of Ajibowo & Co. Ltd. v. Western Textiles Mills Ltd. (1976) 7 SC 97; Fatayi - Williams JSC (as he then was) stated the law as follows:

D *“...What actually constitutes the design is that particular combination and arrangement of lines which give such features... This is why it is important that in a case where the newness of such a design is disputed, the design claimed to be new and the old design should be put side by side to enable the court to compare and see whether*
E *they are basically the same or there are fundamental differences...”*

The mere comparison of the two products and conclusion on that basis that they are similar and produced from the same is not enough. It is for this and the fuller reasons contained in the lead
F judgment that I also hereby dismiss the appeal.

MOHAMMED JSC

G I entirely agree that this appeal has failed. I have had the preview of the judgment of my learned brother, Ogwuegbu, JSC, in draft and for the reasons given in that judgment. I will dismiss the appeal. I award the respondents N10,000.00 costs.

H IGUH JSC

I have had the privilege of reading in draft the judgment just delivered by my learned brother, Ogwuegbu, J.S.C. and I am in entire agreement with him that this appeal is without substance and ought to be dismissed. For exactly the same reasons which are fully

contained in the said judgment and which I do not hesitate to endorse, this appeal accordingly fails and is hereby dismissed by me with costs as assessed in the leading judgment.

KALGO JSC

I have read in advance the judgment of my learned brother Ogwuegbu, JSC just delivered. I entirely agree with his reasoning and conclusions reached therein, and adopt same as mine. My learned brother has in my respectful view painstakingly considered the issues raised in the appeal very well and I do not think that I should add anything more to what he has already said. In the result, I also find no merit in the appeal and I dismiss it with N10,000.00 costs in favour of the respondents. Appeal dismissed.

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