

SUPREME COURT OF NIGERIA
FRIDAY 12TH DECEMBER, 2003. SC. 320/2001
CORAM:- S. M. A. BELGORE, A. I. KATSINA-ALU,
U. A. KALGO, N. TOBI, S. O. UWAIFO JJSC

1. MOBIL PRODUCING NIG UNLTD
2. MOBIL INCORPORATED OF USA APPELLANTS
AND

1. CHIEF SIMEON MONOKPO
2. CHIEF HON. JOSEPH T.A. NWI-UE
(For themselves and on behalf of Bonmu,
Lewe & Other communities of Rivers State)
AND

1. HIS ROYAL HIGHNESS ETEBOM KAY RESPONDENTS
WILLIAM AKANOWO
2. CHIEF RICHARD OBEDIAH AYANG
3. PRINCE ANIEFIOK ADPAN MOENANG
4. ETOP WILLIAM AKPANOWO ENOIDEM
(For themselves and on behalf of
the people of Akpanowo, Ayang,
Imoenang Fishing Communities of
Ikot Obong Ikpa-Ibekwe of Ikot
Abasi, Akwa Ibom State of Nigeria)

APPEALS - Parties - Right of appeal - Party to proceedings cannot appeal against a decision arrived thereat - Which does not wrongfully deprive him of an entitlement (H1)

APPEALS - Right of appeal - Interested party - By s. 233(5) 1999 Constitution - Such party may appeal with leave - And must disclose that he has a legally recognizable interest in the decision (H2)

ACTIONS - No case submission - Procedure - By O. 38 r. 15 FHC Rules - Defendant is asked if he intends to call evidence - And where he rests his case on that of plaintiff - He is bound by the evidence as it stands (H3)

ACTIONS - Court - No case submission - If at close of plaintiff's case there is submission of no case - Judge should refuse to rule on it -

Unless defence counsel indicates he is not to call evidence (H4)

PRACTICE & PROCEDURE - Courts - No case submission - Where defendant is not put to his election to call evidence - And submission of no case fails - The right to call evidence is not lost (H5)

COURTS - Motions - Determination - Court is to decide on merit of any application brought before it by party - Notwithstanding the perceived strength or weakness of such application (H6)

COURTS - Motions - Fair hearing - Except in exercise of punitive jurisdiction - Against contemnor of court order - A refusal by court to hear motion is breach of right to fair hearing (H7)

PRACTICE & PROCEDURE - Courts - Conflicting motions - Where motion seeks to terminate proceedings - And another seeks to regularize same - Priority should be given to the latter (H8)

JUDGMENTS - Motions - Determination - Where judgment is prepared but not delivered - And motion is brought which is relevant to judgment - Same should be determined before delivery of the judgment (H9)

FACTS

1st and 2nd sets of plaintiffs/respondents instituted two separate suits in the Federal High Court, Calabar against defendants/appellants for ecological and environmental pollution arising from crude oil spillage. 1st set of respondents claimed special damages of N3,698,524,656.00 and general damages of N301,475,344.00 while 2nd set of respondents claimed special damages of N938,200,464.00 and general damages of N61,799,536.00. The learned trial Judge ordered a consolidation of the two suits as they had the same cause of action.

At the hearing, respondents called four witnesses. 1st appellant sought and obtained the order of court to amend their statement of defence and thereafter called one witness. Meanwhile, 2nd appellant brought a motion for dismissal of the respondents' case against it on the ground that pleadings and evidence led by respon-

dents disclosed no cause of action against it. Respondents in turn by way of a notice of cross-motion asked for the dismissal of 2nd appellant's motion and judgment against 2nd appellant. At the close of hearing, trial judge entered judgment for 1st and 2nd sets of respondents against 2nd appellant. Dissatisfied, appellants appealed to the Court of Appeal, Calabar Division. The appeal was dismissed. They have further appealed to Supreme Court.

ISSUES FOR DETERMINATION

"1. Whether the plaintiffs' action as constituted was competent.

2. Whether the Court of Appeal was right in confirming the award of N4 billion unliquidated damages made in favour of the plaintiff in spite of the fact that the valuation report on which the High Court replied (sic) was not placed before the Court of Appeal.

3. Whether the judgment of N4 billion unliquidated damages made against the 2nd defendant was proper when the co-defendant was still giving evidence and vigorously defending and disputing the alleged common acts of negligence in respect of pipes allegedly owned by the 1st and 2nd defendants.

4. Whether award of unliquidated damages could be based on plaintiff's pleadings and uncompleted evidence of a co-defendant.

5. Whether there was proper evaluation of the evidence before the court and whether the judgment of N4 billion Naira was on merit.

6. Whether the construction placed on the provision of Order 38 rule 1 and Order 28 rule 7 was correct and whether the award of N4 billion unliquidated damages could be based on the said rules.

7. Whether the appellants' right to fair hearing was not violated by the lower courts' refusal to consider on its merits the 2nd appellant's motion to dismiss on the ground that the motion was in the nature of a demurrer.

8. The liability of the defendants being joint and several, whether the judgment against the 2nd defendant based on the inconclusive evidence was not seriously prejudicial to the 1st defendant's case yet to be concluded and therefore wrongly upheld by the lower court.

9. Whether the lower courts have any valid legal reasons for failing to consider and/or grant the prayers contained in the 2nd

defendant's motion to dismiss especially when no counter-affidavit was filed to challenge the facts forming the basis of the prayer and if so, whether judgment for the plaintiffs was a necessary and automatic corollary of refusing the prayers.

B *10. Whether or not the Court of Appeal was right in upholding the ruling of the High Court in refusing to entertain and grant the 2nd defendant's application to regularize the statement of defence filed out of time.*

C *11. Whether the plaintiffs 'notice of cross-motion' not being known to law and unsupported by affidavit was competent. If the answer is in the positive, whether the hearing thereof without giving the defendant's counsel the mandatory two clear days to react to it was not in breach of the rules of court, the principles of natural justice and the 2nd defendant's constitutional right to fair hearing.*

D *12. Whether the award of costs of N300,000.00 was in judicial and judicious exercise of the discretion of the High Court based on proper procedures and correct principles as to justify a confirmation of the award by the lower court. "*

E **HELD** (Allowing the appeal per **UWAIFO JSC**,
Katsina-Alu JSC Dissenting)
Parties - Right of appeal

F **1. A party to proceedings cannot appeal a decision arrived thereat which does not wrongfully deprive him of an entitlement or something which he had a right to demand. Unless there is such a grievance, he cannot appeal against a judgment which has not affected him since the whole exercise may**
G **turn out to be academic. Under no circumstances can it be argued that a party to proceedings who has not been affected by a decision may nevertheless appeal against it merely as a party.** (p. 2733 A)

H *Right of appeal - Interested party*

2. It is conceded, however, that section 233(5) also contains a provision that any other person (not necessarily a party to proceedings) having an interest in the matter of the proceed-

ings may appeal with the leave of court against a decision given therein. He will have to disclose in an application for leave that he has a genuine and legally recognisable interest in respect of such a decision. (p. 2733 C)

ACTIONS - No case submission - Procedure

3. In view of the contents of the affidavit relied on by Mr. Ajumogobia, one may now turn to Order 38 of the Federal High Court Rules, 2000. In essence, Mr. Ajumogobia by that affidavit evidence was saying that at the close of the plaintiffs' case, no case had been made against the second defendant. But in that situation, the procedure is not for the defendant relying on a no case to approach the court with a motion. It is up to him to proceed under and keep within the provisions of r.15 as he may desire.

It is important to note that the said provisions require that a defendant be asked at the close of a plaintiff's case if he intends to call evidence; that is to say, he should be put to his election unless it is clear he does not wish to call evidence, such as indicating that he is resting his case on that of the plaintiff. In that case he will be bound by the evidence as it stands. (pp. 2738 E & 2739 A)

Court - No case submission

4. It has been recognised as part of the practice that where a Judge is trying an action without a jury and if at the close of the case for the party who begins there is a submission of no case, he should in general refuse to rule on it unless counsel for the defendant says or otherwise indicates that he is going to call no evidence. (p. 2739 E)

PRACTICE & PROCEDURE - Courts - No case submission

5. It is, however, the law that if an election to call no evidence does not actually take place, and the submission of no case fails, the right to call evidence is not lost. In that case, evidence may be called as if the submission had never been made. The practice is to put the defendant to his election. (p. 2740 E)

Motions - Determination

6. It has been laid down in many decisions that it is the duty of a court to entertain and decide on the merit of any application brought before it by any party notwithstanding the perceived strength or weakness of such an application. It seems to me that this principle of law has been solidly laid down by the Court of Appeal. (p. 2746 C)

Motions - Fair hearing

7. It is not only essential but mandatory for a court before which a motion (or application) has been brought to hear and determine it at the appropriate time. It has no right to refuse to hear it unless possibly in a proper circumstance in the exercise of its punitive jurisdiction against a contemnor of a court order who is expected to purge himself of the contempt before he could be heard. A refusal of a court to hear a motion is a breach of the right to a fair hearing guaranteed under the Constitution and an essence of the audi alteram partem rule of natural justice. (p. 2747 B)

Courts - Conflicting motions

8. In the present case, it is true that the learned trial Judge was already hearing argument in respect of two motions, each of which was capable of bringing an abrupt end (as indeed it happened) to the proceedings. But there was this other motion which was, as it were, in competition with those two. Those two were to achieve some result and terminate the proceedings; the other one was seeking for time to regularize some processes with a view to an opportunity to continue further hearing in the proceedings. The practice has always been to give priority to hearing such motion seeking to regularize a process. (p. 2747 H)

JUDGMENTS - Motions - Dete

9. The prevailing view is that even when a judgment has been prepared, but before it is delivered, a motion is brought which may be relevant to the substance of that judgment, the motion

should be considered and determined before the judgment may or may not thereafter be delivered. (p. 2748 G)

NOTABLE POINTS OF INTEREST

TOBI JSC

1. Court process not known to law is void

B

A court process which is filed but not known to law, in my humble view, is null and void ab initio. I can still move further. If the court process results in a judgment, ruling or order, the judgment, ruling or order, is also null and void, ab initio. I see such a situation in this C appeal. (p. 2767 G)

2. Jurisdiction of court cannot be waived by party

The law is elementary that a party cannot or has not the competence to waive lack of jurisdiction of the court. Where a court lacks jurisdiction, the entire proceedings however well conducted are a nullity and a party cannot in law resuscitate or revive a nullity by waiver. Jurisdiction is basic to the entire adjudication. It affects the power of the court to adjudicate on a matter. Where a court lacks jurisdiction, no amount of indolent conduct on the part of any of the parties, particularly the defendant, can ripen into the defence of waiver. It is my view that the jurisdiction of a court, where there is none, cannot be enlarged either by estoppel or waiver. (p. 2768 H)

F

3. Courts to consider evidence it sees

There is no procedural law known to me which allows an appellate court to accept the evaluation of exhibits by the trial court, which are not before that court. The word 'evaluate', the act of evaluation, which in general parlance means to calculate or judge the value of a thing, presupposes that the thing, the subject of evaluation must be seen by the valuer, who in our context is the Court of Appeal. The Court of Appeal that did not see exhibits A and B, the main plank of the award of N4 billion, was not in a position to come to the conclusion it came to.

H

A court, trial or appellate, must see the exhibits before taking any decision on them. A court, trial or appellate, must see the exhibits before probing into their veracity or authenticity. A court, trial or

appellate, cannot and must not come to the conclusion, one way or the other, on exhibits which it did not see. Where a court does that, there is a clear miscarriage of justice and the judgment must be declared a nullity. (p. 2772 E)

B **KATSINA-ALU JSC** (Dissenting)

4. Party is entitled to decide whether or not to adduce evidence in support of his pleadings

A party or a litigant has a right to choose whether to adduce evidence in support of his pleading or not and the court has no power to interfere with the exercise of that right. Similarly a defendant i.e. a party sued has a right to choose whether to file a defence to the claim against him or not. I think once that choice is made and that choice was acted upon by both parties in the suit and by the court, the party that made the choice cannot turn around afterwards and seek to be allowed time within which to file a defence and call evidence in order to repair his damaged case. If the court indulges parties in this way, there will be no end to litigation. (p. 2782 A)

E **REPRESENTATION**

Chief Afe Babalola, SAN with O. Okunloye, SAN, A. Adenipekun, Esq., A. Akpan, Esq., O. Amao, Esq., Remi Awe [Miss] and Remi Olaopa [Mrs.]), for Appellants.

F L.E. Nwobu, Esq. with J.T.O. Ugboduma, Esq.), for Respondents

CASES REFERRED TO

Eguamwense v. Amaghizemwen (1986) 5 NWLR (Pt.41) 282

Harrods Ltd. v. Anifalaje (1986) 5 NWLR (Pt.43) 603

G Kotoye v. Saraki (1991) 8 NWLR (Pt.211) 638

Mokwe v. Williams (1997) 11 NWLR (Pt.528) 309

Okoro v. Okoro (1998) 3 NWLR (Pt.540) 65

Eriobuna v. Obiorah (1999) 8 NWLR (Pt.616) 622

Laurie v. Reglan Building Co. Ltd. (1942) 1 KB 152

H Parry v. Aluminium Corporation (1940) W.N. 44

Yuill v. Yuill (1945) 1 All ER 183 at 185.

Akanbi v. Alao (1989) 3 NWLR (Pt.108) 118

Ekpanya v. Akpan (1989) 2 NWLR (Pt.101) 86

United Bank for Africa Ltd. v. Nwora (1978) 11-12 SC 1

UTC v. Pamotei (1989) 2 NWLR (pt.103) 244

Nishizawa v. Jethwani (1984) 12 SC 234

STATUTE & RULES REFERRED TO

Constitution of Federal Republic of Nigeria 1999, s. 233(5)

Federal High Court Rules 2000, O. 3, O. 12 r. 16, O. 28 rr. 4, 7 and B
O. 38 rr. 11, 15(1)

High Court of Cross River State (Civil Procedure) Rules Cap. 51 Vol.
III 1979, O. 42 rr. 5, 6

LEAD JUDGMENT BY UWAIFO JSC

Two suits were instituted in the Federal High Court, Calabar on June 1, 1998 by two separate sets of plaintiffs against the same defendants. The said defendants are now the appellants. The first suit No. FHC/CA/CS/30/98 claimed special damages of D
N3,698,524,656.00 and general damages of N301,475,344.00. The plaintiffs therein are now the 1st set of respondents. The second suit No. FHC/CA/CS/31/98 claimed special damages of N938,200,464.00 and general damages of N61,799,536.00. The plaintiffs in that suit are now the 2nd set of respondents. The defendants in the two suits E
were sued jointly and severally. The two suits have as their cause of action ecological and environmental pollution arising from crude oil spillage.

In both suits, the statements of claim were filed on 22 July, F
1998 and the statements of defence of the 1st defendant only were filed on 12 October, 1998 and latter amended and filed on 29 June, 2000. The 2nd defendant had applied on 12 October, 1998 (in both suits) to have its name struck off the suit as a party improperly joined. It claimed in the supporting affidavits to be “a separate legal entity G
independent” of the 1st defendant. It then further said in para. 4:

*“That the 1st defendant is neither in liquidation nor in receivership. In consequence therefore, the 2nd defendant should not be joined as a necessary party to this suit. An attempt to bring them in as H
a party in this suit is calculated to embarrass them and bring them into ridicule.”*

I cannot make any head or tail out of the reasons given for the application. Suffice it to say that the 2nd defendant was not struck off the suits. The two suits were later consolidated on 10 April, 2000 on

the oral application of both the counsel for the defendants and the plaintiffs. The plaintiffs led evidence in support of their case in suit No. FHC/CA/CS/30/98.

Evidence in suit No. FHC/CA/CS/31/98 was commenced by the plaintiffs and concluded on 16th June, 2000. The matter was B adjourned to 27th, 28th and 30th June, 2000 for defence because Mr. Ajumogobia for the defence said he did not anticipate that the plaintiffs' case would be closed that day. But on 27th June, Mr. Ajumogobia, learned counsel, filed a motion to amend the statement C of defence in suit No. FHC/CA/CS/30/98 on behalf of the 1st defendant. This was granted that same day. The statement of defence in suit No. FHC/CA/CS/31/98 was similarly amended on behalf of the 1st defendant. Mr. Nwosu, learned counsel for the plaintiffs, was given liberty to file a reply.

D The first defendant then immediately opened its defence by calling Dr. Godfrey Okon Udoh, estate manager and urban estate surveyor. He was extensively cross-examined and his evidence was concluded. The case could not go on the next day as scheduled because the court was told that Mr. Ajumogobia was appearing at the E Court of Appeal that day. It was then adjourned to 30th June. But on 29th June, 2000, Mr. Ajumogobia filed a motion praying the court to dismiss the action as against the second defendant and to strike it off the suit. The affidavit in support was sworn by Patrick A. Osu, a legal practitioner in the firm of Ajumogobia and Okeke. Paras. F 3, 4 and 5 of the affidavit read:

"3. That I am informed by Mr. Odein Ajumogobia that neither the plaintiffs pleadings nor any part of the evidence led by or in support of the plaintiffs case contains any allegations of fact against the G 2nd defendant which would entitle the plaintiffs to any relief whatsoever against the said 2nd defendant.

4. That I am informed by Mr. Ajumogobia and I verily believe that the plaintiffs in this suit closed their case on June 16, 2000.

H *5. That I verily believe that the only fact purporting to connect the 2nd defendant with this action is the pleading in paragraph 2 of the statement of claim unsupported by evidence that the 2nd defendant is the parent company of the 1st defendant and directs the 1st defendant's management policies."*

It was in view of this motion filed on behalf of the second de-

fendant that Mr. Nwosu on behalf of the plaintiffs filed what he called a cross-motion. In it, he sought an order to dismiss the second defendant's motion and to enter final judgment against the second defendant. Mr. Ajumogobia's argument was that no case had been made against the second defendant either from the statement of claim or from the evidence. His only concession was the averment that the second defendant is the parent body of the first defendant. It was not also disputed that the claim was for special damages of N3,698,524,656.00 and general damages of N301,475,344, making a total of N4 billion. Mr. Nwosu's contention was that the two defendants were sued jointly and severally and that in the statements of claim allegations were averred against the defendants accordingly. He submitted that throughout, up to the close of the plaintiffs' case, no statement of defence was filed on behalf of the second defendant. He therefore argued that the plaintiffs conducted their case on the assumption that the second defendant having in the circumstances admitted the facts pleaded, the plaintiffs had no obligation to lead evidence against it. He contended further that now that the second defendant had submitted at the close of the plaintiffs' case that no case had been made against it, the court would have to come to judgment on the merits of the plaintiffs' case. Mr. Nwosu then urged the court to give judgment for the plaintiffs against the second defendant upon the fact that there had been no evidence led, and indeed no statement of defence filed, by it in court.

Mr. Ajumogobia at that stage applied for an adjournment "to reply to the submissions of my learned friend on points of law as a rejoinder to issues of law raised by my learned friend." Mr. Nwosu opposed the adjournment sought. But Mr. Ajumogobia insisted, as recorded, by saying: "My learned friend has raised some issues of law which calls (sic) for rejoinder. I am prepared to take a very short adjournment to Monday, 3rd of July, 2000." The learned trial Judge eventually granted an adjournment to 7 July, 2000 "for the defendants' counsel to rejoin on points of law thereafter the court will rule on the motions for dismissal and judgment."

Mr. Ajumogobia no longer pursued the course of making a reply on points of law for which he had sought and was granted an adjournment. Instead, for the first time, he filed a motion on 6 July, 2000 praying for an order extending the time within which the sec-

ond defendant shall be at liberty to file a memorandum of appearance and statement of defence, and an order deeming as properly filed the said processes filed on 5 July, 2000. He seemed to have taken a different course from the proceedings of 30 June, 2000 in regard to the submission by him to have the case dismissed on the
 B ground that no case had been made against the second defendant. He completely backed off from the circumstances leading to the adjournment granted at his instance to 7 July, 2000 for him “to make his rejoinder” to Mr. Nwosu’s reply. Yet it was deposed in the affidavit
 C in support of the latest motion that the affidavit was made “in good faith in response to the plaintiffs’ notice of cross motion filed and served on the 30th day of June, 2000.”

Mr. Nwosu opposed the hearing of the motion filed by the plaintiffs’ counsel for extension of time to put in the second defendant’s
 D statement of defence. The learned trial Judge held the view that the said motion Mr. Ajumogobia brought at the stage he did to wish to file a statement of defence for the second defendant was an abuse of court process and was intended to overreach the plaintiffs. He said *inter alia*:

E *“I have in the main considered the implication of motion for extension of time to file a statement of defence for the 2nd defendant in the circumstances of this case where the plaintiffs have led evidence, tendered exhibits, and closed their case for the plaintiffs*
 F *and the (1st) defendant had opened its case (and) called a witness. In my considered and humble opinion, the plaintiffs conducted and concluded their case on the assumption that the 2nd defendant filed no pleadings and did not join issues with the plaintiffs. It follows therefore that allowing such filing of pleadings at this stage will amount to*
 G *over reaching the plaintiffs who had concluded their case as they will not have the opportunity of leading evidence again on the issues to be joined. That is the more reason I agree with Mr. Amego of counsel for the plaintiffs that what is being asked for is a final judgment and not judgment in default...*

H *I hold that the application of the 2nd defendant to move a motion for extension of time within which to file a defence for the 2nd defendant without first rejoining on points of law in conclusion of court motions moved on the 30/6/2000 and no application to stay same will amount to abuse of Court process and aimed at overreach-*

ing,”

In the end, the trial Judge refused to consider the motion and insisted that either that the second defendant's counsel would make his reply on points of law or withdraw the motion for extension of time to file a statement of defence.

Mr. Shasore of counsel on behalf of the second defendant proceeded in the circumstances to make his submission in “rejoinder” to the cross-motion. On 11 July, 2000, the learned trial Judge in a considered ruling gave judgment for the plaintiffs against the second defendant as follows:

“Suit No. FHC/CA/CS/30/98, judgment for N3,698,524,656.00 as special damages and N200,000.00 as general damages, with N200,000.00 costs.
Suit No. FHC/CA/CS/31/98, judgment for N938,200,464.00 as special damages and N50,000.00 as general damages, with N100,000.00 costs.”

The two defendants appealed to the Court of Appeal, Calabar Division. On 10 July, 2001, the Court of Appeal dismissed the appeal. In his leading judgment with which Edozie and Ekpe, JJCA concurred, Opene, JCA agreed with the learned trial Judge that a final judgment could be entered on an application of a plaintiff made to the court to give judgment summarily. The learned Justice then went on to say:

“As regards the question that judgment was wrongly entered against the 2nd defendant having regard to the statement of defence filed out of time on behalf of the 2nd defendant and the statement of defence properly filed on behalf of the 1st defendant. It was argued by the appellants that the learned trial Judge ought not to have entered judgment against the 2nd defendant on the ground that the 2nd defendant failed or refused to file any defence in the matter because there was a statement of defence filed out of time and also a pending motion for extension of time to regularize the statement of defence. In support of their argument, they referred to the following cases:- *U.B.A. v. Nwora* (1978) 11-12 SC 1; *U.T.C. v. Pamotei* (1989) 2 NWLR (Pt.103) 244; *Nishizawa v. Lethwani* (1984) 12 SC 234, (1984) ANLR 470. I have perused at (sic) those judgments and they all deal with two competing applications - one asking for judgment and the other for extension of time where the statement of defence

was irregularly filed or a case brought under a summary judgment.”

In the instant case, there was a trial, the plaintiffs/respondents called witnesses who testified after which they closed their case. The defence opened and one witness testified before the defendants/ap-
 B appellants brought a motion for an order to dismiss the plaintiffs’ action
 and in response to that the plaintiffs/respondents applied that a final
 judgment be entered in their favour. Later he said:

*“The appellants in their brief of argument have made a very
 heavy weather about this issue that the learned trial Judge ignored or
 disregarded the 2nd defendant/appellants’ statement of claim (sic:
 C defence) and also did not consider the 1st defendant/appellant’s state-
 ment of defence and proceeded to enter final judgment in favour of
 the plaintiffs/respondents but I must say without any equivocation
 that the learned trial Judge’s ruling on that point cannot be faulted.*

*D The motions to dismiss the action and for final judgment had been
 argued and were adjourned for the defendants/ appellants’ counsel
 to make a rejoinder on points of law, what the appellants’ counsel
 had wanted the learned trial Judge to do was to abandon the mo-
 tions that had been argued midstream without delivering a ruling on
 E them and then take a fresh motion by the defendants/ appellants.”*

Further still, the learned Justice said:

*“The learned trial Judge in entering final judgment against the 2nd
 defendant is not obliged to consider the 1st defendant’s statement of
 claim (sic: defence) as he was considering the case against the 2nd
 F defendant who was sued jointly and severally with 1st defendant.
 Order 28 rule 4 is very clear on this point and it provides:-*

*‘4. Where the plaintiff’s claim against a defendant is for un-
 liquidated damages only, then, if that defendant makes default in
 G pleading, the plaintiff may, after the expiration of the period fixed as
 aforesaid, for service of defence, have judgment entered against that
 defendant for damages to be assessed by the court and costs, and
 may proceed with the action against the other defendants, if any.’*

Finally, on this issue, I must observe that the learned trial Judge
 H was perfectly right when he ruled that the defendants/appellant’s
 counsel should make the rejoinder on points of law to the part heard
 motion before him or withdraw his motion so that he could proceed
 and rule on the plaintiffs/respondents’ motion. It is after he had ruled
 on those two motions that the 2nd defendant/appellant’s motion

would be ripe for hearing and this also depends on what his ruling would be.”

The other issues raised were also considered by the court below and in the end the appeal was dismissed and the judgment of the trial court affirmed. In the appeal to this court, the appellants set down 12 issues for determination which they stated thus: B

“1. Whether the plaintiffs’ action as constituted was competent. Grounds 1,2,3,4.

2. Whether the Court of Appeal was right in confirming the award of N4 billion unliquidated damages made in favour of the plaintiff in spite of the fact that the valuation report on which the High Court replied (sic) was not placed before the Court of Appeal. Ground 27. C

3. Whether the judgment of N4 billion unliquidated damages made against the 2nd defendant was proper when the co-defendant was still giving evidence and vigorously defending and disputing the alleged common acts of negligence in respect of pipes allegedly owned by the 1st and 2nd defendants. Ground 5.

4. Whether award of unliquidated damages could be based on plaintiff’s pleadings and uncompleted evidence of a co-defendant. Grounds 6 and 15. E

5. Whether there was proper evaluation of the evidence before the court and whether the judgment of N4 billion Naira was on merit. Grounds 20, 21 and 25.

6. Whether the construction placed on the provision of Order 38 rule 1 and Order 28 rule 7 was correct and whether the award of N4 billion unliquidated damages could be based on the said rules. Grounds 13 and 14. F

7. Whether the appellants’ right to fair hearing was not violated by the lower courts refusal to consider on its merits the 2nd appellant’s motion to dismiss on the ground that the motion was in the nature of a demurrer. Grounds 19 and 20. G

8. The liability of the defendants being joint and several, whether the judgment against the 2nd defendant based on the inconclusive evidence was not seriously prejudicial to the 1st defendants case yet to be concluded and therefore wrongly upheld by the lower court. H

9. Whether the lower courts have any valid legal reasons for failing to consider and/or grant the prayers contained in the 2nd

defendant's motion to dismiss especially when no counter-affidavit was filed to challenge the facts forming the basis of the prayer and if so, whether judgment for the plaintiffs was a necessary and automatic corollary of refusing the prayers. Grounds 10, 12 and 19.

B *10. Whether or not the Court of Appeal was right in upholding the ruling of the High Court in refusing to entertain and grant the 2nd defendant's application to regularize the statement of defence filed out of time. Grounds 7, 8, 11 and 19.*

C *11. Whether the plaintiffs 'notice of cross-motion' not being known to law and unsupported by affidavit was competent. If the answer is in the positive, whether the hearing thereof without giving the defendant's counsel the mandatory two clear days to react to it was not in breach of the rules of court, the principles of natural justice and the 2nd defendant's constitutional right to fair hearing. Ground D 18.*

12. Whether the award of costs of N300,000.00 was in judicial and judicious exercise of the discretion of the High Court based on proper procedures and correct principles as to justify a confirmation of the award by the lower court. Grounds 22, 23 and 24."

E There is a preliminary objection by the respondents which I shall deal with here very briefly. It is in three parts: (1) That the first defendant is not an aggrieved party since no judgment was given against it. (2) That no leave was obtained to file the grounds of appeal argued by the appellants and therefore the appeal is incompetent. (3) That an affidavit having been deposed to saying that the second defendant does not exist, it cannot file this appeal to contest the judgment against it.

G It is true that the judgment of the trial court which was affirmed by the court below was given against only the second defendant. In effect, the first defendant is not an aggrieved party that can appeal against the judgment of the court below to this could simply on the basis that it was a party to the proceedings in which judgment was given in reliance on the provision of section 233(5) of the 1999 Constitution which says that: "Any right of appeal to the Supreme Court from the decisions of the Court of Appeal conferred by this section shall be exercisable in the case of civil proceedings at the instance of a party thereto." That provision must be understood to apply to an aggrieved person or party.

A party to proceedings cannot appeal a decision arrived thereat which does not wrongfully deprive him of an entitlement or something which he had a right to demand. Unless there is such a grievance, he cannot appeal against a judgment which has not affected him since the whole exercise may turn out to be academic. Under no circumstances can it be argued that a party to proceedings who has not been affected by a decision may nevertheless appeal against it merely as a party. See, for instance, Akinbiyi v. Adelabu (1956) SCNLR 109 where it was recognised that a person entitled to appeal is a person aggrieved by a decision, i.e. a person against whom a decision has been pronounced which deprived him of some right. B C

It is conceded, however, that section 233(5) also contains a provision that any other person (not necessarily a party to proceedings) having an interest in the matter of the proceedings may appeal with the leave of court against a decision given therein. He will have to disclose in an application for leave that he has a genuine and legally recognisable interest in respect of such a decision. See Ademola v. Sodipe (1992) 7 NWLR (Pt.253) 251. The first appellant did not appeal under the said provision as a party interested. I am satisfied that it is not a proper appellant in this appeal. However, the relevant grievances made, for the purpose of this appeal, are sufficiently referable to the situation of the second defendant. For that reason, its appeal is competent. D E F
As regards the objection that no leave was obtained to raise the grounds of appeal canvassed in this appeal, Chief Babalola, SAN is right that leave was accordingly obtained. On 8 April, 2002, this court considered an application containing eight prayers including those for leave to file additional grounds of appeal, to argue fresh issues, to amend and file amended notice of appeal, to depart from the rules to compile record, and for deeming orders. They were all granted. G

The third objection is that the second defendant does not exist because an affidavit was deposed to on its behalf that it is non-existent. A defendant is entitled to raise any defence which it believes will relieve it of liability. In some cases it is known that such a defence may simply be frivolous or untrue; and in some cases alternative defences may be raised. If a defendant says it is not a legal personality the matter does not end there. . That issue can be pursued to ascertain its H

validity. If so investigated, it is for the court to rule on it. In the present case, the issue was not examined nor acted upon. As a matter of fact the trial court gave judgment against the second defendant in which it was made liable to pay huge sums to the plaintiffs. The plaintiffs cannot be heard to argue that the said second defendant is non-existent in order to deprive it of the right to appeal against that judgment. If that argument were to be upheld, it would be indefensible in principle and at the same time counterproductive to the interest of the plaintiffs because this court would be obliged to declare the judgment either unenforceable or that the proceedings are a nullity as they led to judgment against a nonexistent party. I have come to the conclusion that the preliminary objection must be overruled and I accordingly do so.

Having regard to what transpired in the trial court, I shall at this point focus attention on issue 10. I have considered the arguments under this issue, first, in regard to the propriety of the “cross-motion” of the respondents (as plaintiffs in the trial court); second, whether it was a motion for judgment in default of filing a defence by the second defendant; and third, as to the obligation of the court to consider the motion for extension of time within which to file the second defendant’s statement of defence. The cross-motion for judgment, as the process filed by the plaintiffs in reaction to the second defendant’s motion to dismiss was headed, did not in anyway indicate that it was brought in default of pleading by the second defendant. The implication of the motion by the second defendant appears to have been misunderstood by all, even by its counsel, at the time it was argued. I shall return to these motions later.

In the meantime let me say that all the counsel who represented the defendants, particularly the second defendant, at different stages of the trial failed to live up to the minimum standard of commitment and in some respect the competence one would expect of them professionally. I shall give a few instances. First, after the defendants had been served with the statement of claim, Mrs. Omodele O. Ekpo, of counsel, in the law firm of Idowu & Co. brought a motion on 12th October, 1998 on behalf of the second defendant, as stated on the face of the motion, for-

*“AN ORDER striking out the name of the 2nd defendant/ap-
plicant as a party in this suit for being improperly joined.*

(a) *That the non-joinder of the 2nd defendant will not lead to injustice and inconvenience.*

(b) *That the absence of the 2nd defendant as a party will not prevent the court to effectually and completely adjudicate upon and settle all the questions involved in the cause or matter.*

(c) *The cause or matter is not liable to be defeated by the non-joinder.* B

(d) *It is possible for the court to adjudicate on the cause of action set up by the plaintiffs without the 2nd defendant.*

(e) *The 2nd defendant sought to be joined is not a person who ought to be joined.* C

The relevant paragraphs of the affidavit in support read as follows:

“3. That the 1st defendant is a separate legal entity independent of the 2nd defendant and registered as an unlimited liability company under the Companies and Allied Matters Decree. D

4. That the 1st defendant is neither in liquidation nor in receivership. In consequence therefore, the 2nd defendant should not be joined as a necessary party to this suit. An attempt to bring them in as a party in this suit is calculated to embarrass them and bring them into ridicule.” E

The remaining paragraphs of the affidavit simply repeated the order grounds stated on the face of the motion. I cannot see the rational behind the motion from the grounds stated thereon and the deposition in the affidavit other than a display of incompetence. The motion disclosed no known reason for objecting to a party being allowed to continue as a defendant to a suit. Paragraph (e) of the motion is misleading because it was not being sought to join the second defendant to the suit. It was already made a defendant from the outset. F

Second, Chief Ekong Bassey, SAN was, at a point on 8 March, 1999 before actual hearing began, announced as likely to take over from Chief Idowu but he really never came in. On 17 May, 1999, the said Chief Bassey and one Eric Utang appeared for the defendants. He had come with a request apparently on behalf of Ajumogobia & Okeke for adjournment on the ground that they were still studying the case. H

Evidence of the PW1 commenced that day nonetheless. It is

not very clear at what stage the firm of Ajumogobia & Okeke began to represent the defendants. Third, on 16 February, 2000, there was no appearance for the defendants but it was recorded that a letter for an adjournment had been sent in from Ajumogobia & Okeke saying that Mr. Ajumogobia was appearing in the Court of Appeal. An adjournment was granted but on two dates set for the hearing, 17 March, 2000 and 10 May, 2000 Mr. Ajumogobia did not appear. It was on 15 May, 2000 he announced in court that he had brought an application dated 17 April, 2000 for change of counsel. It was granted.

Fourth, Mr. Ajumogobia then referred to a motion he filed on 12 May, 2000 for stay of further proceedings in the case pending the determination by the Court of Appeal, Lagos Division of a motion on notice dated 17 March, 2000. It was a most curious application because, as the learned trial Judge pointed out, there was no appeal pending against his own decision on which such motion could be based. In any case, the Lagos Division of the Court of Appeal would have been a most unlikely venue. It appeared the motion was either a ploy to delay proceedings or an aspect of incompetence. The application was refused.

Fifth, on 30 May, 2000, one Mr. Okuobi who appeared for the first defendant brought a letter from Mr. Ajumogobia for an adjournment of the hearing of the case which had been fixed for 29 and 30 May, and June 1, 2000. He wanted all three dates abandoned because he was billed to travel out of the country that night saying that *"it was only after returning to Lagos on 15/5/2000 that it came to my notice that ICCA International Court of Arbitration has been scheduled for May 31st, 2000."* After much discussion, the court adjourned to the next day May 31st, to enable Mr. Okuobi to familiarize himself with the case. Surprisingly, Mr. Ajumogobia appeared the next day, 31st May, 2000, and the record shows among other things: *"Mr. Ajumogobia: I apologize for not being here yesterday in person to ask for adjournment this was due to the fact that I was feeling ill."* He then went further to talk about the International Court of Arbitration sitting that day which, from an earlier request for adjournment, he was supposed to appear in. It was simply an attempt by Mr. Ajumogobia to delay the proceedings.

Sixth, the plaintiffs closed their case on 16 June, 2000 and the case was adjourned to 27, 28 and 30 June for the defence. On 27

June, Mr. Ajumogobia argued two motions to amend the statements of defence of the first defendant in respect of the two suits. They were granted. Evidence for the first defendant commenced and further hearing was adjourned to the next day. Mr. Ajumogobia did not come the next day 28 June but asked Mr. Patrick Osu of counsel to seek further adjournment to 30 June. This was accordingly granted. B It is on record that the 29 June had been skipped in the fixture for hearing because Mr. Ajumogobia said it was his birthday which he wanted to observe. But on 29 June, Mr. Ajumogobia filed the motion for an order to dismiss the action against the second defendant. C That led to the “cross-motion” by Mr. Nwosu. The two motions were argued on 30 June, 2000.

Seventh, Mr. Ajumogobia sought an adjournment for him to reply on issues of law. The matter was adjourned to 7 July, 2000. But on 6 July, Mr. Ajumogobia filed a motion for an order extending the time within which the second defendant may file a memorandum of appearance and statement of defence; and to deem properly filed the memorandum of appearance and statement of defence already so filed. This was the motion the learned trial Judge refused to consider. E

Now, to the three motions involved directly in this appeal. It seems to me from my understanding of the central issue upon which this appeal depends, I ought to limit my judgment to those motions. The motion filed by Mr. Ajumogobia on 29 June to have the suit F against the second defendant dismissed and its name struck off the suit was moved on 30 June by him in reliance on Order 12, rule 16 of the Federal High Court (Civil Procedure) Rules, 2000 which came into effect on May 1, 2000. The rule reads:

“16. An application to add or strike out or substitute a plaintiff G or defendant may be made to the court or Judge in Chambers at any time before trial by motion or summons or in a summary manner at the trial of the action.”

That motion cannot be regarded at the time it was brought, to be appropriate. It certainly does not fall under Order 12, rule 16 H because trial had already begun at the time the motion was brought and evidence had also been taken. This is more so when the affidavit in support placed some reliance on the evidence thus:

“3. That I am informed by Mr. Odein Ajumogobia that neither

the plaintiffs pleadings nor any part of the evidence led by or in support of the plaintiffs case contains any allegation of fact against the 2nd defendant which would entitle the plaintiffs to any relief whatsoever against the said 2nd defendant.

B *4. That I am informed by Mr. Ajumogobia and I verily believe that the plaintiffs in this suit closed their case on June 16th, 2000.*

C *5. That I verily believe that the only fact purporting to connect the 2nd defendant with this action is the pleading in paragraph 2 of the statement of claim unsupported by evidence that the 2nd defendant is the parent company of the 1st defendant and directs the 1st defendant's management policies."*

D That was a very unusual motion in the circumstances of the case in reliance on Order 12, r.16 of the said civil procedure rules. In the same way the "cross-motion" by the plaintiffs is very strange. It was meant for an order to dismiss the second defendant's said motion and at the same time get judgment against the second defendant. No ground or reason of any type was stated on the said process; and it was not supported by affidavit. It would appear that both counsel decided to operate outside the known procedures in civil suits to put a quick end to their respective side of the case.

E ***In view of the contents of the affidavit relied on by Mr. Ajumogobia, one may now turn to Order 38 of the Federal High Court Rules, 2000. In essence, Mr. Ajumogobia by that affidavit evidence was saying that at the close of the plaintiffs' case, no case had been made against the second defendant. But in that situation, the procedure is not for the defendant relying on a no case to approach the court with a motion. It is up to him to proceed under and keep within the provisions of r.15 as he may desire.*** That rule says:

"15(1) The party beginning shall produce his evidence and examine his witness.

H *When the party beginning has concluded his evidence, he shall ask the other party if he intends to call evidence (in which term is included evidence taken by affidavit or deposition, or under commission, and documentary evidence not already read or taken as read) and if answered in the negative, he shall be entitled to sum up the evidence not already given, and comment thereon, but if answered in the affirmative, he shall wait for his general reply."*

The above-stated provisions were not observed. ***It is important to note that the said provisions require that a defendant be asked at the close of a plaintiff's case if he intends to call evidence; that is to say, he should be put to his election unless it is clear he does not wish to call evidence, such as indicating that he is resting his case on that of the plaintiff. In that case he will be bound by the evidence as it stands.*** In *Toriola v. Williams* (1982) 7 C 27 at 33, Idigbe, JSC observed, though obiter, that the appellants had overlooked the consequences of the position in which they - "placed themselves by resting their case on that of the respondents i.e. by in effect submitting that the respondent as plaintiff failed to make out a prima facie case and by electing, in consequence, not to call evidence in support of their own case. The legal position in such a situation is, of course, that the appellants are bound by the evidence called in support of the case for the respondent qua plaintiff, and the case must be dealt with on the evidence as it stands (per Lord Greene M. R. in *Laurie v. Reglan Building Co. Ltd.* (1942) 1 KB 152 at 156. See also *Goddard LJ. in Parry v. Aluminium Corporation* (1940) W.N. 44 at 46 and Lord Greene M.R. in *Yuill v. Yuill* (1945) 1 All ER 183 at 185."

It has been recognised as part of the practice that where a Judge is trying an action without a jury and if at the close of the case for the party who begins there is a submission of no case, he should in general refuse to rule on it unless counsel for the defendant says or otherwise indicates that he is going to call no evidence. Lord Greene M.R. made the point in *Laurie v. Raglan Building Co. Ltd.* (supra) at 155 when he said:

"After the evidence for the plaintiff had been concluded on the question of liability, counsel for the defendants submitted that there was no case for him to answer. It is unfortunate, I think, that the learned trial Judge did not follow the practice which ought to be followed in such cases, as has been quite clearly laid down in this court, of refusing to rule on the submission unless counsel for the defendant said that he was going to call no evidence."

If the defendant announced that he was going to rest his case on that of the plaintiff, and the submission made by him failed, he would not be allowed to lead evidence nor obviously, on appeal, would he be given leave to lead fresh evidence as was attempted in

Akanbi v. Alao (1989) 3 NWLR (Pt.108) 118. In that case, the defendants' counsel rested their case on that of the plaintiffs and addressed the court extensively. But judgment went against his clients. On appeal to the Court of Appeal, the defendants sought leave to adduce fresh evidence by way of tendering two judgments which they pleaded B in their statement of defence saying that their counsel made the mistake not to tender them at the trial. The Court of Appeal gave leave. The plaintiffs then appealed to the Supreme Court. It was in those circumstances that Craig, JSC who gave the leading judgment observed inter alia at page 140:

C *"It is true that the courts will not punish a litigant for the mistake or inadvertence of his counsel in procedural matters. But the question which arises in the present appeal is whether a decision by counsel not to call evidence is a mistake or mere inadvertence? In my D view, it is neither far from being a mistake, it is in actual fact a distinct exercise of a legal right ...*

In my experience, a decision not to call evidence has always been regarded as a legal strategy, not a mistake. If the strategy succeeds, then it enhances the case of that party; but if it fails, such a E litigant cannot ask for leave to adduce further evidence in order to repair his damaged case."

It is, however, the law that if an election to call no evidence does not actually take place, and the submission of no F case fails, the right to call evidence is not lost. In that case, evidence may be called as if the submission had never been made. The practice is to put the defendant to his election. If, however, for any reason, as was said by Lord Greene M.R. in Yuill v. Yuill (supra) at page 185, "either through oversight or (as here) G through a misapprehension as to the nature of counsel's argument, the Judge does not put counsel to his election and no election in fact takes place, counsel is entitled to call his evidence just as much as if he had never made the submission." For a defendant to lose his right to call evidence when he makes a no case submission, there must be no H doubt as to the final course he had chosen, in whatever manner he might have done that. That Judge will need to be satisfied of a clear intention not to call evidence: See Ekpanya v. Akpan (1989) 2 NWLR (Pt.101) 86 at 94-95.

The learned trial Judge did not appreciate the implication of

the motion brought on behalf of the second defendant in which, as I have pointed out, Mr. Ajumogobia relied on the fact of lack of evidence against the second defendant in his affidavit in support of the motion and in his argument. In the argument, he said inter alia:

“The grounds for this application as stated on the face of this motion paper is that at the close of plaintiffs’ case, no evidence whatsoever has been laid (sic) or introduced to connect the 2nd defendant, Mobil Incorporated of USA with any of the claims or the reliefs sought by the plaintiffs in this action ... Neither the pleadings nor the evidence laid (sic: led) by the plaintiffs disclosed any evidence whatsoever against the 2nd defendant. That the only evidence or case of the plaintiffs in their pleading is that the 2nd defendant is the parent body of the 1st defendant and directs their management policy That there is no iota of evidence to substantiate that allegation of fact. Counsel submitted that that alone entitles the court to dismiss the suit against the 2nd defendant.”

This is a clear instance of a no case submission which is covered by Order 38, r. 15 primarily and IT. 16 and 17 consequentially. The provisions are similar to those of Order 42 rr. 5 and 6 of the High Court of Cross River State (Civil Procedure) Rules Cap. 51 Vol. III, Laws of Cross River State, 1979 considered in *Ekpanya v. Akpan* (supra). That being so, there was a prima facie obligation to comply with the usual practice in the treatment of a no case submission.

The learned trial Judge should have dealt with the matter of the motion as a no case submission, instead of as a matter falling under Order 28 as he did. That order deals with default of pleadings. The learned trial Judge relied on rr. 2,4 and 7 which read:

“2. If the plaintiff’s claim is only for a debt or liquidated demand, and the defendant does not, within the time allowed by these rules or an Order of court or Judge in Chambers for that purpose, file a defence, the plaintiff may, at the expiration of the time, apply for final judgment for the amount claimed, with costs.

4. Where the plaintiff’s claim against a defendant is for unliquidated damages only, then, if that defendant makes defaults in pleading, the plaintiff may, after the expiration of the period fixed as aforesaid, for service of defence, have judgment entered against that defendant for damages to be assessed by the court and costs, and may proceed with the action against the other defendants, if any.

7(1) *Where the plaintiff makes against a defendant or defendants a claim of a description not mentioned in rules 2 to 5 of this Order and the defendant or all the defendants (where there are more than one) fails or fail to serve a defence on the plaintiff, the plaintiff may, after the expiration of the period fixed as aforesaid for service of the defence, apply to the court for judgment, and on the hearing of the application the court shall give such judgment as the plaintiff appears entitled to on his statement of claim.*

(2) *Where the plaintiff makes such a claim as is mentioned in sub-rule (1) of this rule against more than one defendant, then, if one of the defendants makes default as mentioned in that sub-rule, the plaintiff may*

(a) if his claim against the defendant in default is severable from his claim against the other defendants, apply under that sub-rule for judgment against that defendant, and proceed with the action against the other defendants; or set down the action on motion for judgment against the defendant in default at the time when the action is set down for trial, or is set down for motion for judgment against the other defendants.

(3) *An application under sub-rule (1) of this rule shall be by summons or motion on notice."*

These rules are inapplicable when a defendant waits till the plaintiff has closed his case after leading evidence. The rules in question under Order 28 envisage the implication of admission of a claim by a defendant who fails to file a defence. The plaintiff will have to act as directed by the rules on the basis of the facts of his statement of claim. But once the plaintiff leads evidence in support of his case even without a statement of defence, he must rely on the evidence to discharge the burden that lies on him. This is more so where reliefs which cannot be normally granted even on admission, e.g. declaratory reliefs, are sought. But it will apply in respect of other reliefs where the plaintiff resorts to leading evidence as in the present case. In that situation, a defendant is entitled to consider the quality of the evidence led and decide to submit a no case notwithstanding that he filed no statement of defence. Admittedly, this can happen only in very rare cases because no serious-minded defendant will take the risk of not filing a defence simply to hope that the plaintiff will fail to make a case out upon his pleadings. I do not at all overlook the

difficulty that may arise when such a defendant is put to his election as to whether he intends to call evidence since he has not laid the foundation upon which he could call evidence. The difficulty will have to be confronted in the event of a defendant finding himself in such an awkward situation seeks leave to file a statement of defence out of time. It will depend on the circumstances of a particular case when the Judge is faced with considering an application for that purpose. However, the issue of that difficulty was not given a chance to be tested and resolved in the present case because a procedure unknown to the rules of court was adopted with the consequence that the normal practice of dealing with a no case submission was not given due attention. B C

If the learned trial Judge had appreciated this he would have drawn learned counsel's attention to the proper procedure under the rules. In the same way, the cross-motion by the plaintiffs for judgment was misconceived. It was no longer a matter for judgment by motion when the case had gone to trial. At a point in the ruling of the learned trial Judge in which he acted on that motion to give plaintiffs judgment, he relied on Order 38 r. 11 in addition to Order 28 already set out in this judgment. The Judge said: "The plaintiffs need no formal application for judgment as there was trial. Order 38 rule 11 of the rules of this court makes it mandatory for a trial Judge to enter judgment at or after trial without a formal motion." He then quoted the rule, and said: "The judgment entered in this case after the plaintiffs have closed their case could qualify as judgment entered during or after trial." The learned trial Judge was certainly at that stage under a misconception because even though he realized that the said rule 11 does not permit of such judgment to be given on motion, strangely enough, he still went ahead to do so. The rule reads: D E F G

"11. The trial Judge shall, at or after trial, direct judgment to be entered as he thinks right, and no motion for judgment shall be necessary in order to obtain the judgment."

While the trial court was in this double error and while the argument in respect of the two motions was raging, Mr. Ajumogobia probably realized that he placed himself in a difficult situation. He persisted on having an adjournment to reply to points of law. As I have earlier narrated in this judgment, the court granted an adjourn- H I

ment to 7 July, 2000. On 6 July, Mr. Ajumogobia filed a motion (the last of the three motions concerned in this appeal) for an order extending the time within which the second defendant may file a memorandum of appearance and statement of defence and to deem them properly filed. This was brought to the notice of the court on 7 July.

B The court's reaction has earlier been stated. In short the learned Judge insisted on determining the fate of the two motions in respect of which he was still to receive further submission. He refused to consider this third motion. The ruling he eventually gave on 11 July, 2000 pre-empted the said motion and irreversibly determined the liability of
C the second defendant. The Court of Appeal upheld the decision of the trial Judge to refuse to entertain the motion to file a statement of defence out of time.

The arguments before this court on that refusal as canvassed
D by the appellants may be briefly put. First, that the refusal to entertain that motion on the ground that it was filed too late in the proceedings is not in consonance with Order 3 of the Federal High Court Rules, 2000. I have perused Order 3 which deals with the effect of noncompliance with the rules. I find it clearly inapplicable. I do not
E see how the failure of the court to consider that motion can be a matter falling within non-compliance. Also, failure of a party to file pleadings within time cannot be cured under non-compliance saving. Order 3 is meant to save proceedings which have taken place
F from being declared a nullity for some irregularity committed by any of the parties, or even, in certain circumstances, by the court itself. The second argument is that the courts in Nigeria have generally, in the interest of justice, leaned heavily in favour of such procedures as would ensure the trial of cases on their merits and also minimize the
G time and expense of litigation. Reliance is placed on *United Bank for Africa Ltd. v. Nwora* (1978) 11-12 SC 1; *UTC v. Pamotei* (1989) 2 NWLR (pt.103) 244; *Nishizawa v. Jethwani* (1984) 12 SC 234. The first case deals with the normal circumstances where a defendant fails to file a statement of defence within time or regularly as in the present
H case; the others deal with cases under summary judgment procedure where instead of affidavit, a statement of defence is filed. The central point of convergence of what was decided in the two situations is that a court faced with the difficulty as to the late filing of a statement of defence should not shut its eyes to such a process, even if filed irregu-

larly or sought to be filed, but ought to have a look at it to see if it discloses a defence which might be considered in the interest of justice. I do not think that statement of principle can be disputed.

There is a third argument which I consider hugely crucial to this appeal. This is because (a) the plaintiffs had closed their case and had assumed that the second defendant who failed to file a defence had admitted the averments in the statement of claim in reliance on *Mosheshe General Merchants Ltd. v. Nigerian Steel Products Ltd.* (1987) 1 NWLR (Pt.55) 110; *Federal Capital Development Authority v. Naibi* (1990) 3 NWLR (Pt.138) 270, decisions of this court; (b) the second defendant's counsel in reliance on the plaintiffs' pleading and evidence applied by motion for a dismissal of the plaintiffs' suit, although I have shown that at that stage a no case submission was the appropriate course to take; (c) having not taken the proper course, and the learned trial Judge being in error as to the implication of the motion before him, there was no opportunity to put second defendant's counsel to his election; (d) had he been put to his election, a decision not to call evidence would have foreclosed him; but a decision to call evidence in case his submission failed would have there and then raised the further question: upon which pleading was he going to lead evidence? There would appear to be a bundle of legal tangle put together by both counsel and the trial court. This is where the essence of the third argument must be examined, and if possible used to unravel that tangle.

The argument is that two courts below were in grave error occasioning a miscarriage of justice when they refused to entertain the second defendant's motion for an order of extension of time within which to file a statement of defence and to regularize the one filed out of time on the ground that the motion for judgment had been argued. It goes further to say, and I think this touches the heart of the matter, that the issue is not whether or not the motion would have been granted because that depends on the judicious and judicial exercise of the discretion of the court; but that a complete refusal to consider the motion was an affront to the rule of natural justice and the appellants' constitutional right to a fair hearing, leading to a nullity of the proceedings. The learned Senior Advocate for the appellants cited *Salu v. Egeibon* (1994) 6 NWLR (Pt. 348) 23; (1994) 18 LRCN 241 at 259.

The learned counsel for the respondents in his reaction to the above relied in his brief of argument on what the court below said that the learned trial Judge “was perfectly right when he ruled that the defendants/appellants’ counsel should make the rejoinder on points of law to the part-heard motion before him or withdraw his motion so that he could proceed and rule on the plaintiffs/respondents’ motion. It is after he had ruled on those two motions that the second defendant/appellant’s motion would be ripe for hearing and this also depends on what his ruling would be.” So the issue now is whether the Court of Appeal, was right in what it said and whether the respondents’ counsel can rely on it for this appeal.

It has been laid down in many decisions that it is the duty of a court to entertain and decide on the merit of any application brought before it by any party notwithstanding the perceived strength or weakness of such an application. It seems to me that this principle of law has been solidly laid down by the Court of Appeal. There are very many of its decided cases on it, a few may be cited thus: Eguamwense v. Amaghizemwen (1986) 5 NWLR (Pt.41) 282; Harrods Ltd. v. Anifalaje (1986) 5 NWLR (Pt.43) 603; Kotoye v. Saraki (1991) 8 NWLR (Pt.211) 638; Mokwe v. Williams (1997) 11 NWLR (Pt.528) 309; Okoro v. Okoro (1998) 3 NWLR (Pt.540) 65; Eriobuna v. Obiorah (1999) 8 NWLR (Pt.616) 622. Of the six cases cited above, Tobi, JCA made pronouncements in the last four in regard to the principle of law in question which I think well project the principle. Whether in his leading judgments or his contributions in those cases, the learned Justice of Appeal made a consistent observation. To quote what he said in his leading judgment in Eriobuna v. Obiorah (supra) at page 642:

“A court of law or a tribunal has a legal duty in our adjectival law to hear any court process, including a motion before it. The process may be downright stupid, unmeritorious or even an abuse of court process. The court must hear the party or parties and rule one way or the other. A Judge, whether of a court of law or tribunal, has no jurisdiction to come to a conclusion by resorting to his own wisdom outside established due process that a motion cannot be heard because it has no merit. That does not lie in the mouth of a Judge in our adversary system of adjudication. The failure on the part of the learned tribunal to hear the motion of the 1st appellant filed on 1st

May, 1999 is against the provisions of section 33(1) of the 1979 Constitution on fair hearing, and particularly the natural justice rule of audi alteram partem. “

The pronouncements the learned Justice made in the other three cases are virtually to the same end. I entirely endorse them.

It is not only essential but mandatory for a court before which a motion (or application) has been brought to hear and determine it at the appropriate time. It has no right to refuse to hear it unless possibly in a proper circumstance in the exercise of its punitive jurisdiction against a contemnor of a court order who is expected to purge himself of the contempt before he could be heard. Otherwise the court must set the motion down and hear and determine it one way or another even if it might be of the opinion that the motion was brought late and that what it seeks is downright irregular and frivolous. It has to give the applicant a hearing. It is a basic right. If for any reason the motion was not expeditiously drawn to the attention of the court by the court officials who ought to do so, that could be no excuse for simply discountenancing it when later the court came to learn of its existence and instead proceeding to give judgment or make some order, more particularly when a decision on the motion was likely to have had a bearing on the judgment or order. The adversarial system of our justice administration demands no less. ***A refusal of a court to hear a motion is a breach of the right to a fair hearing guaranteed under the Constitution and an essence of the audi alteram partem rule of natural justice.*** It is perhaps important to add that if a Judge or court were at liberty to decide to ignore any motion filed in court it would raise a fundamental issue. There will be a danger that instead of allowing the administration of justice to be done upon a compulsory even keel, it may be left to the tyranny of the arbitrary or selective decision of a particular Judge or court as to if and when any motion will be considered at all. The consequences of this to the normal run of court proceedings are disturbing to contemplate. I think the argument of the appellants that it would be irrelevant to take into consideration now whether the motion for extension of time within which to file the second defendant's statement of defence would or would not have succeeded is well founded.

In the present case, it is true that the learned trial Judge

was already hearing argument in respect of two motions, each of which was capable of bringing an abrupt end (as indeed it happened) to the proceedings. But there was this other motion which was, as it were, in competition with those two. Those two were to achieve some result and terminate the proceedings; the other one was seeking for time to regularize some processes with a view to an opportunity to continue further hearing in the proceedings. The practice has always been to give priority to hearing such motion seeking to regularize a process. That is the hallmark of a proper exercise of discretion. If the motion to regularize succeeds, the other motions or motion seeking to terminate the proceedings will be withdrawn, and in appropriate cases there will be compensation by way of costs. This has been eloquently laid down by this court: See *Nalsa & Team Associates v. N.N.P.C.* (1991) 8 NWLR (Pt.212) 652 at 667; *Long John v. Blakk* (1998) 6 NWLR (Pt.555) 524 at 550, 551- 552.

It is upon the error committed by the learned trial Judge as pointed out above that, in my view, the present appeal untimely depends. Some aspects of the excerpts from the judgment of the court below which I earlier reproduced in this judgment show that the learned Judge's decision on the point was approved by that court when *Opene*, JCA said:

"I must say without any equivocation that the learned trial Judge's ruling on that point cannot be faulted. The motions to dismiss the action and for final judgment had been argued and were adjourned for the defendants/appellants' counsel to make a rejoinder on points of law, what the appellants' counsel had wanted the learned trial Judge to do was to abandon the motions that had been argued midstream without delivering a ruling on them and then take a fresh motion by the defendants/appellants."

The prevailing view is that even when a judgment has been prepared, but before it is delivered, a motion is brought which may be relevant to the substance of that judgment, the motion should be considered and determined before the judgment may or may not thereafter be delivered: See *Mokwe v. Williams* (1997) 11 NWLR (Pt.528) 309; *Savannah Bank (Nig) Ltd. v. S.I.O. Corporation* (2001) 1 NWLR (Pt.693) 194 at 208. This is always to avoid taking a course that may pre-empt or foreclose the

possibility of doing real justice between the parties. The court below therefore fell into the same error as the trial court in the view taken that it was proper to conclude arguments on the motions and deliver ruling in respect thereof before considering the motion seeking extension of time within which to file the statement of defence.

It would appear on the whole that the procedure leading to the judgment given by the trial court and the refusal of the learned Judge to consider and rule on the motion by the second defendant to regularize the filling of a statement of defence have been flawed. The circumstances were such that there was the real likelihood of a miscarriage of justice. I will allow the appeal on that basis and set aside the judgments of the two courts below together with the orders for costs. I hereby order that the case be remitted to the Federal High Court, Calabar for hearing do novo. I make no orders as to costs.

BELGORE JSC

In any matter in court it is a cardinal principle of our jurisprudence that no stone will be left unturned to procure fair hearing. All issues and points raised must be addressed. In a matter like this now at hand, the appellants filed a motion pertinent to the case before trial court. That court refused to hear the motion/application and went on to deliver judgment. That was an outrage against the notion of fair hearing. The court below erred in not addressing favourably this time-honoured principle adequately. The only available remedy is to have the matter reheard at trial High Court before another Judge other than the one that heard it before. I therefore agree with the judgment of my learned brother, Uwaifo, JSC, that this appeal has merit and for the reasons he clearly adumbrated therein, I also allow the appeal with the same consequential orders.

KALGO JSC

I have had the privilege of reading in draft the judgment just delivered by my learned brother, Uwaifo, JSC in this appeal. I entirely agree with him that there is substance in the appeal and that it ought to be allowed. I also agree that having regard to the circumstances of the case, a retrial should be ordered in the interest of jus-

tice.

The crucial point on which this appeal must be decided, in my respectful view, is the consideration of the defence of the 2nd defendant/appellant notwithstanding the stage at which it arose in the trial court's proceedings before judgment was delivered. It is also of utmost importance in my view, whenever a judgment is to be given in the absence of any defence in a civil case, to ensure that the defendant against whom judgment is to be given, has clearly and unequivocally indicated, (whether he filed any pleadings or not), that he did not intend to call any evidence in defence. See *Toriola v. Williams* (1982) 7 SC 27 at 33; *Amponsa Tandoh v. C.F.A.O.* 10 WACA 187; *Laurie v. Reglan Building Co.* (1942) 1 KB 152 at 155. If he indicates an intention to call defence evidence by filing an application to that effect as in this case the trial court should hear and determine the application on merit before proceeding to give judgment for the plaintiff. There is no doubt that the procedure adopted by the learned counsel for the parties in their applications to the trial court before judgment was rather unusual but that should not close the eyes of the court from the possibility of doing real justice to the parties.

In the instant appeal at the end of the case for the plaintiffs/respondents the 2nd defendant/appellant prayed the trial court by motion to discharge it from liability or to strike out its name from the case. Thereafter the plaintiffs/respondents' counsel filed his cross-motion and the two motions were being heard together when the 2nd defendant/appellant filed the motion for extension of time to file its statement of defence. This clearly showed its intention not to rely on the plaintiffs/respondents case but to defend the action. Therefore the proper thing the trial court should have done was to deal with the motion to file the defence in order to avoid any miscarriage of justice. This was not done. It was therefore wrong for the learned trial Judge to proceed to give judgment on the cross-motion since the 2nd defendant/appellant had clearly indicated that he wished to defend the action. The motion to enlarge time to file the defence should have been considered first and determined on its merit. This was not done here. In my view the trial Judge was wrong in failing to do so and the Court of Appeal was similarly wrong to uphold him in the circumstances.

I therefore agree with and adopt as mine the reasoning and

conclusions reached in the leading judgment of my learned brother, Uwaifo, JSC. I accordingly, find that the learned trial Judge was wrong in giving judgment against the 2nd defendant without considering is application for extension of time to file its statement of defence in the case and the Court of Appeal was also wrong in confirming such judgment. B

In the circumstances, I also allow the appeal, set aside the decision of the Court of Appeal and order a retrial of the case before another Judge of the Federal High Court, Calabar. I make no order as to costs. C

TOBI JSC

I have read in draft the judgment of my learned brother, Uwaifo, JSC, and I agree with him that the case be sent back for re-trial. D

The facts of the case are fairly chequered. I will try to summarize them. The first set of plaintiffs who are respondents in this appeal claimed from the defendants who are the appellants jointly and severally for ecological damage and injurious affection as follows special damages of N3,698,524,656.00 being the sum assessed by the plaintiffs expert chartered valuers in the valuation report and general damages of N301,475,344,00 for shock, inconveniences, loss of amenities, cost of the surveys and expert reports. E

The second set of plaintiffs who are also respondents in this appeal claimed from the defendants who are also the appellants jointly and severally for ecological damage and injurious affection as follows; special damages of N938,200,464.00 being the sum assessed by the plaintiffs expert chartered valuers in the valuation report and general damages of N61,799,536.00 for shock, inconveniences, loss of amenities, cost of the surveys and expert reports. As the two suits had the same cause of action, although the amounts claimed are different, they were consolidated by an order of the learned trial Judge. F G

After some preliminary issues, the learned trial Judge took evidence. The plaintiffs gave evidence. They called four witnesses. They closed their case on 16th June, 2000. The 1st defendant/appellant sought and obtained the order of court to amend their statement of defence. The 1st defendant called one witness on the day the court H

granted the application for amendment of their statement of defence. Thereafter the case was adjourned for continuation.

In the interval, the 2nd defendant/appellant brought a motion for dismissal of the plaintiffs' case against the 2nd defendant on the ground that the plaintiffs on the pleadings and the evidence led, disclosed no cause of action against the 2nd defendant. That was on 29th June, 2001. The plaintiffs in turn asked for the dismissal of the 2nd defendant's motion and judgment against the 2nd defendant. That was by way of a "notice of cross-motion". Let me read the reliefs sought:

*"(1) to dismiss the 2nd defendant's motion and
(2) to enter judgment for the plaintiffs based on law."*

The "notice of cross-motion" was not supported by an affidavit. The motion for judgment was moved by counsel for the plaintiffs.

Counsel for the 2nd defendant sought an adjournment to reply to the motion for judgment. The matter was adjourned to 7th July, 2000. Before 7th July, 2000, the 2nd defendant filed a memorandum of appearance and statement of defence. The 2nd defendant also sought for extension of time within which to file the statement of defence and deem the statement already filed as properly filed.

Came 7th July, 2000 the date earlier fixed for reply to the plaintiffs' motion for judgment by the 2nd defendant, counsel for the plaintiffs raised an objection to the hearing of the motion for extension of time to file the statement of defence of the 2nd defendant. The main ground of opposition was that the motion was not ripe for hearing and that the plaintiffs were entitled to 48 hours notice. The trial Judge upheld the objection.

Counsel for the 2nd defendant proffered oral submission in opposition to the motion for judgment already moved by counsel for the plaintiffs. Ruling was adjourned to 11th July, 2000. On that date, the learned trial Judge dismissed the 2nd defendant's motion for dismissal of the plaintiffs' case against the 2nd defendant and granted the cross motion for judgment. In his judgment against the 2nd defendant, the learned trial Judge ordered as follows at pages 213 and 214:

"In the final analysis, I hold that from the circumstances of this case, the plaintiffs are entitled to final judgment as per their statement

of claim and damages as proved by their witnesses and exhibits tendered in court. Consequently judgment is hereby entered for the 1st set of plaintiffs against the 2nd defendant in suit No. FHC/CA/CS/30/98 in the sum of N3,698,524,656 (Three Billion, Six Hundred and Ninety Eight Million, Five Hundred and Twenty Four Thousand, Six Hundred and Fifty-Six Naira) being special damages for ecological damage and injurious affection as assessed by the plaintiffs Expert Chartered Valuers in the valuation report tendered in this court. I also hold that the plaintiffs herein are entitled to general damages assessed at N200,000,000.00 (Two Hundred Million Naira) against the 2nd defendant. The court further awards the sum of N200,000.00 (Two Hundred Thousand Naira) only as the cost of this action in favour of the 1st set of plaintiffs against the 2nd defendant.

Judgment is also entered for the 2nd set of plaintiffs against the 2nd defendant i.e. in suit No. FHC/CNCS/31/98 in the sum of N938,200,464.00 (Nine Hundred and Thirty Eight Million, Two Hundred Thousand, Four Hundred and Sixty-Four Naira) as special damages for ecological damages and injurious affection as assessed by plaintiffs' Expert Chartered Valuers in the valuation report tendered before this court. The court held that the 2nd set of plaintiffs are entitled to general damages against the 2nd defendant assessed at N50,000,000.00 (Fifty Million Naira) only. It is further ordered that the 2nd defendant shall pay cost of this action to the 2nd set of plaintiffs in the sum of N100,000.00 (One Hundred Thousand Naira) only. That shall be the judgment of this court. The matter is further adjourned to the 26th and 27th of July, 2000 for continuation of hearing of the 1st defendant's defence."

Dissatisfied with the judgment, the defendants appealed to the Court of Appeal. That court dismissed their appeal. They have come to this court. Briefs were filed and duly exchanged. The respondents filed a preliminary objection to the competence of the appeal. In their brief, they formulated the following issues for determination:

"i. Whether the appeal filed by the 1st defendant/appellant against whom no judgment, decree, order or litigation is made or pending is competent.

ii. Whether the 12 issues formulated by the appellants in their brief of argument dated 30/6/02 and filed on 2/7/02 are competent in relation to the notice and grounds of appeal before this court.

iii. Whether the 2nd defendant/appellant can without more purport to appeal in the name by which it was sued after and during the subsistence of its own deposition on oath that is non-existent."

In appellants' brief in response to the respondents' preliminary objection, the appellants formulated the following issues for determination:

"(i) Whether having regard to the time of filing the 1st appellant's appeal, the appeal constitutes an abuse of court process and liable to be struck out?"

(ii) Whether or not the issues formulated in the appellants' brief do not arise from the grounds of appeal filed by the appellants?"

(iii) Whether an alleged statement in an affidavit signed by a lawyer for extension of time to file statement of defence which application is still to be considered by High Court qualifies as an established fact which needs no further proof."

Learned counsel for the respondents, Mr. Nwosu, submitted on issue No. 1 that in so far as there is no lis between the plaintiffs and the 1st defendant, and in so far as there is no judgment or order enrolled against the 1st defendant the appeal lodged by the 1st defendant is incompetent and empty. He cited Attorney-General of Anambra State v. Okeke (2002) 12 NWLR (Pt. 782) 575 at 609-610 and urged the court to follow its earlier decision above.

On issue No.2, learned counsel submitted that throughout the length and breadth of the appellants' notice of appeal, there is nowhere the twelve issues formulated by the appellants can be pretended to have arisen from the said grounds of appeal. He submitted that all the grounds of appeal upon which the appellants' issues for determination are formulated are therefore incompetent.

On issue No.3, learned counsel submitted that since the 2nd defendant swore in an affidavit that it does not exist, the 2nd defendant cannot in law file an appeal: Learned counsel referred to the relevant portion of the affidavit and submitted that the 2nd defendant cannot in common sense be allowed to argue this appeal, without more, to purport to perjure itself by initiating the appeal. He cited Chief Fawehinmi v. Nigerian Bar Association (No.1) (1989) 2 NWLR (Pt. 105) 494 at 551 and section 233(5) of the 1999 Constitution. He urged the court to dismiss the appeal in its entirety as it lacks merit and an abuse of the legal process.

Learned Senior Advocate for the appellants, Chief Babalola, submitted on issue No.1 that an abuse of court process relates to the use of judicial process in an unfair, oppressive and wrongful manner that such a proceeding can be said to be lacking in bona fide and or a perversion of a regularly issued process. He cited *Olawumi v. Mohammed* (1991) 4 NWLR (pt.186) 516; *Attahiru v. Bagudu* (1998) 3 NWLR (Pt. 543) 656 at 666 and *ACB Plc v. Nwaigwe* (2000) 1 NWLR (Pt. 640) 201. B

Learned Senior Advocate contended that since the respondents did not appeal against the orders of the Court of Appeal and the Federal High Court, they cannot be allowed to pursue the line of argument under reference. Citing *The Vessel St. Roland v. Oshinloye* (1997) 4 NWLR (Pt. 500) 387 at 392 and 396, learned counsel submitted that any person who wishes to discontinue an action after taking an advantage in the proceedings cannot do so without being imposed as in ratio 4 of the judgment. C D

Denying that the 2nd defendant admitted its non-existence, learned Senior Advocate argued that the 2nd defendant deposed that the company sued does not exist. He cited *ACB v. Obmiami Bricks and Stone Ltd.* (1990) 5 NWLR (Pt. 149) 230 at 252; and *Nwankwo v. Nwankwo* (1995) 5 NWLR (Pt. 394) 153 at 148, and submitted that until there is legal proof of the issue raised in the affidavit, the Supreme Court cannot hold that the issue is an established fact which can be relied on for the type of preliminary objection raised by the plaintiffs/respondents. E F

Still on the issue of admission, learned Senior Advocate argued that the burden of proof is on the respondent who alleges that partial statement is an admission. He contended that although a legal practitioner can make a formal admission on behalf of his client like in pleadings or orally in court, he cannot do so in the case of an informal admission in an affidavit. He cited *Phipson on Evidence*, 12th edition, para. 740, page 322; *Eboade v. Atomesin* (1997) 5 NWLR (Pt. 506) 590; *Okonduwa v. Peju* (1992) 2 NWLR (Pt. 276) 633; *Okonkwo v. Kpajie* (1992) 2 NWLR (Pt. 226) 633; *Okesuji v. Lawal* (1991) 1 NWLR (Pt. 170) 661 and *Langdale v. Danby* (1982) 3 All ER 129 at 132 and 135. G H

On the conduct of the respondents, learned Senior Advocate submitted that the court was misled by the respondents to go on with

the application for judgment. A situation where a party improperly prevented the other from filing a defence on an issue, and goes further to obtain judgment for a whopping sum of N4.9 billion and later turns round to assert that a mere affidavit in support of the motion which would have put the defence in place, is evidence of admission
B of a pleaded fact in the plaintiffs' statement of claim, is most reprehensible, learned Senior Advocate reasoned.

It was the submission of learned Senior Advocate that if the 2nd defendant does not exist, as contended by the plaintiffs, it follows that the plaintiffs suing a non-existent person should have his case struck out. He cited *Agbonmagbe Bank v. General Manager GB Ollivant* (1961) 1 All NLR 116. The offending affidavit of the 2nd defendant of 6th July, 2000, cannot be countenanced in this appeal, counsel argued. He cited *Adegoke Motors Ltd. v. Adesanya* (1989) 3
C D NWLR (Pt. 109) 250 at 266 and 267 and *Clay Industries Nigeria Ltd. v. Aina* (1997) 8 NWLR (pt. 516) 208 at 227 to 228. Citing *Agboola v. Saibu* (1991) 2 NWLR (pt. 175) 566, learned Senior Advocate argued that a defendant cannot be held to be incapable of any further defence of his case or from appealing against any judgment given against it simply because it had pleaded that it was not a
D E juristic person.

Let me take first the submission of Mr. Nwosu that since there is no lis between the 1st defendant and the plaintiffs as there is no judgment against the 1st defendant, the appeal lodged by it is incompetent. My learned brother, Uwaifo, JSC has correctly examined the provisions of section 233(5) of the Constitution vis-a-vis the 1st defendant. I agree with him. Although the 1st and 2nd defendants were sued jointly and severally, the judgment was clearly given against the
F G 2nd defendant, not the 1st defendant. I entirely agree with Mr. Nwosu that since the judgment was not against the 1st defendant, it cannot lodge an appeal. This is because an appeal is lodged against a grievance arising from a judgment. In other words, only a party who is aggrieved by a judgment can appeal against it. Such a party is either
H a party in the case or a party interested in the case. While a party in the case can appeal as an appellant qua plaintiff or defendant at the lower court without satisfying the court of any reason for filing an appeal, a party interested must prove his interest in the matter. The latter is not the situation or circumstance of the 1st defendant. In the

circumstances, the 1st defendant cannot in law be an appellant in this appeal. But that is not the end of the matter. That does not mean that the entire appeal is incompetent. It is the law that where there are two or more appellants, an appeal will be competent if one or more of them have the competence to appeal. In other words, an appeal will not be incompetent if one or more of the appellants have the competence to file the appeal. The judgment in this appeal is against the 2nd defendant and that is enough to give competence to this appeal, and I so hold. B

On the issue of obtaining no leave to file additional grounds of appeal, my learned brother has referred to the date when this court granted an application for leave to file additional grounds. I shall not waste one second to deal with that aspect. I endorse his conclusion here. C

A related issue to the grounds of appeal raised by the plaintiffs is that the twelve issues formulated are incompetent as they are not distilled from and related to the grounds of appeal. It is the law of briefs or brief writing that issues must be formulated from the grounds of appeal. They must be based on, related to or arise from the grounds of appeal. In *Madumere v. Okafor* (1996) 4 NWLR (Pt. 445) 637, *Ogwuegbu, JSC*, said at page 644: D

"It is trite law that an issue for determination should arise and relate to a ground of appeal." E

See also *Idika v. Erisi* (1988) 2 NWLR (Pt. 78) 563; *Jimoh v. Olawoye* (2003) 10 NWLR (Pt. 828) 307; *Bankole v. Dada* (2003) 11 NWLR (Pt. 830) 174; *Mashuwareng v. Abdu* (2003) 11 NWLR (Pt. 831) 403; *Oladele v. Anibi* (1998) 9 NWLR (Pt. 567) 559 and *Okelola v. Boyle* (1998) 2 NWLR (Pt. 539) 533; (1998) 1-2 SC 60. F

Where issues are not formulated from grounds of appeal, they will either be deemed abandoned or discountenanced by the court. The issues will be struck out. See *Nkado v. Obiano* (1997) 5 NWLR (Pt. 503) 31; *7up bottling Co. Ltd. v. Trio Comm. Co. Ltd.* (1996) 6 NWLR (Pt. 455) 441; *Alhaji Animashaun v. University College Hospital* (1996) 10 NWLR (Pt. 476) 65; *Godwin v. Christ Apostolic Church* (1998) 14 NWLR (Pt. 584) 162, (1998) 12 SC 1. H

I have carefully examined the twelve issues formulated by the appellants and I am satisfied that they are distilled from and related to the grounds of appeal. The only problem I should have had with

both the issues and the grounds of appeal, was their character and content of prolixity, but since that issue was not raised, I merely think aloud and will not pursue it.

Learned counsel has seriously hammered the point that the 2nd defendant, by its affidavit, does not exist and therefore cannot
B file an appeal. Learned Senior Advocate, Chief Babalola, in his oral reply sagaciously submitted that if counsel for the respondents is serious about his submission, then the action the plaintiffs instituted against the 2nd defendant is incompetent and this court will be entitled to
C strike it out.

I think this is a good one for the appellants and a bad one for the respondents. Such a decision will certainly act almost as a boomerang, if not, completely boomerang on the entire case of the plaintiffs and that will be the end of the case made against the 2nd defendant by the plaintiffs. Since the plaintiffs will certainly not be prepared for that bargain, learned counsel for the plaintiffs did not reply. I agree entirely with his silence because if he insisted and this court came to the conclusion that the 2nd defendant did not exist, the legal consequence, as properly put by my learned brother, is for this court
E to declare *“the judgment either unenforceable or that the proceedings are a nullity as they led to judgment against a nonexistent party”*.

In the light of the above consideration of the preliminary objection, I have no difficulty in coming to the conclusion that the objection has no merit and it fails and hereby refused and struck out.
F Let me pause here to take the legal impact of the first motion filed by the 2nd defendant to dismiss the suit against it, a motion which would seem to be likened to the 2nd defendant resting its case on that of the plaintiffs qua respondents in this appeal.

I am of the very firm view that the cases of *Toriola v. Williams* (1982) 7 SC 27 at 33; *Laurie v. Reglan Building Co. Ltd.* (1942) 1 KB 152 at 156 and *Akanbi v. Alao* (1989) 3 NWLR (Pt. 108) 118 are inapposite because they dealt with the defendant resting their case on that of the plaintiff. The case we have on our hands is not such a
H case. The 2nd defendant, by its application, did not ask that its case should rest on the evidence of the plaintiffs qua respondents. All he prayed the court was that its name be struck out as there was no evidence against it. In my view, there is a difference between the two situations, although the difference could be thin.

I now go to the appellants' brief. The appellants have formulated twelve issues for determination. Since my learned brother has reproduced the issues in his judgment, I shall save myself the trouble to repeat the exercise. I shall attempt a brief summary of the major areas of the brief.

On issue No.1, learned Senior Advocate for the appellants, Chief Babalola, submitted as follows:

(a) that the items in respect of which claims are made are not the property of the plaintiffs;

(b) that the plaintiffs as a community cannot sue for damages suffered by individual members of the B community;

(c) that there is no reasonable cause of action against the defendants. He cited *Southport Corporation v. Esso Petroleum Co. Ltd.* (1954) 2 All ER 561; *Ipadeola v. Oshowole* (1987) 3 NWLR (Pt. 59) 18, (1987) 5 SC 376, 389; *Amachree v. Newington* (1952) 14 WACA D 97; *Oragbade v. Onitiju* (1962) 1 All NLR 32; *Smith v. Cardiff Corporation* (1954) 1 QB 210 and *Umudje v. Shell BP Petroleum Development Company of (Nig.) Ltd.* (1975) 9-11 SC 155, 174.

Learned Senior Advocate submitted on issue No.2 that the Court of Appeal was wrong in affirming the judgment of the trial court without seeing the contents of exhibits A and B which were not before the court. He cited *Aniekan v. Aniekan* (1999) 12 NWLR (Pt. 631) 491; *Tea v. COP* (1963) 2 All NLR 60, 62 ... defendant to hold the 2nd defendant liable in the sum of over N4.8 billion. He cited *Oforlete v. State* (2000) 12 NWLR (Pt. 681) 415; *Imo Broadcasting Corp v. Iwueke* (1995) 1 NWLR (Pt. 372) 488, 502; *Oke v. Aiyedun* (1986) 2 NWLR (Pt. 23) 548, 565; *Albasma (Nig.) Ltd. v. Salami* (1998) 4 NWLR (Pt. 546) 448, 459-460; *Odume v. Nnachi* (1964) 1 All NLR 329; *Nigerian Airways Ltd. v. Ahmadu* (1991) 6 NWLR G (Pt. 198) 492, 499-500; *Amao v. Civil Service Commission* (1992) 7 NWLR (Pt. 252) 214; *Ogunsan v. Iwuagwu* (1968) 2 All NLR 124; *M.F Kent (WA) Ltd. v. Martchem Ind. Ltd.* (2000) 8 NWLR (Pt. 669) 459, 568; *Ogundipe v. A.-G., Kwara State* (1993) 8 NWLR (Pt. 313) 558, 568; *Karibo v. Grend* (1992) 3 NWLR (Pt. 230) 426, 444. H

On issue Nos. 7 and 9, learned Senior Advocate submitted that the conclusion of the trial court on the two issues was wrong and that the lower court was also in error to have upheld the decision of the trial court. He cited *Onibudo v. Akibu* (1982) 7 SC 60 at 75- 76;

- Akintola v. Solano (1986) 2 NWLR (Pt. 24) 598, (1986) All NLR 395 at 422; Fadare v. A.-G., Oyo State (1982) 4 SC 1; Onwonta v. Minaise (1952) 14 WACA 77; 7up Bottling Co. Ltd. v. Abiola and Sons Ltd. (2001) 13 NWLR (Pt. 730) 469, (2001) 88 LRCN 2214 at 2229; National Bank of Nigeria Ltd. v. Shoyoye (1977) 5 SC 181 at 186;
- ^B Sodipo v. Lemminkainen (1985) 2 NWLR (Pt. 8) 547, (1985) 7 SC (Pt. 1) 492 at 499; Ukwu v. Bunge (1997) 8 NWLR (Pt. 518) 527; Oloba v. Akereja (1988) 3 NWLR (Pt. 84) 508, (1988) 7 SC (Pt. 1) 15 at 35; Westminster Bank Ltd. v. Edwards (1942) AC 529; Falobi v. Falobi (1976) NMLR 169 at 177; Adigun v. A.-G., Oyo State (1987)
- ^C 1 NWLR (Pt. 53) 678, (1987) 3 SC 250 at 335; Ayoola v. Baruwa (1999) 11 NWLR (Pt. 628) 595; Union Beverages Ltd. v. Pepsi Cola Int. Ltd. (1994) 3 NWLR (Pt. 330) 1 at 16; EBBW Vale UDC v. South Wales Traffic ALA (1951) 2 KG 366 at 374.
- ^D On issue No. 10, learned Senior Advocate submitted that the Court of Appeal was wrong in upholding the High Court ruling refusing to entertain and/or grant the 2nd appellant's motion to regularize its statement of defence filed out of time in the case. He cited Salu v. Egeibon (1994) 18 LRCN 241 at 259; U.B.A v. Nwora (1978)
- ^E 11-12 SC 1; UTC v. Pamotei (1989) 2 NWLR (Pt. 103) 244; Nishizawa v. Lethwani (1984) 12 SC 234; Gibings v. Strong (1884) 26 Ch. 66; Nyagba v. Mbahan (1996) 9 NWLR (Pt. 471) 207; Salaudeen v. Mamman (2000) 14 NWLR (Pt. 686) 63, 75; Princewill v. Usman (1990) 5 NWLR (Pt. 150) 274, 286; Acka v. Akure (1987) 1 NWLR
- ^F (Pt. 47) 74; Ceekay Traders v. General Motors (1992) 2 NWLR (pt. 222) 132; Onifade v. Olayiwola (1990) 7 NWLR (Pt. 161) 130; Ita v. Dadzie (2000) 4 NWLR (Pt. 652) 168, 182; Erisi v. Idika (1987) 2 NWLR (Pt. 66) 503, 517; U.B.A. v. Nwora (1978) 11-12 SC 1; Tabaa
- ^G v. Lababedi (1974) 4 SC 139 at 146-147; Akinyede v. Appraiser (1971) 1 All NLR 162 at 165-166; Ahmed v. Trade Bank Plc (1996) 3 NWLR (Pt. 437) 445 at 451 and Iyalabani Co. Ltd. v. Bank of Baroda (1995) 4 NWLR (Pt. 378) 20 at 25.

^H On issue No. 11, learned Senior Advocate submitted that plaintiffs' "notice of cross-motion", not being known to law and unsupported by affidavit is incompetent. He cited Falobi v. Falobi (1976) 1 NMLR 169; Madukolu v. Nkemdilim (1962) 2 SCNLR 341; Ogunsola v. NICON (1999) 10 NWLR (Pt. 623) 492; G and C Lines v. Olaleye (2000) 10 NWLR (Pt. 676) 613, 628; Onwadike and Co. Ltd. v.

Brawal Shipping Nig. Ltd. (1996) 1 NWLR (pt. 422) 65; Free Enterprises (Nig) Ltd. v. Global Transport Oceanico (1998) 1 NWLR (Pt. 532) 1. On notice between service and hearing, counsel cited *Skenconsult v. Ukey* (1981) 1 SC 6; *Olubusola Stores v. SBN* (1975) 4 SC 51; *Ibodo v. Enarofia* (1980) 5-7 SC 42; *Nneji v. Chukwu* (1988) 3 NWLR (Pt. 81) 184,266 and *Olanloye v. Fatunbi* (1999) 8 B NWLR (Pt. 614) 203.

On issues Nos. 4 and 6, learned Senior Advocate submitted that the two lower courts erred in law by misconstruing and misapplying the provisions of Order 28 rules 4 and 7 and Order 38 rule 11 of the Federal High Court Rules to the facts of the case having regard to the particular motion before the court and wrongly entered B judgment for the plaintiffs pursuant to those provisions. He cited *Odume v. Nnachi* (1964) 1 All ALR 329 and *Mosheshe General Merchants Ltd. v. Nigerian Steel Products Ltd.* (1987) 2 NWLR (Pt. D 55) 110, (1987) 4 SC 154.

On issue No.5, learned Senior Advocate submitted that there was no proper evaluation of the evidence and that in any case the evidence was not ripe for evaluation. He cited *Bornu Holding Co. Ltd. V. Bogoco* (1971) 1 All NLR 324 at 333, *Ehidimhen v. Musa* E (2000) 8 NWLR (Pt. 669) 540, 555; *Vale UBC v. South Wales Traffic Area Licensing Authority* (1951) 2 KB 366; *Aromire v. Awoyemi* (1972) 2 SC 1 and *Mogaji v. Odofin* (1978) 4 SC 91.

Learned Senior Advocate submitted on issue No. 12 that the Court of Appeal wrongly dealt with the complaint of the appellants in respect of the procedure adopted by the trial court in the award of costs. He cited *University of Lagos v. Aigoro* (1985) 1 NWLR (Pt. 1) 143; *Inneh v. Obaraye* (1975) SCNLR 180; *Okonredo Egharegbemi v. Julius Berger* (1995) 5 NWLR (Pt. 398) 679 at 693; *NEPA v. Oyekanmi* (1992) 4 NWLR (Pt. 237) 636; *NCC v. SCOA* (1991) 7 NWLR (Pt. 201) 80 at 95-96 and *Ladega v. Akinliyi* (1975) 2 SC 91 at 98-99. He urged the court to allow the appeal.

The respondents adopted the twelve issues formulated by the appellants. Learned counsel for the respondents, Mr. Nwosu, submitted that issue No.1 of the appellants' brief is incompetent as it is raised for the first time in this appeal without leave nor was it in compliance with Order 6 rule 5(1)(b) of the Supreme Court in relation thereto. He cited *Rylands v. Fletcher* (1866) LR 1 Exch. 265.

On issue No.2, learned counsel also submitted that as ground 27 is incompetent as not forming part of the original notice nor one of the additional grounds of appeal, issue No.2 formulated therefrom is a fortiori incompetent. He cited *Compton Commercial and Ind. SPR Ltd. v. Ogun State Water Corpn. (2002) 9 NWLR (Pt. 773) B 629 at 651.*

Learned counsel submitted on issues Nos. 3 and 8 that the issues as formulated by the appellants have no bearing or relationship whatsoever with “making use of the inconclusive evidence of 1st defendant to hold the 2nd defendant liable” as alleged. He cited *A.G. Anambra State v. Okeke (2002) 12 NWLR (Pt. 782) 575 at 609-610; Amao v. Civil Service Commission (1992) 7 NWLR (Pt. 252) 214 at 227; Nzeribe v. Dave Engineering Co. Ltd. (1994) 8 NWLR (Pt. 361) 124 at 137; Seismograph Services Ltd. v. Onokpota D (1972) 1 All NLR 343 at 345.*

On issues Nos. 7 and 9, learned counsel submitted that the appellants have once again introduced some confusion in relating issues formulated to their grounds of appeal. He took pains to justify his submission at pages 31-34 of his brief. He cited *Federal Capital Development Authority v. Naibi (1990) 3 NWLR (Pt. 138) 270 at 345.*

It was the submission of counsel on issue No. 11 that the appellants, by arguing the merits of the cross-motion, have waived whatever irregularity (if any) that afflicted the said cross-motion and cannot now be heard to complain about the purported defect in the cross-motion. He cited *Saude v. Abdullahi (1989) 4 NWLR (Pt. 116) 387 at 405.* He also referred the court to pages 516, 518 and 540 of the record and submitted that the stand of the Court of Appeal is justifiable in law. He renewed his earlier argument in his preliminary objection that only issues and arguments which are within the grounds of appeal before the court that can be entertained and pronounced upon by it. He cited *Nigerian Deposit Insurance Corporation v. Federal Mortgage Bank of Nigeria (1997) 2 NWLR (Pt. 490) 735 at 752; Mbanugo v. Nzefili (1998) 2 NWLR (Pt. 537) 343 at 352 and 353; Awere v. Atitebi (1962) NSCC 150 at 152.* On issue No. 12, learned counsel simply submitted that “*issue No. 12 is also not made out*”. He urged the court to dismiss the appeal.

On issues Nos. 4 and 6, learned counsel contended that the

appellants are repeating the same error they have been making, in their brief, viz, that the cross-motion was for judgment in default of pleading alone and that it was brought only under 28 rule 7(1)(2)(b) of the Federal High Court (Civil Procedure) rules. He took time to explain the factual and legal positions in pages 59 to 65 of his brief. He cited *Mosheshe General Merchants Ltd. v. Nigerian Steel Products Limited* (1987) 2 NWLR (Pt. 55) 110 at 119. B

On issue No.5, learned counsel adopted his earlier response related to the issue. He submitted that the case of *Bornu Holding Co. Ltd. v. Bogoco* (1971) 1 All NLR 324 cited by the appellants is of no assistance to their case. He distinguished *Bornu* from the facts of this case. In his reply brief, learned Senior Advocate submitted that leave to raise fresh issues not raised in the courts below was granted to the appellant on 8th April, 2002 when an application to that effect was moved and granted by this court. He cited Order 6 rule 5(1)(b) of the rules of this court. On failure by the respondents to discharge the burden to prove particulars of special damages, learned Senior Advocate cited *A-G., Anambra State v. Onuselogu Ltd.* (1987) 4 NWLR (Pt. 66), (1987) 9-11 SC 197. C D

On issue No.2, learned Senior Advocate submitted that the issue is that the court below could not lawfully affirm the damages awarded based on the valuation report tendered when those documents were not before the court below and were not therefore cited by the court. Counsel pointed out that the court below in its judgment affirmed the contents of exhibits A and B which the trial court adopted as the basis for its judgment without seeing the documents, is fatal to the judgment of the court. E F

On issues Nos. 3 and 8, learned Senior Advocate pointed out that the appellants did not submit that the courts below used the evidence adduced by the 1st defendant. On the contrary, the submission, learned Senior Advocate reiterated, is that judgment was given using the evidence that is still being challenged by the evidence of the 1st appellant. He cited *Mohammed v. Hussein* (1998) 14 NWLR (Pt. 584) 108; *The Vessel St. Roland v. Osinloye* (1997) 4 H NWLR (Pt. 500) 387; *Cedar Stationery Products Ltd. v. IBWA Ltd.* (2000) 15 NWLR (Pt. 690) 338, 347.

On issues Nos. 7 and 9, learned Senior Advocate submitted that an appellant is perfectly entitled to widen the scope of his argu-

ment on appeal and make further legal argument to support an issue that was raised at the court below. He cited Cedar Stationary Products Ltd. v. IBWA Ltd. once again. Counsel action against the 2nd appellant and are in the circumstances not entitled to judgment against it.

B On issue No. 10, learned Senior Advocate submitted that the self-coined “cross-motion” for judgment based on law cannot be hinged on “common sense, fairness, equity and justice”, as claimed by the respondents. The end result is that it has not promoted the course of justice in this case, as it is at best ambushing and or reprisal, C counsel reasoned.

On issue No. 11, learned Senior Advocate submitted that the complaint against the strange “notice of cross-motion” is not merely procedural but substantive as it is not cognisable under any law. Counsel D submitted on issues Nos. 4 and 6 that the provisions of Order 38 rule 11 or any other rules including the inherent powers of court cannot accommodate the respondents’ application for judgment at the time it was made.

E Let me first take the issue of the learned trial Judge’s refusal or failure to take the motion for extension of time to file brief. The learned trial Judge reacted to the motion at pages 186 and 187:

“The attention of the court was just drawn to the said motion for extension of time for the first time here in the open court. I agree with Mr. Ben Amego that these motions are not yet ripe for hearing. F Again it is my considered opinion that filing another motion in court in respect of the same matter for which an earlier motion touches on and that earlier motion having been argued and adjourned for ruling will definitely amount to abuse of court process ... For the foregoing G reasons, I hold that the application of the 2nd defendant to move a motion for extension of time within which to file a defence for the 2nd defendant without first rejoining on points of law in conclusion of the motions moved on the 30/6/2000 and no application to stay same will amount to abuse of court process and aimed at over-reaching. H ing. The court will not allow such application.”

I do not think the learned trial Judge was correct when he said that the two motions were in respect of the same matter. He will be correct to say so only if the words the “same matter” mean the same case, bearing suits Nos. FHC/CA/CS/30/98 and FHC/CA/CS/31/98

consolidated. But that cannot be an abuse of the court process. It is the tradition for counsel to file and argue motions before the end of the trial and judgment given. As a matter of practice, parties freely file motions throughout the hearing and this is part of our adjectival law. Courts cannot deny parties their rights to file and argue motions.

In this matter, the first motion referred to by the learned trial Judge sought prayer for dismissal of the suit against the 2nd defendant and striking out the name thereof. The second motion was for extension of time within which the 2nd defendant can file statement of defence. See *Long-John v. Blakk* (1998) 6 NWLR (Pt. 555) 524, (1998) 5 SC 83. B
C

Certainly, the two motions ask for two different reliefs and so the question of abuse of court process does not arise. Abuse of court process, in the context in which the learned trial Judge used the expression, can only arise when an applicant who has already filed a motion, bring another motion of similar or like content as the first one. In other words, the applicant is asking for the same prayers or almost the same prayers that, disposing of the first will mean disposing of the second one. In that respect, the second motion is an abuse of the court process, and the court process is the first motion which has already asked for the prayers in the second motion. This is because the first motion has actually or essentially asked for the same prayers as the second motion. There cannot be abuse of the court process in respect of the two motions referred to by the learned trial Judge because the motions asked for different reliefs. D
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It is remarkable that the learned trial Judge concluded by saying that because the second motion is an abuse of court process, he "*will not allow such application*". In my humble view, that conclusion was not available to the learned Judge when he has not taken the motion. He ought to have taken the motion before holding that he "*will not allow such application*". G

Whether a trial Judge thinks that a motion is an abuse of the court process, he is under a legal duty to allow the applicant move the motion. It is after moving the motion that the trial Judge can rule that it is an abuse of the court process. A judge has no right to come to the conclusion that a motion is an abuse of the court process without hearing it. Any court process however unmeritorious and an abuse of the court process that it may be, the court must hear it before H

coming to the conclusion of its unmeritorious content or that it is an abuse of the court process. When this matter was adjourned for judgment, I had a brain wave in respect of decisions I know I gave in the Court of Appeal on the issue. My brain failed me and so I could not readily place my hands on any of the decisions. My learned brother, B Uwaifo, JSC, was most resourceful and referred to four of the decisions in the leading judgment. I am sincerely grateful to him. Let me quote what I said in one of the judgments. It is *Okoro v. Okoro* (1998) 3 NWLR (Pt. 540) 65, I said at page 74 of the judgment:

C *"A Judge, trial or appellate, has no right to refuse hearing a civil process before him, including a motion. A motion may be down-right stupid, irregular, unmeritorious or an abuse of the judicial process, the Judge must hear it and rule one way or the other. He cannot prevent an applicant from making his motion for whatever reason. Refusal of a Judge to hear a motion is clearly a breach of the constitutional right of an applicant to be heard and that is not only against section 33(1) of the Constitution (if one may say so naively) but also against the natural justice rule of audi alteram partem".*

E A trial Judge who refuses or fails to hear a pending motion has done a wrong thing. It is my view that the learned trial Judge who refused or failed to hear the second motion of the 2nd defendant did a wrong thing, wrong because it is contrary to our adjectival law. What was the reaction of the Court of Appeal to the refusal or failure on the part of the learned trial Judge to hear the second motion of F the 2nd defendant? The Court of Appeal said at page 533:

G *"Finally on this issue. I must observe that the learned trial Judge was perfectly right when he ruled that the defendants/appellants counsel should make the rejoinder on points of law to the part heard motion before him or withdraw his motion so that he could proceed and rule on the plaintiffs/respondents that the 2nd defendant/appellants motion would be ripe for hearing and this also depends on what his ruling would be."*

H By the above, the motion for extension of time is buried forever and cannot come from the grave to resuscitate the defence of the 2nd defendant. I come to this conclusion because the event the court anticipated in the last few words did not happen and it is in respect of a negative outcome or result of the ruling of the learned trial Judge on the application for judgment. The position taken by

the Court of Appeal with the greatest respect is not consistent with the position of the law in respect of two competing motions. Let me fall back once again to what I said in *Okoro v. Okoro* (supra) at page 74:

“Where there are two competing motions before a court of law, one urging the court to strike out or dismiss the action and the other asking for extension of time within which to regularize a procedural position, a court of law, which is a court of justice is required to take the latter motion first. It is only when the latter motion fails that the first one should be taken. This is because of the need for the court to save the life of the action if it is in law saveable rather than burying it forever.”

I must point out that the case is not the same as the one on appeal. While *Okoro* dealt with an issue of dismissal, the case on appeal is in respect of giving judgment to the plaintiffs in limine. The impact or effect of the two cases is similar as both deal with the need to save the life of the existing action. In both *Okoro* and this appeal, the litigation abruptly came to a close, in *Okoro* by a dismissal and in this appeal by giving judgment to the plaintiffs in limine.

That takes me to the “notice of cross-motion”. I must confess that I have never heard of any court process bearing that nomenclature in our procedural law. I have examined the Federal High Court (Civil Procedure) Rules and I cannot place my hands on a court process in the name and style of “notice of cross-motion”. I know of the existence of cross-appeal, not cross-motion. Does the process exist and if so where? If it does not exist, why its use?

Innovations of counsel in our system of civil procedure which conform with the rules of procedure are acceptable by the courts. Where such innovations conflict with the rules of procedure, they must give way to the rules. At that stage the court will not be interested in counsel’s innovations but in the rules of court.

A court process which is filed but not known to law, in my humble view, is null and void ab initio. I can still move further. If the court process results in a judgment, ruling or order, the judgment, ruling or order, is also null and void, ab initio. I see such a situation in this appeal.

The notice of cross-motion has another defect, assuming (without conceding) that it is a process known to law. The defect is that it

was not supported by an affidavit. This is contrary to Order 9 rules 3 and 4 which provide inter alia that every motion shall be supported by an affidavit. The word “shall” is mandatory and has the force of command with the attendant result that failure to file an affidavit will nullify the motion. And so from whatever angle one looks at the process, it is moribund in the sense that it does not convey, or better still, cannot carry or convey any meaning in our procedural law.

Learned counsel for the respondents in his brief submitted that the cross-motion is a mere irregularity by virtue of Order 3 rule 1 and therefore the appellants have waived whatever irregularity (if any) that afflicted the cross-motion and cannot now be heard to complain about the purported defect in the cross-motion. He cited Saude v. Abdullahi (1989) 4 NWLR (Pt. 116) 387, particularly what Uwais, JSC (as he then was) said at page 405.

What did Uwais, JSC (as he then was) say in the case? The learned Justice dealt with the issue of irregularity. He said at page 405:

“It has since been established by a plethora of authorities that the appropriate time at which a party to proceedings should raise an objection based on procedural irregularity is at the commencement of the proceedings or at the time when the irregularity arises. If the party sleeps on that right and allows the proceedings to continue on the irregularity to finality, then the party cannot be heard to complain, at the concluding stage of the proceedings or on appeal thereafter that there was a procedural irregularity which vitiated the proceedings.”

Saude dealt with a rule of procedure which requires a Judge to sign an originating summons used in the form of Form 2, which the Supreme Court regarded as a procedural irregularity in the event of some other person signing the process. It was in the above circumstances that Uwais, JSC (as he then was) made the above pronouncement.

That case is poles and poles apart from this appeal. In this appeal, this court is dealing with a process not known to law and it is the “notice of cross-motion”. And this clearly affects the jurisdiction of the court to hear the motion. The law is elementary that a party cannot or has not the competence to waive lack of jurisdiction of the court. Where a court lacks jurisdiction, the entire proceedings how-

ever well conducted are a nullity and a party cannot in law resuscitate or revive a nullity by waiver. Jurisdiction is basic to the entire adjudication. It affects the power of the court to adjudicate on a matter. Where a court lacks jurisdiction, no amount of indolent conduct on the part of any of the parties, particularly the defendant, can ripen into the defence of waiver. It is my view that the jurisdiction of a court, where there is none, cannot be enlarged either by estoppel or waiver. B

In *Jadesimi v. Okotie-Eboh* (1986) 1 NWLR (Pt. 16) 264, Nnamani, JSC, in his concurring judgment said at page 281: C

"It is settled law that where there is an objection to jurisdiction of an inferior court a party who consented to the exercise of the jurisdiction is not thereby estopped from afterwards raising the objection since the jurisdiction cannot be enlarged by estoppel."

Jurisdiction, being the forerunner of the judicial process, cannot, by acquiescence, collusion, compromise, or as in this case, waiver, confer jurisdiction on a court that lacks it. Parties do not have the legal right to donate jurisdiction on a court that lacks it. D

Non-compliance with rules which affects the very foundation, or props of the case, cannot be treated by the courts as an irregularity but as nullifying the entire proceedings. Once the non-compliance affects the substance of the matter to the extent that the merits of the case are ruined, then it is impossible to salvage the proceedings in favour of the party in blunder, who in this appeal are the respondents, and no amount of waiver by the party can be of any assistance to the adverse party. The defence of waiver lacks merit and I so hold. Since I have answered the first leg of issue No. 11, I do not think I should go to the second leg which I regard as otiose. E F

Was a motion really necessary at that stage to propel the judgment? Assuming (without conceding) that the cross-motion was known to law, was it really necessary? I think not. The matter was already on trial and witnesses have given evidence. In that circumstance, a motion was unnecessary as the court can suo motu adjourn for judgment on the evidence before it. The learned trial Judge needed no prompting by way of a motion. G H

Another area I would like to deal with is the stage of the proceedings the judgment was given by the trial court. It is clear from the record that the 1st defendant was still giving evidence when the learned

trial Judge gave judgment against the 2nd defendant. Chief Babalola argued the point in issue No.3. He described the evidence of the 1st defendant as inconclusive when the learned trial Judge gave judgment against the 2nd defendant. It is on record that the 1st defendant had called two witnesses and still had two more to call when judgment was given against the 2nd defendant. Although the learned trial Judge gave judgment against the 2nd defendant and not against the 1st defendant, there is the possibility of the impact of the judgment against the 2nd defendant coming on the 1st defendant, particularly in the light of the claim of negligence by the respondents. It appears to me from the claim that there were some joint elements in the tort of negligence. And here, I should point out that the claim of negligence against the two defendants was disputed by the 1st defendant, although at that stage the 2nd defendant was busy with his applications.

It is good law that a judgment is delivered after evidence of witnesses and address of counsel. Although there are exceptions to the above position of the law, I do not see the exceptions applying in this case.

Learned Senior Advocate for the appellants raised in issue No.2 that the Court of Appeal did not see the evaluation report on which the Federal High Court relied upon for the award of the N4 billion unliquidated damages, before confirming the award by the High Court. Learned Senior Advocate narrated the sequence of events in paragraph 5.09 of his brief that the record of appeal transmitted from the trial Federal High Court did not include the exhibits. The records were just the documents filed and the proceedings held in court up to the judgment of the court. The exhibits were left behind with the Registrar to the Federal High Court and the original copies are still with the court up till now. It was when the present counsel for the appellants came into the matter at the Supreme Court stage that the new counsel discovered the grievous omission and they filed as supplementary record of appeal as directed by this court on 8th April, 2002, learned Senior Advocate narrated. What is the reaction of learned counsel for the respondents?

The first reaction is that ground 27 on which issue No.2 was formulated is incompetent as not forming part of the original notice and even one of the additional grounds of appeal applied for in the

appellants' motion of 29/10/2001. To the learned counsel, the issue formulated therefrom is a fortiori incompetent.

I should reproduce the ipsissima verba of ground 27:

"The learned justices of the Court of Appeal erred in law in dismissing the appellants' appeal against the award of damages of over N4 billion against them for the ecological damages and injurious affection as assessed by the respondents' Chartered Valuers by the trial court and in affirming the award of damages as assessed by the trial Judge when the exhibits containing the valuation reports on which trial Judge based the award of damages was not before the Court of Appeal thereby occasioning a miscarriage of justice."

The above is clearly in the amended notice of appeal, which included both the original and additional grounds. I therefore cannot really appreciate the submission of learned counsel for the respondents. Since learned counsel submitted that issue No.2 is also incompetent, I shall reproduce the issue here for ease of reference. I had earlier not seen the need to state the issues because that was done in the leading judgment. I now see the reason to reproduce issue No.2. The issue reads:

"Whether the Court of Appeal was right in confirming the award of N4 billion unliquidated damages made in favour of the plaintiffs in spite of the fact that the valuation report on which the High Court relied was not placed before the Court of Appeal. Ground 27"

An issue, which is formulated from or related to the ground of appeal, cannot be incompetent. I had earlier made the point. It is clear to me that issue No.2 is formulated from ground 27 as both have in common the award of N4 billion by the learned trial Judge and the confirmation of that award by the Court of Appeal without the Court of Appeal seeing the evaluation reports. In the circumstances, I hold that both the ground of appeal and the issues are competent.

Learned counsel for the respondents has also argued in his brief that the complaint under issue No.2 is baseless because the quantum of damages awarded by the trial court was not competently raised as an issue in the court below. To counsel, quantum of damages could not have been raised as an issue in the court below because there was no ground of appeal argued before that court challenging the quantum of compensation as was evaluated by the expert valuer

vide exhibits A and B. I do not think I will go into the above argument of counsel. In the light of the final order made by my learned brother of which I entirely agree with, it will amount going into the merits of the appeal if I respond to the above submissions. I think I can skip it for good and for now. On the valuation reports, exhibits A
B and B, the Court of Appeal said:

*"It cannot therefore be said that the learned trial Judge did not properly and thoroughly evaluate the evidence before him. He had well and carefully considered the evidence adduced before him including the expert evidence and the exhibits tendered and found
C rightly in my opinion that in the absence of any contradictory evidence that he had no option than to accept them There is no way this finding can be faulted."*

An appellate court must and I repeat must come to the conclusion such as the above if that court has seen the exhibits. What an appellate court cannot see is the evidence given by the witnesses and so he goes by the record to see whether the evaluation and conclusion reached by the trial Judge are vindicated in the record. Even here, if the conclusions are not borne out from the record, an appellate court can reject them on grounds of perversity.
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There is no procedural law known to me which allows an appellate court to accept the evaluation of exhibits by the trial court, which are not before that court. The word 'evaluate', the act of evaluation, which in general parlance means to calculate or judge the value
F of a thing, presupposes that the thing the subject of evaluation must be seen by the valuer, who in our context is the Court of Appeal. The Court of Appeal that did not see exhibits A and B, the main plank of the award of N4 billion, was not in a position to come to the conclusion it came to.
G

A court, trial or appellate, must see the exhibits before taking any decision on them. A court, trial or appellate, must see the exhibits before probing into their veracity or authenticity. A court, trial or appellate, cannot and must not come to the conclusion, one way or
H the other, on exhibits which it did not see. Where a court does that, there is a clear miscarriage of justice and the judgment must be declared a nullity. Since the whole claim of N4 billion plus was based on exhibits A and B which were not before the Court of Appeal, I have no hesitation in declaring that the judgment of that court is a nullity

as the exhibits are central to the determination of the liability of the appellants in respect of the damages claimed.

Finally, let me say a bit about the need for caution or precaution on the part of the learned trial Judge in this matter. In the light of the huge amount involved in the case, I expected the learned trial Judge to take caution or precaution in this matter before giving judgment in limine involving a staggering and tremendously huge sum of about N4 billion. While I agree that the principles of law remain the same if the claim is for 1 kobo (and I have not seen a claim for 1 kobo) I still say that there was obvious need for the learned trial Judge to consider the justice of giving a judgment on such as amount in a “notice of cross-motion”, a process not known to law, without hearing the motion of the 2nd defendant for extension of time within which to file a statement of defence. This is very serious and I must disassociate myself from such a judgment. I also disassociate myself from the judgment of the Court of Appeal which endorsed the judgment of the trial court in the award of that large sum without seeing the exhibits which were material to the case.

I clearly see a miscarriage of justice by the judgment of both courts. In the circumstances, I order that the case be remitted to the Chief Judge of the Federal High Court for retrial by another Judge of competent jurisdiction. I make no order as to costs.

KATSINA-ALU JSC (DISSENTING)

This appeal is from a decision of the Court of Appeal Calabar Division given on 10 July, 2001. The facts briefly stated, are these. The appellants were 1st and 2nd defendants sued jointly and severally in two separate suits Nos. FHC/CA/CS/30/98 and FHC/CA/CS/31/98 instituted by the 1st and 2nd sets of plaintiffs now respondents on 1 June, 1998. The two suits were subsequently consolidated by order of court.

The plaintiffs’ cause of action arose from ecological damage resulting from a major oil spillage from the defendants’ Idoho to Qua Iboe Crude Oil Terminal Pipeline rupture.

Pleadings were ordered on 22 July, 1998. The plaintiffs had 14 days within which to file statement of claim and the defendants were given 60 days each within which to file their statement of de-

fence. The statement of claim was filed on 22 July, 1998. The 1st defendant filed its statement of defence on 12 October, 1998. The 2nd defendant filed no defence. Both defendants were represented by same counsel.

At the close of the plaintiffs' case on 16 June, 2000, the defendants brought a motion dated 29 June, 2000 for an order dismissing the plaintiffs' *"action against the 2nd defendant and striking out the 2nd defendant from the suit"* on the ground that no evidence whatsoever has been led or introduced to connect the 2nd defendant with the claims made or reliefs sought. The plaintiffs in turn brought a *"cross motion"* for the dismissal of the defendants' motion and judgment against the 2nd defendant. This motion was filed on 30 June 2000.

On 30 June, 2000 learned counsel for the 2nd defendant addressed the court on his motion for the dismissal of the plaintiffs' case. Learned counsel for the plaintiffs replied and at the end of his reply, counsel for the 2nd defendant asked for an adjournment to enable him to reply on points of law raised. The matter was adjourned to 7 July, 2000.

However on 6 July, 2000, counsel for the 2nd defendant filed a motion on notice for *"an order extending the time within which the 2nd defendant shall be at liberty to file a memorandum of appearance and statement of defence in this suit."* Counsel sought to move this motion on 7/7/2000 the date on which he sought an adjournment to address the court on points of law raised by counsel for the plaintiffs. The trial court would not allow counsel to move the motion but insisted that he complete his address which he had begun a week earlier. Counsel thereafter completed his address and the learned trial Judge reserved his ruling to 11 July, 2000.

As I have already stated, the learned trial Judge entered judgment in favour of the plaintiffs. He said, in the course of his Judgment, thus:

"In the final analysis, I hold that from the circumstances of this case, the plaintiffs are entitled to final judgment as per their statement of claim and damages as proved by their witnesses and exhibits tendered in court. Consequently judgment is hereby entered for the 1st set of plaintiffs against the 2nd defendant in suit No. FHC/CA/CS/30/98 in the sum of N3,698,524,656 (Three Billion, six hundred and

ninety-eight million, five hundred and twenty-four thousand, six hundred and fifty-six Naira) being special damages for ecological damages and luxurious affection as assessed by the plaintiffs expert chartered valuers in the valuation report tendered in this court. I also hold that the plaintiffs herein are entitled to general damages assessed at N200,000,000.00 (Two Hundred Million Naira) against the 2nd defendant. The court further awards the sums of N200,000.00 (Two Hundred Thousand Naira) only as the cost of this action in favour of the 1st set of plaintiffs against the 2nd defendant. Judgment is also entered for the 2nd set of plaintiffs against the 2nd defendant i.e. in suit No. FHC/CNCS/31/98 in the sum of N938,200,464.00 (Nine Hundred and Thirty Eight Million, Two Hundred Thousand, Four Hundred and Sixty-four Naira) as special damages for ecological damages and injurious affection as assessed by the plaintiffs' Expert Chartered Valuers in the valuation report tendered before this court.

I hold that the 2nd set of plaintiffs are entitled to general damages against the 2nd defendant assessed at N50,000,000.00 (Fifty Million Naira) only. It is further ordered that the 2nd set of plaintiffs in the sum of N100,000.00 (One Hundred Thousand Naira) only. That shall be the judgment of this court."

The defendants' appeal to the Court of Appeal was unsuccessful. It was dismissed. They have further appealed to this court. Both parties filed their respective briefs of argument. The defendants, as appellants, have submitted twelve (12) issues for determination at pages 7 and 8 of their brief. These are:

1. Whether the plaintiff's action as constituted was competent. Grounds 1, 2, 3 and 4

2. Whether the Court of Appeal was right in confirming the award of N4 Billion unliquidated damages made in favour of the plaintiff in spite of the fact that the valuation report on which the High court relied was not placed before the Court Appeal. Ground 27.

3. Whether the judgment of N4 billion unliquidated damages made against the 2nd defendant was proper when the co-defendant was still giving evidence and vigorously defending and disputing the alleged common acts of negligence in respect of pipes allegedly owned by the 1st and 2nd defendants. Ground 5.

4. Whether award of unliquidated damages could be based on plaintiff's pleadings and uncompleted evidence of a co-defendant. Grounds 6 and 15.

B 5. Whether there was proper evaluation of the evidence before the court and whether the judgment of 4 Billion Naira was on merit. Grounds 20, 21 and 25.

C 6. Whether the construction place on the provision of Order 38 rule 11 and Order 28 rule 7 was correct and whether the award of N4 Billion unliquidated damages could be based on the said rules. Grounds 13 and 14.

7. Whether the appellants right to fair hearing was not violated by the lower courts' refusal to consider on it merits the 2nd appellant's motion to dismiss on the ground that the motion was in the nature of a demurrer. Grounds 19 and 20.

D 8. The liability of the defendants being joint and several, whether the judgment against the 2nd defendant based on the inconclusive evidence was not seriously prejudicial to the 1st defendants case yet to be concluded and therefore wrongly upheld by the lower court.

E 9. Whether the lower courts have any valid legal reasons for failing to consider and/or grant the prayers contained in the 2nd defendant's motion to dismiss especially when no counter-affidavit was filed to challenge the facts forming the basis of the prayer and if so, whether judgment for the plaintiffs was a necessary and automatic corollary of refusing the prayers. Grounds 10, 12 and 19.

F 10. Whether or not the Court of Appeal was right in upholding the ruling of the High Court in refusing to entertain and grant the 2nd defendant's application to regularize the statement of defence filed out of time. Grounds 7, 8, 11 and 19.

G 11. Whether the plaintiffs "notice of cross-motion" not being known to law and unsupported by affidavit was competent. If the answer is in the positive, whether the healing thereof without giving the defendant's counsel the mandatory two clear days to react to it was not in breach of the rules of court, the principles of natural justice and the 2nd defendant's constitutional right to fair hearing.

H I shall treat both issues together. The plaintiffs filed a statement of claim to which the 1st defendant filed its statement of defence. The 2nd defendant did not file a defence even though the 1st and 2nd defendants were represented by same counsel.

At this stage, I think it is desirable to read the claim to which the 2nd defendant did not file a defence. It is to be remembered that C the defendants were sued jointly and severally. The plaintiffs' statement of claim filed on 22nd July, 1998 reads:

"Statement of claim

1. The plaintiffs on record are chiefs and heads of 81 fishing B settlements lying and situate along the Banks of Imo River Estuary to the Atlantic Ocean and its tributaries from the Andoni River and tidal feeder Creeks. Wetlands and Mangrove swamps within the jurisdiction of this Honourable Court. They bring this action for themselves C and on the joint behalves of the respective settlements in this mass disaster class lawsuit.

2. The 1st defendant is a crude oil prospecting and producing company incorporated in Nigeria with unlimited liability. It has its head offices at Mobil House Lekki Expressway, Victoria Island Lagos, D its Port Harcourt offices at Km. 17 Port Harcourt, Aba Expressway Port Harcourt and main operational base at Qua Iboe Terminal, Eket, Akwa Ibom State.

3. The 2nd defendant is the American incorporated parent E company of the 1st defendant and direct from Fair-fax and Dallas its management policies, offshore equities and financial policies and shall be affected in monetary terms and over-all oil spill causative and containment matters as affecting this suit.

4. The defendants are owners of large offshore oil mining lease F concessions in Nigeria. From these concessions the defendants developed the Adua, Asabo, Usari, Enanag, Inim, Edop, Etim, Iyak, Iyak S.E., Ubit, Eku, Unam oil fields.

5. The crude oil bleeding from these fields are arterially connected by a mesh of pipelines varying from 16" to 20" diameter to G the defendants IDOHO platform facility as a gathering point. It is from this Idoho platform that all the crude oil is injected into a 12 mile long 24" diameter pipeline running through the continental shelf to the defendants Mobil Qua Iboe Oil Terminal QIT for draining, fiscalisation, storage and eventual shipment for sale and profit. H

6. The said IDOHO 24" pipeline to QIT was constructed over 20 years ago and due partly to use and partly to the salinity of the sea water under which it was laid had outlived its usefulness.

7. On January 12, 1998, the said pipeline which had been

corroding un-attended for several years finally ruptured, fractured and completely spewed its current capacity of 263,7000. b.p.d. into the Atlantic Coast-line in the South Easterly area of Nigeria.

B 8. *Because of the strong South Westerly Ocean current prevailing in the area, the entire spilled oil was washed ashore by merciless waves beating the shoreline in that direction. The River became natural receptors of the oil. These Rivers are essentially fresh water Rivers up stream but in the lower Delta are salinated because of the tidal surge and regimes from the Atlantic Ocean. The Crude Oil thus received by the Rivers circulated within the fragile deltaic wet lands and mud flats. With ebbing tide, it sedimented into the pockets of chicoco swaps and mangrove all of which provide natural habitat for fish, fish ponds, protective vegetation and plaintiffs only means of livelihood.*

D 9. *Wherefore the plaintiffs have been greatly damnified and claim as per their solicitors writ.*

E 11(a) *The plaintiffs are fishermen and farmers. They fish in the open seas with gill Nets which span several meters a piece with floating devices to keep them in place. The plaintiffs also fish within the deltaic inland waters with Cast nets and hooks. An important part of their occupation is fish husbandry through / man made fish ponds, brooks, lakes and canals.*

F (b) *The fish ponds are serviced in the swamps and mud flats by flow and ebb tidal regimes which bring in fingerlings and fish food and evacuates stale water during ebb tide. It is in the mangrove swamps that spawned young fish are nursed away from the harsh waves of the Atlantic Ocean. These young fish are the main source of re-charging the fish population of the deep waters.*

G (c) *The mangrove provides the vital shore protection with their basket and sediment entrapping prop roots which prevents coastal erosion. It is also the mangrove that provides the sustainable all season source of fuel for domestic cooking. Mangrove is the most predominant vegetation in the saline river, Nigeria Delta and the roots provide natural habitat for Shell fish, mud-skippers, oysters, crustacean and a variety of mollusk.*

H (d) *Crude Hydrocarbon Oil which is lighter than water floats on water and the meniscus is at the highest water level during flow tide and is gently smeared and deposited downwards on the man-*

grove trees and swamps as the tide ebbs. All the recesses and swamp holes of the aquatic animals automatically collect pockets of oil when the flood recedes. This process is repeatedly undergone as long as the spilt oil lasted.

(e) Plaintiffs will show that Crude Hydrocarbon Oil coming from the bowls of the earth have amongst several impurities a lot of dissolved nitrogen, sulfur, heavy metals, toxic effluent waters ordinarily call Basic Sediments and water (BS&W) all of which are not readily visible to the naked eyes, in the aqueous medium.

(f) The Idoho Spill in question was straight from the earths bowel and discharged at the sea bed with all its impurities. Defendant only was concerned with the floating hydrocarbon oil but neglected the associated and highly dangerous toxic BS&W. This substance wipes off all known marine food. It rendered the few surviving adult fish that ingested it un-fit for human consumption. Plaintiff will show that the Idoho pipeline was laid at the sea bed in a concave position with the two highest points at Qua Iboe Terminal and Idoho platform. The distance in between is 12 miles while fracture occurred 3 miles to the shoreline.

11. Plaintiffs say that the entire line fill of "24 x 12" mile long pipeline from the defendant's Idoho platform to their Quo-Iboe terminal was spilled. This is in addition to the total 15 hour production from the 263000 barrel per day production of the defendants field which was being pumped into the sea in error prior to the spill discovery and consequential shut down of the facilities. Thus over 100,000 barrels.

12. Plaintiffs say that the defendant was negligent in both the causation and containment of the Oil Spillage:-

i. The defendant ought to have carried out periodic underwater inspection of its pipeline via X-rays to detect early signs of fracture and corrosion .

ii. Defendant ought to have maintained proper surveillance with state of the art instrument panels that will promptly alert on a sudden loss in pressure along the pipeline which device would serve as an early warning of a leakage.

iii. Defendant being aware of the prevalent strong south-western Ocean current in the area should have anticipated that in case of an oil spill from its south-easterly field the mouths of the major Rivers

lying south-westerly in the Nigeria Delta Eq Qua, Imo, Andoni, Bonny, Sambreiro, New Calabar, Santa Barbara, San Bartholomew and Brass Rivers will be a natural point of entry into the fragile Deltaic homesteads of the plaintiffs. The defendant failed to stock pile contingent sorbent and Coastal booms or install same at the mouths of these Rivers to forestall unhindered access of the Oil slick via natural tidal transport.

Defendant failed to warn the plaintiffs of the dangers of the oil spill. Defendant used a very toxic chemical called Corexit 9500 which merely emulsified the floating mass of Oil coagulating it and thus temporarily gave it a higher density than water. Consequently it sank in lumps to the bottom of the water. It eventually over a few weeks started floating like large masses of decomposed jelly fish.

13. Plaintiff will in addition rely on the rule in Rylands v. Fletcher.

14. Plaintiffs say they commissioned the following firms of Consultants when it became obvious that the defendant was being merely cosmetic and propagandist in their approach to disaster.

(a) Messrs. Pajumo Surveys Ltd. to carry out a delineation survey of the impacted. Their survey plan will be relied upon at the trial.

(b) Messrs. Nun Rivers Ventures Ltd. To carry out a post Impact Scientific Investigation of the spill. They submitted their report accordingly.

15. Plaintiffs will found on all reports mentioned in 14 above inclusive of all correspondences and documents related to this spill, especially their effect on the ecosystem, water, air, fish, economy, social life and Health of the plaintiffs.

16. Wherefore plaintiffs claim from the defendants jointly and severally for ecological damage and injurious affection as follows:-

1. Special damages: N3,698,524,656.00 being the sum assessed by the plaintiffs expert chartered valuers in the valuation reports afore-pleaded.

2. General damages

The sum of N301, 475, 344.00 for shock, inconveniences, loss of amenities, cost of the survey and expert reports.”

As I have already stated, only the 1st defendant filed its statement of defence. The matter then proceeded to trial. The plaintiffs called three witnesses and closed their case.

At the close of the plaintiff's case, the 2nd defendant on 29

June, 2000 brought a motion for the following order:

“1. An order dismissing this action against the 2nd defendant and striking out the 2nd defendant from the suit.

2. And for such further or other orders as this Honourable Court may deem fit to make in the circumstances.

AND FURTHER TAKE NOTICE that the ground of this application is that at the close of the plaintiffs case no evidence whatsoever has been led or introduced to connect the said 2nd defendant with the claims made or reliefs sought by the plaintiffs in this action.”

In their reaction to the above motion for the dismissal of their action, the plaintiffs on 30 June, 2000 filed what they termed “Notice of Cross motion” in the following terms:

“TAKE NOTICE that at the hearing of the 2nd defendant’s motion filed on 29/6/2000 for dismissal of this suit, the plaintiffs herein shall pray this Honourable Court for an order dismissing the said motion and proceed to enter final judgment against the 2nd defendant based on law.”

Learned counsel for the defendants addressed the court and counsel for the plaintiffs replied. The learned trial Judge ignored the motion filed subsequently for enlargement of time within which to file the 2nd defendant’s statement of defence, and proceeded to judgment.

It has been contended on behalf of the 2nd defendant that the court of trial had only one course of action open to him and that is, to hear and extend time for the 2nd defendant to put in a defence. This approach in my opinion is too simplistic. It ignores or overlooks the full significance of the 2nd defendant’s action. As I have earlier on indicated the 2nd defendant’s motion, at the close of the case for the plaintiffs, was for an order dismissing the action against the 2nd defendant on the ground that no evidence whatsoever had been led which linked the 2nd defendant with the claims made or the reliefs sought by the plaintiffs. By this motion the 2nd defendant was in fact saying that it rested its case in that of the plaintiffs.

Its contention was that the plaintiffs failed to make a prima facie case and had in effect elected not to call evidence in support of its case. In such a situation the legal position is that the defendant is bound by the evidence called in support of the case for the plaintiff, and the case must be dealt with on the evidence as it stands.

A party or a litigant has a right to choose whether to adduce evidence in support of his pleading or not and the court has no power to interfere with the exercise of that right. Similarly a defendant i.e. a party sued has a right to choose whether to file a defence to the claim against him or not. I think once that choice is made and that choice was acted upon by both parties in the suit and by the court, the party that made the choice cannot turn around afterwards and seek to be allowed time within which to file a defence and call evidence in order to repair his damaged case. If the court indulges parties in this way, there will be no end to litigation.

In the English case of *Laurie v. Reglan Building Co. Ltd.* (1942) 1 KB 152 at 155 Lord Greene M.R. held thus:

"The course that the trial took was this. After the evidence for the plaintiff had been concluded on the question of liability, counsel for the defendants submitted that there was no case for him to answer. It is unfortunate, I think, that the learned trial Judge did not follow the practice which ought to be followed in such cases, as has been quite clearly laid down in this court, or refusing to rule on the submission unless counsel for the defendant said that he was going to call no evidence. That must be regarded as the proper practice to follow and it is to be found very lucidly set out, if I may say so, Corporation (1). I do not, however, wish it to be thought that there is any particular magic about that question being asked, because it seems to me that counsel can make it perfectly clear, by words which he uses or by the way in which he acts, that he does not intend to call any evidence, and he must be taken to have given a negative answer to the question which the Judge might otherwise have put to him. In the present case Mr. Humphrey Edmunds, who appeared at the trial for the plaintiff, challenged Mr. Beresford by saying that he assumed that Mr. Beresford did not respond to that challenge and proceeded with his argument. When he was before us he frankly admitted that, if the Judge had put to him the question which ought to have been put, he would have said that he did not intend to call any evidence. That being so, there can be no question of a new trial. The matter must be dealt with on the evidence as it stands."

This case was cited with approval by this court in *Hammed A. Toriola & Ors. v. Mr. Olushola Williams* (1982) 7 SC 27. This court at p. 33 stated as follows:

"This submission overlooks the position in which the appellants placed themselves by resting their case on that of the respondent i.e. by in effect submitting that the respondent as plaintiff failed to make out a prima facie case and by electing, in consequence, not to call evidence in support of their own case. The legal position in such a case is, of course, that the appellants are bound by the evidence called in support of the case for the respondent qua plaintiff, and the case must be dealt with on the evidence as it stands per Lord Greene M.R. in Laurie v. Reglan Building Co. Ltd. (1942) 1 K.B. 152 at 156." See also *Akanbi v. Alao* (1989) 3 NWLR (Pt.8) 118 at p. 140 this per Craig, JSC held this:

"A party is free to choose whether to adduce evidence in support of his pleading or not and the court has no power to interfere with the exercise of that right. See the case of Mobil Oil (Nigeria) Ltd. v. Federal Board of Inland Revenue (1977) 3 SC 97 at 115."

Furthermore, it is provided in Order XLI, rule 5 of the Supreme Court (Civil Procedure) Rules, 1948 that:

'When the party beginning has concluded his case, the other party shall be at liberty to state his case and to call evidence and to sum up and comment thereon'

In my view, when a party makes it choice which the law requires him to make, and that choice was acted upon by both parties in the suit and by the Court, the party who made the choice cannot turn round afterwards and claim that he had made a mistake. Such a mistake of law will not excuse the party.

In my experience, a decision not to call evidence has always been regarded as a legal strategy, not a mistake. If the strategy succeeds, then it enhances the case of that party; but if it fails, such a litigant cannot ask for leave to adduce further evidence in order to repair his damaged case.

It seems to me that if every party who makes a wrong choice of that nature is allowed to repair his case in this way, there will be no end to litigation."

These cases have lucidly set out the procedure and the position of the law in cases where a defendant chooses to rest his case on that of the plaintiff.

The practice in such cases, as has been clearly laid down in the above authorities, is for the learned trial Judge to refuse to rule on

the submission unless counsel for the defendant makes it clear that he is going to call no evidence. Where a defendant rests his case on the plaintiff's, he is, in effect, submitting that the plaintiff has failed to make a prima facie case and electing in consequence, not to call evidence in support of his own case. A defence counsel who announces that he is resting his case on that of the plaintiff must be understood to be saying either:

(a) that the plaintiff has not made out any case for the defendant to answer; or

(b) that the defendant has a complete answer in law to the plaintiff's case.

Once counsel makes this announcement, and addresses the court on it, he must stand by his submission. See Tandoh v. C.F.A.O. of Accra (1944) 10 WACA 186.

By the motion of 29 June, 2000 for the dismissal of the plaintiffs' action on the ground that the plaintiffs had failed to make out a prima facie case against the 2nd defendant, the defendant had, in effect, elected not to call evidence in support of its case. All that the defendant needed to do at this stage, was to make it perfectly clear, by words which he used or by the way in which he acted, that he did not intend to call any evidence. Counsel's motion for dismissal of the action at the close of the plaintiffs' case was tantamount to saying to the court that he was resting his case on that of the plaintiff. Counsel, it must be recalled, addressed the court on it. Counsel in the circumstances must stand by his submission.

In the instant case, the 2nd defendant chose not to file a defence. Both parties and the court acted on that choice. Furthermore the 2nd defendant chose to rest his case on that of the plaintiffs and in effect not to call evidence. It was, in these circumstances, bound by the evidence called in support of the case of the plaintiffs. It could not be granted an extension of time within which to file a defence which it could have filed in 1998, in order to repair its damaged case.

One more issue before I complete this judgment. It relates to the preliminary objection to the competence of the 1st defendant's appeal. It is not in contention that the judgment appealed from was specifically entered against the 2nd defendant. In his judgment the learned trial Judge unequivocally said:

"In the final analysis, I hold that from the circumstances of this case,

the plaintiffs are entitled to final judgment as per their statement of claim and damages as proved by their witnesses and exhibits tendered in court. Consequently judgment is hereby entered for the 1st set of plaintiffs against the 2nd defendant ...”

What is more, the plaintiffs withdrew their case against the 1st defendant and it was accordingly struck out on 27 November, 2000. B So, what this means is this. First, there is no lie between plaintiffs and the 1st defendant. Secondly, there is no judgment entered against the 1st defendant. In the light of these facts, the 1st defendant is not an aggrieved party. It has no reason whatsoever to appeal against the judgment in question. The objection by learned counsel for the plaintiffs C is well taken, the 1st defendant’s appeal is accordingly struck out.

For the foregoing reasons, I would dismiss the appeal and affirm the decisions of the trial court and the Court of Appeal. The plaintiffs are entitled to costs which I assess at N 10,000.00. Appeal D allowed.

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