

SUPREME COURT OF NIGERIA
3RD FEBRUARY, 2006. SC. 388/2001
CORAM:- I. L. KUTIGI, D. MUSDAPHER, G. A. OGUNTADE,
M. MOHAMMED, W. S. N. ONNOGHEN, JJSC

S. A. I. Ossai

..... APPELLANT

And

1. Isaac F. Wakwah

(Alias I. F. Awuse)

2. G. N. Amadi

3. G. J. Duke

4. Wyn Chemist Limited

5. Alpha International (Nig.) Limited

6. Essiet Ephraim

..... RESPONDENTS

(Alias Udo Ephraim)

7. F. S. Alara

8. Nathan Emesiobi

9. Edward Olugbuali

10. G. Obinwa

PRACTICE & PROCEDURE - Originating Summons - When proceedings can be commenced thereby - Are as stated under the High Court Rules - Questions in this suit - Do not fall within the provision of the Rules (H1)

PRACTICE & PROCEDURE - Originating Summons - Propriety of - Can be used only in resolving questions of law - Or construction of instruments and interpretation of documents - But not in a hostile property dispute case (H2)

ORIGINATING SUMMONS - Disputed facts - Nature of the claims - And facts deposed in the supporting affidavit - Are what may disclose disputed facts - Even in the absence of counter affidavit (H3)

COURTS - Evidence - Admissibility - Document - That was not part of

plaintiff's case - Was wrongfully fished out suo motu - And relied upon by trial court - And appellate court will reject such inadmissible evidence (H4)

COURTS - Neutrality - Where trial court took side with plaintiff - Court of Appeal rightly set aside its judgment (H5)

APPEALS - Issues - Resolution of - Where an issue arose from a proceeding - That has been set aside - Resolving it becomes unnecessary (H6)

COURTS - Appeals - Record of the court - Allegation against the court - That is not substantiated - By the lower court's record - Will not be upheld (H7)

FACTS

Before the Rivers State High Court Port Harcourt, the plaintiff/appellant by an originating summons, instituted an action against the defendants/respondents. Plaintiff claimed inter alia, an order of court directing the defendants to pay all arrears of rents and mesne profits into the High Court Registry, or in default to deliver vacant possession of the premises and appurtenances thereof. Certain questions in relation to the claim were set down by the plaintiff for the trial court's determination. The originating summons with the supporting affidavit was served on the defendants, who through their counsel entered a conditional appearance, and later took steps to defend the action.

At the conclusion of hearing, the trial judge relying on the affidavit in support of the originating summons, which he said was not challenge by the defendants found in favour of the plaintiff. He also relied on a document found in the court's file which he admitted in the course of the judgment as exhibit A, though plaintiff did not make the said document part of his case. Defendants' appeal to the Court of Appeal was upheld as it ordered a fresh hearing of the action on pleadings before another Judge. Being aggrieved, the plaintiff has now appealed to the Supreme Court.

ISSUES FOR DETERMINATION

“(i) Whether or not the Court of Appeal was right in setting aside the decision of the High Court of Rivers State on ground that the Originating Summons was inappropriate for the commencement of the suit and that Exhibit ‘A’ was not before the trial court.

(ii) Whether or not the decision of the Court of Appeal in striking out the appellants Preliminary objection, was correct.

(iii) Whether or not the judgment of the Court of Appeal was not null and void ab initio, having been given after the appeal had been restored upon contentious motion and in breach of the appellant’s right of fair hearing.”

HELD (Unanimously dismissing the appeal per **MOHAMMED JSC**)

Originating Summons - When proceedings can be commenced thereby

1. The main question to be answered now is whether the questions set out by the appellant above having regard to the nature of the dispute disclosed therein, are appropriate for determination by Originating Summons proceedings. The answer to this question partly lies in the relevant rules of the trial High Court. Order 1 Rule 2(2) of the Rivers State High Court (Civil Procedure) Rules 1987 states-

“Proceeding may be began by an originating summons where:

(a) the sole principal question at issue is, or is likely to be, one of construction of written law or of any instrument made under any written law or of any deed, will, contract or other document or some question of law.

(b) There is unlikely to be any substantial dispute of fact”-

See also Order 38 Rules 1 and 2 of the same High Court Rules. Looking at the questions A, B and C in the Originating Summons filed by the appellant at the trial High Court, it is quite plain that the questions have not been linked with and have nothing to do with the construction of any written law or any instrument made under any such written law. The questions do not seek the construction of any deed, will, contract or any other document not to talk of other question of law. Although the questions raised by the appellant in the originating summons relate to the payment of

arrears of rents and mesne profits in respect of a property known as No.61 Ikwerre Road, Mile 1, Diobu, Port Harcourt presumably occupied by the tenants under an existing tenancy agreement, no such agreement was referred to the questions let alone identified any of the provisions of the B agreement for construction or interpretation. Furthermore, the very fact that the appellant himself as the plaintiff in the action began by the Originating Summons is complaining in the questions formulated by him therein that the respondents who are tenants on the property had refused C to recognize him as their landlord, seemed to have completely ruled out the possibility that there is unlikely to be any substantial dispute of facts within the requirement of paragraph (b) of Order 1 Rule 2(2) of the Rules. Also glaringly disclosed in the questions framed by the appellant and the affidavit in support of the originating summons, is the fact that there is a D dispute over the ownership of the property No.61 Ikwerre Road, Mile 1, Diobu, Port Harcourt still in court yet to be resolved. (p. 557 C)

Originating Summons - Propriety of

E 2. Although the merits of the Originating Summons as a way of initiating actions lie in the fact that proceedings commenced thereby are very expeditiously determined, care must be taken to use such proceedings only in resolving questions of law or construction of instruments made in F exercise of powers under the law or the construction and interpretation of documents. The dispute in the present case between the parties, which dispute centered on the payment of arrears of rents and mesne profits and in the alternative the recovery of possession of the rented property also in dispute, is obviously not suitable to be initiated by means of originating G summons. Not only that the facts in issue are highly in dispute but that the nature of the appellant's claims for arrears of rents and mesne profit in respect of the property of which the tenants have refused to recognize him as their landlord, the proceedings are not only likely to be contentious but H also extremely hostile. To this end, the court below was quite right in holding that the proceedings ought not to have been initiated by originating summons. The setting aside of the judgment of the trial High Court which emerged at the end of the wrong or improper proceedings, coupled with

the ordering of a fresh hearing of the matter on pleadings by another judge of the Rivers State High Court, is quite in order. (p. 559 D)

ORIGINATING SUMMONS - Disputed facts

3. It must be emphasized that it is not the filing of a counter affidavit to oppose claims in an originating summons that makes such proceedings contentious or result in disputed facts. Even where no counter affidavit was filed or where counter affidavit was filed but ignored by the trial court, as in the lost out case, the nature of the claims and the facts deposed in the affidavit in support of the claims in the Originating Summons are enough to disclose disputed facts and hostile nature of the proceedings. (p. 560 A)

COURTS - Evidence - Admissibility - Document

4. With regard to the document exhibit 'A', it is not in dispute that the document was not part of the facts deposed to in the affidavit of the appellant in support of his claims in the Originating Summons. The parties did not advert to the document in their respective addresses in the course of the proceedings before the trial court. It was the trial court in the course of writing its judgment that stumbled upon the document and suo motu admitted it in the judgment as exhibit 'A' and relied exclusively on it in finding for the appellant as the plaintiff without affording the parties any opportunity of being heard on the contents of the document. The learned trial judge ought not to have engaged in a private research in the record of the court to fish out a piece of evidence to support the case of a party without affording the parties a hearing on the piece of evidence. It is the law that courts of law only act on legally admissible evidence while inadmissible evidence is rejected. See *Okonjo v. Njokanma* (1991) 7 NWLR (pt.202) 3. Similarly, an appellate court will reject inadmissible evidence wrongly admitted by a trial court. (p. 560 C)

COURTS - Neutrality

5. By personally taking steps in the absence of the parties, in fishing out of exhibit 'A' to rely upon in his judgment, the learned trial judge clearly

descended into the arena of the fight between the parties to take side with the appellant. The wrongful admission of exhibit ‘A’ by the trial court no doubt occasioned a miscarriage of justice justifying the setting aside of that judgment by the court below. On this issue alone, I find no merits in the B appeal which must accordingly fail. (p. 561 C)

Issues - Resolution of

6. Therefore Obi Eze not being a party in the present case, whether or not his notice and grounds of appeal against the ruling of the trial court in the C interlocutory appeal to the Court of Appeal was filed out of time or not, has no bearing whatsoever to the present case. The court below was therefore right in striking out the appellant’s preliminary objection. In any case this issue having arisen from the proceedings on the originating D summons and judgment of the trial High Court of 3-2-1994 that had been set aside and fresh proceedings on pleadings ordered before another judge, and having resolved issue No (i) in this appeal agreeing with the judgment of the court below, it is no longer necessary to resolve the present issue. E As the contest between the parties in the dispute between them is to start afresh, Obi Eze could renew his application for joinder in the fresh action whenever it is filed if he so desires. (p. 561 F)

F ***Appeals - Record of the court***

7. This record is indeed binding on the parties and on this court. The notice of appeal of the respondents dated 11-2-1994, was never withdrawn. In the absence of the contrary position from the record of appeal, the respondents appeal heard on the notice and grounds of appeal and the G judgment resulting therefrom, cannot be regarded as a nullity as argued by the appellant. It is also clear from this record that contrary to the claim of the appellant that he was not heard at the hearing of the motion, the record shows that his learned counsel was heard in opposing the motion before H it was granted. Thus the appellant’s claim of denial of fair hearing in this issue has also collapsed.

In the result, this appeal must fail. Accordingly the appeal is hereby dismissed. (p. 563 D)

NOTABLE POINTS OF INTEREST**OGUNTADEJSC***1. Tenancy dispute should not be commenced by Originating Summons*

It seems to me that much as the plaintiff and the trial court might have had good intentions, it was still necessary that only the procedure which guaranteed to the parties a full ventilation of their defence should have been employed. The entitlement to rents on a property is a right flowing to the landlord in a landlord and tenant relationship. The defendants each had independent holdings and had not one collective tenancy. It is therefore, wrong to rope all of them into one suit as if they jointly occupied their apartments in the building as the tenant. Even a tenant who has defaulted in the payment of rents still has to be ejected by the proper procedure, which necessitates serving statutory notices.

I am of the view that the plaintiff/appellant was wrong to have used an originating summons in initiating the action. (p. 566 D)

ONNOGHENJSC*2. Originating summons is not proper where facts are likely to be in dispute*

I hold the view that the Court of Appeal is right in allowing the appeal and remitting the case to the High Court of Rivers State to be dealt with by another judge. Originating summons, even though one of the modes of commencing an action in the High court as recognised by the Rules of that Court, is not suitable for use in hostile proceedings where the facts are in dispute or likely to be in dispute. In the present case, the issue of ownership of the property in question is still outstanding between appellant and Chief Okafor. What the originating summons sought to do is not a resolution of dispute involving questions of law which could have been most appropriate having regards to decided authorities such as *Doherty v. Doherty* (168) NWLR 241 at 242; *New Nigeria Bank Ltd v. Alakija* (1978) 9-10 S.C.59. (p. 567 G)

REPRESENTATION

E. B. Ukiri Esq. for the appellant, with him is S. I. Ameh Esq.

Okey Wali Esq. for the respondents.

CASES REFERRED TO

- Okonjo v. Njokanma (1991) 7 NWLR (pt.202) 3
- B Onyido v. Ajemba (1991) 4 NWLR (pt.184) 203 at 225
- Okoduwa v. The State (1988) 2 NWLR (pt.76) 333 at 354
- Eboh & Ors v. Akpotu (1968) All NLR 218 at 222
- Timitimi & Ors v. Amabebe (1953) 14 WACA 374
- Adeagbo v. Yusuf (1990) 6 NWLR (pt.158) 588 at 596
- C Ashipa & Ors v. Yakubu & Anor (2001) 12 NWLR (pt.728) 77
- U.B.A. Ltd v. Ajlleye (1999) 13 NWLR (pt.633) 116 at 126
- Doherty v. Doherty (168) NWLR 241 at 242
- New Nigeria Bank Ltd v. Alakija (1978) 9-10 S.C.59
- D Oloyo v. Alegbe (1983) 2 SCNLR 35 at 67
- Olumide v. Ajayi (1997) 8 NWLR (pt.517) 433 at 442
- Doherty v. Doherty [1968] N.M.L.R. 241 at 242
- National Bank of Nigeria Ltd. & Anor. v. Lady Alakija & Anor. [1978] 9-10 SC 59 at 71

RULES REFERRED TO

- Rivers State High Court (Civil Procedure) Rules 1987 O. 1 r. 2(2), O. 2 r. 1(1), O. 2 r. 2(2), O. 38 r. 1 & 2
- F Court of Appeal Rules O. 3 r. 18(5)

LEAD JUDGMENT BY MOHAMMED JSC

- The plaintiff who is now the appellant in this court by an Originating
- G Summons dated 14-5-1992, instituted an action at the High Court of Justice Rivers State Port Harcourt against the defendants who are now the respondents. The Originating Summons reads -

- "To 1. 1st-4th, 6th-10th defendants of No.61 Ikwere Road, Mile 1,
- H Diobu, Port Harcourt.
2. 5th defendant of Elelenwo Road, Elelenwo or c/o 5th defendant, No. 17 Ndashi Street D/Line, Port Harcourt.
3. 5th defendant of No.17 Ndashi Street, D/Line, Port Harcourt.

Let the defendants whose addresses are stated above in the Port Harcourt Judicial Division within eight days of the service of this originating summons on them, inclusive of the day of such service cause an appearance to (sic) entered for them to this summons which is issued upon the application of S.A.I. Ossai of No.61 Ikwere Road, Mile 1, Diobu, Port Harcourt who claims to be entitled to an Order of this Honorable Court directing the defendants to pay all arrears of rents and mesne profits for their use and occupation of No.61 Ikwere Road, Mile 1, Diobu, Port Harcourt into the High Court Registry forthwith pending the determination of an appeal pending in the Court of Appeal as suit No. CA/PH/134/89 or in default to deliver up vacant possession of the premises and appurtenances thereof., and for the determination of the following questions :-

(a) Whether or not the defendants should pay rents and/or mesne profits for their use and occupation of No.61 Ikwere Road, Mile 1, Diobu, Port Harcourt.

(b) If the answer to "A" above is the affirmative can the defendants be allowed to avoid payment of rents by refusing to acknowledge the plaintiff as their landlord on the ground that the plaintiff has filed an appeal against part of the decision in PHC/139/83: Obi Eze v. Attorney General of Rivers State and S.A.I. Ossai wherein Obi Eze claimed title to No.61 Ikwere Road, Port Harcourt and in the alternative damages for compulsory acquisition of No.61 Ikwere Road, Port Harcourt by the Rivers State Government.

(b) Whether it would not serve the interest of justice more to order the defendants who are tenants of No.61 Ikwere Road, Port Harcourt to pay their arrears of rents and mesne profits into the High Court Registry pending the determination of the aforesaid appeal.

AND TAKE FURTHER NOTICE that upon the determination of the above questions the plaintiff shall seek the following reliefs:-

1. An order of this Honourable Court directing all the defendants to pay their arrears of rents and mesne profits into the High Court Registry Port Harcourt forthwith pending the determination of Appeal No. CA/PH/134/89; Attorney General of Rivers State & Anor v. Obi Eze, and in

default of such payment to deliver up vacant possession of the premises forthwith.

Dated this 14 day of May, 1992.”

The originating summons supported by an affidavit was duly served on the defendants, who through their learned counsel entered conditional appearance on 21-6-1992. Meanwhile, learned counsel to the plaintiff had already started moving the trial court in the hearing of the matter since 1-6-1992, a date fixed for the hearing. In the course of the hearing, learned counsel to the defendants took steps to defend the action by filing counter-affidavits and a motion to dismiss the action for being an abuse of the process of the court. The trial court however decided to ignore the counter affidavits and the motion of the defendants and directed the defendants’ learned counsel to respond to the claims in the Originating Summons on grounds of law in the course of the hearing. At the conclusion of the hearing, the learned trial judge relying on the affidavit in support of the Originating Summons, which he said was not challenged by the defendants and a document found in the court’s file which he admitted in the course of the judgment as Exhibit A, found in favour of the plaintiff granting all his claims including the alternative claim of delivery up of possession of the rented premises in dispute between the parties.

The defendants who were not happy with the judgment of the trial High Court delivered on 3-2- 1994, appealed against it to the Port Harcourt Division of the Court of Appeal. Upon the hearing of the appeal on the respective briefs of argument filed and served between the parties and the court, the Court of Appeal in a unanimous judgment delivered on 26-3-2001, allowed the defendants’ appeal, set aside the judgment of the trial High Court in favour of the plaintiff and ordered fresh hearing of the action on pleadings before another judge of the High Court of Justice Rivers State in Port Harcourt. This judgment was not acceptable to the plaintiff who lost at the Court of Appeal and therefore decided to appeal to this court.

The dispute between the plaintiff who is now the appellant in this court and the defendants who are now the respondents, centered over various claims on the landed property known as No.61 Ikwerre Road, Mile 1, Diobu, Port Harcourt. This property is also a subject of claim in appeal

No. CA/134/89 between the Attorney General of Rivers State & Anor. v. Obi Eze now pending at the Court of Appeal Port Harcourt Division. The property in question is an abandoned property which the appellant claimed to have acquired through the Rivers State Government's Abandoned Property Commission. It was during the pendency of the matter in the Court of Appeal that the appellant decided to commence an action by means of an Originating Summons against the respondents for the payment of arrears of rents and the recovery of possession of the premises. The appellant who succeeded at the trial High Court and lost at the Court of Appeal, is now in this court on appeal.

Three issues were identified in the appellant's brief of argument. They are -

"(i) Whether or not the Court of Appeal was right in setting aside the decision of the High Court of Rivers State on ground that the Originating Summons was inappropriate for the commencement of the suit and that Exhibit 'A' was not before the trial court.

(ii) Whether or not the decision of the Court of Appeal in striking out the appellants Preliminary objection, was correct.

(iii) Whether or not the judgment of the Court of Appeal was not null and void ab initio, having been given after the appeal had been restored upon contentious motion and in breach of the appellant's right of fair hearing."

These issues were virtually adopted in the respondent's brief of argument except for the respondents' version of the issue No. (iii) the first part of which does not appear to have arisen from the grounds of appeal filed by the appellant. This particular issue in the respondents' brief reads -

"Whether the Court of Appeal exercised its discretion judiciously and judicially when it restored the appeal erroneously dismissed in consequence of a notice of discontinuance filed in relation to two different notices of appeal and whether the court acted in breach of the appellant's right of fair hearing."

On scrutinizing the original grounds of appeal and the additional grounds of appeal filed by the appellant, particularly the appellant's

additional grounds four and five from which the appellant's issue No (iii) was derived, there is no ground of appeal in which the appellant complained of the failure of the court below to exercise its discretion judiciously and judicially in restoring the appeal erroneously dismissed.

B That is to say, the wrongful exercise of discretion on the part of the lower court, is not a subject of complaint by the appellant in any of the grounds of appeal filed by him to challenge the decision of the lower court in this court. It is trite that an issue for determination ought not to be formulated as abstract legal issue without concrete reference to the facts of the particular case. Also, it is for an appellant to put forward the foundation of the issues for determination in an appeal in his grounds of appeal. Therefore it is not open to the respondent to depart from those grounds, or ignore some of them, or add his own. A respondent can only, without departing from the grounds, formulate his own issues with a slant favourable to his own case. In other words in the formulation of issues, a respondent can only add to grounds of complaint in the appeal if he has also filed a cross-appeal or a respondent's notice. See *Okoye v. N.C. & F. Company Ltd* (1991) 6 NWLR (pt.199) 501; *Momodu v. Momoh* (1991) 1 NWLR (pt.169) 608 at 621. If a respondent ignores some of the grounds of appeal filed by the appellant in formulating of issues, he may be deemed to have conceded them. See *Agbai v. Okogbue* (1991) 7 NWLR (pt.204) 391 at 421-422. Hence, it is obvious in the case at hand that the first part of the respondents issue No (iii) complaining of wrongful exercise of discretion by the lower court, does not arise from the appellant's grounds of appeal. On the principles I have stated above, I shall stick to the issues as identified in the appellant's brief of argument for resolution in this appeal.

On the first issue in the appellant's brief of argument which I have earlier quoted in this judgment, the learned counsel to the appellant referred to the provisions of Order 1 Rule 2(2) of the Rivers State High Court (Civil Procedure) Rules 1987 and explained that the Originating Summons filed by the appellant which merely sought for the legal interpretation of some questions contained at pages 2-3 of the record of this appeal, was quite in order. According to the learned counsel, in the absence of a counter-

affidavit to oppose the facts deposed in the affidavit in support of the Originating Summons, the facts remained unchallenged and therefore not disputed by the respondents within the requirements of Order 1 Rule 2(2) of the Rivers State High Court (Civil Procedure) Rules, 1987. The case of Soy Agencies and Industrial Services Ltd. v. Metalum Ltd & Ors (1991) 3 NWLR (pt.177) 35 at 43-44 was cited to support the appellant's argument that the appellant's action was correctly commenced by way of Originating Summons, particularly taking into consideration of the provisions of Order 2 Rule 1(1) of the High Court (Civil Procedure) Rules, 1987 which protected the judgment of the trial court.

As for the use of Exhibit 'A' by the learned trial judge in his judgment, the learned counsel to the appellant argued that since the document was signed by the parties and filed in the court in the course of the proceedings in the case, it had become part of the record of the court, which as a public document, the learned trial judge was entitled to take judicial notice of its contents without even the document being admitted in evidence. The case of Abraham & Anor. v. Olorunfunmi & Ors. (1991) 1 NWLR (pt.165) 53 at 77-78 was relied upon by learned counsel in support of this contention. With this last submission, learned counsel urged this court to allow the appeal.

The contention of the respondents on this issue is that having regard to the hostile and contentious nature of the appellant's action in this case in which the facts are in dispute or likely to be in dispute, proceedings by way of original summons was not appropriate. Learned counsel observed that Originating Summons are usually used to resolve disputes that involve questions of law and not disputes involving issues of facts. Several cases cited in support of this stand of the respondents include Doherty v. Doherty (1968) NMLR 241 at. 242; New Nigerian Bank Ltd v. Alakija (1978) 9/10 SC 59 per Eso JSC; (1978) 2 LRN 78 at 90 and Sadikwu v. A.G. Lagos State (1994) 7 NWLR (pt. 355) 235. Learned counsel referred to Order 1 Rule 2(2) of the High Court (Civil Procedure) Rules 1987, Order 38 Rules 1 and 2 of the same Rules and the nature of the dispute specified in the Originating Summons and submitted that the court below was right in setting aside the judgment of the trial court.

Coming back to the question of the admission and use of Ex. 'A' by the learned trial judge in his judgment, learned counsel to the respondents insisted that exhibit 'A' was not properly admitted in evidence to justify the reliance on it by the trial court which suo-motu admitted it and relied on it in its judgment. Being an inadmissible evidence, learned counsel argued that the lower court was right in declaring exhibit 'A' inadmissible and reliance on it to give the appellant's judgment, as having caused a miscarriage of justice warranting the setting aside of the judgment. Reliance was placed on the cases of Okonjo v. Njokanma (1991) 7 NWLR (pt.202) 3, Onyido v. Ajemba (1991) 4 NWLR (pt.184) 203 at 225; Okoduwa v. The State (1988) 2 NWLR (pt.76) 333 at 354 and Eboh & Ors v. Akpotu (1968) All NLR 218 at 222.

I shall tackle this rather double barrel issue first from the aspect of it dealing with the initiation of the action by Originating Summons before coming back to the aspect of the issue on the status of exhibit 'A' as a piece of evidence.

According to the appellant in his brief of argument, he took out the Originating Summons at the trial court and sought for the legal interpretation of the question stated at pages 2-3 of the record of this appeal. Although I have earlier in this judgment quoted the said questions, I shall reproduce them again here for effective consideration. The questions at pages 2-3 of the record are -

“(A) Whether or not the defendants should pay rents and/or mesne profits for their use and occupation of No.61 Ikwerre Road, Mile 1, Diobu, Port Harcourt.

(B) If the answer to 'A' above is in the affirmative can the defendants be allowed to avoid payment of rents by refusing to acknowledge the plaintiff as their landlord on the ground that the plaintiff has filed an appeal against part of the decision in PHC/139/83: Obi Eze v. Attorney General of Rivers State and S.A.I. Ossai wherein Obi Eze claimed title to No.61 Ikwerre Road, Port Harcourt and in the alternative damages for compulsory acquisition of No.61 Ikwerre Road, Port Harcourt by the Rivers State Government.

(C) Whether it would not serve the interest of justice more to order

the defendants who are tenants of No.61 Ikwerre Road, Port Harcourt to pay their arrears of rents and mesne profits into the High Court Registry pending the determination of the aforesaid appeal.

AND TAKE FURTHER NOTICE that upon the determination of the above questions the plaintiff shall seek the following reliefs:-

An order of this Honourable court directing all the defendants to pay their arrears of rents and mesne profits into the High Court Registry Port Harcourt forthwith pending the determination of Appeal No. CA/PH/134/89; Attorney General of Rivers State & Anor. v. Obi Eze, and in default of such payment to deliver up vacant possession of the premises forthwith"

The main question to be answered now is whether the questions set out by the appellant above having regard to the nature of the dispute disclosed therein, are appropriate for determination by Originating Summons proceedings. The answer to this question partly lies in the relevant rules of the trial High Court. Order 1 Rule 2(2) of the Rivers State High Court (Civil Procedure) Rules 1987 states-

"Proceeding may be began by an originating summons where:

(a) the sole principal question at issue is, or is likely to be, one of construction of written law or of any instrument made under any written law or of any deed, will, contract or other document or some question of law.

(b) There is unlikely to be any substantial dispute of fact"-

See also Order 38 Rules 1 and 2 of the same High Court Rules. Looking at the questions A, B and C in the Originating Summons filed by the appellant at the trial High Court, it is quite plain that the questions have not been linked with and have nothing to do with the construction of any written law or any instrument made under any such written law. The questions do not seek the construction of any deed, will, contract or any other document not to talk of other question of law. Although the questions raised by the appellant in the originating summons relate to the payment of arrears of rents and mesne profits in respect of a property known as No.61 Ikwerre

Road, Mile 1, Diobu, Port Harcourt presumably occupied by the tenants under an existing tenancy agreement, no such agreement was referred to the questions let alone identified any of the provisions of the agreement for construction or interpretation. Furthermore, the very fact that the appellant himself as the plaintiff in the action began by the Originating Summons is complaining in the questions formulated by him therein that the respondents who are tenants on the property had refused to recognize him as their landlord, seemed to have completely ruled out the possibility that there is unlikely to be any substantial dispute of facts within the requirement of paragraph (b) of Order 1 Rule 2(2) of the Rules. Also glaringly disclosed in the questions framed by the appellant and the affidavit in support of the originating summons, is the fact that there is a dispute over the ownership of the property No.61 Ikwerre Road, Mile 1, Diobu, Port Harcourt still in court yet to be resolved.

It is not at all in doubt from the provisions of the rules, that Originating Summons is one of the means of commencing of civil proceedings in the High Court which is intended to be used in limited situations specified in the rules. Principally it is ideal for use in an action involving mainly the construction and interpretation of documents. This is the view expressed by Kayode Eso JSC in *National Bank of Nigeria Ltd & Anor v. Lady Alakija & Anor.* (1978) 9-10 S.C. 59 at 71:-

“In other words, it is our considered view that originating summons should only be applicable in such circumstances as where there is no dispute on question of facts or the likelihood of such dispute. Where, for instance, the issue to determine short questions of construction, and not matter of such controversy that the justice of the case would demand the setting of pleadings, originating summons could be applicable. For it is to be noted that originating summons is merely a method of proceedings and not one that is meant to enlarge the jurisdiction of the court.”

In an earlier decision of this court in *Doherty v. Doherty* (1968) NMLR 241, Ademola C.J.N. of the blessed memory had warned against the use of originating summons in hostile proceedings at page 242 where he said -

“We cannot help thinking that the confusion in the court below was due to the procedure being used for beginning this case. It is said in Underbill’s Law Relating to Trust and Trustee (1959) at p.537 that -

It is generally inadvisable however, to employ an originating summons for hostile proceedings against a trustee, and this procedure is, of course quite unsuitable where the facts are in dispute, as the evidence is by way of affidavit.’ In this case the proceedings were hostile indeed.”

In contrast to the situation in *Doherty v. Doherty* (Supra) and *National Bank of Nigeria Ltd v. Alakija* (supra) in which the use of originating summons was found inappropriate having regard to the facts in dispute and the hostile nature of the proceedings, this court in *Oloyo v. Egbe* (1983) All NLR 387 at 393 found the proceedings began by originating summons to challenge the declaration that the seat of a member of the House of Assembly of the then Bendel State was vacant, was quite suitable and appropriate.

Returning to the case at hand, **although the merits of the Originating Summons as a way of initiating actions lie in the fact that proceedings commenced thereby are very expeditiously determined, care must be taken to use such proceedings only in resolving questions of law or construction of instruments made in exercise of powers under the law or the construction and interpretation of documents. The dispute in the present case between the parties, which dispute centered on the payment of arrears of rents and mesne profits and in the alternative the recovery of possession of the rented property also in dispute, is obviously not suitable to be initiated by means of originating summons. Not only that the facts in issue are highly in dispute but that the nature of the appellant’s claims for arrears of rents and mesne profit in respect of the property of which the tenants have refused to recognize him as their landlord, the proceedings are not only likely to be contentious but also extremely hostile. To this end, the court below was quite right in holding that the proceedings ought not to have been initiated by originating summons. The setting aside of the judgment of the trial High Court which emerged at the end of the wrong or improper**

proceedings, coupled with the ordering of a fresh hearing of the matter on pleadings by another judge of the Rivers State High Court, is quite in order. It must be emphasized that it is not the filing of a counter affidavit to oppose claims in an originating summons that makes such proceedings contentious or result in disputed facts. Even where no counter affidavit was filed or where counter affidavit was filed but ignored by the trial court, as in the lost out case, the nature of the claims and the facts deposed in the affidavit in support of the claims in the Originating Summons are enough to disclose disputed facts and hostile nature of the proceedings.

With regard to the document exhibit 'A', it is not in dispute that the document was not part of the facts deposed to in the affidavit of the appellant in support of his claims in the Originating Summons. The parties did not advert to the document in their respective addresses in the course of the proceedings before the trial court. It was the trial court in the course of writing its judgment that stumbled upon the document and suo motu admitted it in the judgment as exhibit 'A' and relied exclusively on it in finding for the appellant as the plaintiff without affording the parties any opportunity of being heard on the contents of the document. The learned trial judge ought not to have engaged in a private research in the record of the court to fish out a piece of evidence to support the case of a party without affording the parties a hearing on the piece of evidence. It is the law that courts of law only act on legally admissible evidence while inadmissible evidence is rejected. See *Okonjo v. Njokanma* (1991) 7 NWLR (pt.202) 3. Similarly, an appellate court will reject inadmissible evidence wrongly admitted by a trial court. See *Onyido v. Ajemba* (1991) 4 NWLR (pt.184) 203 at 225. This practice or type of conduct of the learned trial judge in dealing with Exhibit 'A' to support his judgment was strongly condemned by this court in *Okoduwa H v. The State* (1988) 2 NWLR (pt.76) 333 at 354 where Nnaemeka Agu JSC remarked as follows:-

“There are certain fundamental norms in the system of administration of justice we operate. The system is the adversary system in contra-

diction to the inquisitorial system. In that adversary system, the parties with their counsel, and the Judge have their respective roles to play. Basically it is the role of the judge to hold the balance between the contending parties and to decide the case on the evidence brought by both parties and in accordance with the rules of the particular court and the procedure and practice chosen by the parties in accordance with those rules. Under no circumstance must a judge under the system do anything which can give the impression that he has descended into the arena, as obviously his sense of justice will be obscured."

By personally taking steps in the absence of the parties, in fishing out of exhibit 'A' to rely upon in his judgment, the learned trial judge clearly descended into the arena of the fight between the parties to take side with the appellant. The wrongful admission of exhibit 'A' by the trial court no doubt occasioned a miscarriage of justice justifying the setting aside of that judgment by the court below. See Eboh & Ors v. Akpotu (1968) All NLR 218 at 222 and Timitimi & Ors v. Amabebe (1953) 14 WACA 374. On this issue alone, I find no merits in the appeal which must accordingly fail.

The next issue for determination is whether or not the decision of the Court of Appeal in striking out the appellant's preliminary objection, was correct. This issue arose from the appellant's notice of preliminary objection against the interlocutory appeal filed by one Obi Eze, who is not a party to the present appeal and whose application for joinder in the present case was refused by the trial court on 9-6-1993. However, the Court of Appeal extended time for Obi Eze to appeal against the ruling of the trial court refusing his application to join the instant case. **Therefore Obi Eze not being a party in the present case, whether or not his notice and grounds of appeal against the ruling of the trial court in the interlocutory appeal to the Court of Appeal was filed out of time or not, has no bearing whatsoever to the present case. The court below was therefore right in striking out the appellant's preliminary objection. In any case this issue having arisen from the proceedings on the originating summons and judgment of the trial High Court of 3-2-1994 that had been set aside and fresh proceedings on pleadings**

ordered before another judge, and having resolved issue No (i) in this appeal agreeing with the judgment of the court below, it is no longer necessary to resolve the present issue. As the contest between the parties in the dispute between them is to start afresh, Obi Eze could
B **renew his application for joinder in the fresh action whenever it is filed if he so desires.**

The last issue is whether the judgment of the Court of Appeal was a nullity for being based on an appeal which had been restored upon a contentious motion heard in breach of the appellant's right to fair hearing.
C The appellant has argued that by a notice of withdrawal of the appeal which was heard and granted by the Court of Appeal, the appeal was dismissed on 13-7-1999 under Order 3 Rule 18(5) of the Court of Appeal Rules. Learned counsel pointed out that the court below was in error in granting
D the respondents' application to set aside the order of dismissal of the appeal as the court lacked the jurisdiction to set aside the order on the authority of many cases including Adeagbo v. Yusuf (1990) 6 NWLR (pt.158) 588 at 596; Ashipa & Ors v. Yakubu & Anor (2001) 12 NWLR (pt.728) 77;
E and U.B.A. Ltd v. Ajlleye (1999) 13 NWLR (pt.633) 116 at 126. On the complaint for denial of fair hearing, counsel referred to pages 252-253 of the record and maintained that the motion on Notice to restore the appeal was not heard but simply granted suo motu by the Court below. Relying
F on the case of Ogundoyin & Ors v. Adeyemi (2001) 13 NWLR (pt.730) 403 at 421-422, learned counsel submitted that the judgment of the court below was a nullity.

In the respondents' brief of argument, it was explained that three different Notices of appeal were filed by three different counsel on
G different dates at the Court below in respect of this matter with all the three notices of appeal bearing the same appeal number. At the hearing of the respondents' notice of withdrawal of the first two notices of appeal, the lower court granted the application affecting all the three notices of appeal
H including the last notice of appeal filed by Chris Uche, learned counsel to the respondents who were the appellants at the court below and in respect which appellants' brief of argument had already been filed. Learned counsel to the respondents submitted that the restoration of the appeal filed

on 11-2-1994 which was erroneously ordered withdrawn, was quite in order so as not to allow technicalities to sway the court at expense of justice.

This issue is based on the assertion of the appellant that the notice and grounds of appeal upon which the lower court heard the respondents' appeal, had earlier been withdrawn and dismissed by the lower court. This assertion is not however supported by the record of this appeal at page 253 which contains the proceedings of the lower court of 25-5-2000 when the application to restore the appeal was heard. The record for that day reads-

"Mr. Onunkwo: Two notices of appeal were withdrawn. They are ones filed on 10-2-1994 and 9-2-1994. The one filed on 11-2-94 was not withdrawn and should be restored. Exh. 'A'."

Miss Ovie: I oppose the application

Court: The motion is granted as prayed and the notice of appeal filed on 11-2-1994 is hereby restored since it was never withdrawn."

This record is indeed binding on the parties and on this court. The notice of appeal of the respondents dated 11-2-1994, was never withdrawn. In the absence of the contrary position from the record of appeal, the respondents appeal heard on the notice and grounds of appeal and the judgment resulting therefrom, cannot be regarded as a nullity as argued by the appellant. It is also clear from this record that contrary to the claim of the appellant that he was not heard at the hearing of the motion, the record shows that his learned counsel was heard in opposing the motion before it was granted. Thus the appellant's claim of denial of fair hearing in this issue has also collapsed.

In the result, this appeal must fail. Accordingly the appeal is hereby dismissed. The judgment of the court below setting aside the judgment of the trial court and ordering fresh hearing of the appellant's action on pleadings by another judge of the trial High Court is hereby affirmed.

There shall be N10,000.00 costs in favour of the respondents. E. B. Ukiri, Esq. with him S. I. Ameh, Esq. for the appellant. Okey Wali Esq. for the respondents.

KUTIGIJSC

I have had the privilege of reading in advance the judgment just rendered by my learned brother Mohammed, JSC. I agree with his reasoning and conclusions. The appeal completely lacks merit. It is dismissed with N10,000. 00 costs against the Appellant and in favour of the Respondents.

MUSDAPHERJSC

I have had the opportunity to read in advance the copy of the judgment of my Lord Mahmud Mohammed, JSC just delivered with which I respectfully agree. For me same-reasons-so-lucidly-set-out in the judgment, I too, dismiss the appeal and affirm the decision of the Court below. I abide by the Order for costs contained in the aforesaid judgment.

OGUNTADEJSC

I have had the advantage of reading in draft a copy of the lead judgment by my learned brother Mohammed J.S.C. I agree with the said judgment which has ably dealt with the issues.

It is in my view well settled that a civil suit should not be commenced by originating summons where there is a dispute or likelihood of a dispute on the facts. See *Doherty v. Doherty* [1968] N.M.L.R. 241 at 242 and *National Bank of 'Nigeria Ltd. & Anor. v. Lady Alakija & Anor.* [1978] 9-10 SC 59 at 71.

In the instant case, there had been a dispute between the plaintiff and one Chief Obi Eze over the ownership of the building situate at 61, Ikwerre Road, Mile 1, Diobu Port-Harcourt. The defendants had not been plaintiffs tenants as he had not put them in possession of the apartment they occupied in the property. A court case had been raging between the plaintiff and the aforementioned Chief Obi Eze over the ownership of the building. The suit had been fought up to the Court of Appeal. It was only in the event plaintiff won in that other case that he could become the owner of the building and perhaps the defendant's landlord.

It was in these circumstances that the plaintiff brought a suit by

originating summons against the defendants claiming to be entitled to an order of the High court:

“directing the defendants to pay all arrears of rents and mesne profits for their use and occupation of No. 61 Ikwerre Road, Mile 1, Diobu, Port-Harcourt into the High Court Registry forthwith pending the determination of an appeal pending in the Court of Appeal as suit No. CA/PH/134/89 or in default to deliver up vacant possession of the premises and appurtenances thereof.”

In the affidavit in support of the originating summons, it was not deposed that the defendants had been plaintiffs tenants or had subsequent to their initial occupation attained tenancy to him. It was not shown that the defendants had been served statutory notices to quit. It was not shown what connection the defendants had with appeal No. CA/PH/130/89 such that it could be understood why the determination of that appeal was made a contingency in the current proceedings. It seems to me that it ought to have occurred to plaintiffs counsel who filed the originating summons that the several issues of fact were bound to arise in the proceedings which would be contentious. It was therefore wrong to have employed an originating summons for this kind of proceedings.

Order 2 rule 2(2) of the Rivers State High Court (Civil Procedure Rules 1987 provides:

“Proceeding may be begun by an originating summons where:

(a) the sole principal question at issue is, or is likely to be one of construction of written law or of any instrument made under any written law of any deed, will contract or other document or some question of law.

(b) There is unlikely to be any substantial dispute of fact.”

The trial court in its ruling at page 168-169 of the record said:

“Thus an order of this Court directing all the defendants in this case who are the tenants at 61, Ikwerre Road, Diobu, Port Harcourt to pay their arrears of rents and mesne profits into the High Court Registry, Port Harcourt forthwith pending the determination of Appeal No. CA/PH/134/89 - Attorney General Rivers State & Another v Obi Eze and in default of such payment to deliver up possession of the premises to the plaintiff.

It is also the order of this court that the money as paid into Court

should be used to open a Savings Account either in U.B.A. Plc., Main Branch, Port Harcourt or at any of its branches in Port Harcourt or Union Bank Plc. Or First Bank Plc., Port Harcourt.

*The rents paid should be deposited for the benefit of whosoever is
B adjudged to claim the money as between the plaintiff S. A. I. Ossai and
Obi Eze at the determination of the Appeal CA/PH/134/89.*

*It is further order that the Plaintiff in this case should take
C possession of any or all the rooms, stores or shops that is vacant and if
another tenant or tenants move in money so collected as rent which after
necessary renovation of the same the balance of the rent so collected
should be deposited with the Court for the benefit of who amongst the is
D adjudged the owner of the property or who should claim the money at the
determination of the appeal.”*

*It seems to me that much as the plaintiff and the trial court might
have had good intentions, it was still necessary that only the procedure
which guaranteed to the parties a full ventilation of their defence should
E have been employed. The entitlement to rents on a property is a right
flowing to the landlord in a landlord and tenant relationship. The defendants
each had independent holdings and had not one collective tenancy. It is
therefore, wrong to rope all of them into one suit as if they jointly occupied
their apartments in the building as the tenant. Even a tenant who has
F defaulted in the payment of rents still has to be ejected by the proper
procedure, which necessitates serving statutory notices.*

*I am of the view that the plaintiff/appellant was wrong to have used
an originating summons in initiating the action. No doubt, the procedure
G by originating summons ensures a quick disposal of the suit but it may also
unfairly inhibit a defendant from ventilating fully his defence in a conten-
tious matter.*

*I would also dismiss this appeal with N10,000. 00 as cost in favour
of the respondents.*

H

ONNOGHENJSC

*I have had the benefit of reading in draft, the lead judgment of my
learned brother, mohammed JSC just delivered, I agree with his reasoning*

and conclusion that the appeal is without merit and ought to be dismissed.

It is not disputed that the appellant and one Chief Uche Okafor who sued as attorney for obi eze have been disputing in court, the ownership of the property at No. 61 Ikwere Road, Port Harcourt which resulted in appeal No. CA/PH/134/89 before the Port Harcourt Division of the court of Appeal. While the appeal was pending, appellant commenced an action by way of originating summons against the respondents who are tenants in the said Mo.61 ikwere Road, Port Harcourt to recover possession and arrears of rent. Appellant did not join Chief Okafor with whom he has been battling for ownership of the property. The trial court subsequently refused an application by Chief Okafor to be joined in the proceedings. The court also refused to admit a counter affidavit by the respondents before proceeding to enter Judgment for the appellant. The trial judge again, in circumstances that are not dear from the record, proceeded to rely on a purported exhibit A which was neither tendered in the proceedings nor exhibited to the affidavit in support of the originating summons to enter judgment for the appellant.

The respondents were not satisfied with that judgment and therefore appealed to the court of Appeal which allowed the appeal, primarily, on the ground that the proceedings being hostile, originating summons is not the proper mode of commencing such action. .

There is also the fact that Chief Okafor did appeal against the order refusing his application for joinder which appeal the appellant considers to be incompetent and applied, by way of preliminary objection to strike same out. From the facts, it is clear that the interlocutory appeal, whether competent or otherwise, has nothing to do with the substantive appeal in which the said Chief Okafor is not a party and therefore cannot, in law, affect the hearing and determination thereof.

I hold the view that the Court of Appeal is right in allowing the appeal and remitting the case to the High Court of Rivers State to be dealt with by another judge. Originating summons, even though one of the modes of commencing an action in the High court as recognised by the Rules of that Court, is not suitable for use in hostile proceedings where the facts are in dispute or likely to be In dispute. In the present case, the issue of ownership

of the property in question is still outstanding between appellant and Chief Okafor. What the originating summons sought to do is not a resolution of dispute involving questions of law which could have been most appropriate having regards to decided authorities such as *Doherty v. Doherty* (168) NWLR 241 at 242; *New Nigeria Bank Ltd v. Alakija* (1978) 9-10 S.C.59; Oloyo VS. Alegbe (1983) 2 SCNLR 35 at 67; *Olumide v. Ajayi* (1997) 8 NWLR (pt.517) 433 at 442; *Alagunbade III v. Osunbade* (2001) 16 NELR (pt.738) 126 at 171,181. Apart from the dispute as to ownership of the property in issue, there is also the dispute as to what rents the respondents have paid and what is in arrears. These have to be settled by pleadings and proved by evidence at the trial.

On the striking out of the preliminary objection of the appellant by the Court of Appeal, I hold the view that the court was right in doing so particularly as that objection is grossly irrelevant to the determination of the substantive appeal, the objection being relevant only to the interlocutory appeal by Chief Okafor who is not a party to the substantive appeal in which the objection was filed. I hold the further view that the striking out of that objection has not occasioned a miscarriage of justice since appellant still has the right to raise same when the appropriate appeal comes to be heard, it is therefore clear that appellant has not been shut out in fact, the filing of that objection in the substantive appeal in which Chief Okafor is not a party is an attempt at creating confusion in the proceedings which should not be encouraged at all.

On the issue of breach of fair hearing, I agree with the learned counsel for the respondents that appellant was duly heard by the lower court before granting the motion for an order restoring the appeal, erroneously struck out, to the cause list of that court. The record shows that learned counsel for appellant opposed the application to relist the appeal which the lower court overruled in its ruling at page 253 of the record.

In conclusion I too find no merit in the appeal which is accordingly dismissed. I abide by all consequential orders made by my learned brother MOHAMMED JSC In the lead Judgment including the order as to costs.
Appeal dismissed.