

SUPREME COURT OF NIGERIA
17TH FEBRUARY, 2006. SC. 46/2001
CORAM:- S. M. A. BELGORE A. I. KATSINA-ALU, U. A.
KALGO, A. O. EJIWUNMI, W. S. N. ONNOGHEN, JJSC

CHIEF L. L. B. OGOLO APPELLANT
AND	
JOSEPH T. OGOLO RESPONDENT

APPEALS - Interference - Discretion of trial court - Where properly exercised - Appellate court will not interfere therewith (H1)

JUDGMENTS - Finality of - Where a judgment is given on the merit - And is a final judgment - It can only be challenged by appeal (H2)

JUDGMENTS - Revocation of - Default judgment - Where judgment was given in default of defence - The trial judge can set it aside (H3)

JUDGMENTS - Default judgment - Considerations court will make - In setting aside judgment given in default of defence - Includes whether the exhibited statement of defence - Shows the case to be unsupportable (H4)

APPEALS - Default Judgment - Trial Court's failure - To consider the defence - In refusing to set aside its default judgment - Justified Court of Appeal's intervention (H5)

ACTIONS - Reliefs - Declaratory relief - Cannot be granted without plaintiff leading evidence - Even if the claim was admitted (H6)

JUDGMENTS - Finality - Determining whether a decision is final or interlocutory - Is by looking at the nature of the order made - And not the nature of the proceedings (H7)

JUDGMENTS - Finality - A decision that finally determines the parties'

rights - Is final - Though given in an interlocutory application (H8)

APPEALS - Leave of court - Miscarriage of justice - Appeal from a final decision of trial court - Is as of right needing no leave - And justice is not violated - By lower court's failure to determine this issue (H9)

FACTS

Before the Rivers State High Court, the plaintiff/appellant filed an action against the defendant/respondent claiming that he is the duly elected and recognized Chief of Main Ogolo House and head of Dieperi section of Opobo town. Appellant also claimed a perpetual injunction against the respondent. The respondent entered appearance in the High Court and filed a notice of preliminary objection challenging the competence of the action on the grounds that it was frivolous, vexatious and an abuse of court's process. The case proceeded in a manner that appellant was able to obtain judgment in default of defence upon a motion filed by him. Respondent filed a motion to set aside the said default judgment and attached his statement of defence to the motion.

The trial judge in its ruling refused to set aside the default judgment, and did not consider the attached statement of defence. Respondent's appeal to the Court of Appeal was allowed and the matter was remitted to the Trial Court to be dealt with according to law. Being dissatisfied, appellant has now appealed to the Supreme Court.

ISSUES FOR DETERMINATION

“(a) Whether the lower court adopted the correct approach in determining the appeal challenging the exercise of judicial discretion by the trial court and, if not whether the approach occasioned miscarriage of justice to warrant interference by the Supreme Court in the circumstances (original grounds 1, 2, 3, 4 and 5)

(b) Whether the lower court occasioned miscarriage of Justice by ignoring the preliminary objection as to The competency of the substantive appeal in considering the merit vel non of the appeal (Additional ground 6).”

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

APPEALS - Interference - Discretion of trial court

1. The law is settled that a discretion properly exercised by trial court will not be lightly interfered with by an appellate court even if the appellate court was of the view that it might have exercised the discretion differently. It is only when a trial court exercised its discretion upon a wrong principle or mistake of law or under a misapprehension of the facts or took into account irrelevant or extraneous matters or excluded relevant matters thereby occasioning injustice, that an appellate court will not abdicate its duty to interfere with the exercise of that discretion in order to prevent injustice - see *Oyejanmi v. NEPA* supra at 438 cited and relied upon by both counsel. (p. 680 C)

Where a judgment is given on the merit

2. It is settled law that a judgment given at the end of a normal trial, after hearing evidence of both parties and submissions of counsel on the relevant issues of facts and law, is on the merit of the action and also a final judgment which the court concerned is incapable of setting aside except for fundamental defects that go to the jurisdiction of the court.

Where the judgment is final and the court that enters it has no jurisdiction to set same aside having thereby become functus officio, the only way to challenge it or remedy any defect therein is by appeal to a superior court - see *Alapa v. Sanni* (1967) NMLR 397. (p. 681 A)

JUDGMENTS - Revocation of - Default judgment

3. In the instant case, the judgment of 8th October, 1996 by the trial court was a judgment in default of defence and therefore not a final judgment since both parties were not heard on the merits of the case, in such a case, the rules of court particularly order 27 Rule 10 of the applicable High Court Rules provides the procedure for the setting aside of a judgment not given on the merits by the court that gave it. According to the decision in *Evans v. Bartlam* (1937) A.C 473 at 480, “*the principle obviously is that unless and until the court has pronounced a Judgment upon the merits or toy consent, it is to have the power to revoke the expression of its coercive*

power when that has only been obtained by a failure to follow any of the rules of procedure." (p. 681 D)

Default judgment - Considerations court will make

- B 4. The crucial question that necessarily follows is: what are the relevant considerations upon which the court relies in deciding whether or not to grant an application to set aside its judgment given in default of defence? These have been laid down by this court in the case of Williams v. Hope Rising Voluntary Funds Society (1982) 1-2 S.C 145 AS follows:-
- C
1. The reason for the default in filing the defence
 2. Whether there has been undue delay in making the application so as to prejudice the respondent;
 3. Whether the respondent would be prejudiced Or embarrassed
- D upon an order for rehearing being made so as to render it inequitable to permit the case to be re-opened and,
4. Whether the applicants' case is manifestly unsupportable.

From the above, it is very clear and I hereby hold that for the court

E to exercise its discretion judicially and judicious with regards to an application to set aside a judgment given in default of a Statement of Defence one of the matters it must consider is whether the applicant's case is manifestly unsupportable having regards to the proposed statement of

F Defence exhibited to the affidavit in support of the application to set aside the said default judgment. An applicant who fails or neglects to exhibit a proposed Statement of Defence to an application for an order to set aside a judgment in default of defence cannot be granted that indulgence because

G he must satisfy the court that he has a defence on the merit before he can be allowed in to defend the action. (p. 681 F)

APPEALS - Default Judgment - Trial Court's failure

5. I therefore agree with the finding of the lower court at page 123 that:
- H *"In the instant case, the appellant attached his Statement of Defence to the affidavit in support of the motion to set aside the judgment, yet the learned trial judge shut his eyes to it....."*

The failure or neglect of the trial court to look at that defence so as

to determine whether the case of the applicant is manifestly unsupportable made it necessary, in fact imperative, for the lower court, being a court designed to ensure substantial justice to parties, to look into the issue, which it did.

The lower court therefore found it necessary to interfere with the trial court's exercise of its discretion in refusing the application to set aside its judgment in default of defence and I hold the view that the lower court is right in so doing; particularly as the trial court failed to act judicially and judiciously and also failed to take into consideration the very relevant statement of Defence exhibited as exhibit Ogolo 1 to the affidavit in support of the application before it. I also hold that it is in the interest of justice for the lower court to have so interfered with the said ruling of the trial court. (p. 683 C / H)

Declaratory relief - Cannot be granted without evidence

6. It must be noted that the reliefs claimed by the respondent at the trial court and which were granted in the default judgment, included a declaratory relief. The law is settled that such a relief cannot be granted without oral evidence by the plaintiff even where the defendant expressly admitted same in the pleadings, the said relief being equitable in nature. When looked at from that angle it becomes very clear that the trial judge was under a misconception of the law when he granted the declaratory judgment in default of Statement of Defence thereby rendering the said judgment liable to be set aside upon proper application to that effect.

In conclusion I resolve the issue under consideration against the appellant. (p. 684 B)

Determining whether a decision is final or interlocutory

7. I agree with learned counsel for the respondent that the correct test in determining whether a decision is final or interlocutory is to look at the nature of the order made rather than the nature of the proceeding resulting in the order. When viewed in that way it becomes obvious that a decision reached in an interlocutory application may be final if it disposes finally of the rights of the parties, having no further reference to that court on the

matter in which it has delivered its decision. For instance a decision by a court refusing an application to transfer a case is a final decision since it has finally determined the rights of the parties as to whether or not to transfer the case. (p. 687 A)

B

A decision that finally determines the parties' rights

8. In the instant case I hold the view that as soon as the trial court refused to grant the application for an order setting aside its judgment of 8/10/96, that decision finally determined the rights of the parties as to whether or not to set aside the said default judgment, thereby having no further reference to itself on the matter in which it has delivered its decision. It does not, therefore matter that the decision arose from an interlocutory application; the decision determined the rights of the parties to the particular issue in dispute between the parties, in this case the issue as to whether or not to set aside the judgment in default of defence. (p. 687 C)

APPEALS - Leave of court - Miscarriage of justice

9. I therefore hold that the decision of the trial court refusing to set aside the judgment of 8/10/96 in default of defence being a final decision, the present respondent does not need leave of court to appeal against it to the Court of Appeal particularly as section 220(1) (a) of the 1979 constitution grants the respondent the right to appeal against that decision as of right, in other words, the respondent does not need leave of court to appeal against that decision whether the ground(s) of appeal is (are) of mixed law and facts or of facts alone. That being the case, I hold the view that the Court of Appeal had jurisdiction to hear and determine the said appeal and in the circumstance no miscarriage of justice has been occasioned by that court not delivering a ruling on the preliminary objection of the present appellant that the appeal was incompetent on the ground that no leave of court was first had and obtained before filing the said appeal.

I therefore resolve the second issue also against the appellant.

(p. 687 G)

REPRESENTATION

Dr. J. O. Ibik, SAN for the appellant with him is I. G. Ibik (Mrs.).
E. G. Ukala, SAN for the respondent with him are M. S. Agwu Esq. and
O. M. Longe (Miss)

B

CASES REFERRED TO

Alapa v. Sanni (1967) NMLR 397
Evans v. Bartlam (1937) A.C 473 at 480
Williams v. Hope Rising Voluntary Funds Society (1982) 1-2 S.C 145 C
Omonuwa v. Oshodi (1985) 2 NWLR (pt.10) 924 at 937
Ebokam v. Ekwenibe & Sons Trading Co. Ltd. (1999) 10 NWLR (pt. 623)
242 at 254
Blay v. Solomon (1947) 12 WACA 175
Ude v. Agu (1961) 1 SCNLR 98; (1961) All NLR 65 D
Chike Obi v. DPP (NO. 2) (1961) All NLR 458
Folola v. UBN Plc (2005) 7 NWLR (pt. 924) 405 at 418 - 419
UBA v. Akinsanya (1986) 7 S.C 233
Western Steel Works v. Iron & steel Workers union (1986) 3 NWLR E
(pt.30) 617
Ezeobi v. Abang (2000) FWLR (pt. 56) 652 at 661
Bello v. Eweka (1981) 1 S.C 101 at 103
Wallersteiner v. Moir (1974) 3 Ad Er. 217 at 251 F
United spinners Ltd. v. Chartered Bank Ltd. (2001) 14 NWLR (pt. 732)
195 at 219 - 220

STATUTE REFERRED TO

Constitution of the Federal Republic of Nigeria, 1979 ss. 220(1), 221(1) G
& 277

LEAD JUDGMENT BY ONNOGHEN.JSC

H

This is an appeal against the judgment of the Port Harcourt division
of the Court of Appeal in appeal No. CA/PH/65/98 delivered on 11th May,
2000 in which it reversed the ruling of the trial court refusing to set aside

a default judgment in favour of the plaintiff (now appellant).

The appellant as plaintiff, instituted suit NO. PHC/851/93 against the defendant now respondent, claiming the following reliefs:-

(a) A declaration that the plaintiff is the duly elected and recognized
B chief of Main Ogolo House and head of Dieperi section of Opobo town in Andoni/Opobo Local Government Area of the Rivers State; and

(b) a perpetual injunction restraining the defendant by himself, his
C servants, agents and privies from parading or holding out himself (the defendant) whether in Port Harcourt or elsewhere as the Chief of Main Ogolo House and/or Head of Dieperi section of Opobo Town in Andoni/Opobo Local Government Area of the Rivers State or howsoever acting
D or purporting to act or assert any right to act as such Chief of main Ogolo House and/or Head of Dieperi Section of Opobo town aforesaid during the incumbency of the plaintiff on the said Chieftaincy stool.

The respondent entered appearance in the High Court and filed a Notice of Preliminary objection challenging the competence of the action on the grounds that it was frivolous, vexatious and an abuse of process.
E Eventually appellant regularized his statement of claim but the respondent did not file any Statement of Defence making it possible for appellant to file a motion in April, 1996 for an order for judgment in default of a statement of Defence, which notice was duly served on the respondent.
F At the time of filing the motion for judgment, the preliminary objection of the respondent on the jurisdiction of the court to entertain the action was still pending. However on 8th October, 1996 the learned trial judge without inviting arguments on the objection struck out the same while ruling on an application for adjournment. That action made it possible for the said court
G to hear and determine the motion for judgment in default of defence on the same day, 8th October, 1996. The court also refused , an application for adjournment by counsel for the respondent to the following day after striking out the objection.

H Respondent then filed a motion to set aside the judgment in default on the 11th day of October, 1996. Meanwhile on the 8th day of October, 1996 respondent had filed a Statement of Defence, a copy of which was exhibited to the affidavit in support of the motion to set aside the judgment

and thereon marked as exhibit OGOLO 1. The trial judge failed to consider the said Statement of Defence in its ruling refusing the application to set aside the judgment. The respondent was dissatisfied with that ruling and appealed to the Court of Appeal which overruled the trial court and remitted the matter to that court to be dealt with according to law. Appellant is dissatisfied with that judgment and has appealed to this court. B

Learned senior counsel for the appellant, Dr. J. O. IBIK, SAN, in the appellant's brief of argument deemed filed on 2/6/03 submitted two issues for the determination of the appeal. The issues are: C

“(a) Whether the lower court adopted the correct approach in determining the appeal challenging the exercise of judicial discretion by the trial court and, if not whether the approach occasioned miscarriage of justice to warrant interference by the Supreme Court in the circumstances (original grounds 1,2,3,4 and 5) D

(b) Whether the lower court occasioned miscarriage of Justice by ignoring the preliminary objection as to The competency of the substantive appeal in considering the merit vel non of the appeal (Additional ground 6).” E

Arguing issue 1, learned senior counsel stated that Order 27 Rule 10 of the Rules of court under which respondent brought the application confers on the trial court discretion as to whether or not to set aside the default judgment. Learned counsel then referred to the issue for determination in the lower court as formulated by the counsel for the appellant therein and the one formulated by the lower court and submitted that the dispute between the parties in that court had nothing to do with the issue as to whether or not the defendant ought to have been allowed “to put in his defence” as the lower court seems to have dwelt upon in arriving at its decision to allow the appeal. Referring the court to pages 122 to 124 learned senior counsel submitted that the lower court erroneously decided the appeal as if the issue in controversy was an application by the defendant for enlargement of time within which to file a defence whereas no such issue was presented; that at the time judgment was entered, neither the respondent (defendant) nor his counsel said anything about the filing of a Statement of Defence neither was there any application before that court F G H

for leave to file a statement of Defence out of time; that the affidavit in support of the motion for judgment was therefore unchallenged. Learned senior counsel submitted further that the sole ground of appeal before the lower court did not complain about refusal to let in defence, thereby rendering the opinion of the lower court in the pages of the judgment earlier referred to irrelevant for the determination of the issue before that court, and that this court ought to disregard same relying on *IWEKA v. SCOA (NIGERIA) LTD.* (2000) 7 NWLR (pt. 664) 325.

Learned counsel then submitted that the principles establishing the correct approach to be adopted in reviewing exercise of judicial discretion on appeal are as stated by the Supreme Court in the case of *University of Lagos v. Aigoro* (1985) 1 NWLR (pt.1) 143; *Enekebe v. Enekebe* (1964) 1 All NLR 102; *Demuren v. Asuni* (1977) 3 S.C 91; *Solanke v. Ajibola* (1968) 1 All NLR 46; *Ngwu v. Onuigbo* (1999) 13 NWLR (pt. 636) 512 and *Oyekanmi v. N.E.P.A* (2000) 15 NWLR (pt. 690) 414. Learned senior counsel further submitted that since the lower court took a manifestly wrong view of the case presented at the trial court in arriving at its decision, this court ought to set same aside; that it is not correct, as stated by the lower court, that the trial court closed its eyes to the Statement of Defence exhibited to the affidavit in support of the motion to set aside the default judgment because at page 61, the trial judge did comment on the issue; that the conduct of the party applying to set aside judgment in default is always a relevant consideration in dealing with such an application since the relief is equitable and that he who comes to equity must come with clean hands, learned counsel further submitted; that it is not correct that a Statement of Defence was filed before the court resumed sitting on 8th October, 1996 neither was the attention of the trial court drawn to that fact; that the trial court considered all the relevant principles applicable to the exercise of its discretion and found no merit in the application and that the lower court erred in reversing that ruling. Learned S.A.N then urged the court to resolve the issue in favour of the appellant.

On his part, learned counsel for the respondent, E.G. UKALA Esq in the respondent's brief filed on 19/9/03 submitted that the argument of learned senior counsel for the appellant on the issue is misconceived, the

law being that a Court of Appeal is entitled to interfere with the exercise of discretion of the trial court in certain circumstances such as:-

- (a) Where the lower court failed to act judicially and/or judiciously.
- (b) where the lower court acted under a misconception of the law or under misapprehension of the facts;
- (c) where the lower court in the exercise of its discretion has been influenced by irrelevant matters or failed to take into account relevant matters;
- (d) where it is necessary in the interest of justice to interfere.

For the above statement of the law, learned counsel cited and relied on the following cases - Emekebe v. Enekebe (supra); oyekanmi v. N.E.P.A (supra); United spinners Ltd. v. Chartered Bank Ltd (2001) 14 NWLR (pt. 732) 195 at 219 - 220, and Eze v. A- G Rivers State (2001) 18 NWLR (pt. 746) 524 at 545.

Learned counsel then submitted that the lower court was right in interfering with the exercise of discretion by the trial court since the aim is to achieve substantial justice in the case; that the courts have always leaned in favour of hearing cases on the merit and that this has become the proper way of exercising judicial discretion; that the lower court intervened to ensure that the parties had their dispute determined on the merit.

Learned counsel then referred to the finding by the lower court at pages 122 to 124 that the trial judge was not fair to the respondent by giving judgment in favour of the appellant in this court without hearing his own side of the case; that the lower court reviewed the affidavit in support of the motion to set aside and found that there was sufficient reason to let the defendant in to defend the action particularly as it found that respondent has a defence on the merit; that the lower court was therefore not in doubt that the trial court failed to act judicially and/or judiciously and that it was necessary in the interest of justice to interfere with the wrongful exercise of discretion by the trial judge.

Submitting further, learned counsel stated that the subject matter of the action was a declaration and that learned counsel for the appellant at page 22 sought; to be allowed to adduce evidence before judgment could

be entered but the trial judge refused the application and proceeded to enter a declaratory judgment without the benefit of oral evidence, contrary to decided authorities such as *Bello v. Eweka* (1981) 1 S.C 101 at 103; *Wallersteiner v. Moir* (1974) 3 Ad Er. 217 at 251; that the trial court thus acted upon a misconception of the law thereby justifying the interference by the lower court. Learned counsel then urged the court to resolve the issue against the appellant.

Both counsel agree that the appeal is based upon wrongful interference by the lower court in the exercise of discretion by the trial court in an application for an order setting aside the judgment of the trial court entered on 8th October, 1996. **The law is settled that a discretion properly exercised by trial court will not be lightly interfered with by an appellate court even if the appellate court was of the view that it might have exercised the discretion differently. It is only when a trial court exercised its discretion upon a wrong principle or mistake of law or under a misapprehension of the facts or took into account irrelevant or extraneous matters or excluded relevant matters thereby occasioning injustice, that an appellate court will not abdicate its duty to interfere with the exercise of that discretion in order to prevent injustice - see *Oyejanmi v. NEPA* supra at 438 cited and relied upon by both counsel.**

One of the pivots of appellant's argument is that the lower court, in considering the issue before it as to whether or not the trial court wrongfully exercised its discretion in refusing to set aside its judgment in default of defence, erroneously considered and determined the appeal as if the application at the trial court was one to file a defence out of time. Looking closely at the facts of the case and the law applicable thereto I hold the view that the learned Senior counsel is in error in so submitting. Both parties agree that the application before the trial court was for an order setting aside the default judgment entered by that court on 8th October, 1996; that exhibited to the affidavit in support of that application is a statement of Defence on the merit of the action said to have been filed on 8/11/96 - the very day the trial court entered the default judgment. The record shows clearly that the trial judge, in deciding whether to grant the

application or not did not consider the defence of the respondents so as to determine whether the statement of Defence discloses any defence to the action before refusing the application.

It is settled law that a judgment given at the end of a normal trial, after hearing evidence of both parties and submissions of counsel on the relevant issues of facts and law, is on the merit of the action and also a final judgment which the court concerned is incapable of setting aside except for fundamental defects that go to the jurisdiction of the court.

Where the judgment is final and the court that enters it has no jurisdiction to set same aside having thereby become functus officio, the only way to challenge it or remedy any defect therein is by appeal to a superior court - see *Alapa v. Sanni* (1967) NMLR 397. In the instant case, the judgment of 8th October, 1996 by the trial court was a judgment in default of defence and therefore not a final judgment since both parties were not heard on the merits of the case, in such a case, the rules of court particularly order 27 Rule 10 of the applicable High Court Rules provides the procedure for the setting aside of a judgment not given on the merits by the court that gave it. According to the decision in *Evans v. Bartlam* (1937) A.C 473 at 480, “the principle obviously is that unless and until the court has pronounced a Judgment upon the merits or toy consent, it is to have the power to revoke the expression of its coercive power when that has only been obtained by a failure to follow any of the rules of procedure.”

The crucial question that necessarily follows is: what are the relevant considerations upon which the court relies in deciding whether or not to grant an application to set aside its judgment given in default of defence? These have been laid down by this court in the case of *Williams v. Hope Rising Voluntary Funds Society* (1982) 1-2 S.C 145 AS follows:-

1. The reason for the default in filing the defence
2. Whether there has been undue delay in making the application so as to prejudice the respondent;
3. Whether the respondent would be prejudiced Or embar-

passed upon an order for rehearing being made so as to render it inequitable to permit the case to be re-opened and,

4. Whether the applicants' case is manifestly unsupportable.

From the above, it is very clear and I hereby hold that for the court to exercise its discretion judicially and judicious with regards to an application to set aside a judgment given in default of a Statement of Defence one of the matters it must consider is whether the applicant's case is manifestly unsupportable having regards to the proposed statement of Defence exhibited to the affidavit in support of the application to set aside the said default judgment. An applicant who fails or neglects to exhibit a proposed Statement of Defence to an application for an order to set aside a judgment in default of defence cannot be granted that indulgence because he must satisfy the court that he has a defence on the merit before he can be allowed in to defend the action.

In the instant case, the trial court at page 61 stated, inter alia, in relation to the Statement of Defence:

"In the instant case, the defendant was present when I gave judgment against him in default of pleading and his lawyer who later appeared did not even orally ask for extension of time to file the defence or showed to the court the copy of the defence that has been filed if the Registry Copy had got stuck somewhere there without reaching the court's file."

It is clear from the record that the fact that a Statement of Defence was filed in the registry of the trial court on the date the default judgment was entered - that is 8/10/96 - is not disputed because the Statement of Defence so filed was exhibited to the affidavit in support of the application to set aside the judgment vide paragraph 4 and marked exhibit "OGOLO I" and the official stamp of that court thereon at page 31 shows clearly that it was filed on 8/10/96. That being the case, even if the attention of the trial judge was not drawn to the fact that such a Statement of Defence was so filed, as claimed by the trial court, before the entry of the default judgment, it is not disputed that the said Statement of Defence was clearly and legally brought before the court as an exhibit in the application to set aside the

judgment and therefore ought to have been considered by that court in the determination of that application. However, from the passage quoted from the ruling of that court *supra*, it is very clear that the court failed and or neglected to consider the said defence, the reason probably being as stated by that court at page 63 thus:-

“..... having delivered a considered final judgment on 8/10/96, I will be sitting as a Court of Appeal on my own judgment if I grant this application. I am functus officio. The application to set aside the judgment of 8/10/96 in default of pleadings is dismissed.”

I therefore agree with the finding of the lower court at page 123 that:

“In the instant case, the appellant attached his Statement of Defence to the affidavit in support of the motion to set aside the judgment, yet the learned trial judge shut his eyes to it.....”

The failure or neglect of the trial court to look at that defence so as to determine whether the case of the applicant is manifestly unsupportable made it necessary, in fact imperative, for the lower court, being a court designed to ensure substantial justice to parties, to look into the issue, which it did. In the processes of looking into the issue, the lower court found, *inter alia*, as follows:-

“..... I am of the clear and firm view that the learned trial judge was not fair to the appellant by giving judgment in favour of the respondent against him without hearing his own side of the case. This is more so when the action is predicated on who is the recognized Chief of Main Ogolo House and Head of Diepiri Section of Opobo Town as between the respondent and the appellant.

I have looked at the affidavit in support of the motion and I am quite satisfied that the reason given in it is cogent to allow him to put in his defence Looking at the defence, I am also satisfied that it raised a defence on the merits. Where a defendant is able to show that he has a defence on the merit, judgment should not be entered against him. He should be granted extension of time within which to file such a defence.....”

The lower court therefore found it necessary to interfere with the trial court’s exercise of its discretion in refusing the application

to set aside its judgment in default of defence and I hold the view that the lower court is right in so doing; particularly as the trial court failed to act judicially and judiciously and also failed to take into consideration the very relevant statement of Defence exhibited as exhibit Ogolo 1 to the affidavit in support of the application before it. I also hold that it is in the interest of justice for the lower court to have so interfered with the said ruling of the trial court.

It must be noted that the reliefs claimed by the respondent at the trial court and which were granted in the default judgment, included a declaratory relief. The law is settled that such a relief cannot be granted without oral evidence by the plaintiff even where the defendant expressly admitted same in the pleadings, the said relief being equitable in nature. When looked at from that angle it becomes very clear that the trial judge was under a misconception of the law when he granted the declaratory judgment in default of Statement of Defence thereby rendering the said judgment liable to be set aside upon proper application to that effect.

In conclusion I resolve the issue under consideration against the appellant.

On issue NO. 2, learned senior counsel for the appellant submitted that the failure or neglect of the lower court to determine the preliminary objection as to the competency of the appeal robbed the appellant of his constitutionally guaranteed right to fair hearing and thereby occasioned a miscarriage of justice. Referring to the sole ground of appeal filed before the lower court, learned senior counsel submitted that the said ground being of mixed law and fact and the decision appealed against not being, in the opinion of learned senior counsel, a final decision, leave of court was required as prescribed by section 221(1) of the Constitution of the Federal Republic of Nigeria, 1979 (hereinafter referred to as the 1979 constitution), and that the failure to so obtain leave rendered the appeal incompetent and deprived the lower court of the jurisdiction to entertain same. Finally learned senior counsel urged the court to decide the question of the competency of the appeal which the lower court failed to do based on the facts on record and resolve the issue in favour of the appellant and allow

the appeal.

On his part, learned counsel for the respondent conceded that the ruling on the preliminary objection was not contained in the judgment of the lower court and that that failure constitutes an error on the part the lower court since any party who presents an application before a court is B entitled to have same determined one way or the other. Learned counsel also conceded that it is proper for this court to determine the issue rather than remit the matter to the lower court for resolution.

However, learned counsel submitted that the failure to so rule C on the objection has not occasioned a miscarriage of justice particularly as the objection was misconceived since the ruling appealed against was not interlocutory but final decision of the trial court. That the correct test in determining whether a decision is final or interlocutory is to look at the nature of the order made rather than the nature of the proceedings resulting D in the order, relying on *UBA v. Akinsanya* (1986) 7 S.C 233; *Western Steel Works v. Iron & steel Workers union* (1986) 3 NWLR (pt.30) 617; *Ezeobi v. Abang* (2000) FWLR (pt. 56) 652 at 661. Learned counsel further submitted that since the decision appealed against finally disposed of the E rights of the parties, having no further reference to the court on matter in which it has delivered its decision, the decision is a final one for which no leave is required; that no more reference to the trial court is required on the matter whether or not to set aside the default judgment and that under the F provisions of section 220(1) @ of the 1979 Constitution no leave is required to appeal. Learned counsel then urged the court to resolve the issue against the appellant and dismiss the appeal.

There is no dispute that the lower court did not deliver a ruling on G the preliminary objection as to whether the appeal is competent, which ruling was reserved to be delivered along with the judgment in the appeal. Both parties concede this fact. Both parties equally concede that this court can and ought to determine the issue involved particularly since the same affects the jurisdiction of the lower court to determine the appeal. H

In determining the issue, it is my view that one ought to determine whether the failure of the lower court to so determine the preliminary objection has resulted in a miscarriage of justice, it is also my view that to

determine whether a miscarriage of justice occurred one has to look at the preliminary objection to determine whether the decision appealed against is interlocutory and thereby needing leave of court or a final decision of that court which does not need leave to appeal, if it is determined that the decision was interlocutory then a miscarriage of justice must have occurred in the failure of the lower court to rule on the objection. This will definitely lead us to a consideration of which decision is interlocutory and which is final.

The two sections of the 1979 Constitution relied upon by both counsel provide as follows:-

section 220(1) (a)

“An appeal shall lie from decisions of a High Court to the Court of Appeal as of right in the following cases -

(a) final decisions in any civil or criminal proceedings before the High Court sitting at first instance;”

While section 221(1) of the same Constitution states Thus:-

“221(1) subject to the provisions of section 220 of this Constitution, an appeal shall lie from decisions of a High Court to the Court of Appeal with the leave of that High Court or the Court of Appeal.”

The word “*decision*” is defined in section 277 of the 1979 constitution as follows:

““decision” means, in relation to court, any determination of that court and includes judgment, decree, order, conviction, sentence or recommendation.”

Now the following facts are relevant and are not disputed.

(a) That the trial court entered a judgment against the present respondent on 8/10/96 in default of defence; and,

(b) The respondent presented an application before that court for an order setting aside that default judgment which was refused.

The question then is whether that decision refusing the application to set aside the said judgment is interlocutory so as to require leave of court to appeal or final for which no leave is required as provided by the Constitution, in other words, when is a decision of a court said to be interlocutory and when is it final?

I agree with learned counsel for the respondent that the correct test in determining whether a decision is final or interlocutory is to look at the nature of the order made rather than the nature of the proceeding resulting in the order. When viewed in that way it becomes obvious that a decision reached in an interlocutory application may be final if it disposes finally of the rights of the parties, having no further reference to that court on the matter in which it has delivered its decision. For instance a decision by a court refusing an application to transfer a case is a final decision since it has finally determined the rights of the parties as to whether or not to transfer the case.

In the instant case I hold the view that as soon as the trial court refused to grant the application for an order setting aside its judgment of 8/10/96, that decision finally determined the rights of the parties as to whether or not to set aside the said default judgment, thereby having no further reference to itself on the matter in which it has delivered its decision. It does not, therefore matter that the decision arose from an interlocutory application; the decision determined the rights of the parties to the particular issue in dispute between the parties, in this case the issue as to whether or not to set aside the judgment in default of defence -see *Omonuwa v. Oshodi* (1985) 2 NWLR (pt.10) 924 at 937 per Karibi - Whyte, JSC; *Ebokam v. Ekwenibe & Sons Trading Co. Ltd.* (1999) 10 NWLR (pt. 623) 242 at 254 per Kalgo, JSC; *Blay v. Solomon* (1947) 12 WACA 175; *Ude v. Agu* (1961) 1 SCNLR 98; (1961) All NLR 65; *Chike Obi v. DPP* (NO. 2) (1961) All NLR 458; *Folola v. UBN PLC* (2005) 7 NWLR (pt. 924) 405 at 418 - 419, etc, etc. **I therefore** hold that the decision of the trial court refusing to set aside the judgment of 8/10/96 in default of defence being a final decision, the present respondent does not need leave of court to appeal against it to the Court of Appeal particularly as section 220(1) (a) of the 1979 constitution grants the respondent the right to appeal against that decision as of right, in other words, the respondent does not need leave of court to appeal against that decision whether the ground(s) of appeal is (are) of mixed law and

facts or of facts alone. That being the case, I hold the view that the Court of Appeal had jurisdiction to hear and determine the said appeal and in the circumstance no miscarriage of justice has been occasioned by that court not delivering a ruling on the preliminary objection of the present appellant that the appeal was incompetent on the ground that no leave of court was first had and obtained before filing the said appeal.

I therefore resolve the second issue also against the appellant.

In conclusion, I find no merit in this appeal, which is consequently dismissed with costs which I assess and fix at N10,000.00 against the appellant and in favour of the respondent.
Appeal dismissed. .

D

BELGORE JSC

I read in advance the lead judgment by my learned brother, Onnoghen JSC with which I am in full agreement. I find no merit in this appeal and for reasons fully adumbrated in the lead judgment I also dismiss it with N10,000.00K costs to respondent.

KATSINA-ALU JSC

I have read before now, in draft, the judgment delivered by my learned brother Onnoghen JSC in this appeal. I entirely agree with his reasoning and conclusion. I also find no merit in this appeal. I also dismiss it with N10,000.00 costs to the Respondent.

G

KALGO JSC

I have read in advance the judgment of my learned brother Onnoghen JSC just delivered. I agree with him that there is no merit in the appeal and it ought to be dismissed. The only two issues which arose for determination in the appeal and which were mutually agreed by the parties as argued in their respective briefs, read:-

(a) *“Whether the lower court adopted the correct approach in determining the appeal challenging the exercise of judicial discretion by the trial court and, if not, whether the approach occasioned miscarriage of justice to warrant interference by the Supreme Court in the circumstances.*

(b) *Whether the lower court occasioned miscarriage of justice by ignoring the preliminary objection as to the competence of the substantive appeal in considering the merit vel non of the appeal.”*

Issue (a) which is the main issue in the appeal deals essentially with the question of setting aside the judgment of the trial court and the consideration of the defence of the respondents.

In the affidavit in support of the application filed on 24/4/96 for judgment, paragraphs 3 and 4 read:-

“(3) That I also caused the said statement of claim to be served on the said defendant/respondent on or about the 28th of February 1996.

(4) That the period allowed by the rules for the defendant/respondent to file his statement of Defence has since expired and yet neither statement of Defence has been filed nor an application for enlargement of time to file the said statement of Defence made by the said defendant/respondent to the court.

From the above, it is very clear that in this case the main ground for the application for judgment is the failure of the appellant to file his statement of defence, and the trial court granted the application and delivered judgment on 8/10/96 for the respondent.

The application to set aside the judgment delivered on 8th October 1996 in default of pleadings was filed on the 11th of October 1996, 3 days after the judgment was delivered. In the affidavit in support of the application, the respondent deposed in paragraph 4 thus :-

“4. that on 8th of October 1996, a statement of defence was filed by me in the registry of this court. The said statement of defence is herewith attached and marked Exhibit “OGOLO I”.

Exhibit ‘OGOLO I’ referred to in the above paragraph is on pages 29 - 31 of the record and it is clearly shown in the court stamp on page 31, that it was in fact filed on 8th October 1996, the very day the ruling

sought to be set aside was given.

It is also abundantly clear from the record that on the 8th of October 1996 when the motion for judgment was heard and granted, the appellant's counsel was absent and his request for adjournment in writing was refused by the learned trial judge. There was therefore no body to inform the court that a statement of Defence was filed on that day or give any reason why it was not filed in time and so the said judgment itself was given in default of appearance of the appellant. Order 27 Rule 8 (1) of the High Court of Rivers State gives the learned trial judge the power and the discretion to give judgment in default of pleading in any particular case. In this case, the statement of defence was attached to the affidavit in support of the application to set aside the judgment. There was also the act that the application was filed timorously, just 3 days after the judgment sought to be set aside. The Court of Appeal has quite properly considered these matters in my view, and came to the correct conclusion that the learned trial judge was wrong to "*shut his eyes*" to the statement of defence filed in the application; and in failing to set aside his judgment to allow issues to be contested in court on the merits. The relevant rules of court gave him the power to set aside his own judgment for good reason as in this case and he is not and cannot therefore be *functus officio* in respect thereof. See *William v. Hope Rising Voluntary Funds Society* (1982) 1 - 2 SC 145 at 154; *Bank of Baroda v. Mercantile Bank of Nigeria* (1987) 3 NWLR (pt. 60) 233 at 244.

On issue (b), there is no doubt that the Court of Appeal did not pronounce any decision on the preliminary objection as to the competence of the appeal before it even though the parties argued it before the appeal was adjourned for judgment. The issue borders on the question whether the decision of the trial court refusing to set aside its own decision was a final or interlocutory one in this case. This matter has been decided by this court in many cases and I need not repeat them here but suffice it to say that a decision of a court is final if it disposes of all the rights of the parties in the case and gives no room to go back to the same court to ask it to decide further on the same matter. See *Ebokan v. Ekweribe & Sons Trading Co. Ltd* (1999) 10 NWLR (pt. 622) 242; *Aqua Ltd v. Ondo State Sports*

Council (1988) 4 NWLR (pt. 91) 622; Akoh v. Abuk (1988) 3 NWLR (pt. 85) 696. The decision in this case was final

This is an issue of law which this court can properly deal with even though the Court of Appeal made no pronouncement on it, by virtue of the provisions of Section 22 of the Supreme Court Act 1985 as amended. B And since the decision of the trial court was final, the respondent who was appellant in the Court of Appeal, could properly appeal against the decision as of right to the Court of Appeal under Section 221 of the 1979 Constitution which he did. Therefore the failure of the Court of Appeal to pronounce on the competence of the appeal before it did not affect the substance of the appeal and did not amount to any prejudice to the appellant or any miscarriage of justice. C

For the above and more detailed reasons given by my learned brother Onnoghen JSC in the leading judgment, I also find no merit in this appeal. I dismiss it and affirm the decision of the Court of Appeal reversing that of the trial court. I abide by the consequential orders including the order of costs made in the leading judgment. D

E

EJIWUNMIJSC

I was privileged to have read in advance the draft of the judgment just delivered by my learned brother, Onnoghen JSC. For the cogent F reasons given in the said judgment for dismissing the appeal, it is also dismissed by me.

This appeal challenges the decision of the Court below upholding the refusal of the trial Court to set aside the default judgment entered against the defendant for failing to file his Statement of Defence. The G plaintiffs claims in the instant appeal before the trial Court was for

“1. a declaration that the plaintiff is the duly elected and recognized Chief of Main Ogolo House and Head of Dieperi Section of Opobo Town in Andoni/Opobo Local Government Area of Rivers State, and H

A perpetual injunction restraining the defendant by himself, his servants, agents and privies from parading or holding out himself (the defendant) whether in Port Harcourt or elsewhere as the Chief of Main

Ogolo House and/or Head of Dieperi Section of Opobo town in Andoni/ Opobo Local Government Area of Rivers State or howsoever acting or purporting to act or asserting any right to act as such Chief of Main Ogolo House and/or Head of Dieperi Section of Opobo town aforesaid during
 B *incumbency of the plaintiff of the said Chieftaincy Stool.*

2-3 *This appeal reminds me of the words of Lord Scarman in Gleaves v. Deakin & Ors; Regina v. Wells Stree Magistrate Ex Parte Deakin (1980) A.C 474 at 494 -that the appeal of this kind should properly*
 C *be “a rare bird to fly at this altitude” as litigants should not get to the level of this court merely to challenge the exercise of a trial Judge’s discretion in setting aside his own judgment delivered in the absence of one of the parties before him with a view to giving the other party opportunity of being heard unless of course, such exercise has patently resulted in the*
 D *prejudice or embarrassment of the party in whose favour the original judgment subsisted; and this usually is the case where third party rights have intervened pursuant to the original judgment. See N. A. Williams & Ors v. Hope Rising Voluntary Funds Society (1982) 1-2 S.C. 70.”*

E In the instant appeal, although the defendant filed a preliminary objection upon being served with the Statement of Claim, he failed to file and serve his Statement of Defence within the period prescribed by the Rules of Court for filing his defence. It would appear that sequel to the
 F failure of the defendant to file his Statement of Defence, the plaintiff, now respondent, filed a motion dated 24th day of April 1996 for judgment. Hearing date was fixed for the hearing of the motion, and no cognisance was taken of the preliminary objection filed by the defendant, now
 G appellant. That application was heard on 8th of October 1996. The appellant was present but was not represented by counsel. The learned trial judge on that day, 8/10/96, delivered judgment in favour of the respondent, in the face of a letter from counsel to the appellant seeking for an adjournment to the next day.

H On the 11th of October 1996, the appellant filed a motion to set aside the judgment of 10th of October 1996. The relevant paragraphs of the affidavit filed in support of the application read thus: -

“Para 4

That on the 8th of October 1996, a statement of defence was filed by me in the registry of this Court. The said Statement of Defence is herewith attached and marked Exhibit "Ogolo 1"

Para 5

That I also informed the Court that I had already filed the said statement before the Court session began on the 8th of October, 1996.

Para 6

That in the open Court, Mr. Joshua Kehinde a junior counsel in the chambers of Alhaji Fatai Aremu, my solicitor, to my hearing and in my presence informed the Court that Alhaji F. A. Osho, who is principally handling the case was yet to arrive from Abuja to Port Harcourt."

The learned trial judge as previously observed, refused to set aside the default judgment and the defendant had to appeal against the judgment of the trial Court. The Court below, after due consideration of the issues raised before it, allowed the appeal of the defendant and made the following orders:

"(i). The statement of defence attached to the supporting affidavit in the motion to set aside the judgement is to be served on the respondent within fourteen days from today.

(ii) The case is to be remitted to Rivers State High Court for assignment by the Chief Judge before another Judge for accelerated hearing and determination.

(iii) That having regard to the conduct of the appellant in the matter of filing his statement of defence, he is to pay the cost of N300.00 in Court below to the respondent while the cost of N1,000.00 is awarded in this Court to the appellant against the respondent."

Appellant in his appeal to this court against the judgment and orders of this Court raised for the determination of his appeal the following issues:

"(a) Whether the lower Court adopted the correct approach in determining the appeal challenging the exercise of judicial discretion by the trial Court and if not, whether the approach occasion miscarriage of justice to warrant interference by the Supreme Court in the circumstances (original grounds 1,2,3,4 and 5).

(b) Whether the lower Court occasioned miscarriage of justice by

ignoring the preliminary objection as to the competency of the substantive appeal in considering the merit vel non of the appeal (additional ground 6)”

With regard to issue (a), it is manifest from the perusal of the submission made in the appellant’s brief that the thrust of the argument for the appellant are two fold. These are, whether the Court did not mislead itself by considering the appeal on the basis of the refusal of the lower Court to let in the defence of the respondent. And whether the matter was properly considered as one in which the respondent was asking for leave to file a Statement of Defence. And then submitted that on account of the wrong approach of the Court below to the appeal before it, that Court exercised its discretion wrongly. The following cases were cited in support of that proposition; *University of Lagos v. Aigoro* (1985) 1 N.W.L.R. (pt.1) 143; *Demuren v. Asuni* (1977) 3 S.C. 91; *Enekebe v. Enekebe* (1964) 1 ALL N.L.R. (pt.636) 512 and *Oyekanmi v. N.E.P.A.* (2000) 15 N.W.L.R. (pt.690) 414.

I have had the opportunity of reading the relevant record of proceedings and it is in my view quite clear that the central complaint of the respondent is that the trial Court ought to have set aside its judgment in default, in view of the application before it which showed that the respondent had before the Court the Statement of Defence in support of the application that was made timeously following the default judgment. The principles that ought to guide a Court in the determination of an application to set aside its own judgment is settled and I would gratefully adopt the *Idigbe JSC in N. A. Williams & Ors v. Hope Rising Voluntary Funds Society* (supra) at page 74. It reads:

“*These were fully set out by me in I dam Ugwu & Ors v. Nwaji Aba & Ors. (1961) All NLR 43 8 [See also Adebayo Doherty v. Ade Doherty (1964) NMLR 144 at 145]. Among other things, the court must consider (1) the reasons for the applicants’ failure to appear at the hearing or trial of the case in which judgment was given in his absence, (2) whether there has been undue delay in making the application to set aside the judgment so as to prejudice the party in whose favour the judgment subsists, (3) whether the latter party (i.e. in whose favour the judgment subsists) would*

be prejudiced or embarrassed upon an order for rehearsing of the suit being made, so as to render such a course inequitable, and (4) whether the applicants' case is manifestly unsupportable, and I, respectfully, agree with the views expressed by my learned brother, My Lord, Bello SPJ, (as he then was) in Momoh v. Gulf Insurance Corporation (1975) (1) NNLR 184 at 186 that in addition to the foregoing factors the court being asked to exercise its discretion to set aside its own judgment must also be satisfied that the applicants' conduct throughout the proceedings i.e. "from the 'service of the writ upon him to the date of judgment'" has been such as to make his application worthy of a sympathetic consideration."

It is my view that as the decision of the Court below show a clear appreciation of these principles in determining the 'appeal against the appellant, I have no reason to depart from that decision of the Court below. I will therefore resolve issue (a) against the appellant. I have considered also the argument in respect of issue (b) and I must hold that the Court below was right to have interfered with the judgment of the trial Court as it did.

For the fuller reasons given in the lead judgment of my learned brother, Onnoghen JSC, I also dismiss this appeal and I award costs as ordered with all the other costs made in the said judgment.

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