

**SUPREME COURT OF NIGERIA**  
20<sup>TH</sup> APRIL 2007 SC. 154\2002  
**CORAM:- A. I. KATSINA-ALU, N. TOBI, I. F. OGBUAGU,**  
**F. F. TABAI, I. T. MUHAMMAD, JJSC**

ABAYOMI BABATUNDE ..... APPELLANT  
AND  
1. PAN ATLANTIC SHIPPING AND  
TRANSPORT AGENCIES LTD. .... RESPONDENTS  
2. MOBIL OIL (NIG.) LTD.  
3. UNITAF SHIPPING (NIG.) LTD.

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ACTIONS - Discontinuance Notice - Plaintiff has the right to discontinue his action - As a result of some factors - Such as to retain the right to relitigate the claim in due course (H1)

RULES OF COURT - Actions - Discontinuance - Notice of under O. 23 r. 1 Lagos High Court Rules - Both limbs thereof permit termination of the action - Upon proper filing and service of the Notice by the plaintiff (H2)

ACTIONS - Discontinuance - Leave of court - Where mandatory that plaintiff should apply for leave - Court shall exercise judicial discretion - As to whether to strike out or dismiss the action (H3)

ACTIONS - Discontinuance - Statement of defence - Though filed out of time by 3rd defendant - Consequences of the Notice of Discontinuance - Should be made same on all the defendants - By trial court (H4)

ACTIONS - Retrial - Consequence of a retrial or de novo order - Is as if no trial whatsoever has been had - So that earlier part heard trials - Are not part of the new records (H5)

ACTIONS - Withdrawn case - Dismissal of - By trial Court - Is wrong in

this case - Since the Rules of Court contemplated striking out - And litis contestatio was not reached by the parties (H6)

COURTS - Discretion - Appeals - Trial court's exercise of discretion - Will be disturbed by appellate court - To obviate impending miscarriage of justice (H7)

### **FACTS**

Before the Lagos State Court, the plaintiff/1st respondent filed an action against the 1st defendant/appellant and 2nd defendant/2nd respondent. It claimed inter alia, that the defendants do deliver up the sublease registered as 92/92/1923 at the Lagos Lands Registry for cancellation by the honourable court. Defendants denied the claim and filed a counter claim wherein they claimed inter alia, a declaration that the defendant is the person entitled to the statutory right of occupancy in respect of the land in dispute. Plaintiff filed a reply and defence to the counter claim. Pleadings were closed but before commencement of trial, plaintiff filed an application for summary judgment. The application was moved on 27-2-1989 and dismissed same day on the ground that triable issues were disclosed in the pleadings; the suit was adjourned for trial before Agoro, J. 1st plaintiff testified, tendered some exhibits and the matter was adjourned for his cross examination. But Agoro J., was elevated to the Court of Appeal and the proceedings commenced de novo on 6-6-1991 before Desalu J, who took ill. The case was again transferred to Adeyinka J. and eleven days after the suit was set down for trial plaintiff filed a Notice of Discontinuance of the suit against all the parties including the 3rd defendant/respondent who was joined by an order of court and had filed its defence out of time.

In a short ruling delivered on 2-9-1994, Adeyinka J., dismissed the suit against the 1st and 2nd defendants and struck it out against 3rd defendant on the basis that it had not filed its pleadings. Plaintiff appealed to the Court of Appeal, while 3rd defendant cross appealed contending that the case against it ought to have been dismissed and not struck out. The Court of Appeal varied the trial court's order from one of dismissal

to striking out the suit. Being dissatisfied, defendant/appellant has now appealed to the Supreme Court.

**ISSUE FOR DETERMINATION**

Was the court below right in striking out the suit against all the respondents instead of dismissing it having regard to the proceedings at the trial court?

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

***Plaintiff has the right to discontinue his action***

1. It is not long that we saw the antecedents giving rise to this appeal. There was a Notice of discontinuance of the suit in its entirety as against the defendants and the party joined. I think, it is the right of a plaintiff to discontinue his action if he so chooses, as the filing of same does not necessarily imply that the parties have irrevocably committed themselves to resolving their dispute by litigation. Discontinuance can arise from any of the following factors: -

(i) Where a plaintiff realizes the weakness of his claim in the light of the defence put up by the defendant.

(ii) Where plaintiff's vital witnesses are not available at the material time and will not be so at any certain future date.

(iii) By abandoning the prosecution of the case, the plaintiff could substantially reduce the high costs that would have otherwise followed after a full-scale but unsuccessful litigation or

(iv) Where the plaintiff may possibly retain the right to relitigate the claim at a more auspicious time if necessary. The procedure for discontinuance or termination of cases/suits is laid down in the various courts Rules. (p. 1639 D)

***Discontinuance - Notice of under O. 23 r. 1***

2. There is a proposition to the interpretation of the above provision by the court below. It is proffered as follows: -

*“A careful reading of the Rules shows that it could conveniently be broken into two limbs for purposes of application in this respect I agree with the appellant. That is to say, firstly, discontinuance before and*

after receipt of the defendant's defence but before taking any other proceeding in the action (save any interlocutory application). And secondly, in any other circumstance the plaintiff shall not competently do so, that is to say withdraw without leave of court. Under the 1<sup>st</sup> limb of the rule it terminates the action in fact and law beyond the point of no recall See: Chief C. C. Obienu & Ors. v. Chief K. O. Orizu & Ors. (1972) 2 ECSLR 606. The court ordinarily has to strike out the action and it is no bar to defence to a subsequent action as *litis contestatio* has not been reached while under the 2<sup>nd</sup> limb of the rule it (court) in exercise of its discretion has either to strike out or dismiss the action; under both limbs of the Rule with costs. In the event of a dismissal it is a bar to relitigation of the matter and thus opens to a likely plea of *estoppel per rem judicata*.

I have no reason to jettison the above attempt to interpret the provision of Order 23 Rule 1 of the Lagos State High Court (Civil Procedure) Rules as it accords with my own view. If anything, I am only to amplify the circumstances under both limbs. In circumstances where leave of court is not necessarily required as in limb 1, it is my humble deduction from the provision that: -

- (i) Leave of court is not required where the discontinuance is to be effected BEFORE the plaintiff is served with the statement of defence,
- (ii) Leave is not required for discontinuance even after the plaintiff has received the statement of Defence PROVIDED that in such a case, the plaintiff discontinues the action BEFORE taking any other proceedings in it EXCEPT any interlocutory application.

In the above two circumstances, for a plaintiff to discontinue he has to duly file in court and serve on the defendant(s) against whom he intends to discontinue or withdraw, as the case may be, a written notice of discontinuance or withdrawal. Once the service has been duly effected, the notice effectively terminates the action subject to the plaintiff's liability for costs of the defendants action up to the date of the discontinuance. (p. 1640 G)

### ***Discontinuance - Leave of court***

3. On the other limb of the provision of Order 23 R (1) of the Rules under

consideration, a plaintiff who wants to discontinue an action, should make an application to the court for leave to do so. He can no longer file a notice of discontinuance; otherwise such a notice is invalid and should be struck out. In such a situation the trial Judge has discretion as to whether or not to allow the plaintiff to discontinue or withdraw his claim B at that stage of the proceedings and as to whether to dismiss or strike out the claim. The discretion however must, as is always the case, be placed on the Judicial and judicious proverbial scale of Justice.

The consequence of a striking out order is that when a plaintiff C duly discontinues his action without leave, the court should merely strike out the action. It all depends on the state of the law. That is, once a litigant withdraws his action in a situation where no leave of court is required, the trial court has no option but to strike out the suit. This is because a court of law cannot force an unwilling plaintiff to continue D with an action. (p. 1642 D)

***Discontinuance - Statement of defence***

4. These averments without any doubt show that the 3<sup>rd</sup> defendant/re- E spondent filed its statement of defence though out of time. The consequences of the Notice of discontinuance that affected the 1<sup>st</sup> and 2<sup>nd</sup> defendants/respondents, who were said to have filed their statements of defence within time ought to have equally affected the 3<sup>rd</sup> defendant/ F respondent whose Statement of Defence and Counter-claim ought to be deemed as duly filed and served prior to the consideration of the Notice of discontinuance. It was an unnecessary hair splitting embarked upon by the trial court in differentiating the consequences of the Notice of discontinuance filed against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents. Be that as it G may, the court below, corrected the mistake of the trial court by holding that all the 3 defendants/respondents ought to suffer same fate as each filed it's Statement of Defence. I agree with the court below. (p. 1646 E)

***Consequence of a retrial or de novo order***

5. The consequence of a retrial order or a de novo (a VENIRE DE NOVO), H is an order that the whole case should be retried or tried a new as if no

trial whatsoever has been had in the first instance. In the case of *Fadora v. Gbadebo* (1978) N.S.C.L (vol. 1) 121 had cause to make the following observation.

“We think that in trials *de novo* the case must be proved a new or rather re-proved *de novo* and therefore, the evidence and verdict given are completely inadmissible on the basis that *prima facie* they have been discarded or got rid of.”

With these in mind, it was wrong of the trial court to say that the earlier part heard trials were part of the records before his court. This is because as seen earlier, the suits started by Agoro and Desalu J J were truncated and upon transfer to Adeyinka J a fresh hearing had commenced. The proceedings and evidence taken before Agoro and Desalu J J were got rid of and of no legal consequence in the new trial. Thus, the proceedings before Agoro and Desalu J J could not be said to be any step taken by the plaintiff in the prosecution of his action. (p. 1648 G)

**E ACTIONS - Withdrawn case - Dismissal of**

6. The principle of law for sometime has been settled that withdrawn cases are not usually dismissed by just a mere wave of hand. The trial court must ensure that a point of no-return or LITIS CONTESTATIO has been reached by parties.

It is clear that no evidence was ever taken before Adeyinka J, and a point of LITIS CONTESTATIO had never been alleged to exist between the parties as at that stage. The learned trial Judge should not have shut the gate with finality against the plaintiff moreso when the drafters of that statute (i. e. the Rules) made it clear that such discontinuance or withdrawal of the action as the case may be shall not be a defence to any subsequent action. Judge’s duty is to interpret and not to make the law. In the interpretation process, the Judge should be liberal and give the natural meaning of the statute where the words are clear and unambiguous. After all, a close look at the Lagos State High Court (Civil Procedure) Rules, 1972, Order 23 Rule 1 shows that no provision for dismissal was ever contemplated but that of striking out. I resolve appellant’s

sole issue in respondents' favour. (p. 1649 F/1650 D)

### ***COURTS - Discretion - Appeals***

7. The general law on exercise of judicial discretion is that discretion is always that of the trial court and not of the Appeal Court. Hence, an appeal court cannot substitute its own discretion. However, the appeal court would interfere with the exercise of such discretion in the most extra ordinary circumstances. The most obvious case is where the exercise of discretion by the trial court tends to do injustice to one of the parties. C

Thus, it is in order to obviate an impending miscarriage of justice that was why the court below had to interfere with the trial court's exercise of discretion. I think the court below is right in adopting that line of action. An appellate court will certainly interfere with the exercise of discretion by a trial court where it can be shown that the discretion was not exercised judicially and judiciously that is to say if the exercise was MALA FIDE, arbitrary, illegal either by considering extraneous matters or failing to consider material issues. The question to be borne in mind at all times in reviewing the exercise of discretion is whether the exercise accords with the dictates of justice. D E

I think in view of the old age of this matter, it is better if the parties shall allow it to prosper to conclusion with finality. It does not do any of the parties any good by allowing this matter rolling between one court to another. (p. 1651 E/1652 F) F

### **NOTABLE POINTS OF INTEREST**

#### **MUHAMMAD JSC**

*1. Appeals - Briefs - Need for counsel not to confuse the facts and the law*

Although it is the duty of every court, including this court, to make use of a brief of argument placed before it by a party in arriving at its opinion, however bad that brief may be, I think common sense should dictate that where the facts of a case and the law applicable to it are very straight forward, clear and unambiguous, Counsel should owe it a duty not to H

G

confuse the facts and the law applicable in a given case. It certainly serves no purpose for a Counsel to waste the court's precious time and energy by putting up strenuous arguments and submissions on issues that are quite irrelevant to a case. There is no need in this case for the learned Counsel for the appellant making arguments on a substantive matter that the trial court did not have the benefit of deciding to its logical conclusion with finality. (p. 1638 F)

**TOBIJSC**

**2. *Why part of interpretation of Rules is wrong***

While I entirely agree with the interpretation given by the Court of Appeal to the first limb, I do not agree with the court in the interpretation given to the second limb as it relates to the dismissal of the suit. The rule does not provide for dismissal of the suit and a court of law cannot introduce that. Dismissal of an action *in limine* is the greatest punishment that a plaintiff can suffer in civil litigation and a court can only make such an order if the enabling rule so provides. A court of law cannot make such an order if the enabling law does not provide or is silent on it.

The enabling rule, that is Order 23 rule 1, uses the words “*struck out*” twice and a court is bound by the words. Striking out of a suit is quite different from dismissing the suit and this can be gathered from the words “*and such discontinuance or withdrawal as the case may be, shall not be a defence to any subsequent action.*” In other words, an action struck out cannot be the basis of the plea of *res judicata*. But an action dismissed can give rise to a plea of *res judicata*. (p. 1656 A)

**OGBUAGUJSC**

**3. *Discontinuance - Variation in Rules of Court - Duty of court***

From some of the Rules of some State High Courts, I note that from the first date that a case is fixed for hearing and beyond, leave to discontinue the suit, is no longer automatic. This is because, it seems to me, at that stage, the plaintiff is no longer “*dominus litis*”. Even at that stage, it is for the trial court to decide, whether or not the action should be discontinued and upon what terms. In effect, a trial court, can disallow discon-



tinuance and ask the plaintiff to proceed with his case. With respect, I do not agree with the trial court, that perhaps or understandably, followed the decision in *Omo & ors. v. Amantu* (supra) that once pleadings have been filed and exchanged and issues joined, and a plaintiff applies to withdraw the case at that stage, the suit will be dismissed and not struck out. I have stated earlier in this Judgment, that the circumstances of each case, must be considered. A case may appear similar, but certainly they can never be identical. (p. 1666 G)

### **REPRESENTATION**

Etigwe Uwa With Him, K. C. Chidoka (Mrs.) For The Appellant.

Chike Okafor The 1<sup>st</sup> Respondent.

T. A. Yonwuren For 2<sup>nd</sup> Respondent.

3<sup>rd</sup> Respondent Not In The Court, Not Represented But Served.

### **CASES REFERRED TO**

Fadora v. Gbadebo (1978) N.S.C.L (vol. 1) 121

Chief C. C. Obienu & Ors. v. Chief K. O. Orizu & Ors. (1972) 2 ECSLR E 606

Roe v. Naylor (1918) 87 L J., K. B. 958

Nigeria Airways Ltd. v. Lapite (1990) 7 N.W.L.R. (pt. 163) 392

Efetiroroje v. Okalefe II (1991) 5 N.W.L.R (pt. 193) 517

Royal Exchange Assurance (Nig.) Ltd. v. Aswani Textiles Ltd. (1992) 3 N.W.L.R. (pt.227) 1 at page 5

The Resident, Ibadan Province & Anor. v. Mamudu Lagunju (1954) WACA 14, 548 at page 552

Registered Trustees of Ifelaju Friendly society v. Kuku (1991) 5 N.W.L.R. (pt. 189) 65 at 79

Oyeyemi v. Irewole Local Government. (1993) 1 N.W.L.R. (pt. 270) 462 at p. 484

Solanke v. Ajibola (1969) 1 N.L.R. 259

Albert Ilona & George Ugboma v. Olugheli Dei (1971) All N.L.R. 8

Aghadiuno v. Onubogu (1998) 5 NWLR (Pt. 548) 16

**RULES REFERRED TO**

Supreme Court Rules O. 6 r. 5(1)(a) & (2), O. 8 r. (1)-(4)

Court of Appeal Rules 2002 O. 3 r. 18(1)-(5)

Lagos State High Court (Civil Procedure) Rules 1972 O. 22 r. 4(1), O. 23  
B r. 1

**LEAD JUDGMENT BY MUHAMMAD JSC**

This appeal has a chequered history. It is one of the old land cases still lingering in the courts. The plaintiff in 1988 took a writ of summons from the Lagos State High court. Five reliefs were indorsed in the writ. On filing its statement of claim, which was later amended, some of the reliefs were abandoned and the plaintiff made the following claims against the appellant and the 2<sup>nd</sup> respondents that: -

D “(a) *The Defendants do deliver up the sub-lease registered as 92/92/1823 at the Lagos Lands Registry for cancellation by this Honourable Court.*

E *(b) This Honourable Court do expunge the afore-said sub-lease from the records and entries of the land Registry.”*

In their amended statement of defence, the defendants denied the claim and indorsed a counter-claim against the plaintiff. The counter-claim reads as follows: -

F “AND the defendant counter-claims:-

G “(i) *A declaration that the defendant is the person entitled to the statutory right of occupancy in respect of all that piece or parcel of land situate, lying and being along Oshodi-Tin-Can Island Express Road, Ibafor, Olodi Apapa, Awori-Ajeromi District, Badagry Division of Lagos State covered by Plan No. 1387 “A & B” signed by A. O. Adebogun Esq., Licensed Surveyor attached to the Deed of Lease dated the 20<sup>th</sup> day of March, 1978 and registered as No.13 at page 13 in volume 1695 of the Lands Registry in the Office at Lagos.*

H “(ii) *An order setting aside the Deed of Lease dated the 28<sup>th</sup> day of March, 1978 and registered as No. 68 at page 68 in volume 1707 of the Register of Deeds kept in the Lands Registry at Lagos.*

“(iii) *Perpetual injunction restraining the plaintiff, its servants and/*

*or agents from interfering with the possession and/or use of the land in dispute by the defendant, his servants and/or agent.”*

A reply and defence to the counter-claim was filed by the plaintiff. It was also subsequently amended.

The background facts of the case according to plaintiff's version B are the 1<sup>st</sup> respondent herein as plaintiff at the Lagos State High Court, sued the appellant and 2<sup>nd</sup> defendants over a land dispute, on February, 2<sup>nd</sup>, 1987. Pleadings were closed by the parties but before the commencement of trial, the plaintiff filed an application for summary judgment. The application was moved on the 27<sup>th</sup> of February, 1989 and dismissed on the same day on the grounds that triable issues were disclosed in the pleadings and the suit was adjourned for trial before Agoro, J. Trial opened in the case on 6<sup>th</sup> of February, 1990 when the 1<sup>st</sup> Plaintiff's witness testified and tendered some exhibits and the matter was adjourned for his cross examination. Agoro J; was then elevated to the Court of Appeal as a result of which proceedings had to recommence De Novo before Desalu, J. Before Desalu J; trial again opened on the 6<sup>th</sup> day of June, 1991 and the plaintiffs 1<sup>st</sup> witness again testified extensively tendering some exhibits. The said witness was cross-examined after which the 2<sup>nd</sup> defendant amended it's statement of defence and the suit adjourned for further hearing. Unfortunately, Desalu J; took ill from which he never recovered and the case was then re-assigned to Adeyinka, J. Before Adeyinka J; the plaintiff on the 11<sup>th</sup> day of April, 1994 moved an application for accelerated hearing dated the 18<sup>th</sup> of January, 1994, pursuant to which the court set down the suit for hearing on the 9<sup>th</sup> of June, 1994. Eleven days after the suit was set down for trial i.e. on the 22<sup>nd</sup> of April, 1994, the plaintiff filed a Notice of Discontinuance of the suit against all the parties including the 3<sup>rd</sup> defendant who had been joined by an order of court and had delivered it's defence albeit out of time.

In a short ruling delivered on the 2<sup>nd</sup> day of September, 1994, Adeyinka J; dismissed the suit against the 1<sup>st</sup> and 2<sup>nd</sup> defendants and struck it out against the 3<sup>rd</sup> defendant on the basis that it had not filed its pleadings. The plaintiff appealed against this ruling to the Court of Appeal. The 3<sup>rd</sup> defendant also filed a cross-appeal contending that the case against it

ought to have been dismissed and not struck out.

The Court of Appeal in it's judgment varied the order made by the trial court from one of dismissal of the suit to one of striking it out.

It is against this decision that the 2<sup>nd</sup> defendant/respondent, but  
B now appellant before this court, appealed on 2 grounds of Appeal in his Notice of Appeal. (pages 279-281 of the printed record of appeal)

In compliance with the provisions of Order 6 Rules 5(1) (a) and  
(2) of the Supreme Court Rules (as amended in 1999) the parties, with  
C the exception of 2<sup>nd</sup> respondent, filed and exchanged their respective briefs of argument.

On the hearing date of this appeal, 22<sup>nd</sup> of January, 2007 Mr. Uwa  
for the appellant adopted and relied on the appellant's brief and urged the  
court to allow the appeal. Mr. Okafor for the 1<sup>st</sup> respondent adopted 1<sup>st</sup>  
D respondent's brief and urged that the appeal be dismissed.

Learned Counsel for the appellant formulated one issue, which  
reads: -

*"Whether the learned Justices of the Court of Appeal were right in  
E holding that the action at the High court ought to have been struck out  
instead of being dismissed against all the defendants having regard to  
the stage of the proceedings at the trial court."*

Learned Counsel for the 1<sup>st</sup> respondent couched his one issue in  
F the following words: -

*"WHETHER THE LEARNED JUSTICES OF THE COURT OF  
APPEAL WERE RIGHT IN SJJBSJTJJJING (sic) THE ORDER OF DIS-  
MISSAL MADE BY THE HIGH COURT WITH AN ORDER OF STRIK-  
ING OUT SEQUEL TO THE DISCONTINUANCE NOTICE FILED BY  
G THE 1<sup>st</sup> RESPONDENT IN ITS SUIT AGAINST THE APPELLANT AND  
THE 2<sup>ND</sup> AND 3<sup>RD</sup> RESPONDENTS."*

The 3<sup>rd</sup> respondent's issue although similar to that of the 1<sup>st</sup> re-  
spondent has slighted differed in the slang. It is reproduced hereunder: -

H *"Whether on the facts of this case, the Court of Appeal was right  
to substitute its discretion for that of the trial court when it elected to  
strike out the plaintiffs suit instead of dismissing it."*

It is clear from the above three issues, each by the respective

parties, that they all aimed at one poser: -

Was the court below right in striking out the suit against all the respondents instead of dismissing it having regard to the proceedings at the trial court?

Let me have the benefit of a quick hindsight to remind all and sundry that from the facts contained in the Printed Record of appeal before this court, it is my humble observation from the outset that no effective trial in fact and in law had ever been conducted to its logical conclusion by the different Judges of the High Court of Lagos State that at one time or the other dealt with the suit on appeal. I say so because of the following facts upon which there is concurrence between the parties:

(a) Hon. Justice I. O. Agoro started the suit on 18<sup>th</sup> April, 1988. After some preliminaries, the 1<sup>st</sup> plaintiff's witness, Alhaji Adekunle Nurudeen Odunsi, testified on Tuesday, the 6<sup>th</sup> of February, 1990. The case was adjourned on that day for cross-examination to the 26<sup>th</sup> of April, 1990. Meanwhile, Agoro J, was elevated to the Court of Appeal bench and no cross-examination took place on the matter. Thus the trial was truncated at that stage.

(b) On Monday the 8<sup>th</sup> day of April, 1991, the suit was started afresh before Hon. Justice A. Desalu. On the 6<sup>th</sup> of June, 1991, 1<sup>st</sup> plaintiff witness in the same person of Alhaji Adekunle Nurudeen Odunsi started giving his testimony. Some exhibits were tendered and admitted in evidence. PW 1 was cross-examined on the same day. The matter was further adjourned to 1<sup>st</sup> of July, 1991 and 8<sup>th</sup> October, 1991. On the 1<sup>st</sup> of July, 1991, Desalu J. granted leave to the 2<sup>nd</sup> defendant to file an amended statement of defence, which was to be filed within 7 days and to be served within 14 days. The matter was then adjourned to 8<sup>th</sup> of October, 1991. Desalu J was then said to have fallen sick from which he never recovered. Thus, the trial of the suit was truncated again.

(c) On the 11<sup>th</sup> of April, 1994, Hon. Justice A. F. Adeyinka took over the case. He set down the suit for trial on the 9<sup>th</sup> of June, 1994 after granting an application for accelerated hearing of the suit.

(d) A Notice of Discontinuance of the suit against the defendants,

dated 20<sup>th</sup> April, 1994 and filed on the 30<sup>th</sup> of May, 1994 was taken by Adeyinka J. and a ruling given on the 22<sup>nd</sup> of September, 1994 in which the suit was dismissed in respect of 1<sup>st</sup> and 2<sup>nd</sup> defendants and struck out in respect of the 3<sup>rd</sup> defendant.

**B** I have set out the facts in a more comprehensive manner as above for the sake of clarity vis-as-vis the discussion I intend to embark upon on the relevant issues distilled in resolving this appeal Learned Counsel for the appellant submitted that the relevant rule relating to the discontinuance of an action is Order 23 Rule (1) of the High Court of Lagos State (Civil Procedure) Rules, 1972 upon which the parties fought the issue, though the ruling of the trial court was given in September, 1994 when the new High Court of Lagos State (Civil Procedure) Rules, 1994 had come into force.

**D** Learned Counsel went further to submit that the decision whether to strike out or dismiss a suit pursuant to a notice of discontinuance in circumstances which place the discontinuance under the second limb of Order 23 Rule 1 of the High Court of Lagos State (Civil Procedure) Rules 1972 is a matter exclusively for the court in the exercise of its discretion.

**E** He cited and relied on the cases of Aghadinno v. Onubogu (1998) 5 N.W.L.R. (pt 548) 16 at 30; Omo v. Amatu (1993) 3 N.W.L.R. (pt. 280) 187 at p. 196; Nwokedi v. RTA Ltd. (2002) 6 N.W.L.R. (pt. 762) 181, contending that a notice of discontinuance filed when pleadings, are closed and issues joined between the parties will result in a dismissal of the suit.

**F** Learned Counsel argued that pleadings, undoubtedly, in the case at the High Court had closed before the notice of discontinuance was filed. He made reference to the judgment of the Court of Appeal wherein that

**G** court held that the 3<sup>rd</sup> defendant/ 3<sup>rd</sup> respondent, joined by order of the court had filed its defence and that the 1<sup>st</sup> and 2<sup>nd</sup> defendants had filed their defence to the counter-claim of the 3<sup>rd</sup> respondent. It was manifest that issues had been joined in the case at the lower court and summons

**H** for directions had also been taken and the suit was fixed for hearing on the 6<sup>th</sup> and 7<sup>th</sup> of September, 1988. Trial in the suit had opened twice. The court below, he contended, ought to have affirmed the decision of the trial court dismissing the case against the 1<sup>st</sup> and 2<sup>nd</sup> defendants and ought

to have substituted an order of dismissal in respect of the case against the 3<sup>rd</sup> defendant. Learned Counsel urged this court to set aside the judgment of the court below and in its place, make an Order dismissing the action against all the defendants.

Learned Counsel for the 1<sup>st</sup> respondent cited and relied on Order B 23 Rule 1 of the Lagos State High Court (Civil Procedure) Rules, 1972, (referred to herein as the Rules). He made his submissions mainly on this provision. He stated that there are two limbs to Order 23 Rule 1 of / the Rules. Firstly, discontinuance can be effected before or after the receipt C of defendant's defence but before taking any other steps in the action (save interlocutory applications). The court, he argued, is empowered to strike out the suit on terms. He stated that discontinuance or withdrawal Notice and the subsequent order of court striking out the suit sequel D to the discontinuance or withdrawal notice, cannot be used to bar further or subsequent action over the same subject matter. In other words, once an action under this limb is discontinued, it can be relitigated and, by implication, the defence of estoppel or res judicata cannot be raised against a suit struck out by virtue of a withdrawal or discontinuance notice. E

Under the 2<sup>nd</sup> limb, Learned Counsel submitted that it is where further proceeding in the action has been taken by way of trial or conclusion of evidence. In this regard, a withdrawal or discontinuance notice cannot be effected without the leave of court and the court is empowered F to strike out the suit upon terms. The rule does not provide for an order of dismissal. Learned Counsel submitted that it is the first limb of order 23 rule 1 that applied to this appeal. The appropriate order the trial court ought to have made in the circumstances of the facts of this appeal G is one made by the Court of Appeal substituting order of dismissal to that of striking out. The cases cited by the appellant are inapplicable to the facts and circumstances of this case.

The main submission on behalf of the 3<sup>rd</sup> respondent in the brief filed by its Counsel is that having regard to the decision of the Court of H Appeal to the effect that the case has reached the stage of LITIS CONTESTATIO, wherein the plaintiff is no longer DOMINIS LITIS, the lower court was wrong to have substituted its discretion for that of the trial

court in reversing the order of dismissal to that of striking out as it is not for the appellate court to substitute its discretion for that of the lower court because it would have exercised the discretion in another way. He cited and relied on the case of *Josiah Cornelius Ltd. v. Ezenwa* (2002) 16 N.W.L.R. (pt. 793) 298. He contended that the 1<sup>st</sup> respondent who was the plaintiff did not complain that the lower court exercised its discretion on a wrong principle. His main complaint before the court below was that the trial court misapplied the law based on the undisputed facts before it. The court below examined his contention and the prevalent law and agreed with the trial court that the matter was within the 2<sup>nd</sup> limb of the rule. Learned Counsel contended that while the Court of Appeal in the circumstances would be justified in reversing the order of the trial court thereby striking out the matter instead of dismissing same against all the defendants. He cited and relied on the case of *Akujinwa v. Nwaonuma* (1998) 13 N.W.L.R. (pt. 583) 632 SC. Learned Counsel urged this court to hold that having exercised its discretion to strike out the claim against the 3<sup>rd</sup> respondent wrongly as found by the Court of Appeal, the order made in that exercise ought not to stand. He further urged us to allow this appeal.

Let me start by observing that this appeal is otherwise a very simple one within the narrow compass of Order 23 Rule 1 of the Rules referred to earlier. However, for reasons best appreciated by the parties especially the appellant and the 3<sup>rd</sup> respondent whose respective Counsel, unwittingly, drag this court into studying and analyzing their unnecessarily lengthy and verbous briefs of argument. Although it is the duty of every court, including this court, to make use of a brief of argument placed before it by a party in arriving at its opinion, however bad that brief may be, I think common sense should dictate that where the facts of a case and the law applicable to it are very straight forward, clear and unambiguous, Counsel should owe it a duty not to confuse the facts and the law applicable in a given case. It certainly serves no purpose for a Counsel to waste the court's precious time and energy by putting up strenuous arguments and submissions on issues that are quite irrelevant to a case. There is no need in this case for the learned Counsel for the appellant



making arguments on a substantive matter that the trial court did not have the benefit of deciding to its logical conclusion with finality. See: ACME Builders Ltd, v. K. S. W. B. (1999) 2 N.W.LR. (pt.590) 288; Comptroller Nigerian Prison Services. Ikoyi, Lagos & Ors. v. Dr. F. Adekanye & Ors. (2002) 7 SCNJ, 399. B

The main crux of the appeal on hand as contained in the respective briefs of argument of the appellant, the 1<sup>st</sup> and 3<sup>rd</sup> respondents is: whether it was right for the trial court to dismiss the suit before it when pleadings were closed and whether the court below could substitute its discretion C for that of the trial court. I will treat these two issues seriatim.

At what stage does a court of law strike out an Action and under what circumstances? Again, at what stage does a court of law make an order for dismissal of an action before it?

**It is not long that we saw the antecedents giving rise to this** D  
**appeal. There was a Notice of discontinuance of the suit in its entirety as against the defendants and the party joined. I think, it is the right of a plaintiff to discontinue his action if he so chooses, as the filing of same does not necessarily imply that the parties have E irrevocably committed themselves to resolving their dispute by litigation. Discontinuance can arise from any of the following factors:**

-

(i) Where a plaintiff realizes the weakness of his claim in the F light of the defence put up by the defendant.

(ii) Where plaintiff's vital witnesses are not available at the material time and will not be so at any certain future date.

(iii) By abandoning the prosecution of the case, the plaintiff G could substantially reduce the high costs that would have otherwise followed after a full-scale but unsuccessful litigation or

(iv) Where the plaintiff may possibly retain the right to H relitigate the claim at a more auspicious time if necessary. The procedure for discontinuance or termination of cases/suits is laid down in the various courts Rules. In the Supreme Court Rules (as amended in 1999) for instance, Order 8 Rules (1)-(4) have made provisions for withdrawal of an appeal by an appellant, with or without the

consent of the other parties and the various consequences thereof, of either striking out the suit or dismissal depending on the circumstances. The Court of Appeal Rules, as amended in 2002, Order 3 R 18(1)-(5) have made equal provisions as that of the Supreme Court.

B In the appeal on hand, it is order 23 rule 1 of the High Court of Lagos State (Civil Procedure) Rules 1972, that had been cited and relied upon by both the parties and the two lower courts. This order provides as follows: -

C *“The plaintiff may at any time before receipt of j the Defendants defence or after the receipt thereof before taking any other proceeding in the action (save any interlocutory application) by notice or writing discontinue; his action against all or any of the defendants or withdraw any part or parts of his alleged cause or complaint and thereupon he shall*  
D *pay such Defendants costs of the action, or if the action is not wholly discontinued, the costs occasioned by the matter so withdrawn. Such costs shall be taxed and such discontinuance or withdrawal as the case may be shall not be a defence to any subsequent action. Save as in this*  
E *Rule otherwise provided it shall not be competent for the plaintiff to withdraw the record or discontinue the action without leave of the court or a judge in chambers, but the court or judge in chambers may, before, or at or after the hearing or trial, upon such terms as to costs and as to*  
F *any other action and otherwise as may be just, order the action to be discontinued, or any part of the alleged cause or complaint to be struck out or court or judge in chambers may in like manner and with the like discretion as to terms, upon the application of a defendant, order the whole or any part of his alleged grounds of defence or counter-claim to*  
G *be withdrawn or struck out, but it shall not be competent to a defendant to withdraw his defence or any part thereof without leave.”*

(underlining supplied for emphasis).

H **There is a proposition to the interpretation of the above provision by the court below. It is proffered as follows: -**

*“A careful reading of the Rules shows that it could conveniently be broken into two limbs for purposes of application in this respect I agree with the appellant. That is to say, firstly, discontinuance before*

*and after receipt of the defendant's defence but before taking any other proceeding in the action (save any interlocutory application). And secondly, in any other circumstance the plaintiff shall not competently do so, that is to say withdraw without leave of court. Under the 1<sup>st</sup> limb of the rule it terminates the action in fact and law beyond the point of no recall See: Chief C. C. Obienue & Ors. v. Chief K. O. Orizu & Ors. (1972) 2 ECSLR 606. The court ordinarily has to strike out the action and it is no bar to defence to a subsequent action as *litis contestatio* has not been reached while under the 2<sup>nd</sup> limb of the rule it (court) in exercise of its discretion has either to strike out or dismiss the action; under both limbs of the Rule with costs. In the event of a dismissal it is a bar to relitigation of the matter and thus opens to a likely plea of estoppel per rem judicata.*

I have no reason to jettison the above attempt to interpret the provision of Order 23 Rule 1 of the Lagos State High Court (Civil Procedure) Rules as it accords with my own view. If anything, I am only to amplify the circumstances under both limbs. In circumstances where leave of court is not necessarily required as in limb 1, it is my humble deduction from the provision that: -

*(i) Leave of court is not required where the discontinuance is to be effected BEFORE the plaintiff is served with the statement of defence,*

*(ii) Leave is not required for discontinuance even after the plaintiff has received the statement of Defence PROVIDED that in such a case, the plaintiff discontinues the action BEFORE taking any other proceedings in it EXCEPT any interlocutory application.*

In the above two circumstances, for a plaintiff to discontinue he has to duly file in court and serve on the defendant(s) against whom he intends to discontinue or withdraw, as the case may be, a written notice of discontinuance or withdrawal. Once the service has been duly effected, the notice effectively terminates the action subject to the plaintiff's liability for costs of the defendants action up to the date of the discontinuance. But, in a situation where discontinuance is after the receipt of the statement of defence, the plaintiff

would not have taken “*any other proceeding in the action*” other than interlocutory application. This certainly presents it’s unique problem. This is because the phrase “*before taking any other proceeding in the action*,” as used in the Rule, would imply taking any proceeding with the view of continuing the litigation with the defendant and not putting an end to the action. See: *Spincer v. Watts* (1889) 23 QBD 350 and 353; *Mundy v. The Butterley Co.* (1932) 2 Ch. 227. Thus, from the point of view of the prevailing law, it follows that for a proceeding taken by the plaintiff after service of the statement of defence on him to prevent him from discontinuing the action without leave of court, the proceeding must be a formal step in the action, required by the rules to be taken by him for the prosecution of the action. If it is that formal, then, he needs leave of court to discontinue. If it does not, then he can discontinue without leave of the court. The proceeding or step taken must be for prosecution of the action and must be required to be taken by the rules of court. The two conditions should co-exist.

**On the other limb of the provision of Order 23 R (1) of the Rules under consideration, a plaintiff who wants to discontinue an action, should make an application to the court for leave to do so. He can no longer file a notice of discontinuance; otherwise such a notice is invalid and should be struck out.** See: *Nwachukwu & Ors. v. Nze & Ors.* (1955) 15 WACA 36; *Olayinka Rodriques & Ors. v. Okoromadu* (1977) 3 SC 21. **In such a situation the trial Judge has discretion as to whether or not to allow the plaintiff to discontinue or withdraw his claim at that stage of the proceedings and as to whether to dismiss or strike out the claim. The discretion however must, as is always the case, be placed on the Judicial and judicious proverbial scale of Justice.**

**The consequence of a striking out order is that when a plaintiff duly discontinues his action without leave, the court should merely strike out the action.** See: *Soetan v. Total Nigeria Ltd.* (1972) 1 All NLR (pt. 1) 1. **It all depends on the state of the law. That is, once a litigant withdraws his action in a situation where no leave of court is required, the trial court has no option but to strike out the suit.**

**This is because a court of law cannot force an unwilling plaintiff to continue with an action.** Even if the court insists that he should continue, he may refuse to tender evidence or take any further steps in the action, that same court can do nothing other than to strike out the case or where evidence has been taken to a reasonable level to dismiss the action. B  
See: Eronini v. Iheacho (1989) 2 N.W.L.R. (pt. 616) 622. In the appeal on hand it is on record that the plaintiff received the 1<sup>st</sup> and 2<sup>nd</sup> defendant's statements of defence dated on the 18<sup>th</sup> of March, 1987 and on the 29<sup>th</sup> of June, 1990 respectively. It is on record as well that 3<sup>rd</sup> respondent sought to be joined as co-defendant and leave to file statement of defence and counter-claim against the 1<sup>st</sup> and 2<sup>nd</sup> respondents. The said application was granted on June 8<sup>th</sup>, 1992. On 9<sup>th</sup> March, 1994 3<sup>rd</sup> defendant's application for filing of it's defence and counter-claim was granted. On April 11<sup>th</sup>, 1994, the trial court accelerated the hearing of the suit to June 9<sup>th</sup> D  
1994. The Notice of discontinuance by the plaintiff was filed on 22<sup>nd</sup> April, 1994; taken on 9<sup>th</sup> September, 1994; dismissed against the 1<sup>st</sup> and 2<sup>nd</sup> defendants and struck out against the 3<sup>rd</sup> defendant. The reason adduced by the learned trial Judge reads as follows: - E

*"It is now settled that where pleadings have been filed and issues joined the proper order to make is one of dismissal.*

*The 3<sup>rd</sup> Defendant not having filed its statement of defence the proper order to make is one of striking out."* F

I agree with the trial court and the court below that pleadings as between the plaintiff, 1<sup>st</sup> and 2<sup>nd</sup> defendants were completed. But I do not agree with the trial court as the court below too, did not, that the 3<sup>rd</sup> defendant did not file it's statement of defence. The facts contained in the Record of appeal say 3<sup>rd</sup> defendant filed its defence and counter-claim. It is the finding of the court below that the 3<sup>rd</sup> defendant/respondent had filed its statement of defence and a counterclaim: the court below stated; - G

*"However the issue taken in the cross-appeal appears simple and H  
can be reduced to whether the court below is right to have struck out instead of dismissing the suit as against the 3<sup>rd</sup> respondent on the basis that the 3<sup>rd</sup> respondent did not file any defence when in fact it filed a*

*defence but out of time. What informed the remark that the 3<sup>rd</sup> respondent did file a defence is not altogether obvious from the records. All the same, the record of appeal shows that the 3<sup>rd</sup> respondent filed its Statement of Defence and Counter-claim on 9/1/92 out of time and has con-*  
B *tended that the effect in law is that the Statement of Defence and Counter-claim remain valid in law.”*

Facts never lie. In its affidavit in support of Motion on Notice for an order directing Departure from the Rules and for an order abridging the time for brief filing, the 1<sup>st</sup> respondent herein, as appellant/applicant  
C before the court below, averred as follows: -

“8. By application dated September, 30<sup>th</sup> 1991, the 3<sup>rd</sup> respondent sought to be joined as Co-Defendant and leave to file statement of defence and counter-claim against the 1<sup>st</sup> and 2<sup>nd</sup> respondents, and the said  
D application were granted on June 8, 1992.

9. The plaintiff filed a notice of discontinuance dated April 22, 1994 seeking to discontinue the suit against all the respondents.

10. The 3<sup>rd</sup> respondent was yet to file it’s statement of defence and  
E counter-claim as at the date of filing the Notice of Discontinuance.

11. By ruling of September 22, 1994, Mr. Justice Adeyinka after taking the Notice of discontinuance dismissed the suit in respect of the 1<sup>st</sup> and 2<sup>nd</sup> respondent and struck out the suit in respect of the 3<sup>rd</sup> respondent.

12. The 3<sup>rd</sup> respondent had not filed its statement of defence at the  
F time of the said ruling, and trial had not commenced before the said Mr. Justice Adeyinka.”

But in it’s counter-affidavit the 2<sup>nd</sup> respondent herein as 1<sup>st</sup> respondent in the court below, stated as follows: -

G “17 Meanwhile the second respondent filed his written application to amend his pleadings on June 11, 1991. It was taken and granted on July 1, 1991 when further hearing of the substantive suit was scheduled for Tuesday, October 8, 1991. It is this amended pleadings of the  
H second respondent that opened the Pandorax box and scared the appellants out of their wits.

18. That date was interrupted when the third respondent brought an application for leave to join as a party to the suit. The application

*dated September 30, 1991 was scheduled for Monday, October, 14, 1991 but when it was mentioned on October, 1991, the third respondents were not sure f of their footing despite my readiness to accommodate them in order to accelerate the disposal of the suit and had to be adjourned successively to November 25, 1991, January, 20, 1992 when the third respondents were mauled in #100 costs in favour of the 1<sup>st</sup> respondents, then to May 4, 1992, June 8, 1992 when the application for joinder was granted and the substantive suit adjourned to October 12, 1992 in order to allow the new entrant to complete their pleadings.*

*(19) On October 12, 1992 the 3<sup>rd</sup> respondents had still not put their house in order and the suit was further adjourned to November 9, 1992. The 3<sup>rd</sup> respondents waited till that very morning before filing their pleadings which were clearly out of time and upon my objection to the pretensions of these respondents the court adjourned further proceedings to January, 11, 1993 with another #100 costs against the 3<sup>rd</sup> respondents in favour of the 1<sup>st</sup> respondent. Thereafter the third respondents filed their application for leave to regularize their pleadings on November, 23 1992.*

*(20) That application was never heard by Desalu J, the trial Judge for when we reported on January 11, 1993, the Judge never recovered and it became obvious that we had to start de novo before a new trial Judge.*

*(21) I personally made unrecorded numerous efforts to see that the suit was re-assigned as early as practicable to a new Judge and was greatly relieved when the appellants took out an application, first scheduled for Monday, January 1, 1994 was adjourned to March 9, 1994 in order to hear an application on behalf of the 3<sup>rd</sup> respondents to file their defence and counter-claim out of time. The application was taken and granted on the said date when the substantive suit was adjourned to April 11, 1994 to ensure the close of pleadings when the court would then consider the appellants plea to accelerate the hearing of the suit.*

*(22) On April 11, 1994, the court accelerated the hearing of the suit for June 9, 1994.*

*(23) It was against this background that the appellants surprised the court and every other party to the suit by filing a Notice of discon-*

*tinuance on April 22, 1994 without assigning any reason thereof. This arrested the scheduled accelerated hearing on June 9, 1994 at which the appellants were to have proffered evidence in support of their claims.*

*The Notice of Discontinuance could not be considered until re-  
B sumption of proceedings on June 9, 1994 since the appellants advanced their chicanery by not bringing it as an application but hoping that their tactics would present the court and the respondents with a ‘fait accompli.*

*24. On June 9, 1994 against the objection to the 1<sup>st</sup> and 2<sup>nd</sup> respon-  
C dents that the Notice of discontinuance needed complete visitation, it was agreed that the matter be argued for the Court’s ruling on Thursday, September 9, 1994. On that day, the court heard Counsel on behalf of all parties to the suit and dismissed the claims of the appellants against their  
D plea that their writ be struck out. Thereafter the court adjourned further proceedings between all the parties to the suit for hearing. These proceedings include the counter-claims of the 1<sup>st</sup> respondents against the appellants. That hearing is now scheduled for March 21, 1995.”*

***These averments without any doubt show that the 3<sup>rd</sup> defend-  
E ant/respondent filed its statement of defence though out of time. The consequences of the Notice of discontinuance that affected the 1<sup>st</sup> and 2<sup>nd</sup> defendants/respondents, who were said to have filed their  
F statements of defence within time ought to have equally affected the 3<sup>rd</sup> defendant/respondent whose Statement of Defence and Counter-claim ought to be deemed as duly filed and served prior to the consideration of the Notice of discontinuance. It was an unnecessary hair splitting embarked upon by the trial court in differenti-  
G ating the consequences of the Notice of discontinuance filed against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents. Be that as it may, the court below, corrected the mistake of the trial court by holding that all the 3 defendants/respondents ought to suffer same fate as each filed it’s  
H Statement of Defence. I agree with the court below.***

What remains to be said now is on whether the appellant, under the 2<sup>nd</sup> limb of Order 23 Rule 1 of the Rules, had taken any other step(s) in the prosecution of the action. Let me start from the trial court. The



learned trial Judge held as follow: -

*“It is now settled that where pleadings have been filed and issues joined the proper order to make is one of dismissal..... there is only one High Court notwithstanding that a case has gone from one Judge to another Judge. The earlier part heard trials are part of the records before this court. It is hereby ordered that: -*

*1. This suit is hereby dismissed in respect of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.”*

In its analysis, the court below, observed; -

*“The basis for opting for a dismissal against striking out were not given by the court below. And if I may opine it is not as mathematical as that nor right for that matter for the court below to hold that once pleadings have been filed and issues joined as here that ultimately an order of dismissal has to follow as of course i.e. where the plaintiff has sought to discontinue the suit.”*

(Underlining supplied for emphasis)

Let me slightly disagree with the court below that the basis for opting for a dismissal order were not given by the trial court. It is very clear from the trial court’s opinion and as found by the court below that the basis for that order as against an order for striking out was that pleadings had been filed and issues joined at least between the plaintiff, the 1<sup>st</sup> and 2<sup>nd</sup> defendants, (see pages 35 and 275 of the printed Record of appeal which contains the judgments of the trial court and the court below respectively).

But whether the reasons for making the dismissal order by the trial court were given or not is quite immaterial. What is material in view of the 2<sup>nd</sup> limb of Order 23 Rule 1 of the Rules is whether the plaintiff had taken any further step(s) in prosecuting the action, which is capable of denying him a second bite on the cherry. Yes! It is true that the appellant as plaintiff received the Statements of Defence of the defendants and pleadings were closed. But was there any step(s) taken on the action by the plaintiff before Justice Adeyinka? The appellant did open his case and he called one witness before Agoro, J. The same witness was called before Desalu J. and was even cross-examined. None of these two Judges

completed the action before him when each had to surrender to his destined fate. In each occasion, the matter had to start DE-NOVO.

I think I need to repeat what I said sometime, on trial De-Novo. I observed as follows: -

B *“The Latin Maxim “DE NOVO” connotes a New’, ‘Fresh”, a ‘beginning’, a ‘start’ etc. In the words of the authors of Blacks Law Dictionary, DE NOVO trial or hearing means ‘trying a matter a new, the same as if it had not been heard before and as if no decision had been*  
 C *previously rendered ..... new hearing or a hearing for the second time, contemplating an entire trial in same manner in which the matter was, originally heard and a review of previous hearing. On hearing ‘de novo’ court hears matter as court of original and not appellate jurisdiction*  
 D *..... that a trial DE NOVO could mean nothing more than a new trial. This further means that the plaintiff is given another chance to relitigate the same matter, or rather, in a more general sense, the parties are at liberty, once more to reframe their case and restructure it as each may deem it appropriate.”*

E See the case of Biri v. Mairuwa (1996) 8 N.W.L.R. (pt. 467) 425 at page 433 paragraphs A-B and F-G.

This is an auspicious occasion for me to improve on what I said before (quoted above) and I will quote with approval, the dictum of Oputa, JSC in Kajubo v. The State (supra):

F *“The expressions “a new trial” “trial de novo” “retrial” “fresh hearing” “trial a second time” have been freely used in these judgments. This suggests that these expressions are inter- changeable as they relate to the concept that is the finding out by due examination of witness truth of*  
 G *a point in issue or a question in controversy whereupon judgment may be given.”*

**The consequence of a retrial order or a de novo (a VENIRE DE NOVO), is an order that the whole case should be retried or**  
 H **tried a new as if no trial whatsoever has been had in the first instance. See: Kajubo v. The State (supra). In 1978 this court per Idigbe, JSC; in the case of Fadora v. Gbadebo (1978) N.S.C.L (vol. 1) 121 had cause to make the following observation.**

*“We think that in trials de novo the case must be proved a new or rather re-proved de novo and therefore, the evidence and verdict given are completely inadmissible on the basis that prima facie they have been discarded or got rid of.”*

With these in mind, it was wrong of the trial court to say that the earlier part heard trials were part of the records before his court. This is because as seen earlier, the suits started by Agoro and Desalu J J were truncated and upon transfer to Adeyinka J a fresh hearing had commenced. The proceedings and evidence taken before Agoro and Desalu J J were got rid of and of no legal consequence in the new trial. See: *Roe v. Naylor* (1918) 87 L J., K. B. 958. Thus, the proceedings before Agoro and Desalu J J could not be said to be any step taken by the plaintiff in the prosecution of his action.

It is clear from the record that beyond the interlocutory application filed by the plaintiff to discontinue the action and an earlier application for accelerated hearing no steps of any kind were taken by the plaintiff. The 2<sup>nd</sup> limb of Order 23 Rule 1 of the Rules contemplates of a situation where after the receipt of the defendants’ defence the plaintiff proceeds to take any other proceedings or step in the action, except any interlocutory application, then the plaintiff, of necessity, requires the leave of court to withdraw his action and the court has the discretion to either strike out or dismiss the action before it. That is my humble understanding of the 2<sup>nd</sup> limb of Order 23 Rule 1 of the Rules.

I must add that the principle of law for sometime has been settled that withdrawn cases are not usually dismissed by just a mere wave of hand. The trial court must ensure that a point of no-return or LITIS CONTESTATIO has been reached by parties. See: *Eronini v. Iheuko* (supra). In *Nigeria Airways Ltd. v. Lapite* (1990) 7 N.W.L.R. (pt. 163) 392, Uwais, JSC (as he then was) made the following observation):-

“the power of the court to dismiss a case in LIMINE should be exercised with utmost circumspection and not lightly as a matter of course.”

Not much longer thereafter, Tobi, JSC followed suit in the case of Registered Trustees of Ifelaju Friendly society v. Kuku (1991) 5 N.W.L.R. (pt. 189) 65 at 79, that:-

“It is only when the Justice of the case tilts heavily in favour of B dismissal of the action in limine that (a trial Judge) should tow that cruel and lonesome path, a path that a trial Judge should really dread to tread, unless all other pedestrainable paths including that of striking out are closed to him.

C In our democracy where the rule of law both in its conservative and contemporary constitutional meaning operates, the door of the courts should be left wide open and I mean really wide throughout the day for aggrieved persons and the generality of litigants to enter and seek any form of judicial redress or remedy. This is the desideratum of our polity.”

D **It is clear that no evidence was ever taken before Adeyinka J, and a point of LITIS CONTESTATIO had never been alleged to exist between the parties as at that stage. The learned trial Judge should not have shut the gate with finality against the plaintiff**  
E **moreso when the drafters of that statute (i. e. the Rules) made it clear that such discontinuance or withdrawal of the action as the case may be shall not be a defence to any subsequent action. Judge’s duty is to interpret and not to make the law. In the interpretation**  
F **process, the Judge should be liberal and give the natural meaning of the statute where the words are clear and unambiguous. After all, a close look at the Lagos State High Court (Civil Procedure) Rules, 1972, Order 23 Rule 1 shows that no provision for dismissal was ever contemplated but that of striking out. I resolve appellant’s**  
G **sole issue in respondents’ favour.**

I will now consider the 1<sup>st</sup> and 3<sup>rd</sup> respondents identical issues of whether the Court of Appeal was right to substitute its discretion for that of the trial court when it struck out, instead of dismissing the plaintiff’s H suit. Below is what the court below held:-

*“fully aware of the settled Principle that an appellate court ought not to disturb an exercise of judicial discretion by the court below as here just for the mere fact that it may not have made the same, I feel strongly*

*that to decline to do so here would lead to a miscarriage of justice. It therefore follows that the justice of this matter would be better served by intervening to vary the order of dismissal made by the court below to one of striking out to obviate an impending miscarriage of justice in this matter.”*

The authors of the Blacks Law Dictionary 6<sup>th</sup> Edition, 1990, define “judicial and legal discretion” as follows:-

*“These terms are applied to the discretionary action of a Judge or court, and mean discretion bounded by the rules and principles of law, and not arbitrary, capricious, or unrestrained. It is not the indulgence a judicial whim, but the exercise of judicial judgement based on facts and guided by law, or the equitable decision of what is just and proper under the circumstances. It is a legal discretion to be exercised in discerning the course prescribed by law and is not to give effect to the will of the Judge, but to that of the law. The exercise of discretion where there are two alternative provisions of law applicable, under either of which court could proceed. A liberty or privilege to decide and act in accordance with what is fair and equitable under the peculiar circumstances of the particular case, guided by the spirit and principles of the law, and exercise of such discretion is reviewable only for an abuse thereof. Manekas v. Allied Discount Co., 6 Misc 2d 110779, 166 .N.Y.S.2d 366, 369.”*

**The general law on exercise of judicial discretion is that discretion is always that of the trial court and not of the Appeal Court. Hence, an appeal court cannot substitute its own discretion. However, the appeal court would interfere with the exercise of such discretion in the most extra ordinary circumstances. The most obvious case is where the exercise of discretion by the trial court tends to do injustice to one of the parties.** See: Efetiroroje v. Okalefe II (1991) 5 N.W.L.R (pt. 193) 517, per Nnaemeka Agu, JSC, Royal Exchange Assurance (Nig.) Ltd, v. Aswani Textiles Ltd. (1992) 3 N.W.L.R. (pt.227) 1 at page 5. The Resident, Ibadan Province & Anor. v. Mamudu H Lagunju (1954) WACA 14, 548 at page 552.

Among the reasons given by the court below for interfering with the learned trial Judge’s discretion is what I quoted earlier on. The court

below said that it had to intervene to vary the order of dismissal to that of striking out “to obviate an impending miscarriage of justice in this matter.”

In substantiating its view on the above quoted phrase, the court below, earlier on observed:-

*“The court below opted at the end of the day to dismiss this matter. However, having deliberated on the decisions in Eronin v. Iheako (1989) 2 N.W.L.R. (pt. 101) 46, Nigeria Airways Ltd v. Lapite (1990) 7 N.W.L.R. (pt. 163) 392. Registered Trustees of Ifeolu Friendly Society v. Kuku (1991) 5 N.W.L.R. (pt. 189) 65 and Soekan v. Total (Nig.) Ltd. (supra). I could n’t agree more that by opting to dismiss the claim, in Lumine (sic) that the court below has exercised it’s discretion in a manner leading inexorably to sealing for all time the fate of the appellant in this matter. Whether this has satisfactorily resolved this matter - I have serious reservations. I suppose that some other considerations should have come into the matter. Where a court as here has the option to allow litigants in a matter another chance of having their dispute sorted out on the merits by due exercise of its discretionary power speaking for myself, I take the humble view that a discretionary power of dismissing the matter in lumine (sic) in such a situation ought to be exercised sparingly with the utmost care; indeed as a last resort due regard having been had of the balance of convenience and disadvantages to the parties. See Rodngue’s case (supra). The court is the sole arbiter of the two alternatives which to follow.”*

Thus, it is in order to obviate an impending miscarriage of justice that was why the court below had to interfere with the trial court’s exercise of discretion. I think the court below is right in adopting that line of action. An appellate court will certainly interfere with the exercise of discretion by a trial court where it can be shown that the discretion was not exercised judicially and judiciously that is to say if the exercise was MALA FIDE, arbitrary, illegal either by considering extraneous matters or failing to consider material issues. The question to be borne in mind at all times in reviewing the exercise of discretion is whether the exercise accords

**with the dictates of justice.** See: Oyeyemi v. Irewole Local Government. (1993) 1 N.W.L.R. (pt. 270) 462 at p. 484 per Ogwuegbu, JSC; Solanke v. Ajibola (1969) 1 N.L.R. 259; Albert Ilona & George Ugboma v. Olugheli Dei (1971) All N.L.R. 8.

**I think in view of the old age of this matter, it is better if the parties shall allow it to prosper to conclusion with finality. It does not do any of the parties any good by allowing this matter rolling between one court to another.** I resolve this issue, too, in favour of the respondents.

Finally, this appeal lacks merit and is hereby dismissed. I affirm the judgment of the court below which substituted the order of dismissal to that of striking out of the suit before the trial court against all the respondents. I order each party to bear own costs in this appeal.

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#### KATSINA-ALUJSC

I have had the advantage of reading in draft the judgment delivered by my learned brother, Muhammad, J.S.C. I agree with his reasoning and conclusion and have nothing to add.

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#### TOBIJSC

This matter went through three Judges of the High Court. They are Justices Agoro, Desalu and Adeyinka. Justice Agoro took evidence from the first witness of the plaintiff who is the first respondent here. Trial opened on 6<sup>th</sup> February 1990. The witness testified and tendered *Exhibits P1 to P9*. The matter was adjourned for cross-examination. Cross-examination could not be taken as Agoro, J. was elevated to the Court of Appeal before the date fixed for cross-examination. Desalu, J. took over the case, Trial again opened on 6<sup>th</sup> June, 1991. The same witness testified and tendered *Exhibits PA to PH*. The Judge died.

The case was reassigned to Adeyinka, J. On 11<sup>th</sup> April, 1994, the 1<sup>st</sup> respondent, plaintiff in the High Court, moved an application for accelerated hearing. After the suit was set down for trial, the 1<sup>st</sup> respondent

filed a notice of discontinuance of the suit against all the parties, including the 3<sup>rd</sup> respondent who had been joined by an order of court; the 3<sup>rd</sup> respondent had earlier delivered its defence, albeit out of time.

In a ruling on 2<sup>nd</sup> September, 1994, Adeyinka J., dismissed the suit B as against the appellant and 2<sup>nd</sup> respondent. He struck out the suit as against the 3<sup>rd</sup> respondent on the basis that it had not filed its pleadings. The 1<sup>st</sup> respondent appealed against the ruling of the learned trial Judge. The 3<sup>rd</sup> respondent also filed a cross appeal contending that the case C against it ought to have been dismissed and not struck out. The Court of Appeal in its judgment varied the order made by the learned trial Judge. The court struck out the suit in the place of dismissal by the learned trial Judge. This appeal is against the judgment of the Court of Appeal striking out the suit.

D Briefs were filed and duly exchanged. The appellant formulated a single issue for determination. So too the 1<sup>st</sup> and 3<sup>rd</sup> respondents. The issue before this court is whether the Court of Appeal was right in striking put the suit instead of dismissing it, in the circumstances of the case.

E All the parties agree that the applicable rule in this appeal is Order 23 rule 1. It is a long rule but I will read it in full because it is germane to this appeal.

*“The plaintiff may, at any time before receipt of the Defendant’s F defence, or after the receipt thereof before taking any other proceeding in the action (save any interlocutory application) by notice in writing duly filed and served, wholly discontinue his action against all or any of the Defendants or withdraw any part or parts of his alleged cause of complaint, and thereupon he shall pay such Defendants costs of the action, G or if the action be not wholly discontinued, the costs occasioned by the matter so withdrawn. Such cost’s shall be taxed, and such discontinuance or withdrawal as the case may be, shall not be a defence to any subsequent action. Save as in this Rule otherwise provided, it shall not be H competent for the plaintiff to withdraw the record or discontinue the action without leave of the Court or a Judge in Chambers, but the Court or Judge in Chambers may, before, or at or after the hearing of trial, upon such terms as to costs and as to any other action, and otherwise as*



*may be just order the action to be discontinued, or any part of the alleged cause of complaint to be struck out.*

*The Court or Judge in Chambers may in like manner and with the like discretion as to terms, upon application of a Defendant, order the whole or any part of his alleged grounds of defence or counterclaim to be withdrawn or struck out, but it shall not be competent to a defence, or any part thereof, without such leave.”*

By the rule, the plaintiff can with leave of court discontinue his action against any defendant or withdraw any part or parts of the action before or after the statement or defence but before taking any other proceedings in the action. The plaintiff will pay costs for the discontinuance or withdrawal. The court will thereafter strike out the action. Similarly, the court has discretion to strike out grounds of defence or counterclaim of the defendant.

Construing the rule, the Court of Appeal said at page 269 of the Record:

*“The provisions of the foregoing Rule in spite of its clumsiness is clearly unambiguous. Yet the Rule has not, all the same, been easily amenable to application. A careful reading of the Rule shows that it could conveniently be broken into two limbs for purposes of application in this respect I agree with the appellant. That is to say, firstly, discontinuance before and after receipt of the defendant’s defence but before taking any other proceeding in the action (save any interlocutory application). And secondly, in any other circumstance the Plaintiff shall not competently do so, that is to say withdraw without leave of court. Under the 1<sup>st</sup> limb of the Rule it terminates the action in fact and law beyond the point of no recall. See: Chief C. C. Obienu & Ors v. Chief R. O. Orizu & Ors (1972) 2 ECSLR 606. The court ordinarily has to strike out the action and it is no bar or defence to a subsequent action as *lis contestatio* has not been reached while under the 2<sup>nd</sup> limb of the Rule it (Court) in exercise of its discretion has either to strike out or dismiss the action; under both limbs of the Rule with costs. In the event of a dismissal it is a bar to relitigation of the matter and thus open to a likely plea of *estoppel per rem judicata*.”*

While I entirely agree with the interpretation given by the Court of Appeal to the first limb, I do not agree with the court in the interpretation given to the second limb as it relates to the dismissal of the suit. The rule does not provide for dismissal of the suit and a court of law cannot introduce that. Dismissal of an action *in limine* is the greatest punishment that a plaintiff can suffer in civil litigation and a court can only make such an order if the enabling rule so provides. A court of law cannot make such an order if the enabling law does not provide or is silent on it.

The enabling rule, that is Order 23 rule 1, uses the words “*struck out*” twice and a court is bound by the words. Striking out of a suit is quite different from dismissing the suit and this can be gathered from the words “*and such discontinuance or withdrawal as the case may be, shall not be a defence to any subsequent action.*” In other words, an action struck out cannot be the basis of the plea of *res judicata*. But an action dismissed can give rise to a plea of *res judicata*.

And that takes me to the consideration of the latinism *litis contestation*. *Litis Contestatio* means the process by which a legal issue emerges from the opposing statements of the parties. It gave birth to the Scots law term *latiscontestation*, which means joinder of issue, arising from the defence in a lawsuit that has been lodged. I do not think the matter had come to *litis contestatio*.

Learned counsel for the appellant cited three cases. I should examine them. In *Aghadiuno v. Onubogu* (1998) 5 NWLR (Pt. 548) 16, this court interpreted Order 7 rule 1 of the High Court Rules, Cap. 61 Laws of Eastern Nigeria, 1963. That rule is not the same as the rule involved in this appeal. They are differently worded. Perhaps, I should quote the last sentence of Order 7 rule 1 to make the point:

“*If on any other case the plaintiff desires to discontinue a suit or to withdraw any part of his claim, or if a defendant desires to discontinue his counter-claim, or withdraw any part thereof such discontinuance or withdrawal may be allowed on such terms as to costs, and as to any subsequent suit and otherwise as to the court may seem just.*”

It is clear that the above is not contained in Order 23 rule 1 that the Court of Appeal dealt with. Apart from the issue of costs which the two

rules may share, Order 7 rule 1 goes further to give a discretionary power to the court in respect of any subsequent suit. That was the basis for this court taking the issue of *res judicata* when Belgore, JSC (as he then was) said at page 30:

*“Having received all the pleadings and the plaintiff having seen what the defendant set up as their defence, with the issue of res judicata clearly pleaded, the case having thus been set down for hearing, the withdrawal in the circumstances of this case could attract only dismissal not striking out. That court was therefore right in entering dismissal.”*

Iguh, JSC, also said at pages 41 and 42:

*“Where a valid Notice of Discontinuance is filed in a case after the same has been fixed for hearing, it is incumbent on the trial court to take into consideration all the circumstances of the case, including the state of the pleadings in the suit in determining the final order it may make in the action. I think the learned trial Judge in the present case was entitled, as he did, to take all the surrounding circumstances into account in deciding whether to strike out or dismiss the suit. Thus, in the present case, included various pleas of res judicata raised by the appellants in which the respondent made no answer. I think the learned trial Judge, was right in dismissing the plaintiff/respondent’s claim.”*

It is clear from the above that this court was influenced by the plea of *res judicata* in arriving at the decision. There is no such plea in this case.

The second case cited by counsel is *Omo v. Amantu* (1993) 3 NWLR (Pt. 280) 187. This is a Court of Appeal decision. It involved the interpretation of Order 29 rules 2 to 4 of the High Court of Bendel State (Civil Procedure) Rules 1988. The rules provide for when leave will not be sought and when leave will be sought in a motion for discontinuance and withdrawal of suits. In that case, the Court of Appeal held that a suit withdrawn after issues have been joined should be dismissed and not merely struck out. With respect, that decision was not available to the Court of Appeal in the light of the rules before the court for interpretation. The decision was therefore reached *per incuriam*. The issue before the court was whether the notice of discontinuance filed by the respon-

dent was sufficient and whether the notice contravened the provisions of Orders 29 rules 2(1) and 3(1) (2) of the 1988 Rules.

The last case is *Nwokedi v. R.T.A. Ltd.* (2002) 6 NWLR (Pt. 762) 181, The sub-rule provides:

B        “*Except as provided by rules 1, 2 and 3 of this Order, a party shall not discontinue an action or counter-claim, or withdraw any particular claim made by him therein without leave of the court. The court hearing an application for the leave may grant the application and order the*  
C        *action or counter-claim to be discontinued or any particular claim made therein to be struck out, as against any or all of the parties against whom it is brought or made, on such terms as to costs, as it thinks just, or dismiss the action or the claim and award costs to the deserving party or*  
D        *it may refuse the application whereupon if the party refuses or fails to proceed the court shall dismiss the action or the claim and award costs to the deserving party.*”

The above sub-rule is differently worded. It is not similar to Order 23 rule 1. While Order 22 rule 4(1) clearly provides for dismissal, there is no such provision in Order 23 rule 1. In the circumstances, the Court of Appeal correctly upheld the decision of the trial court in dismissing the action.

F        It is good law that a case is decided on the facts before the court and they should also be cited in the light of the facts on which they are decided. Our principles of *stare decisis* will make no meaning if they are removed from their factual milieu. Such a situation will be like a fish not embedded, soaked or surrounded in or by water. Such fish will die. So too the principles of *stare decisis* outside the facts of the case. I see such  
G        a situation here against the appellant. All the cases he cited are not helpful to the case of the appellant and I so hold.

It is for the above reasons and the more detailed reasons of my learned brother, Muhammad, JSC, that I too dismiss the appeal. I abide  
H        by his order as to costs.

## OGBUAGU JSC

The facts of this case, are not in dispute. The 1<sup>st</sup> Respondent sued the Appellant and the 2<sup>nd</sup> Respondent at the Lagos High Court, over a land dispute. The suit was assigned to Agoro, J. who commenced hearing/trial, but he could not conclude it because of his elevation to the Court of Appeal. The suit was thereafter, transferred to Desalu, J, where it was part-heard by the Plaintiffs witness - PW1, testifying, tendering some exhibits and was thereafter, cross-examined before his demise. The suit was subsequently, reassigned to Adeyinka, J. The 3<sup>rd</sup> Respondent, on his application, was joined in the suit on the order of the court. Following the joinder, the Plaintiff/Respondent, filed an Amended Writ of Summons and Statement of Claim. In reaction, the 3<sup>rd</sup> Respondent, filed a Statement of Defence and Counter-Claim. See pages 27 - 29 of the Records. The Plaintiff/1<sup>st</sup>, Respondent, did not file a Reply to the counter-claim, but the 2<sup>nd</sup> Defendant/Respondent, filed a Reply in respect thereof. This was the position; when the 1<sup>st</sup> Respondent filed a Notice of Discontinuance. In other words, the hearing/trial of the suit, did not take off. In a short Ruling, Adeyinka, J, **dismissed** the suit as against the 1<sup>st</sup> defendant/ Appellant and the 2<sup>nd</sup> Respondent, while he **struck out** the suit against the 3<sup>rd</sup> Respondent. The reason for the said dismissal, was because, pleadings had been filed and exchanged and issues joined. For the striking out, the reason was because, “The 3<sup>rd</sup> defendant **not having filed its Statement of Defence .....**”. It is noted above, that the 3<sup>rd</sup> defendant/Respondent, filed a Statement of Defence and counter-claimed therein.

The Plaintiff/1<sup>st</sup> Respondent, appealed to the Court of Appeal, Lagos Division (hereinafter called “the court below”) which allowed the appeal, set aside the decision of Adeyinka, J and instead, struck out the suit. Dissatisfied with the said decision, the Appellant, has appealed to this Court and in his Brief of Argument, has formulated a lone issue for determination, namely,

*“Whether the learned Justices of the Court of Appeal were right in holding that the action at the High Court ought to have been Struck out instead of being dismissed against all the Defendants having regard to the stage of the proceedings at the trial Court”.*

*[the underlining mine]*

On the part of the Plaintiff/1<sup>st</sup> Respondent, it formulated also one issue for determination, namely,

B *“Whether the learned Justices of the Court of Appeal, were right in substituting the order of dismissal made by the High Court with an order of striking out sequel to the discontinuance notice filed by the 1<sup>st</sup> Respondent in its suit against the Appellant and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents”.*

C The 3<sup>rd</sup> Respondent on its part, also formulated a lone issue for determination, namely,

*“Whether on the facts of this case, the Court of Appeal was right to substitute its discretion for that of the trial Court when it elected to strike out the Plaintiff’s Suit instead of dismissing it”.*

D I note, that the 2<sup>nd</sup> Respondent, did not file any Brief of Argument.

Quite understandably, I note that the Appellant, urges this Court to allow the appeal, set aside the judgment of the court below, and in its place, make an order **dismissing the action against all the defendants**. The 2<sup>nd</sup> Respondent, urges the Court to dismiss the appeal and affirm the decision of the court below. The 3<sup>rd</sup> Respondent, who did not file any appeal in the court below and in this Court, urges the Court, to **allow** the appeal for the following reasons:

F *“(i) Because at the time the Plaintiff sought to discontinue the Suit, it was no longer dominis litis; and*

*(ii) Because the Court of Appeal in striking out the suit instead of dismissing same was substituting its discretion for that of the trial court”.*

G Before dealing with the merits of this appeal, I will, unhesitatingly, discountenance the Appellant’s argument in paragraph 6.1 of his Brief, because, as conceded by him in his own words, thus:

H *“Although this was not made an issue in the lower court as the parties may not have contemplated the length of time it would have to dispose of the appeal at the Court of Appeal.....”.*

The said issue did not arise in the court below, it is not covered by any of the two (2) grounds of appeal and finally, no leave of this Court, was ever sought and obtained by the Appellant.

In dealing with the merits of this appeal, it must be clear and borne in mind, that the proceedings that are relevant to the lone issue of the parties, are those before Adeyinka, J. who never started trial of the suit before the filing of the Notice of Discontinuance. Also of importance, is the consideration of Order 23 Rule 1 of the Lagos State (Civil Procedure) Rules 1972. B

The poser is, “Does the Rule, provide for a Dismissal in such circumstances - i.e. in all the circumstances of this Suit? I or one may ask, Now, in the said Ruling of the learned Judge, the following appear, inter alia: C

*“There is only one High Court notwithstanding that a case has gone from one Judge to another Judge. The earlier part-heard trials are part of the records before this Court.....”*

(Underlining is mine) D

His Lordship, then made the said orders stated hereinabove. Order 23 Rule 1 of the said Rules, provide as follows:

*“The Plaintiff may, at any time before receipt of the defendant’s defence, or after the receipt thereof before taking any other proceeding in the action (save any interlocutory application) by notice in writing duly filed and served, wholly discontinue his action against all or any of the defendants ..... thereupon he shall pay such defendant’s costs of the action..... and such discontinuance or withdrawal as the case may be, shall not be a defence to any subsequent action. Save as in this Rule otherwise provided, it shall not be competent for the Plaintiff to withdraw the record or discontinue the action without leave of the court .....upon such terms as to costs and as to any other action, and otherwise as may be just, order the action to be discontinued, or any part of the alleged cause of complaint to be struck out. The Court may in like manner, and with the like discretion as to terms, upon the application of a defendant, order the whole or any part ..... To be withdrawn or struck out, but it shall not be competent to a defendant to withdraw his defence, or any part thereof, without such leave”* F G H

[the underling by His Lordship]

In the instant case leading to this appeal, the Notice of Discontinuation

ance, was filed before the close of pleadings, as the 3<sup>rd</sup> Respondent's application of 10<sup>th</sup> September, 1994, for extension of time to file its Statement of Defence, had not been taken or heard by the trial court. I note that there is no record that the 1<sup>st</sup> Respondent, took any other proceeding  
 B in the action except its filing the said Notice of Discontinuance. It is also plain to me, that the Rule provides that such discontinuance or withdrawal as the case may be, shall not be a defence to any subsequent action. The provisions in this Rule 1, are clear and unambiguous. Applying the principles or guidance in the interpretation of a statute, it is now  
 C firmly settled that where the words are clear and unambiguous, effect should be given to the ordinary plain meaning of the words. See Chief Okotie-Eboh v. Chief James E. Manager & 2 ors. (2004) 12 SCNJ. 139; NNPC v. Lutin Investment Ltd. & anor. (2006) 1 SCNJ. 131; (2006) 2  
 D NWLR (Pt.965) 506; (2006) 1 S.C (Pt.III) 149; (2006) All FWLR (Pt301) 1760; (2006) Vol. 2 MJSC1; (2006) Vol 134 LRCN 316; and (2006) 1 JNSC (Pt.1) 97 and many others. In other words, there is no need to resort to any external or introducing extraneous matters. Courts should  
 E not defeat the enactment by introducing their own words into the enactment. In the above Rule, there is no provision for the dismissal of an action on the ground of the filing of a Notice of Discontinuance or withdrawal of the action. On this ground alone, this appeal fails.

F For purposes of emphasis, I will deal generally and briefly, with some of the pronouncements of some of the courts of the land including this Court, in respect of the consequences of the filing of a Notice of Discontinuance withdrawal of an action at any given stage. In the case of  
 G *Sonekan v. Smith (1967) 1 All NLR 329*, the action was part-heard as the plaintiff had closed his case and the defence opened, when the Plaintiffs counsel, applied for leave to, discontinue the action. The trial Judge, gave leave to discontinue with liberty to, bring another suit. On appeal, this Court, allowed the appeal, varied the order and held that the trial Judge  
 H exercised his discretion on insufficient grounds; That injustice, taking into consideration of all the circumstances of the case, the reasons relied on in support of the application and injustice to the 1<sup>st</sup> defendant who had started testifying, the plaintiff ought to have been denied the opportu-



nity of instituting fresh action against the first defendant for the same action.

In the case of *Giwa v. John Holt Ltd.* 10 NLR 77, the plaintiff filed 4 Notice of Discontinuance, after the case had been called up for hearing. On appeal, it was held that it was not open to him to discontinue B without the leave of the trial court.

In the case of *Izieme & 5 ors. v. Ijeoma Ndokwu & 4 ors.* (1976) (1) NMLR 280, two witnesses had testified. At a stage, the plaintiffs' counsel applied to discontinue the case on the ground that the 2<sup>nd</sup> PW had C confessed that he lied to the court on a material particular. The learned trial Judge, granted the application and struck out the action. On appeal, this Court - per Fatayi- Williams, JSC (as he then was), held that the trial court, had the discretion, firstly, as to whether or not to allow the plain- D tiffs, withdraw or discontinue the action at that stage. That in considering the manner in which the discretion given to a court, should be exercised, the circumstances of each case, must be considered. That the issue involved, had not become so crystalised as to make it possible for the learned trial Judge at that stage, to give a decision on the merits of the E case without doing injustice to one of the parties and that an order for dismissal, could have had that effect. It finally held that the trial court's discretion, could not be questioned.

In the case of *Soetan v. Total Nigeria Ltd.* (1972) 1 S.C. 86 (1975) F *UILR (Pt.II) 218 (a) 220*, it was held that where a plaintiff exercises his right under Order 44 Rule 1 (a) of the Supreme Court (Civil Procedure) Rules, 1945, it is an error, to dismiss the action since there had been no *litis contestatio* and when the determination was not made after hearing G evidence of the whole or some fundamental part of the claim. That the proper order to make, was the striking out of the action.

In the case, of *Eronini & 3 ors v. Iheuko* (1989) 2 NWLR (pt. 101) 46 @ 56, 60, 62, 68; (1989) 3 SCNJ. 130, it was held that a plain- H tiff, may withdraw his claim at any stage of the proceedings before judgment without leave of court where no date has been fixed for hearing and that discontinuance, is no defence to any subsequent suit. That where a case has been fixed for hearing, leave of court to withdraw, is required

and leave may be granted on terms as to costs and as to any subsequent suit and otherwise as the court may deem just.

It need be borne in mind, that a defendant, who does not object to an application for discontinuance, should not expect the suit to be dismissed in his favour. See *Sonekan v. Smith* (supra).

In the case of *Ijiwoye Brothers Ltd, v. National Provident Fund Management Board* (1990) 2 NWLR (Pt.134) 583 @ 588 C.A., it was held that by virtue of the relevant Rules, that a plaintiff, can, by notice to all the parties, discontinue without leave of the court if such notice, was filed before the date fixed for hearing of the suit. That a defendant, in such a case, is entitled to costs as may be appropriate. That such discontinuance or withdrawal, shall terminate the proceedings and that the appropriate order to make, is that of striking out. See also the case of *Ezeani v. Agbeze* (1991) 4 NWLR (Pt.187) 631, 642-643 C.A. The case of *Okorodudu & anor. v. Okoromadu & anor.* (1977) 3 S.C. 21 @ 28; (1977) 3 S.C. (Reprint) 13 @ 17-18 was referred to. It was held in this case that where the notice was/is invalid, that the proper order to make, was to strike out the Notice and call upon the plaintiff to proceed with his case as pleaded and where he refuses, then the court will dismiss the suit as was the case in *Ofoegbu Nze v. David Nze* (1955) 15 WACA 36. See also the case of *Nwokedi v. Roxy Travels Agency & 2 ors.* (2002) 6 NWLR (Pt.762) 181(a)196 C.A.

In the case of *Omo & 5 ors. v. Amantu* (1993) 3 NWLR (Pt.280) 187 @ 195 C.A. pleadings, had been filed and exchanged and the case, was fixed for hearing/trial for 1<sup>st</sup> December, 1989. On 27<sup>th</sup> November, 1989, a Notice of Discontinuance was filed. It was submitted that (in the absence of the respondents and their counsel who did not appear on 1<sup>st</sup> December, 1989), that in view of the filing and exchange of pleadings, and therefore, issues had been joined, that the application should have been by leave of the court. The trial court was then urged by counsel, to strike out the suit. On appeal, it was held that by virtue of the Rules of the trial court, a party may not discontinue, except with the leave of court, unless the discontinuance, is made at any time not later than fourteen (14) days after service on the plaintiff, with the defence. That discon-

tinuance must be done by an application for leave either by summons or motion on notice and that a mere notice of discontinuance, is not sufficient.

I should observe here, that application to withdraw or discontinue, falls into two (2) categories; viz, B

*“(a) An action to withdraw the suit before the expiration of fourteen (14) days from the date of the filing of the defence when there are two or more defendants. In that case, no leave of court is required.*

*(b) After fourteen (14) days, leave is required and the court, has a discretion to either strike out or dismiss the suit with or without costs after considering all the circumstances of the case”.* C

Thus, in the case of *Omo v. Amantu* (supra), it was held that a suit withdrawn after issues have been joined, should be dismissed and not merely struck out. The cases of *Eronini & ors. v. Iheuko* (supra) and *Rodrigues v. Public Trustee* (1971) 4 S.C. 29, were referred to. D

In the, case of *Aghadiuno & 2 ors. v. Onubogu* (Nwankwo) *Ekegbo* (1998) 5 NWLR (Pt.548) 16 (a), 30; (1998) 4 SCNJ. 81, pleadings had been filed and exchanged and the case was fixed for hearing. It was held that the order to be made, depends at what stage the application to discontinue or withdraw is made. That the Rules of that court, had not prescribed a particular mode to be adopted either the application is to be made orally by motion or by Notice. F

In summary, I have gone this far, because firstly, what has to be looked for and considered by a trial court, are the wordings or provisions of each particular Rules of the trial court governing discontinuance or withdrawal of an action/suit. Secondly, when an application for discontinuance of an action is made, one of the things to be considered by a trial court, is at what stage the said application is made. If it is made before a hearing date has been fixed, it seems to me, that it is now firmly settled that the proper order to make, is one of striking out. This is because, there has been no *litis contestatio* and a determination on the merits, has not been made after hearing evidence of either the whole or some fundamental part of the claim. H

If the application is made after hearing has commenced, the trial

court, must weigh and consider all the circumstances of the case in the interest of justice and thus, balance the interest of the parties involved including the balance of convenience and disadvantage which might be suffered by any of the parties concerned. See *Rodrigues v. The Public*

B *Trustee* (supra)

Thirdly, a decision to grant leave to discontinue, is discretionary and the discretion, must be exercised not only judicially but judiciously. See *Okorodudu & anor. v. Okoromadu & anor.* (supra). Acting judi-  
C ciously it is now settled, is said to import the consideration of the interest of both sides and weighing them in order to arrive at a just or fair decision. In the instant case leading to this appeal, although pleadings had been filed and exchanged and thus issues joined, but the application to discontinue, was filed before the commencement of trial/hearing.

D I note that at page 36 of the Records, His Lordship, on the date of the said Ruling, recorded inter alia, as follows:

“*Court. The fact that the plaintiff brought an application for ac-  
celerated hearing before this court after abrupt determination of the ear-  
E lier two trials by the demise of the two Hon. Judges, shows the plaintiffs  
desire of a quick disposal of this action”.*

*[the underlining mine]*

His Lordship thereafter, proceeded to make orders as to costs in  
F respect of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. From the above underlined words, that should have been the more reason, he should have not dismissed the suit at least in fairness or justice to the Plaintiff/Respondent who had shown his willingness and readiness to prosecute its case. But  
G for reasons best known to his learned counsel, the Notice of Discontinuance, was filed.

From some of the Rules of some State High Courts, I note that from the first date that a case is fixed for hearing and beyond, leave to discontinue the suit, is no longer automatic. This is because, it seems to  
H me, at that stage, the plaintiff is no longer “*dominus litis*”. Even at that stage, it is for the trial court to decide, whether or not the action should be discontinued and upon what terms. In effect, a trial court, can disallow discontinuance and ask the plaintiff to proceed with his case. With

respect, I do not agree with the trial court, that perhaps or understandably, followed the decision in *Omo & ors. v. Amantu* (supra) that once pleadings have been filed and exchanged and issues joined, and a plaintiff applies to withdraw the case at that stage, the suit will be dismissed and not struck out. I have stated earlier in this Judgment, that the circumstances of each case, must be considered. A case may appear similar, but certainly they can never be identical.

In concluding this Judgment, I wish to pause here to state firstly that the said proceedings before Agoro J, and Desalu, J., may not have been admissible in evidence except the conditions specified in Section 34(1) of the Evidence Act were satisfied and except for the sole purpose of discrediting a witness who had testified in the previous proceedings. See the cases of *Alade v. Aborishade* 5 FSC 167. 171; *Ariku v. Ajiwogbo* (1962) 1 ANLR 629; *Nwanguma & anor. v. Ikyoande & 5 ors.* (1992) 8 NWLR (Pt.258) 192 @ 194 C.A. and *Obawole & anor. v. Coker* (1994) 6 SCNJ. (Pt..1) 20 @ 39 - per Ogundare, JSC. Secondly, appeals on the exercise of discretion as in the instant case to the court below, can be entertained where such exercise by the trial court or court below, is deemed not to be according to commonsense and according to justice or if there is a miscarriage of justice in the exercise of the discretion. See the cases of *Solanke v. Ajibola* (1969) (1) NMLR 253; (1968) NSCC (Vol.5) 40 (a) 44-46; *Odusote v. Odusote* (1971) NMLR 228; (1971) NSCC Vol 3 231 (a) 235; *Ifediora & ors. v. Ume & ors.* (1988) 2 NWLR (Pt 74) 5; *Chief Kalu Igwe & ors. v. Chief Okuwa Kalu & ors.* (1993) 4 SCNJ. 21 @ 30; (1993) 4 KLR 33, just to mention but a few. Thus, it is settled that where a trial or lower court, exercised a discretion upon a wrong principle or mistake of law or under a misapprehension of the facts (as in the case leading to this appeal) or took into account irrelevant or extraneous matters or exclude relevant matters thereby giving rise to injustice, an Appellate Court, will not abdicate its duty to interfere with the exercise of that discretion in order to correct or prevent the injustice. This is exactly what the court below did. See the cases of *Alhaji A. Oyekanmi v. NEPA* (2000) 12 SCNJ. 75 @ 95; *Eze v. Attorney General Rivers State & anor.* (2001) 12 SCNJ. 35 @ 50-51 and recently, *General & Aviation Services*

*Ltd v. Captain Paul M. Thahal (2004) 4 SCNJ. 89 @ 104-105; (2004) 10 NWLR (Pt.980) 50, just to mention but a few.*

I will conclude this Judgment with the pronouncement of this Court in the case of *Prof. Edozien & 4 ors. v. Chief (Engr.) Edozien B (1993) 1 NWLR (Pt.272) 678; (1993) 1 SCNJ. 166 @ 179, inter alia, as follows:*

*“A party comes to Court for an alleged wrong done to him, or he seeks a declaration in respect of certain rights, hut the moment he decides to exercise his unfettered right not to pursue his action, what is left for the court is the Order to be made as it is outside the Court’s jurisdiction to force a party to continue an action filed by him. There is clearly a difference between the right to withdraw an action filed by a party and a consequential order to be made following the withdrawal”.*

By the order of dismissal, the learned trial Judge, with respect, had unwittingly and unjustifiably, shut out the plaintiff/Responds forever from pursuing its claim or reliefs, if it so wished.

It is from the foregoing and the fuller Judgment of my learned brother, Muhammad, JSC, which I was privileged to read before now, that find no merit in this appeal, which I dismiss. I cannot fault the decision of the court below, which I hereby affirm. I abide by the consequential order in respect of costs in the said lead Judgment.

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### **TABAI JSC**

I had a preview of the leading judgment by my learned brother Muhammad JSC and I agree with the reasoning and conclusion therein. I also dismiss the appeal for the lack of merit. I also abide by the order on costs.

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