

SUPREME COURT OF NIGERIA

25TH JANUARY, 2008, SC.208/2002

**CORAM:- A. I. KATSINA-ALU, D. MUSDAPHER, S. A.
AKINTAN, W. S. N. ONNOGHEN, I. T. MUHAMMAD, JJSC**

1. ANIREJU EKUDANO

2. J. M. DUDU

..... APPELLANTS

(For themselves and on behalf of
Obontegharedo Community)

AND

1. SUNDAY KEREGBE

2. TIMOTHY AIBE

3. JOSEPH FADESAGHA

4. ANDREW PEPPER

..... RESPONDENTS

5. CHIEF J. K. LAWURU

6. JONAH BUNIZOH

(For themselves and on behalf of
Ogbeinbiri Community)

PRACTICE & PROCEDURE - Discontinuance - Stage of proceedings - Determines whether the action will be struck out - Or court should order the terms (H1)

PRACTICE & PROCEDURE - Discontinuance - Leave of Court - Where discontinuance is sought after hearing has commenced - Trial Judge has a discretion - To order outright dismissal of the suit (H2)

PRACTICE & PROCEDURE - Discontinuance - Fair hearing - Court's discretion exercised in dismissing the suit - Is proper in this case - Issue of fair hearing does not arise (H3)

FACTS

The plaintiff/appellants filed an action against the defendants/respondents before the Warri Customary Court. They claimed N2,000 damages for trespass in respect of the timber bush in dispute, entitlement to customary right and forfeiture of the customary tenancy granted to respondents in all fishing camps situated in appellants'

land. As the trial commenced, 1st appellant and two other witnesses gave evidence and were cross examined. Thereafter, the case was adjourned a number of times at appellants' counsel's instance. This was followed by appearance of a new counsel on their behalf who requested for further adjournment to enable him study the case file as he was recently briefed.

At the resumed hearing, appellants' new counsel applied to the court to discontinue the case on the ground that the court lacked jurisdiction. The court took submissions on the application. In a reserved ruling, objection to jurisdiction was overruled and the appellants' claim was dismissed. An appeal to the Court of appeal was also dismissed. Still dissatisfied, appellants have further appealed to the Supreme Court.

HELD (Unanimously dismissing the appeal per **AKINTAN JSC**)
Discontinuance - Stage of proceedings

1. The appellants' grievance in this appeal is in respect of the trial court's order dismissing the case instead of making an order striking out the case. The law is settled that the principle underlying the requirement for leave to discontinue a suit is that after proceedings have reached a certain stage, the plaintiff who had brought his adversary into court, should not be allowed to escape by the side door and avoid the contest. At that stage, he is to be no longer dominus litis and it is for the trial Judge to say whether the action should be discontinued and upon what terms. It follows, therefore that a plaintiff may, without the leave of court, discontinue a suit against all or any of the defendants or withdraw any part of his claim before the date fixed for hearing. In such a situation the notice of withdrawal automatically terminates the proceedings and a formal order striking out the suit may be made by the court. (p. 584 E)

Discontinuance - Leave of Court

2. But where the request for discontinuance is made after the date fixed for the hearing of the suit, the plaintiff may discontinue only with the leave of the court and subject to conditions that may be imposed by the court. In granting the request, the trial Judge may order that the case be struck out or make an order for outright dis-

missal of the suit. Whichever order the court makes will depend on all the circumstances of the case and an appellate court will not ordinarily tamper with the trial court's exercise of such judicial discretion. (p. 585 A)

Discontinuance - Fair hearing

3. Counsel applied to discontinue the suit on the ground that the court lacked jurisdiction to entertain the claim. The court, in a reserved ruling, over ruled the objection to jurisdiction and then dismissed the claim.

The order dismissing the claim was quite within the discretionary power of the court and comes within the powers of the court as I have declared above. In the result, the appeals filed by the appellants to the two lower courts were properly dismissed. I also hold that this appeal lacks any merit and I accordingly dismiss it. I also hold that the issue whether the appellants' right to fair hearing was breached, raised as an issue, does not arise and the appeal as it relates to that issue also fails. (p. 586 F)

NOTABLE POINT OF INTEREST

ONNOGHEN JSC

1. Withdrawal of suit - Dismissal is proper in this case

It must be noted that in deciding whether to strike out a suit or dismiss same upon an application by the plaintiff to withdraw same particularly at the stage where evidence had been led in the matter, the court concerned is being called upon to exercise its discretion one way or the other based on the facts and circumstances of the case. In the instant case, the trial court gave reasons why it thought the proper order to make in the circumstances is that of dismissal rather than striking out.

The court, in exercising its said discretion has to examine the reason offered by the plaintiff for the withdrawal of the suit. In the instant case, the trial court stated that the reason why the plaintiffs have applied for the withdrawal of the case is because it appeared that they were no longer interested in their case because they could not prove same and that it cannot force them to continue with the suit. The lower court agreed with the trial court that the

above reasons cannot be faulted and that the reason of lack of jurisdiction preferred by the appellant in the trial court was a mere ruse particularly as substantial evidence had been led by the appellant in support of their claim (p. 587 H)

B REPRESENTATION

K. O. Longe, Esq. (with him, O. M. Jamgbadi), for the Appellants
Chief D. O. Okoli, (with him Chief F. Zimugham), for the Respondents

C CASES REFERRED TO

Olayinka Rodrigues v. The Public Trustees & Ors. (1977) 4 SC 29

Soetan v. Total Nig Ltd., (1972) 1 ALL NLR (Pt. 1)1

Izieme v. Ndokwu (1976) NMLR 280

D Nigerian Properties Co. Ltd. v. Alegbeleye 19 NLR 101

Giwa v. John Holt Co. Ltd. (1930) 10 NLR 77

Eronini v. Ihuko (1989) 2 NWLR (Pt 101) 46

LEAD JUDGMENT BY AKINTAN JSC

E The appellants were the plaintiffs in this case which was filed at the Warri Area Customary Court while the respondents were the defendants. The plaintiffs' claim before the court as amended was:

F (1) For N2000 damages for trespass committed by the 1st defendant when he entered the plaintiffs' bush between August and September, 1992 at Uba Majebi Ogbosanine in Warri Local Government Area where he fell timber trees without the consent and authority of the plaintiffs;

G (2) Declaration that the plaintiffs were entitled to the customary right of the land in dispute; and

(3) For forfeiture of the customary tenancy granted to the defendants in all the fishing camps situated in the plaintiffs' land.

H At the trial which commenced in the court, the 1st plaintiff and two other witnesses had given evidence and they were duly cross-examined by learned counsel for the defence. Thereafter the case had to be adjourned on a number of times at the instance of learned counsel for the plaintiffs. This was followed by the appearance of new counsel for the plaintiffs who again requested for a further ad-

jourment to enable him study the case as he claimed that he was recently briefed. His request was granted. But at the resumed hearing, the new counsel applied to the court to discontinue the case on the ground that the court lacked jurisdiction to entertain the claim before the court. The court took submissions on the application and adjourned its ruling. B

In its reserved ruling, the court overruled the objection to its jurisdiction and went ahead to dismiss the plaintiffs' claim. The plaintiffs were dissatisfied with the order dismissing the case. An appeal was therefore filed against that decision to the Warri High Court sitting in its appellate capacity. The appeal was dismissed. A further appeal to the Court of Appeal, Benin Division was also dismissed. The present appeal is from the decision of the Court of Appeal. C

The parties filed their brief of argument in this court. The appellant formulated the following three issues as arising for determination in the appeal: D

"1. Did the learned Justice of the Court of Appeal err in upholding the decision of the Warri Area Customary Court dismissing the plaintiffs' suit, after it ruled that it had jurisdiction to entertain it, without first calling on the plaintiffs to proceed with their case?" E

2. Were the plaintiffs not denied the right of fair hearing when the Court of Appeal upheld the decision of the court of first instance not to call on the plaintiffs to proceed with their case after it ruled that it had jurisdiction?" F

3. Did the learned Justice of the Court of Appeal err in upholding the decision of the Warri Area Customary Court that it had jurisdiction to entertain plaintiffs' suit?" F

Three similar issues were also formulated in the respondents' brief. I therefore consider it unnecessary to reproduce them. G

It is the contention of the appellants, as canvassed in the appellants' brief, that the lower court was wrong in dismissing the claim without first calling on the plaintiffs (now appellants) to proceed with their claim after over ruling the objection to the court's jurisdiction. This is their main complaint. It is submitted that the action of the trial court in dismissing the plaintiffs' claim after overruling the submissions made on the court's lack of jurisdiction to entertain the suit was premature. It is argued that the correct procedure is that if the court H

refuses the application, the trial Judge is expected to call on the plaintiffs to proceed with the case. It is where the plaintiffs refuse to proceed that the Judge will consider the evidence led so far and then decide either to strike out the suit on conditions given or dismiss same. The decision of this court in *Olayinka Rodrigues v. The Public Trustees & Ors.* (1977) 4 SC 29 is cited in support of this submission.

It is submitted in reply in the respondents' brief that whether issue of jurisdiction could be raised at any stage does not arise in the appeal. That what happened was that the appellants had made up their mind to withdraw their claim and as such the court could not compel them to go on with the case which they had instituted in a court of their choice. Calling on the appellants to proceed with their case after the ruling that the court had jurisdiction to entertain the claim therefore could not arise. It is further submitted that it was obvious to the judicial minds of the Area Court Judges that the application to withdraw was not made bona fide but merely an attempt to fight and run away in order to fight another day, thus having a second bite at the cherry. The decision of the trial court to dismiss the appellants' claim before the court is therefore said to be quite appropriate. Similarly, both the Warri High Court and the lower court acted within the law by affirming the stand taken by the trial court. A number of decisions of this court are cited in support of this submission.

The appellants' grievance in this appeal is in respect of the trial court's order dismissing the case instead of making an order striking out the case. The law is settled that the principle underlying the requirement for leave to discontinue a suit is that after proceedings have reached a certain stage, the plaintiff who had brought his adversary into court, should not be allowed to escape by the side door and avoid the contest. At that stage, he is to be no longer dominus litis and it is for the trial Judge to say whether the action should be discontinued and upon what terms. It follows, therefore that a plaintiff may, without the leave of court, discontinue a suit against all or any of the defendants or withdraw any part of his claim before the date fixed for hearing. In such a situation the notice of withdrawal automatically terminates the proceedings and a formal order striking out the suit may be made by the

court. See Soetan v. Total Nig Ltd., (1972) 1 ALL NLR (Pt. 1)1; Izieme v. Ndokwu (1976) NMLR 280; Aghadiuno v. Onubogu (1998) 5 NWLR (Pt. 548) 16.

But where the request for discontinuance is made after the date fixed for the hearing of the suit, the plaintiff may discontinue only with the leave of the court and subject to conditions that may be imposed by the court. In granting the request, the trial Judge may order that the case be struck out or make an order for outright dismissal of the suit. Whichever order the court makes will depend on all the circumstances of the case and an appellate court will not ordinarily tamper with the trial court's exercise of such judicial discretion. See Nigerian Properties Co. Ltd. v. Alegbeleye 19 NLR 101; Alegbeleye 19 NLR 101, Giwa v. John Holt Co. Ltd. (1930) 10 NLR 77; Eronini v. Ihuko (1989) 2 NWLR (Pt 101) 46; Ajayi v. Odunsi (1959) SCNLR D 496; Rodrigues v. Public Trustee (1977) 4 SC 29; and Aghadiuno v. Onubogu, supra.

The facts of the present case, as already set out above, are that the appellants, as plaintiffs filed their claim in the Area Customary Court. The trial started and in fact three witnesses, including the first plaintiff, had given evidence and were duly cross-examined. It is also on record that some of the vital documents the plaintiffs relied on in proving their claim were rejected when they tried to tender them. Thereafter their enthusiasm to prosecute or continue with their claim diminished. They started to ask for adjournment which culminated in procuring another Counsel to appear for them. Eventually, their newly introduced ***Counsel applied to discontinue the suit on the ground that the court lacked jurisdiction to entertain the claim. The court, in a reserved ruling, over ruled the objection to jurisdiction and then dismissed the claim.***

The order dismissing the claim was quite within the discretionary power of the court and comes within the powers of the court as I have declared above. In the result, the appeals filed by the appellants to the two lower courts were properly dismissed. I also hold that this appeal lacks any merit and I accordingly dismiss it. I also hold that the issue whether the appellants' right to fair hearing was breached, raised as an

issue, does not arise and the appeal as it relates to that issue also fails. In conclusion, I dismiss the entire appeal with N10,000 costs in favour of the respondents.

KATSINA-ALU JSC

B I have had the advantage of reading in draft the judgment delivered by my learned brother, Akintan, JSC. I agree with it and, for the reasons he has given, I too dismiss the appeal and I abide by all the orders including order as to costs.

MUSDAPHER JSC

I have had the honour to read in advance the judgment of my Lord Akintan, JSC. just delivered in this matter and I respectfully agree. His Lordship had adequately set out the facts and has discussed very comprehensively and admirably all the issues submitted for the determination of the appeal. I have nothing further to add but suffice for me to adopt his reasonings as mine.

I order accordingly and abide by the consequential orders made in the said lead judgment including the order as to costs. I too, dismiss the appeal.

ONNOGHEN JSC

F This is an appeal against the judgment of the Court of Appeal holden at Benin City in appeal No. CA/B/230/96 delivered on 18th day of March, 2002 in which it affirmed the appellate decision of the Delta State High Court in Appeal No. W/51/95 delivered on 15th November, 1995.

G The facts of the case have been detailed in the lead judgment of my learned brother Akintan, JSC. I therefore do not intend to repeat them here except as may be needed to emphasize the point being made. I intend to comment only on the question of dismissal of the case of the appellant after the trial court held that it had jurisdiction to entertain and determine the matter between the parties without giving the appellant the opportunity to continue or complete his case as that is the main or real issue in contention between the parties.

H It should be noted that it was the appellant who applied to the

trial court to withdraw his case after evidence had been taken in the matter, on the ground that the trial court had no jurisdiction to entertain same. He urged the court to strike out the suit. Rather than strike out the suit, the trial court dismissed it observing in the process as follows:-

"As we have said before, it appears that the plaintiffs are no longer interested in this case, hence the application for withdrawal and not that this court has no jurisdiction. This court cannot force the plaintiffs to go on with the case they have applied to withdraw the case and their application will be granted. But the case will not be struck out because evidence has been led as the plaintiffs applies (sic) to withdraw his case, the inference is that he cannot prove the case and the proper order for the court to make is one of dismissing plaintiffs' claim. So that the only order this court can make in the circumstances of this case is one dismissing the plaintiffs' claim in its entirety. The four cases consolidated together are hereby entirely dismissed with N400.00 costs to the defendants."

I hold the view that the above passage contains all the relevant facts for the determination of the issue under consideration which is simply the proper order to make in the circumstance of the case, striking out or dismissal. The Court of Appeal agreed with the trial court that in the circumstances of this case, the proper order is that of dismissal and I hold the considered view that the lower courts are perfectly in order in their holdings.

It is the contention of learned Counsel for the appellant that since the application for withdrawal of the suit predicated on the notion that the trial court had no jurisdiction was overruled, the proper thing for that court to have done, after it found and held that it has the requisite jurisdiction to hear and determine the matter, was to have allowed the appellant to continue with his case to conclusion and that not to allow him to conclude his case before the order of dismissal robbed him of his right to fair hearing, and therefore a condemnable act.

It must be noted that in deciding whether to strike out a suit or dismiss same upon an application by the plaintiff to withdraw same particularly at the stage where evidence had been led in the matter, the court concerned is being called upon to exercise its discretion one

way or the other based on the facts and circumstances of the case. In the instant case, the trial court gave reasons why it thought the proper order to make in the circumstances is that of dismissal rather than striking out.

The court, in exercising its said discretion has to examine the reason offered by the plaintiff for the withdrawal of the suit. In the instant case, the trial court stated that the reason why the plaintiffs have applied for the withdrawal of the case is because it appeared that they were no longer interested in their case because they could not prove same and that it cannot force them to continue with the suit. The lower court agreed with the trial court that the above reasons cannot be faulted and that the reason of lack of jurisdiction preferred by the appellant in the trial court was a mere ruse particularly as substantial evidence had been led by the appellant in support of their claim in fact three of the witnesses had testified and were extensively cross examined on the reliefs claimed. It should also be noted that three documents tendered by the appellant at the trial were rejected and that it was soon after their rejection that the application to withdraw the suit was made to the trial court. It is obvious that by that application at that stage and having regards to the facts and circumstances of the case, the appellant was seeking for an opportunity to have a second bite at the cherry and I hold the view that the lower courts were right in not allowing him to do so.

In conclusion I agree with the reasoning and conclusion of my learned brother Akintan, JSC. that the appeal is without-merit and should be dismissed.

I order accordingly and abide by the consequential orders made in the said lead judgment including the order as to costs.

MUHAMMAD JSC

I have had the opportunity of reading in draft the judgment just delivered by my learned brother Akintan, J.S.C. I am in agreement with my learned brother that the appeal lacks merit. I too dismiss the appeal and abide by all orders made in the leading judgment including order as to costs.