

1

SUPREME COURT OF NIGERIA
7TH MARCH, 2008. SC. 283/2002
CORAM:- N. TOBI, S. A. AKINTAN, M. MOHAMMED, I. F.
OGBUAGU, F. F. TABAI, JJSC

H.R.H. IGWE G. O. UMEONUSOLU
UMEANADU APPELLANT
AND
1. ATTORNEY GENERAL OF
ANAMBRA STATE RESPONDENTS
2. EZEANI ADOLPHUS IBENEME
ANYASO

PRACTICE & PROCEDURE - Originating process - Non-service of -
Where not served on a party newly joined at his own instance - It is
a mere irregularity - That did not occasion miscarriage of justice - And
cannot affect trial court's jurisdiction (H1)

PRACTICE & PROCEDURE - Discontinuance - Notice of - Filed on
or after hearing date was fixed - Makes leave of court necessary - And
trial court may grant or refuse the application - On terms as the case
may require (H2)

DISCONTINUANCE - Leave - Notice of discontinuance - Where filed
after action has been fixed for hearing - Trial court rightly ignored it
- As leave was not sought and obtained - The action remains pending
(H3)

FACTS

Before the Nnewi High Court of Anambra State, the plaintiff/
appellant filed an action vide originating summons against the 1st
defendant/respondent. The purpose of the action was to compel 1st
respondent to issue a fiat to appellant to enable him prosecute 2nd
defendant/respondent for various alleged offences. It was pursuant to
an application filed by the 2nd respondent, that he was joined as a
party to the suit by court's order. There were lots of conflicts/disputes
between appellant and 2nd respondent including a dismissed con-

tempt of court proceedings prosecuted by 2nd respondent against appellant and his counsel. Appellant filed a notice of discontinuance to terminate the originating summons proceedings which was already fixed for hearing. This he did without seeking nor obtaining leave of the trial court.

Appellant also raised a preliminary objection as to the competence of the 2nd respondent to appear in the suit, when inter alia, there was no service of originating process (Form 5) on him vide O.3r. 10 of the High Court of Anambra State Civil Procedure Rules, 1988. The trial court refused or ignored the discontinuance notice, and overruled the preliminary objection. Appellant's appeal to the Court of Appeal was dismissed. Still dissatisfied, he has further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

"1. Whether the Court of Appeal was correct in its decision that the non-service of an Originating process (in this case Form 5) on the 2nd Respondent was a mere irregularity?"

2. Whether the Court of Appeal was correct in its decision that the learned trial Judge was correct in refusing a discontinuance of the suit as sought by the Appellant?"

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

Originating process - Non-service of

1. I completely agree with the Court below on the interpretation and application of the provisions of Order 3 Rule 10 of the Anambra State High Court Rules. Taking into consideration that the joinder of the 2nd Respondent to the Appellant's proceedings in the Originating Summons filed by him, was not at the instance of the Appellant or the 1st Respondent who were original parties in the action but at the instance of the 2nd Respondent on his own application filed by his own Counsel both of whom were present in the Court on 24th October, 1996 when the application for joinder was granted by the trial Court, for the Appellant to insist that the Respondent must be served with Form 5 before he could have been considered as having joined the action, is to assume responsibility which does not belong to the Appellant. The 2nd Respondent having taken the advantage or opportunity provided for his benefit under Order 3 Rule 10 of the Rules, the Appellant cannot hide under the same rule to kick out the 2nd

Respondent from the Appellant's action to which the 2nd Respondent had been rightly joined on the orders of the trial Court. Since the 2nd Respondent is not complaining of the alleged non-service of Form 5 on him, the Appellant, in my view, is the least person qualified to complain on his behalf. I therefore agree with the Court below that failure to serve Form 5 on the 2nd Respondent in compliance with Order 3 Rule 10 of the Anambra State High Court Rules in the present case is a mere irregularity which did not occasion any miscarriage of justice liable to have affected the jurisdiction of the trial Court. This takes care of the first issue for determination which I hereby resolve against the Appellant. (p. 1381 D)

Discontinuance - Notice of - Filed after hearing was fixed

2. The correct interpretation and application of the rule therefore is that if notice of discontinuance is filed on or after the date the action was first fixed for hearing, the learned trial Judge has a discretion to grant or refuse the application on terms as the case may be. Coming back home to one of the decisions of this Court in *Leonard Eronini & Ors. v. Francis Iheuko* (1989) 2 NWLR (Pt. 101) 46 at 56, Obaseki, JSC., stated the position of the law on the subject of the interpretation and application of the provisions of Order 47 Rule 1 of the High Court Rules of Eastern Nigeria, on notice of discontinuance thus -

"It is clear therefore that a Plaintiff and or a Defendant who counter-claims may withdraw his claim or counter-claim at any stage of the proceedings before judgment. In some cases (no leave is required), these are mainly in circumstances where no date has been fixed for hearing. No leave is required. However, where the case has been fixed for hearing, leave to withdraw is required as the Rule gives power to the Court to allow discontinuance. Leave may be granted on terms as to costs and as to any subsequent suit and otherwise as the Court may deem just." (p. 1383 D)

Notice of discontinuance - Trial court rightly ignored it

3. In the present case therefore, there is no dispute whatsoever that the Appellant's notice of discontinuance was filed after the Appellant's action had already been fixed for hearing. Thus, the Appellant not having sought and obtained the leave of the trial Court to discontinue his action

against the Respondents, that action remains firmly before the trial Court for determination in accordance with the law. The Court below was therefore right in its decision that the trial Judge was correct in refusing or ignoring a discontinuance of the suit as sought by the Appellant in the absence of the required leave under the law.

B On the whole, there is no merit at all in this appeal.
(p. 1384 A)

NOTABLE POINTS OF INTEREST

C TOBI JSC

1. Litigation is not a hide-and-seek game of smartness

Litigation is not the children's game of hide-and-seek. It is not a game of smartness. It is not a game of artifice or cunning display of a smart conduct designed to overreach or outsmart the adverse party. On the contrary, litigation is a decent, open, and not deceitful process of making and defending claims in a court of law. The art and craft of even the most litigious person does not allow him to set a trap with a bait to lure the adverse party, as if he is a fish. That should be left to the fisherman or the keeper of an aquarium; not the courts.

E In this appeal, the appellant tried his head and his hands on a court process which he could not finish; a process which finally fell on him and had a reciprocal toil on him. He received a bomb-shell he thought he did not bargain for. He has nobody to blame; not the respondents, but himself. He thought he could bulldoze his way through but it has ended up against him; the bulldozer lacking the strength, capacity and power to pull down the case of the respondents. (p. 1387 A)

G OGBUAGU

2. Need to forbid interlocutory appeals to Supreme Court and review of awardable costs

With profound humility and the greatest respect, this is a typical interlocutory appeal that has strengthened and supported my view or advocacy that interlocutory appeals to this Court, should and ought to be discouraged and in fact, not allowed to continue. I humbly advocate, that unless in very special circumstances, all interlocutory appeals, should wait and be filed together with the main and substantive appeal to

this Court.

This can be done, without filing separate appeals. Speaking for myself, most times, it is time wasting and most of the time, they are designed or employed as delaying tactics or punishment for the opposing party by some litigants and/or learned counsel, who know undoubtedly, or ought to know that their case like this case, is like one standing on a "quick sand" so to speak. Where however, they are allowed to continue, the Rules of this Court, need, with respect, an urgent review in respect of costs which will enable the Court, have discretion in the award of costs which at least, will not be below a certain reasonable amount. Afterwards, it is said that it is the duty of the court, whenever possible, in the interest of justice, to assist the parties in reducing the expense of litigation. That the court should try as much as possible, to avoid placing unnecessary financial burden upon the litigants. (p. 1390 D)

REPRESENTATION

J. B. Alaci, Esq., For the Appellants

G. C. Emenike (Chief State Counsel) Ministry of Justice, Anambra State (with him N. J. Nwankwo, (Mrs.) Principal State Counsel), Anambra State For the 1st Respondent

CASES REFERRED TO

Oseky Omon v. Ojo (1997) 7 SCNJ 367 at 368

Akukalia Alfred Aghadiuno & Ors. v. Ekegbo Onubogu (1998) 4 SCNJ 8 at 93

Nwachukwu & Ors. v. David Eze & Ors. (1955) 15 WACA 36

Giwa v. John Holt & Co. Ltd. 10 N.L.R. 77

Okorodudu v. Okoromadu (1997) 3 S.C. 21

Nwachukwu v. Eze (1955) 15 W.A.C.A. 36

Ogigie & 3 ors. v. Obiyan (1997) 10 SCNJ 1

Okobia v. Madam Ajanya & ors. (1998) 6 NWLR (Pt.554) 348

Dr. M. C. O. Iweka v. SCOA (Nig) Ltd. (2000) 3 SCNJ. 71

Elom Oke & ors. v. Eze Nwaogbuinya (2001) 1 SCNJ. 157

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

Prof. Edozien & 4 ors. v. Chief (Engr.) Edozien (1993) 1 NWLR (Pt. 272) 678; (1993) 1 SCNJ. 166 @ 179

RULES REFERRED TO

High Court of Anambra State (Civil Procedure) Rules 1988, O. 3 r. 10

B High Court Rules of Anambra State, 1991 O. 22 r. 4 (1)

High Court Rules of Eastern Nigeria O. 47 r. 1

Supreme Court (Civil Procedure) Rules, Cap. 211, of the Laws of Nigeria, 1948 O. XLIV r. 1

C **BOOK REFERRED TO**

Blacks Law Dictionary, 5th Edition at page 419

LEAD JUDGMENT BY MOHAMMED JSC

D The Appellant in this appeal who was the Plaintiff at the Anambra State High Court of Justice sitting at Nnewi, is the Traditional Ruler of Ekwulumili in Nnewi South Local Government Area of Anambra State.

E In December 1994, he planned to hold a festival called 'Asala,' during which he arranged to confer chieftaincy titles to deserving indigenes of his domain. The Appellant then sought approval of the State Government for the exercise which was duly granted. However, few days to the date of the festival, a letter was delivered to the appellant purporting to have come from the Government House, Awka, cancelling the festival.

F The Appellant accused the 2nd Respondent, Ezeani Adolphus Ibeneme Anyaso, who was the 2nd Defendant at the trial Court, of masterminding the plot resulting in the cancellation of the festival and therefore logged a complaint on the commission of various criminal offences against him to the Anambra State Commissioner of Police who ordered investigation into the matter.

G On the completion of the Police investigation against the 2nd Respondent, the Police case diary was sent to the State Director of Public Prosecutions for advice. The opinion of the Director of Public Prosecutions that no prima facie case was made up against the 2nd Respondent was forwarded to the Police.

H Aggrieved by this development, the Appellant applied to the Attorney General of the State who was the 1st Defendant at the trial Court and

1st Respondent in this Court for a fiat to initiate private criminal prosecution against the 2nd Respondent. This request was refused by the 1st Respondent resulting in the Appellant filing an action by Originating Summons against the 1st Respondent as Defendant/Respondent principally for the trial High Court Nnewi, to compel the 1st Respondent to grant fiat to the Appellant to prosecute the 2nd Respondent for the alleged offences committed by him in aborting the festival. The 2nd Respondent on becoming aware of the Appellant's pending action, applied at the trial High Court, to be joined and was accordingly joined as 2nd Respondent to the Originating Summons proceedings on 24th November, 1996 which was set down for hearing on 27th January, 1997.

Meanwhile the Appellant who was anxious to have the 2nd Respondent prosecuted initiated criminal proceedings against him at the Chief Magistrate Court, Nnewi. However, in reaction thereto, a motion on notice for stay of proceedings in the criminal prosecution was filed by the learned Counsel to the 2nd Respondent at the Chief Magistrate Court. The same Counsel also proceeded and initiated contempt proceedings against the Appellant and his Counsel at the High Court, where the Appellant's action against the 1st and 2nd Respondents was awaiting hearing. In order to secure the step he had already taken in having the 2nd Respondent prosecuted at the Chief Magistrate Court, the Appellant filed a notice of discontinuance dated 30th April, 1997, at the High Court on May, 1997, to terminate proceedings in the Originating Summons already fixed for hearing on 27th January, 1997.

However, when the motion for committal of the Appellants' and his Counsel came up for hearing at the trial High Court, the Appellant's counsel raised a number of objections to the hearing of the motion which were duly heard and dismissed by the learned trial Judge on 26th March, 1998. The Appellant's appeal to the Court of Appeal, Enugu Division against the dismissal of his preliminary objections by the High Court, was heard and dismissed on 10th July, 2000, hence the present further and final appeal by the Appellant to this Court raising the following two issues for determination from the grounds of appeal filed by him. The issues are-

"1. Whether the Court of Appeal was correct in its decision that the non-service of an Originating process (in this case Form 5) on the

2nd Respondent was a mere irregularity?

2. Whether the Court of Appeal was correct in its decision that the learned trial Judge was correct in refusing a discontinuance of the suit as sought by the Appellant?"

B These two issues were adopted in the 1st Respondent's brief of argument though with a slight variation to suit the understanding of the 1st Respondent to the issues. No brief of argument was filed for the 2nd Respondent because he and his learned Counsel have died before the appeal came up for hearing.

C In his argument on the first issue, learned Counsel to the Appellant cited the case of *Madukolu v. Nkemdelim* (1962) 2 S.C. NLR. 341 and Order 3 Rule 10 of the High Court of Anambra State Civil Procedure Rules, 1988 and submitted that the Respondents who had failed to fulfil the condition precedent to the exercise of jurisdiction of the trial High Court in the matter by not complying with the requirements of Rule 10 of Order 3 of the High Court Rules in serving Form 5 on the 2nd Respondent, the Court below was wrong to regard this fundamental non-compliance with the rule, as a mere irregularity. Learned Counsel maintained that whether a party joining a suit shall have appeared or not, the issuance and service of Form 5 on such a person is still mandatory, making it a condition precedent to the exercise or assumption of jurisdiction over such person by the Court; that there being no provision for a waiver express or implied in the provision of Order 3 Rule 10 of the Rules, the Court below was in error in reading into the Rules exemption clauses which were not contemplated by the law makers, particularly the issue of miscarriage of justice. Learned Counsel concluded that where special statutory provisions are made for filing of a claim, the procedure so laid down ought to be followed as decided by this Court in *Oseky Omon v. Ojo* (1997) 7 SCNJ 367 at 368.

H For the Respondents however, it was argued that Order 3 Rule 10 of the Rules of Court, were merely to afford the parties whose interest are manifest in pending suits, opportunity of being heard on joining as parties; that having regard to the affidavit of the 2nd Respondent to join the proceedings in the Originating Summons as a party, the 2nd Respondent was already fully equipped to defend himself without necessarily waiting for the service of Form 5 on him.

In the judgment of the Court below now on appeal, the same issue on the complaint regarding the non service of Form 5 on the 2nd Respondent, was raised and Fabiyi, JCA., in the lead judgment dealt with it at pages 98 - 99 of the record as follows -

"I should state it here clearly for the avoidance of doubt that where an extraneous legal personality is joined to an existing suit on the application of a party thereto suo motu by the Court, service of Form 5 on such a new party is sine qua non. In such instance, Form 5 shall be served on him to make him attend the Court. It is only then that the Court will be imbued with jurisdiction. On the contrary, as in this case, where the 2nd Defendant/Respondent applied on his own volition to be joined and he was joined in his presence, further service of FORM 5 on him will merely be a formality. It may amount to an 'over-kill.' FORM 5 may be served on him. It is an instance where the word 'shall' can be reasonably interpreted to mean 'may.' It is not in every case that the word 'shall' imports a mandatory meaning into its use. See Welcome Foundation Ltd. v. Lodeka Pharmacy Ltd. & Or. (Supra) at pages 207 - 208."

I completely agree with the Court below on the interpretation and application of the provisions of Order 3 Rule 10 of the Anambra State High Court Rules. Taking into consideration that the joinder of the 2nd Respondent to the Appellant's proceedings in the Originating Summons filed by him, was not at the instance of the Appellant or the 1st Respondent who were original parties in the action but at the instance of the 2nd Respondent on his own application filed by his own Counsel both of whom were present in the Court on 24th October, 1996 when the application for joinder was granted by the trial Court, for the Appellant to insist that the Respondent must be served with Form 5 before he could have been considered as having joined the action, is to assume responsibility which does not belong to the Appellant. The 2nd Respondent having taken the advantage or opportunity provided for his benefit under Order 3 Rule 10 of the Rules, the Appellant cannot hide under the same rule to kick out the 2nd Respondent from the Appellant's action to which the 2nd Respondent had been rightly joined on the orders of the trial Court. Since the 2nd Respondent is not complaining of the alleged non-service of Form 5 on him, the Appel-

lant, in my view, is the least person qualified to complain on his behalf. I therefore agree with the Court below that failure to serve Form 5 on the 2nd Respondent in compliance with Order 3 Rule 10 of the Anambra State High Court Rules in the present case is a mere irregularity which did not occasion any miscarriage of justice liable to have affected the jurisdiction of the trial Court. This takes care of the first issue for determination which I hereby resolve against the Appellant.

The second issue for determination is whether the Court of Appeal was correct in its decision that the learned trial Judge was correct in refusing a discontinuance of the suit as sought by the Appellant. It was argued in support of this issue by the Appellant that following the application filed by the Appellant to withdraw his action against the Respondents on 12th March, 1997, the matter was adjourned to 28th May, 1997 for mention on which date the Respondents told the Court that they were not opposed to the application to withdraw the action but the trial Court gave no reason for not terminating the action as sought. Learned Counsel conceded that although the action was earlier fixed for hearing which supported the requirement of leave of Court for the withdrawal or discontinuance of the action as held in the cases of Akukalia Alfred Aghadiuno & Ors. v. Ekegbo Onubogu (1998) 4 SCNJ 8 at 93 and Nwachukwu & Ors. v. David Eze & Ors. (1955) 15 WACA 36, the situation in the present action which was later adjourned for mention, is quite different particularly when the learned Counsel on the other side were not opposing the application of the Appellant. Learned Counsel therefore urged this Court to allow the appeal on this issue, as no valid reason was advanced by the Court below for the refusal by the trial Court to grant the application.

In the 1st Respondent's brief of argument, learned Counsel stressed that the action filed by the Appellant was first set down for hearing on 27th January, 1997, while the Notice of discontinuance was filed by the Appellant on 7th May, 1997 well after the date set for the hearing of the case. Counsel referred to Order 22 Rule 4(1) of the High Court Rules of Anambra State, 1991 and submitted that leave of the trial Court was required to give effect to the Appellant's notice of discontinuance relying on a number of cases, such as Giwa v. John Holt & Co. Ltd.

10 N.L.R. 77; Okorodudu v. Okoromadu (1997) 3 S.C. 21; Nwachukwu v. Eze (1955) 15 W.A.C.A. 36; Akukalia Alfred Aghadiuno & Ors v. Ekegbo Onubogu (1998) 4 SCNJ 8 at 93 and Leonard Eronini & Ors v. Francis Iheuko (1989) 2 NWLR (Pt. 101) 46 at 56.

I may observe at this stage that the provisions of Order 22 Rule 4(1) of the Anambra State High Court Rules which are in contention in the present case are in pari materia with the provisions of Order 47 Rule 1 of the High Court Rules of Eastern Nigeria, which came under consideration by this Court in the cases cited and relied upon by the 1st Respondent in support of his argument that leave of the trial Court was required before the Appellant's notice of discontinuance could take effect. In Nwobu Nwachukwu & Ors v. David Eze & Ors. (1955) 15 (WACA) 36, the West African Court of Appeal interpreting provisions of Order XLIV Rule 1 of the old Supreme Court (Civil Procedure) Rules, Cap. 211 of the Laws of Nigeria, 1948, had this to say on notice of discontinuance -

"Leave of the Court is necessary to discontinue a suit on or after the date fixed for hearing."

The correct interpretation and application of the rule therefore is that if notice of discontinuance is filed on or after the date the action was first fixed for hearing, the learned trial Judge has a discretion to grant or refuse the application on terms as the case may be. Coming back home to one of the decisions of this Court in Leonard Eronini & Ors. v. Francis Iheuko (1989) 2 NWLR (Pt. 101) 46 at 56, Obaseki, JSC., stated the position of the law on the subject of the interpretation and application of the provisions of Order 47 Rule 1 of the High Court Rules of Eastern Nigeria, on notice of discontinuance thus -

"It is clear therefore that a Plaintiff and or a Defendant who counter-claims may withdraw his claim or counter-claim at any stage of the proceedings before judgment. In some cases (no leave is required), these are mainly in circumstances where no date has been fixed for hearing. No leave is required. However, where the case has been fixed for hearing, leave to withdraw is required as the Rule gives power to the Court to allow discontinuance. Leave may be granted on terms as to costs and as to any subsequent suit and otherwise as the

Court may deem just."

See also *Akukalia Alfred Aghadiuno & Ors. v. Ekegbo Onubogu* (1998) 5 NWLR (Pt. 548) 16 at 28 - 29.

In the present case therefore, there is no dispute whatsoever that the Appellant's notice of discontinuance was filed after the Appellant's action had already been fixed for hearing. Thus, the Appellant not having sought and obtained the leave of the trial Court to discontinue his action against the Respondents, that action remains firmly before the trial Court for determination in accordance with the law. The Court below was therefore right in its decision that the trial Judge was correct in refusing or ignoring a discontinuance of the suit as sought by the Appellant in the absence of the required leave under the law.

On the whole, there is no merit at all in this appeal. The appeal is accordingly hereby dismissed and the decision of the Court below is affirmed.

There shall be N10,000.00 costs in favour of the Respondents.

E

TOBI JSC

As the real facts of the case are not of desperate importance, I will not bother to state them. I will start from the application by the appellant for the withdrawal of the action. That was on 12th March, 1997- The case of the appellant is as follows. The learned trial Judge adjourned the application to 7th May, 1997. Came 7th May, 1997, the respondents filed a motion on notice seeking an order committing the appellant and his counsel to prison for contempt of court based on the same suit in which notice of discontinuance had earlier been filed and served.

The two counsels for the respondents did not oppose the application for withdrawal but the 2nd respondent's counsel asked for the dismissal of the main suit commenced by originating summons. Counsel for the appellant raised a preliminary objection on the competence of the respondent to file his motion on notice for committal on the following grounds: (1) The mandatory service of Form 5 pursuant to Order 3 Rule 10 of the High Court Rules 1988 on the 2nd respondent had not been

effected. (2) No memorandum of appearance had been filed by the 2nd respondent. (3) Forms 48 and 49 were not filed nor served. The objection of counsel for the appellant was overruled. An appeal to the Court of Appeal was dismissed.

The case of the respondents is that during the pendency of an originating summons by the appellant to compel the 1st | respondent to endorse on the private information submitted to him that he had seen the offence therein set out but declined to prosecute at the public instance; the 2nd respondent, who was not originally joined in the suit, applied to be joined. The originating summons was then set down for hearing on 27th January 1997. During the pendency of the originating summons, counsel for the appellant initiated criminal proceedings against the 2nd respondent at the Chief Magistrate's Court, Nnewi. He also filed a motion for stay of proceedings to stop the criminal prosecution of the 2nd respondent at the Chief Magistrate's Court, Nnewi. That notwithstanding, the appellant through his counsel continued in his bid to prosecute the 2nd respondent. The 2nd respondent through his counsel filed an application in the High Court for the committal of the appellant and his counsel for contempt of court.

Respondents said that the appellant on realizing that the heat was apparently being turned against him, counsel for the appellant sought to terminate the originating summons through a notice of discontinuance filed on 7th May, 1997. When the motion for committal was about to be moved, counsel for the appellant raised a preliminary objection to the competence of the respondents to appear in the suit when they have not filed their memoranda of appearance and all that. The learned trial Judge dismissed the preliminary objection. An appeal to the Court of Appeal was dismissed.

The case is better presented by the respondents. This is because the presentation is better vindicated by the Record than that of the appellant. The appellant tried to paint a good picture for his case when he said that on 15th May, 1997, the "2nd respondent filed a motion on notice seeking for an order committing the appellant and his counsel, B. S. Nwankwo, Esq. to prison for contempt of court based on the same suit in which notice of discontinuance had earlier been filed and served." By this statement, appellant tried to paint a picture of abuse on the part of the

respondents. But that was not the position.

In his Ruling on the objection in respect of the contempt proceedings, the learned trial Judge, Ononibe, J. (as he then was) said at page 61 of the Record:

B *"Finally, it was contended that the 2nd Defendant/Applicant did not enter an appearance. The short answer to that was provided quite aptly by the learned counsel for the 1st Defendant/ Respondent, Mr. Emenike, who referred to the fact that this suit was commenced by originating summons and not by Writ of Summons the*
 C *originating summons says what the party served with it should do. It says simply that the Defendant is required to attend the High Court- For the hearing and determination of the questions contained in the originating summons.'*

D *There is no requirement for entry of appearance as in the ordinary writ of summons where appropriate and applicable. The objection of the learned counsel for the Plaintiff/Respondent cannot therefore be sustained and is hereby overruled."*

On appeal, the Court of Appeal, per Fabiyi, JCA, said and I will quote him in extenso at pages 101 and 102 of the Record;

E *"It appears that the move to discontinue the action at the stage it was filed was designed to out-smart and over-reach the 2nd Respondent. I do not want to say that it was done in bad faith. Since their notice to discontinue was filed after the first date fixed for hearing,*
 F *they should not be allowed to escape by the side door and avoid the contest After all, they are no longer dominis litis. To act otherwise will make the two applications filed by the 2nd Respondent and pending at the lower court become extinct. The application for stay of proceedings of the Chief Magistrate's Court, Nnewi will not be taken,*
 G *thus giving the appellants a lee-way to continue their self imposed criminal prosecution of the 2nd Respondent As well, the pending contempt proceedings filed by the 2nd Respondent against both appellants before the lower court will come to an abrupt end. That will be unfair. In the prevailing circumstance, the learned trial Judge has a say as to whether*
 H *the pending action should be discontinued on terms or whether to refuse same. Taking the whole gamut of this matter into consideration, I cannot fault the trial Judge on the reasonable stance taken by him He exercised his discretion judicially and judiciously as well."*

Litigation is not the children's game of hide-and-seek. It is not a game of smartness. It is not a game of artifice or cunning display of a smart conduct designed to overreach or outsmart the adverse party. On the contrary, litigation is a decent, open, and not deceitful process of making and defending claims in a court of law. The art and craft of even the most litigious person does not allow him to set a trap with a bait to lure the adverse party, as if he is a fish. That should be left to the fisherman or the keeper of an aquarium; not the courts. B

In this appeal, the appellant tried his head and his hands on a court process which he could not finish; a process which finally fell on him and had a reciprocal toil on him. He received a bomb-shell he thought he did not bargain for. He has nobody to blame; not the respondents, but himself. He thought he could bulldoze his way through but it has ended up against him; the bulldozer lacking the strength, capacity and power to pull down the case of the respondents. This sounds vague and general and generic. Let me take the appellant to more specifics. He felt bad that the chieftaincy lilies ceremony on some sons of the community could not go on. He decided to fight to finish. When his efforts to make the State prosecute the 2nd respondent failed, he did it on his own. He found the originating summons procedure appropriate. He invoked it. To him, the prosecution of the 2nd respondent was a do or die affair. Although the High Court ordered a stay of proceeding of the criminal action, he moved on. Nothing will, or better should, stop him from achieving that goal. E
The ambition gave him contempt charge which forced him to withdraw the originating summons. He was on cross-roads. He realized that late. He ought to have realized that early. His counsel will take so much of the blame. I will not go further on that. Let sleeping dogs lie. Let us not wake them because they are likely to bark and bite. And that will be bad for those concerned. F G

I think the whole idea of non-service of originating summons looks to me like a mother termite trying to build an accommodation for its children or like trying to drain an ocean of water. That is not the real issue and there is no point counsel labouring on it. I think the Court of Appeal was perfectly in order in dismissing the appeal of the appellant. At the time the appellant decided to apply to withdraw the originating summons, the proceedings in the case were very much H

alive. That was the point Fabiyi, JCA, made at page 101 of the Record.

"Since their notice of discontinuance was filed after the first date fixed for hearing, they should not be allowed to escape by the side door and avoid the contest. After all, they are no longer dominis litis. To act otherwise will make the two applications filed by the 2nd

B Respondent and pending at the lower court become extinct."

I think I can stop here with the quotation. I had earlier quoted it in fuller extract. I have repeated it because I love it. I love it because it is sound I must pause here to make the point that this case is not
C authority that this court will not allow a notice of withdrawal of a case or an appeal by a plaintiff or an appellant respectively. No. That is not the position. A case filed in court belongs to a plaintiff and he has the right to withdraw it any time. So too an appeal as it relates to an appellant. What happened in this case is that there was clear mala
D fide on the part of the appellant and that is the crux of the appeal.

It is for the above reasons and the fuller reasons given by my learned brother, Mohammed, JSC, that I too dismiss the appeal. I award N10, 000.00 costs in favour of the respondents.

E

AKINTAN JSC

This is an appeal from the judgment of the Court of Appeal, Enugu Division delivered on 10th July, 2000. The dispute that led to the action started when elaborate preparations made by the appel-
F lant had to be postponed as a result of a letter purported to have been written by the State Government.

The appellant was the traditional ruler of Ekwulumili in Anambra State. He wanted to celebrate in December, 1994 the "Asala Festival" and
G during the celebration; he intended to confer chieftaincy titles on some illustrious sons of the community. The appellant sought and obtained a written approval of the State Government. But a few days to the day fixed for the ceremonies, a letter purported to be from the State Govern-
H ment was delivered to the appellant. The appellant was informed in the letter that the earlier approval has been cancelled. The 2nd respondent was said to have accompanied someone posing as a policeman who came to deliver the letter to the appellant.

A later investigation revealed that the letter was fake in that the

State Government never issued such letter. The appellant suspected the 2nd respondent as the brain behind the issuance of the fake letter. The matter was referred to the State police command for investigation. At the end of the police investigation, the case file was referred to the State Director of Public Prosecutions (DPP) for advice. The Director of Public Prosecution's advice was that there was insufficient evidence to support prosecuting the 2nd respondent. The appellant was not satisfied with the Director Public Prosecutor's advice. He therefore applied for a fiat to enable him commence private prosecution proceedings against the 2nd respondent. This was refused. The appellant's next step was to commence an action against the State Attorney-General at Nnewi High Court. He sought from the court an order to compel the State Attorney-General to grant him the fiat sought.

The 2nd respondent, on becoming aware of the existence of the suit, applied to be joined as a party and his request was granted. But while this action at the High Court was still pending, the appellant commenced the private prosecution of the 2nd respondent at the Chief Magistrate Court, Nnewi. The 2nd respondent reacted by filing an application at the High Court on 15th May, 1997 praying the court for an order for stay of the proceedings at the Chief Magistrate Court and to stop the criminal prosecution against the 2nd respondent. When the criminal prosecution was not stopped, the 2nd respondent filed an application at the trial court for committal of the appellant for contempt of court.

The appellant reacted to the application for his committal for contempt of court by applying to discontinue the action he filed in the High Court and the 2nd respondent was served with a copy of the notice of discontinuance. However, when the motion for the committal came up for hearing, the appellant raised preliminary objections as to the competence of the 2nd respondent to file the motion for committal on the ground, inter alia, that the service of form 5 was irregular. The objections were over-ruled and an appeal against the ruling to the court below was dismissed. The present appeal is from the judgment of the court below.

Two issues were raised and canvassed in this court by the appellants. The two issues are:

"1. Whether the Court of Appeal was correct in its decision

that non service of an originating process on the 2nd respondent was a mere irregularity; and

2. Whether the Court of Appeal was correct on its decision that the learned trial Judge was correct in refusing a discontinuance of the suit as sought by the appellant."

B The two issues raised by the appellant were comprehensively dealt with in the leading judgment written by my learned brother, Mahmud Mohammed, JSC, the draft of which I have read. I entirely agree with his reasoning and conclusion that there is totally no merit in the appeal. I will, however, like to add that the whole exercise by C the appellant amounts to a complete waste of this court's precious time. This is because the 2nd respondent and his counsel are dead, and as such the outcome would be of no effect. In conclusion, I hold that the appeal be dismissed with costs as assessed in the lead judgment. D

OGBUAGU JSC

E With profound humility and the greatest respect, this is a typical interlocutory appeal that has strengthened and supported my view or advocacy that interlocutory appeals to this Court, should and ought to be discouraged and in fact, not allowed to continue. I humbly advocate, that unless in very special circumstances, all interlocutory F appeals, should wait and be filed together with the main and substantive appeal to this Court. For my stance, see the cases of Ogigie & 3 ors. v. Obiyan (1997) 10 SCNJ 1; Okobia v. Madam Ajanya & ors. (1998) 6 NWLR (Pt.554) 348 at 364-365; (1998) 5 SCNJ 95; Dr. M. C. O. Iweka v. SCOA (Nig) Ltd. (2000) 3 SCNJ. 71 (a), 91 - per Ogundare, G JSC (of blessed memory) and Elom Oke & ors. v. Eze Nwaogbuinya (2001) 1 SCNJ. 157, just to mention but a few. This can be done, without filing separate appeals. Speaking for myself, most times, it is time wasting and most of the time, they are designed or employed as delaying tactics or punishment for the opposing party by some litigants and/or H learned counsel, who know undoubtedly, or ought to know that their case like this case, is like one standing on a "quick sand" so to speak. Where however, they are allowed to continue, the Rules of this Court, need, with respect, an urgent review in respect of costs which will en-

able the Court, have discretion in the award of costs which at least, will not be below a certain reasonable amount. Afterwards, it is said that it is the duty of the court, whenever possible, in the interest of justice, to assist the parties in reducing the expense of litigation. That the court should try as much as possible, to avoid placing unnecessary financial burden upon the litigants. See the case of *Giwa-Amu v. Dipeolu & anor.* (1968) NMLR 59 @, 64. B

Now, the case leading to this interlocutory appeal was taken out by the Appellant by an Originating Summons, on 9th April, 1996. (i.e. about (11) eleven years ago). The 2nd Respondent and his learned counsel are both dead. The facts briefly stated, are that, the Plaintiff/Appellant, is the Traditional Ruler of Ekwulu-Mili Autonomous Community in Anambra State. In December 1994 he planned to confer Honorary Chieftaincy Titles on some illustrious sons of the Community during the Community's "Asala Festival". He applied for the approval of the State Government and this was granted. Few days to the date of the conferment of the Chieftaincy Titles, the 2nd Respondent (now deceased), was identified by some eye-witnesses as having accompanied a fake Policeman who delivered a letter purporting same to emanate from the Government House, Awka which banned the proposed conferment of Chieftaincy Titles. The ceremonies were consequently suspended and later, it turned out that the said letter, was forged as same never emanated from the Government House. The Appellant's Learned Counsel one - Chief M. A. C. Okekeizuagwu petitioned the Government House, Awka which referred the matter, to the Commissioner of Police, Anambra State for investigation. The 2nd Respondent was arrested and he volunteered a Statement to the Police. Other witnesses made Statements to the Police, which indicted the 2nd Respondent. After a detailed investigation, the Police transferred the case file to the State DPP for legal advice. The said Director of Public Prosecution was of the opinion that there was no *prima facie* Evidence against the 2nd Respondent and advised the police accordingly. The Appellant was dissatisfied with the development and he therefore, sought the endorsement/ approval of the 1st Respondent, to enable him prosecute the 2nd Respondent privately pursuant to Section 415 of the Criminal Procedure Law of Anambra State. The 1st Respondent declined to en- C D E F G H

dorse the Certificate or give his approval. The Appellant then instituted Suit No.60/96 at Nnewi High Court for an order of Court, compelling the 1st Respondent, to endorse the said Certificate.

When the 2nd Respondent, became aware of the pending suit on 24th October, 1996, he applied to be joined and was so joined by the order of the High Court and the matter was adjourned to 27th January, 1997 for hearing which did not take place as the Court did not sit. During the pendency of the said suit, the Appellant through his said learned counsel Nwankwo, Esqr, initiated the said Criminal Proceedings against the 2nd Respondent at the Chief Magistrate's Court. Nnewi - Learned counsel for the 2nd Respondent, late Chief Tagbo Nwogu on 15th May, 1997, filed an application in the trial court, for an Order for stay of proceedings and to stop, the said criminal prosecution of the 2nd Respondent at the Chief Magistrate's Court. But the Appellant and his said counsel will not relent and continued the prosecution and therefore. Chief Nwogu, filed an application in the trial court, for the committal of the Appellant and his learned counsel for contempt of court.

For the reason that appears in the Appellant's Brief, on 12th March., 1997 the Appellant's learned counsel applied to the trial court, to withdraw the suit. That court adjourned the matter to 28th May, 1997 for mention, I note that on the 7th May, 1997, the Appellant filed a formal Notice of Discontinuance of the said Suit and served the Respondents.

When the motion for the said committal came up for hearing, the Appellant's learned counsel, raised preliminary objections which included the competence of the 2nd Respondent to file Motion on Notice for Committal on the grounds inter alia, that the service of Form 5 pursuant to Order 3 Rule 10 High Court Rules 1988 on the 2nd Respondent had not been effected and that no memorandum of appearance, had been filed by the 2nd Respondent. After hearing arguments, the learned trial Judge, reserved Ruling to the 28th May, 1997 when the said Objections were over-ruled.

The Appellant was dissatisfied with the said Ruling and appealed to the court below, which on the 10th July, 2000, dismissed the said appeal and affirmed the said Ruling of the learned trial Judge. The Appellant still dissatisfied with the decision of the court below, has

now appealed to this Court.

The Appellant has formulated two (2) issues for determination, namely,

"1. Whether the Court of Appeal was correct in its decision that non-service of an originating process (in this case form 5) on the 2nd Respondent was a mere irregularity?" B

2. Whether the Court of Appeal was correct on its decision that the learned trial Judge was correct in refusing a discontinuance of the Suit as sought by the Appellant?"

On the part of the Respondents, two (2) issues were formulated for determination -which in substance, are the same/similar although differently couched in their respective Briefs. They read as follows: C

"(i) Whether the Court of Appeal was right in its decision that non-service of the originating process (FORM 5) on the 2nd respondent who applied on his own volition to be joined and was joined in the suit in his presence, was a mere irregularity?" D

(ii) Whether the Court of Appeal was right in holding that the Trial Judge was correct in refusing a discontinuance of the suit which had earlier been set down for hearing". E

On 10th December, 2007, when this appeal came up for hearing, learned counsel for the parties, adopted their respective Briefs. While Alaci, Esq., learned counsel for the Appellant, urged the Court, to allow the appeal, Emenike, Esq., learned counsel for the Respondents appearing with Mrs. N.J. Nwankwo, urged the Court to dismiss the appeal and affirm the Judgment of the Court of Appeal. He had earlier informed the Court that the learned counsel for the 2nd Respondent - Chief Tagbo Nwogu, had died a long time ago. F

Thereafter, Judgment was received till to-day. G
Issue 1 of the Parties

I note that the Court of Appeal, Enugu Division (hereinafter called "the court below") in its said unanimous Judgment delivered on 10th July, 2000 per Fabiyi, JCA, who read the lead judgment, stated at page 98 of the Records, inter alia, as follows: H

"It is extant on page 34 of the record of appeal that the 2" Respondent herein was joined as the 2nd defendant by the trial court on 24-10-96. There is no rigmarole or contention over this point. It

is on record that on the day the 2nd defendant was joined as a defendant, he was present in court and represented by Chief Nwogu, of counsel. Yet, there is the fuss heavily generated by the appellants over the non-service of FORM 5 on him. Service of the form on a defendant is to ensure that he is present in court to enable him partake in the proceedings leading to judgment in the suit.

In this case, service of FORM 5 on the 2nd Respondent enures to his benefit. It is for his protection. Since he is already aware of the pendency of the suit and on his own admission on oath obtained a certified true copy of the originating summons, I cannot surmise what further benefit the 2nd Defendant/Respondent will derive from the further service on him of FORM 5. Such will be a mere formality leading to what I must term - a surplusage. Failure to serve FORM 5 on the 2nd defendant/Respondent, in the circumstance depicted above, is, in my considered view, a mere irregularity which did not occasion any miscarriage of justice to the appellants or any of the parties. It is the 2nd defendant/Respondent who should complain about any infraction of his rights in the matter. But he has not complained. The appellant's counsel cannot hold brief for him even if such is done via the back door, as it were".

I agree and this is also because, I note that at page 54 of the Records, the learned counsel for the Appellant submitted inter alia, as follows:

"..... The purpose of Order 3 Rule 10 is misconceived. I ask court to hold that the provision for court to issue notice as in Form 5 is mandatory and not directing (sic)".

The learned trial Judge at pages 59 to 61 of the Records, thoroughly in my respectful view, dealt with the issue. He stated at page 60 thereof inter alia, as follows:

"What does FORM 5 mean? It means simply a notice to the party joined that he or she has been joined as a party..... A party who applied to be joined and obtained the Order requires no further notice that he has been joined nor does he require to be served with the Court order joining him as he has already obtained such an order".

His Lordship expatiated and referred to some paragraphs in the affidavit of the 2nd Respondent in support of his application to be joined

in the suit and stated inter alia, as follows:

"It can be seen therefore that the 2nd Defendant/Applicant obtained a certified copy of the Originating Summons which is the originating process by which this suit was commenced..... What then will be gained by serving him Form 5 whose main purpose is to inform the person joined together with the authority for the joinder and then the court processes already filed by the opponent, The 2nd Defendant/Applicant was already in possession of all these". B

My answer to the issue, therefore, is rendered by me in the Affirmative/Positive. C

Issue 2 of the Parties

In my respectful view, this issue deals with the discretion of a trial court, to agree or refuse an application to discontinue a suit. In short, each case depends on its/the circumstances. A case may appear similar, but two or more cases, cannot be identical. The parties, in their respective Briefs, have cited and relied on some decided authorities. In the Appellant's Brief the cases of Aghadiuno & ors. v. Onubogu which he erroneously cited as (1989) 2 NWLR (Pt. 101) 46 (it is reported in (1998) 5 NWLR (Pt. 548) 16 @ 28-29 and rightly cited in the Respondent's Brief as also reported in (1998) 4 SCNJ. 81) and Nwachukwu & ors. v. Eze (1955) 75 WACA 36 were cited and relied on. (1989) 2 NWLR (Pt. 101) 46 is in respect of the case of-Eronini v. Iheuko (infra). The Respondent, in its Brief, cited and relied on the cases of Eronini v.Iheuko (1989)2 NWLR (Pt. 101) 46, (it is also reported in (1989)2 SCNJ. 130); Giwa v. John Holt & Co. Ltd. 10 NLR 77; Okorodu v. Okoromadu (1977) 3 S.C. 27; Aghadiuno v. Onubogu and Nwachukwu v. Eze (supra). This again, brings to the fore, the need of learned counsel, to cross-check the citations of any case they cite and rely on in their Briefs. D E F G

In my concurring Judgment in the case of Abayomi Babatunde v. Pan Atlantic Shipping and Transport Agencies Ltd. & 2 ors. (2007) 12 NWLR (Pt. 1050) 113 @ 157-166; (2007) 4 SCNJ. 140 @ 172-180; (2007) 4 S.C. (Pt. 1) 71 @113-125; (2007) All FWLR (Pt. 372) 1721 @ 1758-1768 and (2007) 9 SCM 1 @, 32-40. I dealt with the issue of discontinuance perhaps, at some length. I dealt with the right of a plaintiff to discontinue his action and the duty of the court, where he exercises that right and stated, inter alia, as follows: H

"..... A party comes to court for an alleged wrong done to him or he seeks a declaration in respect of certain rights but 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".

I referred to the case of Prof. Edozien & 4 ors. v. Chief (Engr). Edozien (1993) 1 NWLR (Pt. 272) 678; (1993) 1 SCNJ. 166 @ 179, and had this to say, inter alia;

"..... 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 discontinuance and ask the plaintiff to proceed with his case"

I note that Order 22 Rule 4 (1) of the High Court Rules of Anambra State, 1991 which is applicable to the instant case, is in pari materia with Order 47 (1) of the former High Court Rules of Eastern Nigeria. In the case of Eronini & 3 ors. v. Iheuko (supra) which I also referred to in my said Judgment (and where this Court considered the said Order 47 Rule (1), and I stated inter alia, as follows:

"..... It was held that a plaintiff 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....."

From the Records, the Appellant's Notice of Discontinuance was filed after his said suit had been fixed for hearing. The above case, is binding on this Court and it disposes this appeal in favour of the Respondent.

The instant case, also involves the exercise of discretion by the trial court. An Appellate Court is reluctant to interfere especially, where it is not shown by the Appellant as in the instant case, that the exer-

cise by the trial court or even by the court below, occasioned to him, a miscarriage of justice or that it was not according to common sense. See the cases of *Odusote v. Odusote* (1971) 1 All NLR 219 cited in the case of *Achaka Cattle Ranch Ltd, v. Nigerian Agricultural & Co-operative Bank Ltd.* (1998) 3 SCNJ. 54 (a) 72 - per Iguh, JSC., and *Artra Industries Nig. Ltd. v. The Nigerian Bank for Commerce & Industry* (1998) 4 NWLR (Pt. 546) 357; (1998) 3 SCNJ, 97, per Onu, JSC where it was also stated that the essence of discretion, will be defeated, if that essence of option of Pick and choose, is absent. For the definition of discretion, see *Black's Law Dictionary*, 5th Edition at page 419 and the case of *Doherty v. Doherty* (1964) NMLR 144; (1964) 1 All NLR 299.

I note also, that there are concurrent judgments of the two lower courts and in the circumstance, this Court cannot interfere.

It is from the foregoing and the reasons and conclusions contained in the lead Judgment of my learned brother, Mohammed, JSC which I am in agreement with, that I too, find no merit in this appeal. I too, dismiss the same and affirm the said Judgment of the court below. I also abide by the consequential order in respect of costs although if the Rules of this Court had allowed or permitted me, the Appellant and particularly, his learned counsel for his unnecessary fuss (also noted by the court below) in this matter up to this Court, should have paid heavier costs.

F

TABAI JSC

I was privilege to read in draft the lead judgment of my learned brother Mohammed JSC and I entirely agree with the reasoning and conclusion that the appeal lacks merit. I also dismiss the appeal. I also award costs of N10, 000.00 in favour of the Respondents.

H