

**SUPREME COURT OF NIGERIA**

11TH APRIL, 2008 SC. 249/2001

**CORAM:- A. I. KATSINA-ALU, S. A. AKINTAN, M.  
MOHAMMED, W. S. N. ONNOGHEN, C. M. CHUKWUMA-  
ENEH, JJSC**

1. OGLI OKO MEMORIAL FARMS  
LIMITED

2. CHIEF ADEJO OGIRI ..... APPELLANT  
AND

1. NIGERIAN AGRICULTURAL AND  
CO-OPERATIVE BANK LIMITED

2. ANTHONY OZOH (TRADING ..... RESPONDENT  
UNDER THE NAME AND STYLE  
OF OZOH AND PARTNERS)

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COURTS - Record of proceedings - Binding effect of - Parties and courts - Are bound by the record of proceedings - Which in this case has no evidence - Of motion being moved or granted (H1)

APPEALS - Record of appeal - Allegation of error - Proper procedure for - Is not by alleging so in brief of argument - But by a formal impeachment of the record - Before either the Court of Appeal or Supreme Court (H2)

COURTS - Jurisdiction - Invocation of - Filing of process - Jurisdiction of court to determine a matter - Is invoked by filing appropriate process - This implies payment of appropriate filing fees (H3)

ACTIONS - Counterclaim - Nature of - It is a separate and independent action - Which has to be instituted in accordance with rules of court - By assessment and payment of filing fees (H4)

COURTS - Trials - Speediness of - Fair hearing - Though speedy trials by our courts - Is the desire of all involved in the administration of justice - It should not be pursued - At the expense of fair hearing (H5)

### ***FACTS***

The Plaintiffs/Appellants had taken out a writ of summons at the Otukpo High Court in Benue State against the Defendants/Respondents. The Appellants' claim was for a number of declaratory reliefs and injunctive orders which centered mainly on an assertion by the Appellants that they were not indebted to the Respondents. The Respondents, who were out of time in filing their statement of Defence, filed a motion at the trial court for extension of time within which to do so and for an order deeming the proposed statement of Defence attached to the motion as properly filed and served. The proposed statement of Defence incorporated a counter claim in the sum allegedly owed by the Appellants. Although the motion was fixed for hearing on 12th December, 1995, there was nothing on the record of proceedings, as transmitted in the record of appeal, to show that it was heard and granted before judgment on the counter claim.

Meanwhile, the records show that on 23rd January, 1996, when the substantive case came up for hearing, counsel for the Appellants had applied for leave to withdraw his appearance for the Appellants in the action on the ground that he had lost contact with his clients. The trial judge purportedly granted the application, and struck out the suit of the Appellants. Whereupon Respondents drew the attention of the court to their purported counter claim and asked for judgment thereon. The court gave judgment to the Respondents on the purported counter claim there and then. Aggrieved, Appellants appealed to the Court of Appeal but the appeal was dismissed. Appellants have brought this further appeal to Supreme Court.

### ***ISSUES FOR DETERMINATION***

*“(a) Were the learned Justices of the Court of Appeal in their majority decision, right in their view that the judgment in respect of the counter-claim is valid in law?”*

*“(b) Were the learned Justices of the Court of Appeal in the majority decision, right in their view that the appellants' right to fair hearing was not breached in the circumstances of this case?”*

***HELD*** (Unanimously allowing the appeal per **ONNOGHEN JSC**)  
***Record of proceedings - Binding effect of***

1. The question then is whether the motion slated for 12/12/95, was ever moved and granted by the lower court. I have carefully gone through the record of the trial court and am unable to see where that motion was moved and/or granted by that court. It is important to note that the said motion was slated for hearing on 12/12/95, while the judgment on the counter-claim was entered on 23/1/96. This means that the motion, if granted as contended by learned counsel for the respondents would have been so granted either on 12/12/95, when it was fixed for hearing or any other date before the 23/1/96. In the instant case, the proceedings of 23/1/96, clearly show that the said motion was not granted that day. Though learned counsel for the respondents stated emphatically that it was moved and granted before 23/1/96, he never stated the date when the motion was allegedly moved and granted. In the circumstance it is very clear and I hold that the motion in question was never moved nor granted before the 23/1/96, when the judgment on the counterclaim was entered by the trial court as there is no evidence of the grant of same in the record of appeal neither has learned counsel for the respondents who contends the contrary produced any evidence to establish same. It is settled law that parties and the court are bound by the record of the court. (p. 1814 E)

***Record of appeal - Allegation of error***

2. Granted that the record of appeal is in fact incomplete as contended by learned counsel for the respondents, there exists established procedure to be adopted when challenging the correctness or otherwise of the record of the court which is definitely not by stating so in a Brief of Argument. Any person who is contending that the record of proceedings before an appellate court is not a fair record of what happened at the court of first instance, must first formally impeach the record of proceedings. Where the record of proceedings is not formally impeached, it is not open to the appellate court to speculate that other things happened in the trial court which were not recorded in the record of proceedings. In the instant case, the respondent failed to impeach the record of proceedings before either the Court of Appeal or this court. It was not shown that the record was not a full and complete minutes of all that transpired in the court

of first instance. (p. 1815 B)

***Jurisdiction - Invocation of - Filing of process***

B 3. While still on this issue, it is very important to note that the jurisdiction of the court to hear and determine any matter is invoked by the filing of the appropriate process in the Registry of the court and by “filing” of a process is meant payment by the litigant of the appropriate filing fees as assessed by the appropriate or designated registrar of the court concerned. When a process is not duly filed before the court, it does not, in the eyes of the law, exist and as such cannot invoke the jurisdiction of the court. (p. 1815 G)

***Counterclaim - Nature of***

D 4. In the instant case, there is no evidence that the counter-claim was separately paid for by the respondents so as to bring same properly before the court. On the other hand, the Statement of Defence was assessed and paid for. It is settled law, that a counter-claim is a separate and independent action which has to be instituted in accordance with the rules of the court. In the instant case, there is no evidence of any payment for the institution of the counter-claim which, granted that the motion was ordered as prayed, which is not conceded, would still have rendered same (counter-claim) incompetent.’ It is also my view that there being no counter-claim to which the appellants would have filed a defence, it was wrong for the trial court to hold that no defence was filed to a non-existent counterclaim and that the lower court was equally in error when it affirmed the decision of the trial court. (p. 1816 A)

***G Trials - Speediness of - Fair hearing***

5. The question is whether having regard to the facts and circumstances of this case, it can be said that the appellants were accorded fair hearing before judgment was so entered. I have no hesitation in answering the question in the negative.

H Even though it is the desire of all involved in the administration of justice to uphold the principle which states that justice delayed is justice denied, it is equally unacceptable to encourage or do injustice in an attempt at speedy dispensation of justice. Justice may be

slow sometimes but it will surely arrive at its destination. In the instant case, the attempt at speedy trial has resulted in grave injustice to both parties particularly the appellants whose right to fair hearing had thereby been compromised by the court. A little patience and care by the learned trial Judge would have saved time, energy and money if the court had but adjourned the purported counter-claim and ordered hearing notice to be served on the appellants, particularly as their learned counsel had, with the leave of the court, withdrawn his further appearance for the appellants in the matter and their case struck out. (pp. 1817 H/1820 D)

### **NOTABLE POINT OF INTEREST** **AKINTAN JSC**

#### *1. Fair hearing is fundamental to all court proceedings*

It is settled law that the principle of fair hearing is fundamental to all court procedure and proceedings. Like jurisdiction, the right to fair hearing is both fundamental and a constitutional right of every party to a dispute who is to be afforded an opportunity to present his case to the adjudicating authority without let or hindrance from the beginning to the end. It also envisages that the court or tribunal hearing a case should be fair, impartial and without showing any degree of bias against any of the parties. Every party must therefore be given equal opportunity of presenting his case. (p. 1822 E)

### **REPRESENTATION**

Chief A. A. Ogiri, (with him O. Jolaawo and L. Olowookere), for the appellants.

P. A. Omengala, (with him; K. A. Omengala and L. O. Audu-Kiar), for the respondents.

### **CASES REFERRED TO**

State v. Onagoruwa (1992) 2 NWLR (Pt. 221) 33 at 58

Atse v. Gachi (1997) 6 NWLR 609 at 629

Atolagbe v. Awuse (1997) 7 SCNJ 1

Nwosu v. Okoye (1996) 1 SCNJ 1 at 36

Mrs. Eno Okon Epuke v. Mrs Bassey Ita Okon (2002) 6 S.C. (Pt. II) 55

- Orugbo v. Una (2002) 9-10 S.C. 61; (2002) 9-10 S.C. (Pt.II) 1 at 19  
Yarabaina v. Kano N.A. (1961) 1 SCNLR 244  
Panalpina v. Wariboko (1975) 2 S.C. 29  
State v. Aibangbee (1988) 3 NWLR (Pt. 84) 548  
Ogidi v. State (2005) 1 S.C. (Pt. I) 98  
B Ekpeto v. Wanogho (2004) 11-12 S.C 201  
Salu v. Egeibon (1994) 6 NWLR (Pt. 348) 23  
Ceekay Traders v. G.M. Co. Ltd. (1992) 2 NWLR (Pt. 222) 132  
Isiyaku Mohammed v. Kano N. A. (1968) 1 All NLR 424  
C U.S.A. Ltd. v. Achoru (1990) 9-10 S.C. 115

### **STATUTE & RULES OF COURT REFERRED TO**

- Constitution of the Federal Republic of Nigeria, 1979; s. 33(1)  
Benue State High Court Civil Procedure Rules, 1988; O. 25 r. 3(4),  
D O. 27. r. 2(1), 9

### **LEAD JUDGMENT BY ONNOGHEN JSC**

- This is an appeal against the judgment of the Court of Appeal  
holden at Jos in appeal No. CA/J/128/96, delivered on the 29th day  
E of November, 1999, in which the court dismissed the appeal of the  
appellants against the judgment of the High Court of Benue State  
holden at Otukpo in Suit No. OHC/55/95, delivered on the 23rd  
day of January, 1996, in which the court entered judgment in favour  
F of the respondents, then defendants/counter -claimants in default of  
defence thereto.

By a Statement of Claim filed on the 3rd of July, 1995, the  
appellants, as plaintiffs, claimed against the defendants, now respon-  
dents jointly and severally as follows:-

- G “(a) A declaration that the plaintiffs are not indebted to the 1st  
defendant in the sum of One Million, Thirteen Thousand, One Hun-  
dred and Twenty Naira, Eighty Kobo (N1,013,121.80) or any other  
sum as the amount of the plaintiffs indebtedness to the 1st defendant  
(if any) has not been determined and accepted by the parties as the  
H sum being owed.

(b) A declaration that at the interest rate prevailing when the  
sum was advanced, the amount of money being owed (if any) is  
nowhere near the sum of N 1,013,121.80 now being claimed by the

defendant.

(c) *A declaration that the one storey building/property, lying and situate at No.1, Ogiri Oko Road, Makurdi which is covered by the Benue State Statutory Certificate of Occupancy No. BP 3232 was at no time mortgaged to the 1st defendant as a collateral or security for any facility granted to the plaintiffs.* B

(d) *A declaration that the notices of auction dated the 17th day of July, 1994 and the 17th day of May, 1995, putting up the property described in sub-paragraph (c) above for sale as null, void and of no effect; the same having not been pledged as a collateral to C secure any facility*

(e) *An order restraining the defendants or any of them from auctioning the property above referred to in sub-paragraphs (c) and (d) respectively.*

(f) *A declaration that the contract between the 1<sup>st</sup> plaintiff and the 1st defendant was frustrated by events which were unanticipated and uncontrollable by the parties, being an act of God, and that the 1st defendant was not entitled to cause any of the 1st plaintiff's properties to be advertised for sale by way of auction or any other means and by any person or agent.* D E

(g) *An order of the court declaring that since the loss was not caused by the plaintiffs but an act of God, the consequent financial loss occasioned there from should be totally born (sic) by the 1st defendant.* F

(h) *A declaration that even if it is established that a loan obligation exists between the 1st plaintiff to the 1st defendant, the material rate of interest applicable to the loan shall be that agreed upon at the time the relationship between the 1st plaintiff and the 1st defendant commenced in 1987.* G

(i) *An order directing the 1st defendant to return and/or release Certificates of Occupancy No. 38/AD of the 12:8:86 and No. 228/87 of the 15:9:87, now in the 1st defendant's possession to the plaintiffs.*

(j) *A declaration that no legal relationship exists between the 1st plaintiff and the 1<sup>st</sup> defendant."* H

On the 23rd day of October, 1995, the respondents, then defendants filed a motion on notice before the trial court praying that

court for the following orders:-

*“(a) An order granting leave to the applicants to file and serve their Statement of Defence out of time and/or granting the applicants extension of time within which to file and serve their Statement of Defence.*

B *(b) An order deeming the Statement of Defence annexed to the application as duly filed and served.”*

The above motion was stated thereon as slated for hearing on the 12th day of December, 1995, at the “usual hour of 9 o’clock in the forenoon or so soon thereafter.” To the affidavit in support of that motion is annexure “A” headed “Joint Statement of Defence” in which the respondents claim as follows:-

D *“9. WHEREOF the 1st plaintiff claims from the defendants jointly and severally the sum of N825,046.66 (Eight Hundred and Twenty-Five Thousand, Forty-Six Naira Sixty-Six Kobo) only being the outstanding indebtedness of the defendants to the 1st plaintiff as at 30:9:95 with interest of 131/2 per annum from 1:10:95, until judgment and payment of the judgment sum.”*

E From the pleadings of the parties, it is very obvious that there was a loan/credit facility transaction between the plaintiffs and the 1st defendant which later resulted in a dispute between the parties following the failure of the plaintiffs to repay same. However, at the stage in which judgment was entered by the trial court in the counter-claim against the appellants, evidence had not been called. It is also very important to note, at this stage, that at the time judgment was so entered, there is no evidence on record to show that the respondents’ Motion on Notice to file a Statement of Defence out of time and to deem what had been filed and served as properly filed and G served, which was fixed for hearing in December, 1995 was ever heard and granted on or before the 23rd day of January, 1996, when judgment was entered on the said counter-claim on the ground that the appellants failed and or neglected to file any defence thereto despite service of same on them.

H Before the judgment was entered, S. O. Itodo, Esq., of counsel for the plaintiffs applied to the court to be discharged from the case on the ground that his clients had ceased to further instruct him on the matter, to which application learned counsel for the defendants,



Omengala, Esq., did not oppose as a result of which the learned trial Judge ruled, *inter alia*, as follows:-

*“.....I believe Mr. Itodo that he had made several abortive efforts to get his clients interested in the due prosecution of the suit. In the circumstance the suit is hereby struck out. This order shall forthwith be served on the plaintiffs.”* B

From the above, it is very clear that what started as an application of counsel to be relieved of his obligation to further appear and conduct his professional duties to his clients ended up with the striking out of the suit. The plaintiffs were not present in court on that day C but there is an order by the court that they be notified of the striking out of the suit.

The proceeding of that day become more dramatic when soon after making the above order, the following recordings were made by the learned trial Judge:- D

*“Omengala: We have a counter-claim. No defence was filed to the counter-claim which we claim N825,046.66 as at 30:9:95 and interest thereon at 13.5% RA from 1:10:95 until the judgment is satisfied.*

*By Order 27 Rule 2(1) of this court, we are entitled to judgment since there is no defence to the counter-claim. We ask for the judgment in the counter-claim as per our Statement of Defence.* E

*Court: Mr. Itodo, what do you say?*

*Itodo: I am out.*

*Judgment* F

*In the counter-claim the defendants claim that the plaintiffs are/were indebted to the 1st defendant in the sum of N825,046.66. That is the state of account as at 30:9:95. The defendants also claim an order directing the plaintiffs to pay interest at 13.5% PA from 1:10:95, until the judgment debt is fully and finally liquidated. There is no defence to the counter-claim whereupon Mr. Omengala invoking Order 27 Rule.....I) of the rules of this court to ask for judgment in the amount plus interest at 13.5% P.A.....judgment is hereby entered in favour of the 1st defendant for the sum of N825,046.66 plus interest at 13.5% per annum commencing from 1:10:95 until the judgment debt or part shall have been fully and finally paid. The judgment shall forthwith be served on the plaintiffs.”* G H

The appellants were not happy with the above judgment of the court and appealed to the Court of Appeal, which as stated earlier in this judgment, dismissed their appeal resulting in the further appeal to this court where the issues for determination, as identified by learned counsel for the appellants in the appellants joint Brief of  
B Argument filed on 9/8/01 and adopted in argument of the appeal on 14/1/08, are stated therein as follows:-

“(a) *Were the learned Justices of the Court of Appeal in their majority decision, right in their view that the judgment in respect of the counter-claim is valid in law?*”

C “(b) *Were the learned Justices of the Court of Appeal in the majority decision, right in their view that the appellants’ right to fair hearing was not breached in the circumstances of this case?*”

The above issues were adopted by learned counsel for the  
D respondents in the respondents’ Brief of Argument deemed filed on 31/3/04.

In arguing issue 1, learned counsel for the appellants submitted that there was no counter-claim filed at the trial court as the motion slated for hearing on 12/12/95, was neither moved nor granted  
E by that court and as such the said motion is deemed abandoned, relying on *State v. Onagoruwa* (1992) 2 NWLR (Pt. 221) 33 at 58 and *Atse v. Gachi* (1997) 6 NWLR 609 at 629, that the trial court was in error when it proceeded under Order 27 Rule 2(1) of the High  
F Court Rules and the lower court in affirming that decision to give judgment for the respondents when there was no counter-claim properly so called before the court thereby rendering the court incompetent as the condition precedent to its exercise of its jurisdiction did not exist, relying on the case of *Madukolu v. Nkemdilim* (1962) 1 ALL  
G NLR 587 at 594, that no payment was made for the counter-claim as what was reflected at page 24 of the record was in respect of the joint Statement of Defence and that since a counter-claim is an independent action it has to be separately paid for to make it competent, relying on *Atolagbe v. Awuse* (1997) 7 SCNJ 1 and *Nwosu v. Okoye*  
H (1996) 1 SCNJ 1 at 36, that since Order 25 Rule, 3(4) of the Benue State High Court Civil Procedure Rules, 1988 granted the appellant 30 days within which to file a defence to the counter-claim, that time would have started to run from the date the Motion on Notice for

extension of time to file the Statement of Defence would have been granted, which, in this case never materialized and urged the court to resolve the issue in favour of the appellants.

On his part, learned counsel for the respondents, in a rather curious way, stated that he had in his respondents' Brief before the lower court raised the issue of incomplete record to which the appellants filed no Reply Brief and submitted that the appellants have thereby accepted or conceded the point, as the law is that issues raised and not countered are deemed admitted; that *"a look at the entire record of proceedings of the trial court will show that the motion for leave to file defence was in fact moved and granted before the date in which judgment was entered."* but funny enough learned counsel for the respondents, whom I consider to be very responsible by his calling, did not say when it was so granted and at what page of the record. Granted that the record of appeal is incomplete and that the motion *"was in fact moved and granted before the date in which judgment was entered,"* it is the duty of learned counsel who is a minister in the temple of justice to inform this court of the date when the same was moved and granted particularly between 12/12/95, when it was slated for hearing and 23/1/96, when the judgment was entered.

Be that as it may, learned counsel further submitted that the issue of absence of evidence of the grant of the motion for extension of time to file a defence which embodied the counterclaim is a fresh issue which requires the leave of the court which was not obtained by the appellants; that *"the issue (of absence of evidence of grant of the Motion on Notice) is not an attack on the jurisdiction of the Honourable Court to hear and determine the counter-claim. The non-filing of the counter-claim if true (not conceded) merely impairs the exercise of jurisdiction;"* that whilst a litigant cannot waive substantive jurisdiction, he can waive procedural jurisdiction and that at best the non-grant of the Motion on Notice to file defence if at all, though not conceded, is merely procedural which the appellants have, by conduct waived, relying on *Mrs. Eno Okon Epub v. Mrs Bassey Ita Okon* (2002) 6 S.C. (Pt. II) 55; (2002) FWLR (Pt. 84) 145 at 62, and urged the court to resolve the issue against the appellants and dismiss the appeal.

In the Reply Brief filed on 11/1/08, learned counsel for the appellants, O.O. Jalaawo, Esq., submitted that parties are bound by the record of the courts; that in the instant case the record shows that leave was granted the appellants on 16/1/07, to raise a new issue which related to the non-filing of the counter-claim; that there are principles guiding compilation of records of appeal and how such records can be challenged relying on Orugbo v. Una (2002) 9-10 S.C. 61; (2002) 9-10 S.C. (Pt.II) 1 at 19; and urged the court to resolve the issue against the respondents.

From the arguments of learned counsel for the parties, it is clear that both are agreed that for a counter-claim or any suit for that matter to be validly before the court for consideration on the merits, it has to be properly filed. However, while the learned counsel for the appellants contend that the Motion on Notice for an order for extension of time to file a Statement of Defence which incorporated a counter-claim and a further order to deem what had been filed and served as duly so filed and served was neither moved nor granted as prayed and by extension no counterclaim existed in law, the learned counsel for the respondents has argued that it was so moved and granted before the 23/1/96, when the judgment was entered though, as pointed out earlier in this judgment the time as to when such grant was made had not been stated by learned counsel for the respondents. ***The question then is whether the motion slated for 12/12/95, was ever moved and granted by the lower court. I have carefully gone through the record of the trial court and am unable to see where that motion was moved and/or granted by that court. It is important to note that the said motion was slated for hearing on 12/12/95, while the judgment on the counter-claim was entered on 23/1/96. This means that the motion, if granted as contended by learned counsel for the respondents would have been so granted either on 12/12/ 95, when it was fixed for hearing or any other date before the 23/1/96. In the instant case, the proceedings of 23/1/96, clearly show that the said motion was not granted that day. Though learned counsel for the respondents stated emphatically that it was moved and granted before 23/1/96, he never stated the date when the motion was allegedly moved and granted. In the***

**circumstance it is very clear and I hold that the motion in question was never moved nor granted before the 23/1/96, when the judgment on the counterclaim was entered by the trial court as there is no evidence of the grant of same in the record of appeal neither has learned counsel for the respondents who contends the contrary produced any evidence to establish same. It is settled law that parties and the court are bound by the record of the court,** which in the instant case does not contain any evidence of the grant of that motion.

**Granted that the record of appeal is in fact incomplete as contended by learned counsel for the respondents, there exists established procedure to be adopted when challenging the correctness or otherwise of the record of the court which is definitely not by stating so in a Brief of Argument. Any person who is contending that the record of proceedings before an appellate court is not a fair record of what happened at the court of first instance, must first formally impeach the record of proceedings. Where the record of proceedings is not formally impeached, it is not open to the appellate court to speculate that other things happened in the trial court which were not recorded in the record of proceedings. In the instant case, the respondent failed to impeach the record of proceedings before either the Court of Appeal or this court. It was not shown that the record was not a full and complete minutes of all that transpired in the court of first instance - See Yarzabaina v. Kano N.A. (1961) 1 SCNLR 244, Panalpina v. Wariboko (1975) 2 S.C. 29, State v. Aibangbee (1988) 7S.C. (Pt. I) 96; (1988) 3 NWLR (Pt. 84) 548, Animashaun v. University College Hospital (1996) 10 NWLR (Pt. 476) 65, Ogidi v. State (2005) 1 S.C. (Pt. I) 98; (2005) 5 G NWLR (Pt. 918) 286 at 309.**

**While still on this issue, it is very important to note that the jurisdiction of the court to hear and determine any matter is invoked by the filing of the appropriate process in the Registry of the court and by "filing" of a process is meant payment by the litigant of the appropriate filing fees as assessed by the appropriate or designated registrar of the court concerned. When a process is not duly filed before the court, it does not,**

***in the eyes of the law, exist and as such cannot invoke the jurisdiction of the court.*** It is not a matter of procedural jurisdiction as contended by learned counsel for the respondents but of substantive jurisdiction. ***In the instant case, there is no evidence that the counter-claim was separately paid for by the respondents so as to bring same properly before the court*** On the other hand, the Statement of Defence was assessed and paid for. ***It is settled law, that a counter-claim is a separate and independent action which has to be instituted in accordance with the rules of the court. In the instant case, there is no evidence of any payment for the institution of the counter-claim which, granted that the motion was ordered as prayed, which is not conceded, would still have rendered same (counter-claim) incompetent.'*** It is also my view that there being no counter-claim to which the appellants would have filed a defence, it was wrong for the trial court to hold that no defence was filed to a non-existent counterclaim and that the lower court was equally in error when it affirmed the decision of the trial court.

On issue 2, learned counsel for the appellants submitted that in the circumstances of the case which shows that on the 23/1/96, the appellants were absent in court, their counsel Itodo, Esq., withdrew his appearance and their case struck out, it was the duty of the trial court to have adjourned the purported counter-claim for hearing and to have ordered a hearing notice to be served on the appellants; that the issue is not whether the appellants filed a defence to the counter-claim but whether they were given the opportunity to be present and heard when the case was determined against them; that the lower court was in error when it distinguished the instant case from the case of Dan Hausa v. Panatrade (1993) 2 SCNJ 10 at 109 and that the right of the appellants to fair hearing was violated, relying on Nwokoro v. Onuma (1990) 5 S.C. (Pt. I) 124; (1990) 5 SCNJ 93 at 100 and urged the court to resolve the issue in favour of the appellants and allow the appeal.

On his part, learned counsel for the respondents submitted that the appellants were not denied fair hearing in the circumstances of the case and that the lower court was right in affirming the judg-

ment of the trial court; that appellants were served with the counter-claim but they elected not to file a defence thereto as found and held by the lower court at page 65 of the record; that by the provisions of Order 27 Rules 2(1) and 9, the trial court would still have entered judgment against the appellants even if they were present in court on 23/1/96, without hearing from the appellants; that the position would have been different if the counter-claim had been adjourned to a date for hearing and no hearing notice was served on the appellants which would have made the decision in Dan Hausa & Co. Ltd v. Panatrade Ltd, supra, applicable and urged the court to resolve the issue against the appellants and dismiss the appeal. C

From the record, the following facts are not disputed:-

(a) The appellants were not in court when their counsel, Itodo, Esq., sought the leave of the court to withdraw from the case.

(b) That even though the application of learned counsel for D the appellants was for withdrawal from the case, the court went on, ostensibly in granting the application, to strike out the suit of the appellants.

(c) The appellants were never heard before the suit was struck out but the trial court ordered that notice of the striking out E of the suit be served on the appellants.

(d) At the time of striking out of the suit, there was no defence filed by the respondents to the suit but there was a pending Motion on Notice for extension of time within which to file a defence which F incorporated a counter claim.

(e) The said motion was not moved neither was it granted by the court as at 23/1/96.

(f) After the striking out of the suit, the trial court, rather than adjourn the Motion on Notice or the purported counter-claim for G hearing to enable the appellants be present either in person or by counsel of their choice following the withdrawal of their original counsel in the matter, proceeded to hear the purported counter-claim and entered judgment thereon in favour of the respondents on the ground that the appellants filed no defence to the counter- claim. H

***The question is whether having regard to the facts and circumstances of this case, it can be said that the appellants were accorded fair hearing before judgment was so entered. I***

***have no hesitation in answering the question in the negative.***

The proceedings of 23/1/96, speak volumes with regards to what a court ought not to do while holding the scale of justice between the parties before it. The proceedings are as follows:

B “IN THE HIGH COURT OF JUSTICE OF BENUE STATE OF  
NIGERIA IN THE BENUE STATE JUDICIAL DIVISION  
HOLDEN AT OTUKPO

SUIT NO.OHC/55/95

BEFORE:

C HIS LORDSHIP: HON.JUSTICE E.EKO - JUDGE

BETWEEN: OGLI OKO MEMORIAL FARMS &

OR.-

PLAINTIFF

AND

N.A.C.B.LTD.& OR.-

DEFENDANTS

D January 23, 1996

Parties absent.

S. O. Itodo, Esq., for plaintiffs.

P. A. Omengala, Esq., for defendants.

E Itodo: My clients have ceased to further instruct me. I have made repeated attempts to get at the plaintiffs personally and other forms of communications but I got no positive response. I humbly apply to withdraw as I doubt if I still command their confidence.

F Omengala: We do not oppose the withdrawal of counsel. It shows that the plaintiffs were only interested in getting the interlocutory , injunction and abandoning the substantive suit.

Court: Mr. Omengala is saying that the plaintiffs have abandoned you and the suit.

G Itodo: That is the position

H Court: Upon hearing both counsel it appears to me clear that the plaintiffs have abandoned the suit and their counsel after obtaining order for interlocutory injunction. When the suit is abandoned or the parties are indiligent, one of the remedies for such is the striking out of the offensive or abandoned suit. I believe Mr. Itodo that he had made several abortive efforts to get his clients interested in the due prosecution of the suit. In the circumstances the suit is hereby struck out.



This order shall forthwith be served on the plaintiffs.

SGD.

EKO

JUDGE

23:1:96

Omengala: We have counter-claim. No defence was filed to the counter-claim which we claim N825,046.66 as at 30.9.95 and interest thereon at 13.5% P.A from 1.10.95, until the judgment is satisfied. B

By Order 27 Rule 2 (1) of this court, we are entitled to judgment since there is no defence to the counter-claim. We ask for the judgment in the counter-claim as per our Statement of Defence. C

Court: Mr. Itodo, what do you say?.

Itodo: I am out.

**JUDGMENT:** D

In the counter-claim the defendants claim that the plaintiffs are/were indebted to the 1st defendant in the sum of N825,046.66. That is the state of account as at 30.9.95. The defendants also claim an order directing the plaintiffs to pay interest at 13.5% P.A from 1.10.95, until the judgment debt is fully and finally liquidated. There is no defence to the counter-claim whereupon Mr. Omengala invoking Order 27 Rule (1) of the Rules of this court to ask for judgment in the amount plus interest at 13.5% P.A from 1.10.95, until the N825,046.66 until same shall be fully and finally paid. Judgment is hereby entered in favour of the 1st defendant for the sum of N825,046.66 plus interest at 13.5% per annum commencing from 1:10:95, until the judgment debt or part shall have been fully and finally paid. The judgment shall forthwith be served on the plaintiffs. E  
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SGD

EKO

Judge

23:1:95 "(Sic)."

Apart from the fact that the trial court failed to adjourn the counter-claim for hearing with an order that fresh hearing notice be served on the appellants following the withdrawal of their counsel, there is also the disturbing fact that there was no legally cog- H

nizable Counter- Claim before the court as the Motion on Notice for extension of time to file a Statement of Defence which incorporated the Counter-Claim was never moved nor granted by the court before judgment was entered for the respondents thereon. That apart, evidence on record discloses that no payment of filing fee was made by the respondents for the counter-claim, granted that the motion was so moved and granted. In both situations no counter-claim can, in law, be said to have existed to which the appellants could have legally filed a defence. Since the appellants had thirty days by the Rules of court to file a defence to the counter-claim and since there is no record of the grant of the said Motion on Notice, it becomes impossible for the court to hold that the appellants had failed to file a Statement of Defence to the counter-claim prior to 23/1/96, when the judgment was entered as it is the duty of the respondents to prove that the appellants actually did not file their defence to the counter-claim within the thirty days of the order granting the alleged extension of time to file the defence and counterclaim.

***Even though it is the desire of all involved in the administration of justice to uphold the principle which states that justice delayed is justice denied, it is equally unacceptable to encourage or do injustice in an attempt at speedy dispensation of justice. Justice may be slow sometimes but it will surely arrive at its destination. In the instant case, the attempt at speedy trial has resulted in grave injustice to both parties particularly the appellants whose right to fair hearing had thereby been compromised by the court. A little patience and care by the learned trial Judge would have saved time, energy and money if the court had but adjourned the purported counter-claim and ordered hearing notice to be served on the appellants, particularly as their learned counsel had, with the leave of the court, withdrawn his further appearance for the appellants in the matter and their case struck out.***

I am not in anyway encouraging any acts of delay tactics from litigants. All that I am saying is that in the dispensation of justice to all and sundry, the rules of court are available to aid the court in balancing the scale of justice between the parties in respect of their contending claims. The intention of the Rules is to do justice by according the

parties their right to fair hearing, not to deny same. I therefore find merit in the issue under consideration which is hereby resolved in favour of the appellants.

In conclusion, I find merit in the appeal which is hereby allowed with costs which I assess and fix at N50,000.00 in favour of the appellants.

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### **KATSINA-ALU JSC**

I have had the advantage of reading before now in draft the judgment delivered by my learned brother, Onnoghen, JSC., in this appeal. I am in total agreement with it and, for the reasons given therein I also allow the appeal with N10,000.00 costs in favour of the appellants.

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### **AKINTAN JSC**

The appellants were the plaintiffs in this action instituted at Otukpo High Court in Benue State as Suit No. OHC/55/95. The reliefs they sought from the court were a number of declaratory reliefs along with an order directing the 1st defendant to return the Certificates of Occupancy No. 38 AD of 12th August, 1986 and No. 228/87 of 15th September, 1987, now in the 1st defendant's possession to the plaintiffs. The respondents, as defendants, on the other hand, counter-claimed for a total sum of N825,046.66 being the outstanding indebtedness of the defendants to the 1st plaintiff as at 30th September, 1995, with interest of 13% per annum from 1st October, 1995 until judgment and payment of the judgment sum.

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The dispute between the parties that led to the action arose over the failure of the plaintiffs to repay a loan they took from the 1st defendant. The plaintiffs' claim therefore was mainly to contend that they were not owing the defendants while the 1st defendant's counter-claim was for the amount that it claimed the plaintiffs were owing the bank.

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The trial of the case was inconclusive in that after a number of adjournments, learned counsel for the plaintiffs (now appellants) informed the court that he was withdrawing from the case on the ground

that he had lost contact with his clients and as such he could not continue with the case. Learned counsel for the defendants (now respondents) did not object. The court then granted the request and instead of ordering a further adjournment and directing that a fresh hearing notice be issued on the plaintiffs personally, the learned trial Judge struck out the case.

As soon as the court struck out the case, learned counsel for the defendants drew the court's attention to the defendants' counter-claim. He then urged the court to enter judgment for the defendants as the plaintiffs did not file any defence to it. The court again succumbed to the request and accordingly entered judgment to the defendant as claimed in the counter-claim. An appeal by the plaintiff to the Court of Appeal was dismissed. The present appeal is from the judgment of the Court of Appeal.

The main contention of the appellants is that their right to fair hearing under Section 33(1) of the 1979, Constitution, which was then in force, was breached, in that the continuation of the case after the withdrawal of his former counsel without putting him on notice was totally wrong and constituted a breach of his constitutional right to fair hearing.

It is settled law that the principle of fair hearing is fundamental to all court procedure and proceedings. Like jurisdiction, the right to fair hearing is both fundamental and a constitutional right of every party to a dispute who is to be afforded an opportunity to present his case to the adjudicating authority without let or hindrance from the beginning to the end. It also envisages that the court or tribunal hearing a case should be fair, impartial and without showing any degree of bias against any of the parties. Every party must therefore be given equal opportunity of presenting his case: See Ekpeto v. Wanogho (2004) 11-12 S.C 201; (2004) 18 NWLR (Pt. 905) 394, Salu v. Egeibon (1994) 6 NWLR (Pt. 348) 23, Ceekay Traders v. G.M. Co. Ltd. (1992) 2 NWLR (Pt. 222) 132, Isiyaku Mohammed v. Kano N. A. (1968) 1 All NLR 424 and U.S.A. Ltd. v. Achoru (1990) 9-10 S.C. 115; (1990) 6 NWLR (Pt. 156) 254. In the instant case, the failure of the learned trial Judge to ensure that the appellant was put on notice after the withdrawal of his counsel was improper. The onus was on the court to ensure that at least an effort was made to put the appel-

lants on notice after the withdrawal of his said counsel. Similarly, the court was also wrong to have proceeded to enter judgment against the plaintiffs in respect of the counter-claim in their absence.

In the result and for the reasons I have given above and the fuller reasons given in the leading judgment written by my learned brother, Onnoghen, JSC., the draft of which I have read, I also allow the appeal and make similar consequential orders as are made, in the leading judgment, including that on costs.

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**MOHAMMED JSC**

The appellants were the plaintiffs in this action which was commenced by a Writ of Summons dated 20th June, 1995, against the respondents as defendants at the High Court of Justice of Benue State Otukpo. The plaintiffs' claim before the trial court was for a number of declaratory reliefs which centered principally on the claim that the plaintiffs were not indebted to the defendants. The defendants who were out of time in filing their Statement of Defence which also incorporated a counter-claim, filed a motion at the trial court for an extension of time to do so. Although the motion was fixed for hearing on 12th December, 1995, the record of the appeal does not show that the motion was heard and granted by the trial court.

However, the record shows that the substantive case of the plaintiffs came up for hearing on 23rd January, 1996, when the learned counsel to the plaintiffs applied for leave to withdraw his appearance for the plaintiffs in the action on the ground of having lost contact with his clients. The learned trial Judge instead of granting the application with the order that the plaintiffs be notified of the Ruling on the withdrawal of their counsel from the case so as to give them the opportunity to take up their case in person or brief another counsel, proceeded in the same ruling, not only to strike out the suit but also to hear and grant the defendants' counter-claim against the plaintiffs in their absence.

Aggrieved by this decision of the trial court given against them on 23rd January, 1996, the plaintiffs appealed against it to the Court of Appeal, Jos Division which after hearing the appeal, in a majority decision delivered on 29th November, 1999, dismissed the appeal

and affirmed the decision of the trial court. The plaintiffs now appellants are on a further and final appeal to this court raising the following two issues from the three grounds of appeal filed by them for determination in their appellants' Brief of Argument -

B *"(a) Were the learned Justices of the Court of Appeal in their majority decision, right in their view that the judgment in respect of the counter-claim is valid in law?"*

C *"(b) Were the learned Justices of the Court of Appeal in the majority decision, right in their view that the appellants' right to fair hearing was not breached in the circumstances of this case?"*

D These issues were adopted by the defendants now respondents in their respondents' Brief of Argument. The complaints of the appellants in the two issues for determination, are clearly rooted in the proceedings of the trial court of 23rd January, 1996, contained at pages 30-31 of the record which read-

*"January 23rd, 1996,*

*Parties absent,*

*S. O. Itodo, Esq., for plaintiffs,*

*P. A. Omengala, Esq., for defendants*

E *Itodo: My clients have ceased to further instruct me. I have made repeated attempts to get at the plaintiffs personally and other forms of communications but got no positive response. I humbly apply to withdraw as I doubt if I still command their confidence.*

F *Omengala: We do not oppose the withdrawal of counsel. It shows that the plaintiffs were only interested in getting the interlocutory injunction and abandoning the substantive suit.*

G *Court: Mr. Omengala is saying that the plaintiffs have abandoned you and the suit.*

*Itodo: That is the position.*

*Court: Upon hearing both counsel it appears to me clear that the plaintiffs have abandoned the suit and their counsel after obtaining order for interlocutory injunction.*

H *When the suit is abandoned or the parties are indiligent, one of the remedies for such is the striking out of the offensive or abandoned suit. I believe Mr. Itodo that he had made several abortive efforts to get his clients interested in the due prosecution of the suit.*

*In the circumstance the suit is hereby struck-out.*

*This order shall forthwith be served on the plaintiffs.*

SGN

E. Eko

Judge

23rd January, 1996

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*Omengala: We have a counter-claim. No defence was filed to the counter-claim which we claim N825,046.66 as at 30th September, 1995 and interest thereon at 13.5% P. A. from 1st October, 1995 until the judgment is satisfied.*

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*By Order 27 Rule 2(1) of this court, we are entitled to judgment since there is no defence to the counter-claim. We ask for the judgment in the counter-claim as per our Statement of Defence.*

*Court: Mr. Itodo, what do you say?*

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*Itodo: I am out.*

### JUDGMENT

*In the counter-claim the defendants claim that the plaintiffs are/were indebted to the 1st defendant in the sum of N825,046.66. That is the state of account as at 30th September, 1995. The defendants also claim an order directing the plaintiffs to pay interest at 13.5% P.A. from 1st October, 1995, until the judgment debt is fully and finally liquidated. There is no defence to the counter-claim whereupon Mr. Omengala invoking Order 27 Rule 2(1) of the Rules of this court to ask for judgment in the amount plus interest at 13.5% P.A. from 1st October, 1995, until the N825,046.66 until same shall be fully and finally paid. Judgment is hereby entered in favour of the 1st defendant for the sum of N825,046.66 plus interest at 13.5% per annum commencing from 1st October, 1995 until the judgment debt or part shall have been fully and finally paid. The judgment, shall forthwith be served on the plaintiffs."*

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*I only wish to examine these proceedings in relation to the second issue for determination in this appeal in which the appellants complained that the court below was wrong in its judgment that the proceedings were not in breach of the appellants' right of fair hearing. While the appellants relying on the cases of Dan Hausa*

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v. Panatrade (1993) 7 SCNJ (Pt. 1) 100 at 109 and Nwokoro v. Onuma (1990) 5 S.C. (Pt. I) 124; (1990) 5 SCNJ 93 at 100, are saying that their right to fair hearing had been breached by the trial court, the respondents are asserting that in the circumstances of this case, there was no breach of fair hearing. It is indeed trite that it is a  
 B fundamental requirement of our adversary system of administration of justice that a party to any litigation before a court of law, must be given the opportunity of being heard before the court can determine his civil rights or obligations before it. This right is so fundamental that  
 C it is enshrined in Section 33(1) of the 1979, Constitution of the Federal Republic of Nigeria which was in force or applicable when the decision of trial court now on appeal was given on 23rd January, 1996. See Nwokoro v. Onuma (1990) 5 S.C. (Pt. I) 124; (1990) 3 NWLR (Pt. 136) 22 at 31. It is quite clear that when the plaintiffs/  
 D appellants' case came up for hearing on 23rd January, 1996, all the parties were absent but were duly represented by their learned counsel. However, right on the beginning of the proceedings on that day, the learned counsel to the plaintiffs/appellants applied to withdraw from the case and his application was granted resulting in leaving the plain-  
 E tiffs/ appellants absent and not represented. What the trial court ought to have done to give the plaintiffs/appellants a hearing, was to have adjourned the case in order to put the plaintiffs/appellants on notice that their learned counsel had withdrawn from their case so as  
 F to give them the opportunity to take necessary steps under the law to prosecute their case. By proceeding to hear the case behind the appellants resulting in striking out the case and entering judgment against them in the counter-claim, the trial court, in my view, certainly breached the appellants' fundamental right of fair hearing. The court  
 G below was therefore in error in finding to the contrary in its judgment now on appeal. See Ilona & Ors. v. Dei & Ors. (1976) 1 NMLR 5; (1976) 1 All NLR 8 and Odusote v. Odusote (1971) All NLR 223 (1990) Edition).

The facts of this case as to what actually took place on 23rd  
 H January, 1996, are not at all in dispute. It was quite obvious that the appellants constitutional right of fair hearing as enshrined under Section 33(1) of the 1979, Constitution, had been breached rendering those proceedings a complete nullity which ought to have



merited allowing their appeal by the court below. See Amadi v. Thomas Aplin & Co. Ltd. (1972) 4 S.C. (Reprint) 205; (1972) 1 NLR (Pt. 1) 409; (1971 - 1972) NSCC. Vol. 7 page 262 and Adigun v. Attorney-General of Oyo State (1987) 1 NWLR (Pt. 53) 678 at 709.

Therefore for the foregoing reasons and fuller reasons contained in the leading judgment of my learned brother, Onnoghen, JSC., I also allow this appeal and abide by the orders contained in the leading judgment including the order on costs.

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**CHUKWUMA - ENEH JSC**

I have had the privilege of reading in advance the judgment of my learned brother, Onnoghen, JSC., just delivered with which I agree entirely. Respectively, I adopt it as mine. I find the appeal meritorious and accordingly allow it.